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CASES ARGUED AND DETERMINED

IN THE

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

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OF THE

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

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Hon. JOHN B. McPHERSON, District Judge, E. D. Pennsylvania.....Philadelphia, Pa.

[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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Hon. EDWARD T. SANFORD, District Judge, E. and M. D. Tennessee ..Knoxville, Tenn.
Hon. JOHN E. McCALL, District Judge, W. D. Tennessee.....Memphis, Tenn.

[4] Appointed May 25, 1909. [5] Appointed May 18, 1909. [6] Resigned.

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Hon. SOLOMON H. BETHEA, District Judge, N. D. Illinois.....Chicago, Ill.
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Hon. JOHN J. DE HAVEN, District Judge, N. D. California.....San Francisco, Cal.
Hon. OLIN WELLBORN, District Judge, S. D. California.....Los Angeles, Cal.
Hon. FRANK S. DIETRICH, District Judge, Idaho.....Boise, Idaho.
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Hon. CHARLES E. WOLVERTON, District Judge, Oregon.....Portland, Or.
Hon. ROBERT S. BEAN, District Judge, Oregon[9].....Portland, Or.
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Hon. CORNELIUS H. HANFORD, District Judge, W. D. Washington.....Seattle, Wash.
Hon. GEORGE DONWORTH, District Judge, Washington[10].....Seattle, Wash.

[7] Resigned.
[8] Appointed May 18, 1909, to succeed Milton D. Purdy.
[9] Appointed April 28, 1909.
[10] Appointed May 18, 1909.

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CASES

ARGUED AND DETERMINED

IN THE

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

SNARE & TRIEST CO. v. FRIEDMAN.

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

No. 49.

1. COURTS (§ 347*)—FEDERAL COURTS—PROCEDURE—AMENDMENTS TO CONFORM TO PROOFS.

It was within the discretion of a federal court to permit the amendment of a declaration at the close of the evidence in a case by alleging a different act of negligence on the part of defendant to conform to the evidence.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 921; Dec. Dig. § 347.*]

2. COURTS (§ 347*)—FEDERAL COURTS—PROCEDURE—MOTION TO STRIKE PLEADING.

The action of a federal court in striking out a plea of the statute of limitations before trial *held* within its discretion under the New Jersey practice, where all the facts appeared from the pleading.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 921; Dec. Dig. § 347.*]

3. LIMITATION OF ACTIONS (§ 72*)—INFANCY OF PLAINTIFF—ACTION FOR NEGLIGENCE—NEW JERSEY STATUTE.

2 Gen. St. N. J. 1895, p. 1975, § 4, provides that if any person entitled to an action for a personal injury, the bringing of which is limited by the preceding section to two years, "shall be at the time of any such cause of action accruing within the age of 21 years, * * * then such person * * * shall be at liberty to bring said action so as he * * * institute or take the same within such time as is before limited after his * * * coming to * * * full age." *Held*, that such provision authorized the bringing of an action for an injury to a minor child at any time between the accrual of the cause of action and the expiration of two years after its majority, and that the bringing of an action during minority, which was dismissed, did not start the statute to running, so as to bar another action in two years thereafter.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 398; Dec. Dig. § 72.*]

4. COURTS (§ 365*)—FEDERAL COURTS—STATE LAWS AS RULES OF DECISION—AUTHORITY OF STATE DECISIONS.

Under Rev. St. § 721 (U. S. Comp. St. 1901, p. 581), which makes the laws of the several states rules of decision in trials at common law, so

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

far as the construction of the state Constitution and statutes is concerned, the decisions of the highest court of the state are controlling but upon the question as to what is the common law of the state, unless such decisions have so clearly established a settled rule in the premises as to make it a part of the peculiar and local law of that state, the federal courts exercise an independent judgment, their jurisdiction being co-ordinate with, and not subordinate to, the state court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 950; Dec. Dig. § 365.*

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.]

5. NEGLIGENCE (§ 29*)—DANGEROUS STRUCTURES—DUTY OF CARE AS TO CHILDREN.

One who maintains a dangerous structure or appliance, whether on his own land or lawfully on a public highway, is under duty to use reasonable care to protect from injury, not only those of mature age, who are bound to use their faculties to protect themselves, but also children of tender years, who may without their fault become exposed to the danger.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 41; Dec. Dig. § 29.*]

6. NEGLIGENCE (§ 55*)—PILING OF MATERIAL IN STREET—LIABILITY FOR INJURY TO CHILD.

Defendant, a contractor for the building of a structure in which heavy steel I-beams were used, piled the same on the sidewalk in front of the lot, which it had the right to do with the owner's consent. Plaintiff, who was 4½ years old, was accustomed to play with other small children in the street near such piles, and they frequently climbed or sat upon the same. In some manner one of the beams became crossed diagonally over the pile where it rested in an insecure position, and the evidence tended to show had remained so for two or three days, when the children in playing caused it to fall, and plaintiff was struck by it and injured, *Held*, that defendant, having actual or constructive knowledge that the children were in the habit of playing in the street and would naturally be attracted by the piles of beams, owed them the duty to pile and keep such beams in a reasonably secure manner to prevent their falling and injuring the children, and that its failure to do so was negligence, which rendered it liable for plaintiff's injury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 68; Dec. Dig. § 55.*]

7. NEGLIGENCE (§ 85*)—CONTRIBUTORY NEGLIGENCE—CHILDREN.

A child 4½ years old, who was injured while playing on a pile of steel beams in a street, could not by reason of her age be charged with contributory negligence, or with being a trespasser.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 124; Dec. Dig. § 85.*]

8. JUDGMENT (§ 570*)—CONCLUSIVENESS OF ADJUDICATION—JUDGMENT ON DISCONTINUANCE.

Where the plaintiff in an action in a state court for a personal injury, grounded on defendant's negligence, after a verdict in her favor and an order granting a new trial on the ground that under the facts defendant was not negligent, voluntarily discontinued the action, the judgment did not bar a second action in a federal court on the same cause of action.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1030; Dec. Dig. § 570.*

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.]

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

9. COURTS (§ 372*)—FEDERAL COURTS—STATE LAWS AS RULES OF DECISION.
The question of liability for negligence, when not modified or governed by statute law, is one of general law, upon which federal courts are not required to follow the state decisions, although there may be such a decision based on the identical facts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 977; Dec. Dig. § 372.*]

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

H. M. Hitchings, for plaintiff in error.
Gilbert Collins, for defendant in error.

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

GRAY, Circuit Judge. The case brought before us by this writ of error, is as follows:

Suit was brought in the court below by the defendant in error (hereinafter called the plaintiff), against the plaintiff in error (hereinafter called the defendant), to recover for personal injuries received through the alleged negligence of the said defendant. At the time of the occurrences in question, certain persons, trading under the firm name of Colgate & Co., were the owners of lands, and the buildings thereon erected, in the city of Jersey City, in the state of New Jersey, bordering on a public street or highway of said city. The lands and buildings were located on the south side of the street, and were used and occupied by the firm for manufacturing purposes. At the time of the acts complained of, the firm was engaged in constructing an addition to its buildings, and for that purpose had contracts with the defendant, by which the defendant, among other things, was to furnish and set in place the iron and steel work for the foundation of certain tanks, including cast-iron columns and girders. The defendant, in the course of its performance of this contract, and in the furnishing, delivery, and setting in place of the cast-iron columns and girders, caused to be piled and placed certain iron girders, or I-beams, upon the sidewalk in front of the premises of the said Colgate & Co., for use, from time to time, in the prosecution of its said work. These beams were 22 feet long, 15 inches high, with flanges 4 inches wide, and weighed about 1,000 pounds each. They were, before and at the time of the accident, stored in two piles, one next to the building line and the other next to the curb line of the street, and parallel therewith, leaving a passageway on the sidewalk between the two piles. It was shown in the evidence that they could be piled so as to be measurably secure, by placing a row of three beams upon their sides, and superimposing two others so as to lock with those under them, with their flanges, and one on top locking with the two underneath; or, by placing four or five in the bottom row, and building up in the same manner. The sidewalk in front of these premises was asphalted. There was no curbing, but the asphalt pavement sloped into the

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

street, forming a concave gutter, so that teams could drive from the street across the sidewalk into the premises in question.

There was some testimony in the court below, touching an alleged transfer of the original contract by the defendant to another construction company, and some controversy consequent thereupon, as to whether this company was responsible for the piling of these beams upon the sidewalk. The court below, however, correctly construed the written agreement in question as not in terms transferring the contract, and properly left to the jury the question, whether such other company was in charge of the work, or was merely in what it did the agent of the defendant. As to this, the jury has found in favor of the plaintiff, and the point may therefore be dismissed from further consideration. For the purposes of the case before us, therefore, the defendant is to be considered as an independent contractor, subject to whatever responsibilities attach to it, as such, in the prosecution of its work.

There was evidence tending to show that, at the time of the accident in question, an I-beam on the pile next to the street had become dislocated from its parallel position with the other beams, and was in a position diagonally along the side of the pile, edgeways or nearly edgeways, instead of flat, with the upper end on a piece of plank or joist, and the lower end near the bottom of the pile. It was, at all events, in a state of unstable equilibrium. Several little girls were playing about the pile, some skating on the asphalt pavement and two or more were on the pile, when the plaintiff, Fannie Friedman, 4½ years old, ran across the street to where the other girls, including her two older sisters, were playing. The testimony tends to show that she sat down on the lower end of the beam just described, and that another girl just then jumped across the upper end of the beam onto the plank on which that end was resting, causing the beam to fall over, crushing the foot of the plaintiff beneath it.

The testimony was somewhat confusing as to the exact position of the I-beam, and as to just how the accident occurred, but there can be no doubt that the beam was in a position dangerous to all who came near it, and especially to those who came in contact with it. There was evidence tending to show that this beam was in this situation, or something like it, for two or more days prior to the accident; that it was noticed by, or should have been noticed by, defendant's servants, and that it had remained in this dangerous position long enough to affect defendant with notice. There was no testimony that directly accounted for this dislocation of the beam in question. There was testimony tending to show that these piles had been in place for several weeks, and that a short time before the accident, the number of beams on the pile was less than formerly. How this particular beam came into its dangerous position, was a matter, therefore, of conjecture. Whether it had been dislocated from its original position by taking other beams from the pile, for use in the structure under erection, or had been partly moved for the purpose of such use, and then temporarily abandoned, it is not necessary here to determine, even if it were capable of being determined. The evidence as to its dangerous situation, and its existence in that situation for two or

more days before the accident, was properly submitted to the jury, and there can be no objection to the charge of the court in that regard.

The charge of negligence principally insisted upon at the trial was, not for the original careless piling of the beams, as was charged in the declaration, but for the maintaining of the pile in the dangerous condition testified to after notice of such condition, or after a long enough time had elapsed for notice to be presumed. After the conclusion of the evidence, the learned judge of the court below permitted an amendment to the plaintiff's declaration, charging the defendant with negligence in the latter respect. The defendant excepted to this action of the court and assigned the same as error. We may dispose of it in passing, however, by saying that the action of the court appears to us to have been the exercise of a sound discretion, and not to have transcended the liberal rules in regard to amendments to pleadings which obtain in the practical administration of justice. There was also testimony admitted over the objection of the defendant, tending to show that the asphalt pavement on the north side of the street, near the Colgate factory and these piles, was much resorted to by children of the neighborhood for roller skating and other plays, and that these piles were attractive to such children, as evidenced by the fact that they constantly played thereon, to the knowledge of the defendant. Under the laws of New Jersey, Colgate & Co. were the owners of the fee of the street to its center, subject to the public easement for purposes of travel, and it is not disputed that either by state law or municipal ordinance, they, or their subcontractor by their permission, had the right to a reasonable use of the sidewalk, temporarily, for the storing of material to be used in building, or repair of buildings, on their adjoining property.

The learned judge of the court below instructed the jury, in effect, that not only was the defendant bound to exercise ordinary care in originally piling these girders upon the street, but also in maintaining the piles so that they might not endanger the safety of those lawfully using the sidewalk, and that, if from the weight of the evidence the jury found that the girders so piled on the sidewalk were, at the time of the accident, calculated to tempt and attract little children accustomed to play on the street, to use them for play or rest, and that this was known to the defendant, then, if one of the beams, though originally secure in the pile, became dislocated and was allowed to remain in the dangerous position described in the testimony, for a time long enough to presume notice to the defendant, it became responsible for the damage caused to the plaintiff, who was without fault. A verdict was found for the plaintiff, and upon the judgment entered thereon, this writ of error was sued out.

The assignments of error are very numerous, but they are for the most part covered by the few principal contentions urged at the bar, upon the determination of which the case must turn. The first contention to be noticed is, that the court erred in striking out before the trial, and against the objection of the defendant, the plea of the statute of limitations, and in holding that it was not available to the plaintiff in error. Brief notice only is required of defendant's point, that it had an absolute right to interpose said plea and have it dis-

posed of when it was sought to be availed of during the trial, and that the action of the court, in striking it out before trial, was contrary to the rules of practice and procedure in New Jersey. We think, however, that the granting of the motion to strike out was a matter within the discretion of the court below. All the facts bearing upon the availability of the pleading were stated in the plaintiff's declaration. Even if the granting of the motion to strike out was at variance with practice and procedure in such cases, no possible harm could come to the defendant by reason of such premature striking out as by the law of the state the action of the court in the premises was reviewable, at whatever state of the trial it was had.

This brings us to the substantial question raised by this assignment of error, whether the action brought by the plaintiff was, under the facts set forth in the pleadings, barred by the statute of limitations of the state of New Jersey. The relevant portions of that statute are as follows:

"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." 2 Gen. St. N. J. 1895, p. 1975, § 3, as amended by Laws 1896, p. 119.

Section 4 (same statutes and page) reads:

"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 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 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."

It appears from the pleadings that the plaintiff, Fannie Friedman, then being between the ages of four and five years, brought an action in the state court of New Jersey, in 1903, shortly after the accident, which, after a verdict in her favor and pending a motion for a new trial, was, for reasons that will hereafter appear, discontinued, and that the present action was begun in January, 1906, two years and six months after the former action, and when the plaintiff was something over six years of age. The contention of defendant's counsel is:

"That an infant may remain quiescent after the cause of action accrues, until majority, and may then bring and maintain the action within two years thereafter, or he may bring his action as an infant, issue a summons in the infant's name, and apply thereafter for the appointment of a next friend to prosecute the action so brought, but, in this case, immediately upon the commencement of his action, he sets the statute running and assumes the same legal position as one of full age."

We cannot agree with this construction of these sections of the New Jersey statute. The learned judge of the court below was of opinion that:

"A proper construction of these sections of the New Jersey statute allows the infant all the time intervening between the accrual of the cause of action

and its majority, plus a period thereafter equal to the prescribed limitations of the statute."

In the case of Smith v. Felter, 61 N. J. Law, 104, 38 Atl. 746, Mr. Justice Gummere, of the Supreme Court of New Jersey, in discussing section 4 of the statute, as above quoted, says:

"It seems to me clear that the effect of this provision is to stay the running of the statute while the disabilities mentioned therein continue to exist, and that a party suffering from any of such disabilities may maintain an action at any time during their continuance, or within the six years afterward."

This is practically the opinion of the learned judge of the court below. There can be no doubt that one who was under no disability could bring such an action as we have here, at any time within the limitation of two years prescribed by the statute, discontinue it, and bring another action, provided it also be within the period of limitation. We can see no reason why an infant under 21 years of age, against whom the statute is not running at all, should not be able to do the same thing, that is, bring an action, discontinue the same, and bring another or successive actions during his minority. We can find nothing in the express words of the statute, or in any reasonable interpretation thereof, that justifies the contention of the defendant, as above stated, and no case in the state of New Jersey or elsewhere has been called to our attention which supports the same.

This brings us to the important question in the case, viz., whether defendant owed any duty to the plaintiff for neglect for which it should be held responsible to her in this action. In its consideration, we assume (1) that the defendant, as an independent contractor with the owner of the premises, might lawfully use such portions of the sidewalk of the public street as it actually did use, for the temporary storage of the I-beams in question, or other material to be used in the structures it had contracted to erect; (2) that defendant, being responsible for placing the I-beams on the street and maintaining them there, owed a duty to the public, including the defendant, to place and maintain them with reasonable care, so that those lawfully on the street, and without fault on their part, might not be injured thereby.

Conceding all this for the sake of argument, defendant denies liability, by reason of the premises, contending that plaintiff was at fault (1) in that she was an active trespasser upon the girders at the time she received her injury, the trespass contributing thereto; (2) in that she was playing upon the girders at the time of the injury, and not using the sidewalk for purposes of travel, and that such playing contributed to the injury complained of; (3) in that the use which she was making of the girders at the time the injury occurred, was unlawful, and therefore defendant owed no duty to her.

The foregoing, of course, are different forms of the same contention. It may be admitted that if one, sui juris, had, in using this sidewalk, without reasonable excuse stepped upon the pile of beams while in this condition, and had been injured by the falling of the displaced beam in the manner described, defendant would not have been liable therefor, on the ground of such person's contributory neg-

ligence, or possibly on the ground that defendant owed no duty to one who might be considered a trespasser, to see that the pile of beams was properly constructed. The defendant, however, ignores the distinction which we think is inherent in this case, between those who are and those who are not sui juris, or rather between those who have and those who have not arrived at years of discretion. In the case before us, it is not necessary to consider at what age an infant may be of such discretion as to be responsible in a case like the present for contributory negligence, or for conduct which, in case of sufficient discretion, would make him or her a trespasser. Fannie Friedman, the plaintiff, at the time of the accident, was only 4½ years old, and there can be no question that, in the eyes of the law, by reason of her age, she lacked that discretion which would make her responsible for her conduct. She was legally incapable of contributory negligence, or of being a trespasser. The question then arises, whether defendant owed to such a child, under the circumstances disclosed by this record, any duty other than that owed to those who were sui juris, or who at least had arrived at years where discretion may be presumed. We think there was a peculiar duty of this kind incumbent upon the defendant, in relation to this plaintiff, under the circumstances of this case. Why should not one who has a dangerous structure or appliance, whether on his own land, or lawfully on a public highway, use ordinary care to protect, not only those who are able to protect themselves by the use of their faculties, and who are bound to make such use of them as the ordinary experience of mankind justifies us to expect, but also those of such tender years, as may without fault on their part come within the danger to which the owner of such appliance or structure has exposed them? We think, in reason and in consonance with the legal principles by which the duty of individuals to protect others from the dangers that may result from the use of their own property is determined, and by which they are held responsible for their negligent acts in that regard, this defendant owed a duty to the children of tender years who, to its knowledge, were accustomed to play on the public street in the vicinity of these piles of beams, and also to play and sit thereon, to use due care under the circumstances to prevent the piles from being in such an unstable condition as would be likely to cause injury to such of these children as might come in contact therewith. Peirce v. Lyden, 157 Fed. 552, 85 C. C. A. 312.

In charging the jury upon this branch of the case, the learned judge of the court below said:

"I shall adopt the language of the late Judge Dixon, who charged the jury in a suit between those same parties when it was on trial in the Supreme Court of this state [New Jersey]. Speaking of the public, he said:

" 'The public consists of two classes for the present purpose of this suit: People grown up, adults, people come to years of discretion, and the little children, who have not yet come to years of discretion, who have not yet the ability to take care of themselves as older people do, and the law regards their rights and privileges in the streets as well as those of older persons, and when you are dealing with the safety of things left in the streets, you have to regard children as well as older people. The propensity of little children to play upon the street and to rest from their play in the public

streets, is one with which we are all more or less familiar, and that is also to be taken into consideration (and I may say by way of parenthesis that upon this trial there is evidence tending to show that little children were accustomed to play in the street in the vicinity of where the girders were placed both before and after they were placed), and if things are left in the street in such condition that they will tempt children to make use of them, either for play or for rest, and will be dangerous to little children if they do so make use of them, those things are not in proper condition.' "

This statement of the legal duty resting upon those in the situation of the defendant, we think is as sound as it is humane, and it is supported by decisions of the Supreme Court of the United States, as well as by numerous decisions of the state courts. These decisions are controlling in the present case. The leading case of Railroad Company v. Stout, 17 Wall. 657, 21 L. Ed. 745, was a case in which the plaintiff, a child of tender years, was injured while playing with other children on a railroad turntable. This turntable was ordinarily held secure from movement by a heavy cast-iron latch. This latch had been for some time broken, so that the table could be easily turned on its pivot by the children who played on and near it. The turntable was on the uninclosed land of the railroad company. There was evidence tending to show that small children were in the habit of playing around and upon this turntable, to the knowledge of defendant's servants. Dillon, Circuit Judge, in the court below, had, in charging the jury on the question whether there was negligence on the part of the railroad company, in allowing the turntable to remain in the condition in which it was, said:

"That to maintain the action it must appear by the evidence that the turntable, in the condition, situation, and place where it then was, was a dangerous machine, one which, if unguarded or unlocked, would be likely to cause injury to children; that if in its construction and the manner in which it was left it was not dangerous in its nature, the defendants were not liable for negligence; that they were further to consider whether, situated as it was on the defendant's property in a small town, somewhat remote from habitations, there was negligence in not anticipating that injury might occur if it was left unlocked or unguarded; that if they did not have reason to anticipate that children would be likely to resort to it, or that they would be likely to be injured if they did resort to it, then there was no negligence."

The Supreme Court approved of this statement of the law, and decided that the case had been properly submitted to the jury. The principle of this case has been adhered to by the Supreme Court, in subsequent cases, as also by many cases in the highest courts of the states, and though there is some conflict in the decisions of the state courts, the decided weight of their authority is on the side of what has come to be called the "Doctrine of the Turntable Cases."

In Union Pacific Ry. Co. v. McDonald, 152 U. S. 262, 14 Sup. Ct. 619, 38 L. Ed. 434, the railway company operated a coal mine, and was in the habit of depositing the slack on an open lot belonging to it, between the mine and the station, in such quantities that the slack was in a permanent state of combustion, a fact known to the servants of the company. The lot was open and unguarded. A lad of 12 years of age, in running across this lot, fell onto the slack and was badly burned. It was held that the lad was not a trespasser, under the circumstances, and had not been guilty of contributory negli-

gence, and he was allowed to recover. Mr. Justice Harlan, in delivering the elaborate opinion of the court in this case, approves of the judgment in Railroad Company v. Stout, and quotes with approval the following from Judge Dillon's charge to the jury in that case:

"The machine in question is part of the defendant's road and was lawfully constructed where it was. If the railroad company did not know, and had no good reason to suppose, that children would resort to the turntable to play, or did not know, or had no good reason to suppose, that if they resorted there they would be likely to get injured thereby, then you cannot find a verdict against them. But if the defendants did know, or had good reason to believe, under the circumstances of the case, that the children of the place would resort to the turntable to play, and that if they did they would or might be injured, then, if they took no means to keep the children away, and no means to prevent accidents, they would be guilty of negligence, and would be answerable for damages caused to children by such negligence."

Mr. Justice Harlan then proceeds, as follows:

"That charge was held by this court to be an impartial and intelligent one. And after observing that the jury were at liberty to find for the plaintiff, if from the evidence it could justly be inferred that the railroad company, in the construction, location, management, or condition of the turntable, had omitted that care and attention to prevent the occurrence of accidents which prudent and careful men ordinarily bestow, Mr. Justice Hunt, delivering the unanimous judgment of this court, said:

" 'That the turntable was a dangerous machine, which would be likely to cause injury to children who resorted to it, might fairly be inferred from the injury which actually occurred to the plaintiff. There was the same liability to injure him, and no greater, that existed with reference to all children. When the jury learned from the evidence that he had suffered a serious injury by his foot being caught between the fixed rail of the roadbed and the turning rail of the table, they were justified in believing that there was a probability of the occurrence of such accidents.' "

That this is recognized as the common law by the English courts is shown by Mr. Justice Harlan's discussion of the cases of Lynch v. Nurdin, 1 Q. B. 29, 36, Mangan v. Atterton, L. R. 1 Ex. 239, and Clark v. Chambers, L. R. 3 Q. B. D. 327. See Pollock on Torts, *382, *383. The doctrine of those cases which relate to structures dangerous, as well as attractive, to children, maintained on defendant's own land, is a fortiori applicable to cases like the present, where the defendant has maintained the dangerous thing, structure or condition upon a public street or highway.

The defendant, however, earnestly contends that the decision of the Court of Errors and Appeals of New Jersey, in Friedman v. Snare & Triest Co., 71 N. J. Law, 605, 61 Atl. 401, 70 L. R. A. 147, 108 Am. St. Rep. 764, is binding upon the court below and this court, and settles the law for this case. This contention involves the important question of how far decisions of a state court are conclusive upon the Circuit Courts of the United States, in the exercise of their concurrent jurisdiction with state courts. This question has received the consideration from the Supreme Court, which its importance demanded. It is unnecessary to cite all the decisions in which that court has enunciated the principles by which determination of this question must be guided. These decisions have been founded upon the broad meaning and intent of article 3 of the Constitution, and of the legislation of Congress in pursuance thereof, conferring upon the Circuit Courts

of the United States "original cognizance concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity * * * in which there shall be a controversy between citizens of different states," and have been made in conformity to that spirit of comity and practical good sense by which, in the administration of this concurrent jurisdiction, "unseemly conflicts" with the state courts have been avoided. These principles, for our present purpose, may be summarized as follows:

There is no common law of the United States, and the thirty-fourth section of the judiciary act (Act Sept. 24, 1789, c. 20, 1 Stat. 92), as embodied in section 721 of the Revised Statutes (U. S. Comp. St. 1901, p. 581), provides:

"That the laws of the several states, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

So that, in any trial at common law, a Circuit Court of the United States, where its jurisdiction is founded on diverse citizenship, has to inquire what the law of the state in which its jurisdiction is exercised may be, and it is the law of that state, whether statute or common law, that it is called upon to administer. So far as the constitutional or statute law of a state is concerned, the Constitution and statutes speak for themselves, and it is a rule well settled, that where a question arises upon the construction of a state Constitution or statute, the courts of the United States will feel themselves bound by the construction given to them by the Supreme Court of the state. So, also, as to what may be the common law of the state, as applicable to a case before a federal court, the ordinary evidence is to be found in the decisions of the state's tribunal of last resort.

The question in the class of cases we are now considering, being what the law of the state is, which is to be administered by the court, if there can be found in the decisions of the highest court of that state intrusted with the construction of its statutes, and the interpretation and application of its common law, a well settled rule, that generally will be deemed the law of that state. Especially is this true, whenever the decisions of the state courts relate to some law of a local character, which may have become established by those courts as part of the law of the state. And generally, where in an ordinary trial, in an action at common law in a United States court, we speak of the common law, we refer to the common law of the state as it has been adopted by statute or recognized by the courts, as the foundation of legal rights, so that, though a United States Circuit Court, having jurisdiction in a given state, is an independent forum, and distinct from that of the state, it administers no new or different law from that administered in the state court. But the jurisdiction exercised by those federal courts in such cases, is concurrent and not subordinate, and they are called upon to exercise, and do exercise, an independent judgment as to what the law of the state may be.

As to the constitutional and statute law of a state, and the construction given thereto by the highest state tribunals, there is little

or no difficulty. And as to what the common law of a state may be, the best evidence is generally found in the settled line of decisions of the state court, so accepted and recognized as to constitute a general rule of property or conduct. More latitude, however, is practiced in questions that depend upon a common law, not merely part of the local and customary law of the state, but common to all states and countries where what is known as the "common law" prevails. On these questions, the courts of the United States do not hold themselves bound by the decisions of the courts of the state, unless, perchance, such decisions have so clearly established a settled rule in the premises as to make it part of the peculiar and local law of that state. In deciding what the common law of a state may be, they will resort to the same sources of information as are open to the state courts, and find the evidence of the law where the state courts must seek it, in that general jurisprudence of which we have spoken. State courts are accustomed, in discussing such questions, to refer, not only to decisions of their own states, but to those of other states in this country, as well as to decisions in that country from which we originally derived the common law. The Circuit Courts of the United States may, therefore, in forming their independent judgment, in questions where the common law of the state is derived from the principles of general jurisprudence common to all the states, at times feel compelled to differ from the conclusions arrived at by the state court. In other words, they may differ from a state court in determining what the common law of the state, thus derived, and applicable to the given case, may be. Swift v. Tyson, 16 Pet. 1, 8, 10 L. Ed. 865.

It is to be remembered, however, that this diversity of opinion will not be indulged in by the courts of the United States, where, as we have just said, in the ordinary administration of the law by the state courts, and by the settled course of their decisions, certain rules are established which have become rules of property and conduct in the state, and have all the effect of law, which it would be wrong to disturb. Burgess v. Seligman, 107 U. S. 20, 37, 2 Sup. Ct. 10, 27 L. Ed. 359; Bucher v. Cheshire R. R. Co., 125 U. S. 555, 8 Sup. Ct. 974, 31 L. Ed. 795; Etheridge v. Sperry, 139 U. S. 267, 275, 11 Sup. Ct. 563, 35 L. Ed. 171.

This contention makes it necessary to refer to the somewhat peculiar history of the litigation between the parties to this suit, as disclosed in the record. From the facts stated in the fifth plea filed by the defendant, and afterwards stricken out by the court upon motion of the plaintiff, it appears that the defendant in error, Fannie Friedman, and her father, Samuel Friedman, on July 20th, 1903, brought two separate actions against the present plaintiff in error, in the Supreme Court of New Jersey, to recover damages for the same injury and upon the same state of facts for which the present action was brought in the court below. The two actions came on for trial, and by stipulation and consent were tried as one before a justice of the Supreme Court and a jury. A verdict was rendered in favor of Fannie Friedman for $7,000, and for Samuel Friedman, who sued per quod servitium amisit, for $800. On the judgment in the case of Samuel Friedman, a writ of error was sued out by the de-

fendant company, from the Court of Errors and Appeals of the state of New Jersey, and in Fannie Friedman's case a judgment nisi being entered, a rule to show cause why the verdict should not be set aside was granted, returnable before the New Jersey Supreme Court. The Samuel Friedman case was duly argued before the said Court of Errors and Appeals, and the judgment appealed from was finally reversed. The ground of this reversal, as stated in the opinion of the court, was that the defendant company owed no duty to the children of tender years to whom, to its knowledge, these piles of beams might be attractive for playing upon or resting upon, to keep them in a reasonably safe condition, other than it owed to those who were sui juris. It was held that Fannie Friedman was a trespasser upon these materials of the defendant, and that for the injury suffered by her, as such, no cause of action or recovery could accrue to her father.

After this judgment of the Court of Appeals, in the case of Samuel Friedman, as was inevitable, the rule to show cause why a new trial should not be granted in the case of the infant plaintiff against the same defendant, was made absolute by the trial court, and the suit was thereafter discontinued by plaintiff, and a new action was brought in the court below, the judgment and record in which, by writ of error, are now before this court for review. The objection made by plaintiff in error, that the suit in the state court barred the right of action in the second suit in the United States court, does not seem to have been seriously pressed, and requires but a word in passing. Manhattan Life Ins. Co. v. Broughton, 109 U. S. 121, 3 Sup. Ct. 99, 27 L. Ed. 878, was a case where a nonsuit in the state court had been granted on defendant's motion and a new action was subsequently instituted in the Circuit Court of the United States, where it was contended that the former judgment was a bar and a request made to direct a verdict for defendant. The court denied the request and overruled the objection. Upon error to the Supreme Court, these rulings were held to be correct, and that "a trial upon which nothing was determined cannot support a plea of res judicata or have any weight as evidence at another trial." And in Gardner v. Mich. Cent. R. R. Co., 150 U. S. 349, 14 Sup. Ct. 140, 37 L. Ed. 1107, the plaintiff sued defendant in the state court of Michigan, and a verdict and judgment were in plaintiff's favor. This judgment was reversed by the Supreme Court of the state, and a new trial ordered. When the case was remanded, plaintiff voluntarily withdrew his action, and then commenced suit in the Circuit Court of the United States, on the same cause of action. The defendant contended that the plaintiff was precluded from bringing this action by the judgment in the state court, rendered for the same cause of action and on the same state of facts. This contention was overruled by the Circuit Court of the United States, and the Supreme Court of the United States, in the case cited, held that this ruling of the Circuit Court was correct.

We recur, therefore, to the contention that the decision of the Court of Errors and Appeals of New Jersey, in Friedman v. Snare & Triest, is binding on this court, and settles the law for this case. We have already stated at sufficient length the principles that should guide this

court in determining how far it should consider itself bound by this decision of the Court of Errors and Appeals of New Jersey. The question, whether the defendant owed any duty, as respected the children of tender years on said street and near said piles of beams, which to the knowledge of the defendant had proved attractive to such children to rest or play upon, other than and different from that which it owed to persons using the street and who were sui juris, was clearly a question of the common or unwritten law of the state of New Jersey. It was not a question of statute law, or of title to land, or of merely local law or custom, but belonged to that domain of jurisprudence to which we have above alluded, which prevails generally in all states and countries where the common law is recognized, and is so often referred to in the decisions of the Supreme Court. It is well settled that the general question of liability for negligence, when not modified or regulated by statute law, belongs to this domain. In Gardner v. Mich. Cent. Railroad Co., supra, Chief Justice Fuller, in speaking for the Supreme Court, says:

"But in the present case, only the responsibility of a railroad company to its employés was involved, and it is settled that that question is a matter of general law, and that in the absence of statutory regulations by the state in which this cause of action arose, this court is not required to follow the decisions of the state court. Railroad Co. v. Lockwood, 17 Wall. 357, 21 L. Ed. 627; Hough v. Railway Co., 100 U. S. 213, 25 L. Ed. 612; Myrick v. Mich. Cent. R. R., 107 U. S. 102, 1 Sup. Ct. 425, 27 L. Ed. 325; Lake Shore, etc., Ry. v. Prentice, 147 U. S. 101, 13 Sup. Ct. 261, 37 L. Ed. 97; B. & O. R. R. Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772."

In ascertaining what this unwritten or common law prevailing in New Jersey, as well as widely elsewhere, requires in the premises, the court below had the right to exercise its independent judgment. In doing so, it might explore the sources, and scrutinize the evidence, of that law precisely as the state court has done. However reluctant it may be to differ with, it was not bound by, the decision of the state court in such a case, although judicial comity might require it to bow to a line of decisions so uniform and well settled, and extending through so long a time, as to establish a rule of conduct which "it would be wrong to disturb." The only question, then, is, was the judgment of the Court of Errors and Appeals of New Jersey, in the case referred to, declaratory of a rule of law so established as to be peculiar to that state? In accordance with the principles above stated, its decision that the title of the abutting owners on a street in New Jersey extend to the middle thereof, subject to the public easement, and that by the law of that state such abutting owners have the right to the temporary and reasonable use of the street for storing materials to be used in building and repair of structures on such abutting land, as a matter of local law, should be and was respected as conclusive by the Circuit Court, especially as its decision in this respect was supported by the authority of a uniform line of state decisions.

With reference, however, to the general question of negligence, and the duty owed under the circumstances by defendant to plaintiff, the only New Jersey cases referred to by the learned justice who delivered the opinion of the Court of Errors and Appeals are the cases of

Turess v. N. Y., Susq. & West. R. R. Co., 61 N. J. Law, 314, 40 Atl. 614, decided by the Supreme Court, and D., L. & W. R. R. Co. v. Reich, 61 N. J. Law, 635, 40 Atl. 682, 41 L. R. A. 831, 68 Am. St. Rep. 727, decided by the Court of Errors and Appeals.

The case first cited was in the Supreme Court, not the court of last resort. It was a turntable case, and squarely took issue with the doctrine of Railroad Company v. Stout and the "Turntable Cases," so called, that have followed it. The case was decided in 1898, and it was said by Chief Justice Magie, who rendered the opinion, that the question was for the first time presented for consideration to the courts of New Jersey.

The second case was in the Court of Errors and Appeals, and was also a turntable case. Mr. Justice Gummere, in delivering the opinion of the court, in speaking of the doctrine of the "turntable cases," says that:

"Although this doctrine has received the support of many courts of high distinction, it has been absolutely repudiated by other courts whose decisions rank equally high."

He also says that "this court," the Court of Errors and Appeals, "has up to the present time never been called upon to decide the question, and we are free to adopt either the view taken by the United States Supreme Court, in Railroad Company v. Stout, supra, and the cases which have followed it, or that taken by" other courts. It was accordingly held by the court that the owner of the turntable and of the land on which it was built, owed no duty to a child of tender years, who was hurt by playing thereon, on the ground that it was a trespasser at the time of the accident.

In addition to these, counsel for the plaintiff in error has referred us to the cases of Isaac S. Vanderbeck v. Hendry, 34 N. J. Law, 467, Fitzpatrick v. Cumberland Glass Co., 61 N. J. Law, 376, 39 Atl. 675, and Taylor v. Haddonfield & C. Turnpike Co., 46 Atl. 707. These cases all refer to the duties of landholders, with reference to persons sui juris who enter upon their lands as licensees, and do not at all touch the question with which we are here concerned. It is evident, therefore, that there is no such settled rule of law established by the decisions of the New Jersey tribunal of last resort, as would be binding upon the United States Circuit Court or relieve it from the duty of forming an independent judgment as to what the unwritten or common law of New Jersey required of the defendant in the premises. That the law was not so settled in New Jersey, is further evidenced by the strongly reasoned dissenting opinion of Fort and Bogert, JJ., in the case of Samuel Friedman v. Snare & Triest Co., supra, and by the view taken by that eminent jurist, the late Mr. Justice Dixon, in the trial of this same case in the Supreme Court, and whose opinion, as approved by the learned judge of the court below, we have already quoted. With the highest respect for the Court of Errors and Appeals of the state of New Jersey, and for the learned members of that court who announced its opinion in the case referred to, we are compelled to the conclusion that the rule of law, as announced in the case of Railroad Co. v. Stout, supra, and in the subsequent approving cases, is the law applicable to

the present case, and the assignments of error in that regard must be overruled.

It is only necessary in conclusion to refer briefly to the contention of the plaintiff in error, that because the case of Samuel Friedman v. Snare & Triest Co., in the Court of Errors and Appeals of New Jersey, grew out of the identical facts and circumstances upon which the present case is founded, it was in some peculiar sense binding upon this court, as well as upon the court below. In view of what has already been said, we can give no weight to this suggestion. It still remains a matter in which two courts of concurrent and independent jurisdiction have arrived at a different view of the law.

In the case of Bucher v. Cheshire R. R. Co., 125 U. S. 555, 8 Sup. Ct. 974, 31 L. Ed. 795, the plaintiff in error was plaintiff below in the Circuit Court of the United States, and sought to recover from defendants for injuries which he sustained by reason of their negligence, while traveling upon their roads. The court on the trial substantially instructed the jury that the plaintiff could not recover, because the injury complained of occurred while he was traveling upon the Sabbath day, in violation of the law of the state of Massachusetts. A suit between the same parties in regard to the same transaction had been brought in the Supreme Court of that state, in which, on a trial before a jury, the plaintiff obtained a verdict. This was carried to the court in banc, and was there reversed and sent back for a new trial. The plaintiff then became nonsuit in the state court, and brought his action in the Circuit Court of the United States. Mr. Justice Miller, in delivering the opinion of the Supreme Court, discussed the general question as to the binding effect of decisions of the state courts upon the courts of the United States, and we have already cited a passage from his opinion. He nowhere, however, gives any weight to the fact that there had been an opinion of the Massachusetts court of last resort, in the very case then before the Supreme Court, but confines himself to the inquiry, whether any settled rule in the premises had been established by the decisions of the Massachusetts courts. He concludes as follows:

"The decisions on this subject by the Massachusetts court are numerous enough and of sufficiently long standing to establish the rule, so far as they can establish it, and we think that, taken in connection with the relation they bear to the statute itself, though giving an effect to it which may not meet the approval of this court, they nevertheless determine the law of Massachusetts on that subject."

In the case at bar, no statute of the state was involved.

As we have seen in the case of Gardner v. Michigan Cent. R. R. Co., supra, there was the same situation to be dealt with. The Supreme Court of the United States refused to be bound by the decision of the Supreme Court of Michigan, on the same facts and between the same parties, and said:

"We conclude, therefore, that the opinion of the state Supreme Court should be given only such weight as its reasoning and the respectability of the source from which it proceeds entitles it to receive."

Nearly all the other contentions founded upon the assignments of error are disposed of by what we have already said, and as to those

that are not so disposed of, we content ourselves with saying that they are without merit and present no reversible error. We think the questions we have discussed were properly submitted to the jury by the learned judge of the court below, and the judgment below is therefore affirmed.

PERRIN v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. March 1, 1909.)

No. 1,541.

1. CONSPIRACY (§ 43*)—CONSPIRACY TO DEFRAUD THE UNITED STATES—SUFFICIENCY OF INDICTMENT.

An indictment under Rev. St. § 5440 (U. S. Comp. St. 1901, p. 3676), which charges that the defendants conspired together to defraud the United States of the title to and possession of large tracts of public lands described, and avers overt acts thereunder, is sufficient without averring the means employed, the gist of the offense being the unlawful combination.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 85; Dec. Dig. § 43.*]

2. CONSPIRACY (§ 43*) — CONSPIRACY TO DEFRAUD THE UNITED STATES—SUFFICIENCY OF INDICTMENT.

An indictment under Rev. St. § 5440 (U. S. Comp. St. 1901, p. 3676), charging a conspiracy to defraud the United States by fraudulently obtaining title to and possession of certain described lands, then public lands of the United States, is not insufficient because it further charges that the purpose of the conspiracy was to be accomplished through the state by securing the selection of the lands by the state in lieu of school lands included in a government forest reservation and their fraudulent transfer from the state to defendants, nor because the state was entitled to select such lands under the law.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 85; Dec. Dig. § 43.*]

3. CRIMINAL LAW (§ 409*) — EVIDENCE — WRITTEN ADMISSIONS BY ACCUSED — RIGHT TO ADMISSION OF ENTIRE STATEMENT.

On the trial of defendants charged with conspiracy to defraud the United States of certain lands, a special agent for the Land Department testified that he asked one of the defendants for a statement in respect to the transaction, and in reply received a letter from him stating, "I send herewith the statement of Mr. Williams, covering, as I believe, all the points you suggested," and inclosing an affidavit of said Williams to which were attached copies of contracts of different dates between the defendants relating to the acquisition of the lands in question. *Held*, that it was error to permit the prosecution to detach the copy of one of the contracts from the affidavit and to introduce the same, together with the letter in evidence, as a declaration or admission of defendant, and at the same time to exclude the affidavit and copies of the other contracts which formed an integral part of the statement.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 409.*]

4. CRIMINAL LAW (§ 396*) — EVIDENCE — EVIDENCE ADMISSIBLE BY REASON OF ADMISSION OF SIMILAR EVIDENCE OF ADVERSE PARTY.

Where a contract between codefendants charged with conspiracy to defraud the United States was introduced in evidence by the prosecution as tending to prove such conspiracy, it was error to exclude evidence offered by defendants to show that on learning that such contract might

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

be unlawful it was superseded by another claimed to be legal, especially where evidence was admitted of acts done by the defendants subsequent to the date of the alleged substituted agreement.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 861; Dec. Dig. § 396.*]

Gilbert, Circuit Judge, dissenting.

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

Peter F. Dunne and Barclay Henley, for plaintiff in error.

Robt. T. Devlin, U. S. Atty., and A. P. Black, Asst. U. S. Atty.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. The plaintiff in error was indicted in the court below with John A. Benson for a conspiracy to defraud the United States of the title to and possession of large tracts of land containing twelve thousand (12,000) acres, situated in the county of Tehama, in the state of California. To this indictment the defendants interposed demurrers on the grounds, among other things, that the indictment did not state facts sufficient to constitute an offense against the laws of the United States, and on the ground that the court was without jurisdiction for the reason that the alleged offenses set out in the indictment were exclusively a matter of state cognizance. The demurrers were overruled, and the defendants pleaded not guilty; they were tried and convicted, and a judgment entered accordingly. For a review of this judgment the defendants have prosecuted separate writs of error.

The first question to be determined is the sufficiency of the indictment. The indictment contains two counts. The first count charges that John A. Benson and the plaintiff in error, on the 31st day of October, 1903, in the city and county of San Francisco, state of California, conspired together to defraud the United States of the title to and possession of large tracts of land of great value, containing twelve thousand (12,000) acres, situated in the county of Tehama, state of California, and located more particularly in townships twenty-four (24) and twenty-five (25) north, ranges eight (8) and nine (9) west, Mt. Diablo base and meridian, which were lands of the United States open to and to be opened to selection in lieu of lands included and to be included within the limits of forest reservations established and to be established under the laws of the United States in the state of California, by means of false, fraudulent, and fictitious applications and affidavits to purchase, and false, fraudulent, and fictitious entries of said lands, which said false, fraudulent, and fictitious applications, affidavits, and entries were to be filed in the California state land office, at Sacramento, Cal., and by reason of which said false, fraudulent, and fictitious applications and affidavits to purchase and entries the state of California was to demand of the United States the lands covered by and mentioned in the said applications and affidavits in lieu of other lands in the state of California which had been heretofore

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

included in forest reservations established in said state of California by the United States government.

The indictment further charges that John A. Benson had theretofore caused the lands included in the forest reservations in lieu of which the state of California was to demand the lands applied for by the defendants to be covered by false, fraudulent, and fictitious applications and affidavits to purchase from the said state of California, and by the pretended relinquishment of said lands, so included in the said forest reservations, by the said John A. Benson, the state of California was apparently entitled to select other lands in lieu thereof.

The indictment further charges that according to and by reason of said conspiracy, combination, confederation, and agreement, and to the effect and object of said conspiracy, the defendants, at the city and county of San Francisco, state and Northern district of California, on the 31st day of October, 1903, entered into an agreement in writing, in the words and figures and substance following, to wit:

"This agreement, made and entered into this thirty-first day of October, 1903, between Edward B. Perrin, of Williams, Arizona, the party of the first part, and John A. Benson, of the city and county of San Francisco, state of California, the party of the second part, witnesseth: That the said party of the first part employs the said party of the second part to secure for him, by means of state indemnity school land location or in other legal manner the following described land, to wit: As per plat attached hereto—containing twelve thousand (12,000) acres.

"That the said party of the second part agrees to file the applications of the nominees of the said party of the first part for said land in the state land office, and to have said land properly selected in the United States land office, and certified to the state by the Secretary of the Interior; and, thereafter, as soon as the same can lawfully be done, to have a patent for the said land issued to the said party or his assigns—provided that, meanwhile, the full payment for said land has been made by said party of the first part, in accordance with the terms of this agreement.

"In consideration hereof the said party agrees to pay the said second party the sum of four & 50/100 ($4.50) dollars per acre for said land, (including 50c an acre for location fee in installments as follows, to wit: Two and 50/100 ($2.50) dollars per acre cash, and two ($2.00) dollars per acre when the application for the above described land has been approved by the state Surveyor General, which in no case shall be less than three months. The party of the first part is to have the privilege of paying the second installment within ninety days from November 18, 1903, with forest reserve script at $4.50 per acre—and party of the second part is also to pay the state of California, the sum of one dollar and twenty-five cents per acre when the same becomes due.

"If the party of the first part shall fail to obtain a good and sufficient title to said land or any part thereof, under the location to be made as aforesaid, or in some other legal manner within three years from date hereof, then the said second party will refund to the said party of the first part, any money that he, the said party of the second part, may have received on account hereof, in proportion to the quantity for which title may fail. It is agreed that there shall be no further location charges other than the $6,000 already paid, on account of lands, whether located within forest reserve script or otherwise, to be selected by the party of the first part in townships 24 and 25 north, ranges 8 and 9 West, Mount Diablo meridian."

The indictment charges that by the word "nominees," used in the aforesaid agreement, was meant the names of the fictitious persons whose false, fraudulent, and fictitious applications for the said land in said agreement mentioned were to be filed in the state land office, at Sacramento, Cal., by the said John A. Benson, and the said agreement

was by the consent of both parties thereto changed on or about the 1st day of November, 1903, so that the said "nominees" were to appear as the nominees of the party of the second part.

It is further charged that for the purpose of carrying out the object of the conspiracy, combination, federation, and agreement the plaintiff in error on the 31st day of October, 1903, paid the said John A. Benson the sum of thirty thousand ($30,000) dollars, which was received by the said John A. Benson on account of the foregoing agreement.

The indictment further charges that the plaintiff in error on or about the 1st day of November, 1903, caused one Charles P. Snell to write his name to a large number of blank nonmineral affidavits aggregating one hundred (100), more or less, which said affidavits so signed in blank by the said Snell were taken possession of by the plaintiff in error, and were afterwards by him turned over to the said John A. Benson to be fraudulently filled in and used as true and genuine affidavits, and filed along with the false, fraudulent, and fictitious applications and affidavits and entries aforesaid; and the said John A. Benson caused the said affidavits so signed in blank by said Charles P. Snell to be filled in and filed as the true and genuine affidavits of the said Charles P. Snell in connection with the aforesaid false and fictitious applications and entries.

It is further charged that on November 4, 1903, the said John A. Benson, to effect the object of the said conspiracy, caused to be filed in the state land office, at Sacramento, Cal., application No. 13,562, in the name of R. M. White, 810 Mission street, San Francisco, for the purchase of certain lands in township 24 north, range 8 west, Mt. Diablo base and meridian, which application was false, feigned, fraudulent, and fictitious, and then and there known to the said defendants to be false, feigned, fraudulent, and fictitious, in this: That the alleged R. M. White had not in fact made any application to purchase, and did not in fact live at 810 Mission street, San Francisco, or at any other place, and did not in fact exist.

The indictment further charges that on November 4th, in the year 1903, the said John A. Benson, to effect the object of the conspiracy, caused to be filed in the state land office, at Sacramento, Cal., application No. 13,563, in the name of John S. Forsythe, 407 Castro street, San Francisco, for the purchase of certain lands in township 24 north, range 8 west, Mt. Diablo base and meridian, which said application was false, feigned, fraudulent, and fictitious, and then and there known to the said defendants to be false, feigned, fraudulent, and fictitious, in this: that the alleged John S. Forsythe had not in fact made any application to purchase, and that he did not in fact live at 407 Castor street, San Francisco, or at any other place, and did not in fact exist.

In the second count of the indictment the conspiracy and combination are alleged substantially as in the first count, but the charges in the second count are more in detail concerning the means adopted by the defendants for the purpose of selecting and fraudulently entitling defendants to a pretended right to select and have the state of California select, and thereafter obtain title to the 12,000 acres of land mentioned in the indictment as school indemnity lieu lands from the United

States, and convey the same to the said defendants in lieu of said lands covered by forest reservations.

It is first objected to this indictment that its allegations are not clear and concise, and as to the matters charged with respect to the object of the alleged conspiracy, namely, to fraudulently obtain title to certain lands belonging to the United States in lieu of other lands belonging to the state, the indictment goes no further than to charge that the state of California was to demand of the United States the lands to be applied for, leaving it to be inferred without any charge to that effect that, when the state received the lands from the United States in exchange for lands of the state included in Forest Reservations, it would issue certificates of purchase and final patents for the lands so received to the applicants, who would transfer or convey the title to the plaintiff in error.

The indictment is unquestionably open to criticism, but giving effect to all of its allegations, including the agreement between Benson and the plaintiff in error set forth in the indictment, and construing these allegations in view of the statutory provisions relating to the exchange of lands of the state within forest reservations of the United States for lands outside of these reservations, we think the crime of conspiracy is sufficiently charged; but the criticism is directed mainly to allegations of the first count relating to the means employed to carry the conspiracy into effect. Section 5440 of the Revised Statutes (U. S. Comp. St. 1901, p. 3676), under which the indictment was found, provides:

"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 to such conspiracy shall be liable."

The gist of the offense is the unlawful combination. Bannon and Mulkey v. United States, 156 U. S. 464, 468, 15 Sup. Ct. 467, 39 L. Ed. 494. The unlawful combination is sufficiently charged in the indictment in the allegation that the defendants conspired together "to defraud the United States of the title to and possession of large tracts of land" described in the indictment. It is not necessary to aver the means employed to carry the unlawful combination into effect. United States v. Benson, 70 Fed. 591, 17 C. C. A. 293. Having averred the use of such means as would clearly apprise the defendant of the offense of which he is charged, we think the allegations are sufficient.

It is next contended that the indictment does not charge a conspiracy to defraud the United States of anything; that, so far as any charge is made, it is that an agreement was entered into between Benson and the plaintiff in error to secure certain lands in California by means of state school lieu locations, and that if such an agreement amounted to a conspiracy to fraudulently obtain title to such lands it was a fraud upon the state and not upon the United States. This is but a limited and partial view of the indictment. It charges more. It alleges, in substance, that, when this conspiracy was formed to obtain title to the lands described, the lands were lands of the United States, and the object of the conspiracy was to secure a transfer of the title of the United States to the lands through the state of California to the plaintiff in error. The machinery of the state land office was to be used

as an instrument to carry out the purpose of the conspiracy and secure the title to certain lands of the United States, and it is no answer to this view of the acts of the parties to contend that the state was entitled to the lands as selections in lieu of other lands lost to the state. As stated by the Supreme Court in Hyde v. Shine, 199 U. S. 62, 82, 25 Sup. Ct. 760, 764, 50 L. Ed. 90, "The law punishes the false practices by which the lands are obtained." In United States v. Keitel, 211 U. S. 370, 374, 29 Sup. Ct. 123, 130, 53 L. Ed. ——, the court, referring to an indictment charging the conspiracy to be effected by procuring various persons or agents to enter coal lands in their own name ostensibly for their own benefit, but in reality for the use and benefit of the accused and a named corporation, said:

"The unsoundness of the argument that as, when the prohibited entries were made, the price of the lands was paid to the United States, therefore the United States could not have been defrauded, is refuted by its mere statement. If it were true, then in every case, however flagrant, where the lands of the United States were procured in violation of express prohibitions of law, the element of fraud would cease to exist by the mere payment of the price; that is to say, the successful operation of the fraud would deprive the transaction of its fraudulent character. But the inherent weakness of the contention need not be further pointed out, because its want of merit is conclusively established by the ruling of Hyde v. Shine, where a like contention was decided to be without foundation."

It cannot be doubted that, had a disclosure been made to the officers of the Land Department of the United States of the facts alleged in the indictment, it would have effectively barred the obtaining by the alleged conspirators from the United States through the state of California the lands mentioned in the indictment.

What the court said in the Keitel Case concerning the scope of the statute under consideration is applicable here:

"Nor do we deem it necessary to do more than briefly refer to the elaborate statements at bar concerning constructive crimes, and the fear which also found expression in the opinion below, that, if the words 'to defraud' in any manner or for any purpose receive a broad significance, charges of crime may be hereafter predicated upon acts not prohibited and innocuous in and of themselves, and which, when they were committed, might have been deemed by no one to afford the basis of a criminal prosecution. It will be time enough to consider such forebodings when a case arises indicating that the dread is real and not imaginary. That they are mere phantoms when applied to the case here presented results from the obvious consideration that the conspiracy charged had for its purpose the doing of acts which were in clear violation of the direct prohibition of the coal land laws, a prohibition whose meaning and effect had been unmistakably announced and applied by a decision of this court rendered many years before the formation of the conspiracy here charged. The cogency of these considerations becomes more pointedly manifest when it is borne in mind that the purpose and necessary effect of the conspiracy complained of was to obtain the lands of the United States by the suppression of facts which, had they been disclosed, would have rendered the acquisition impossible."

We are of the opinion that the indictment sufficiently charges an offense against the United States.

During the progress of the trial a number of objections were interposed to the admission and rejection of testimony; the rulings of the court upon these objections are assigned as errors.

The first witness placed upon the stand for the United States was one George C. Hunt, who testified that he was a special agent of the General Land Office of the United States; that he knew the plaintiff in error, who is referred to in the proceedings as Dr. Perrin. The witness testified that he had a conversation with Dr. Perrin in September, 1905, in regard to the contract he had entered into with Benson in 1903. The witness said they met on the train; that the witness desired to get a statement from the doctor about the transaction. He did not get a written statement, but Dr. Perrin gave a verbal statement. The attorney for the United States (Mr. Black) then asked the witness the following question:

"Q. Did you afterwards receive a communication from Dr. Perrin inclosing a copy of the contract; that is, inclosing what purported to be a statement of his secretary, Mr. Williams, which included a copy of the contract? A. I think I did. Q. I show you a paper dated September 14, 1905, and ask you if that was received by you in due course of mail, and whether that is signed by the defendant, Dr. Perrin? A. I received it through the mail, and, from what I have seen of his signature, I think that is it. That is the letter that I got. Q. And inclosed with that letter were true copies of what purported to be a copy of the contract sent to you by Mr. Williams, his secretary? A. Attached to this affidavit of Mr. Williams are copies of the contract. That is a copy of the contract."

The attorney for the United States then offered in evidence the letter of Dr. Perrin dated September 14, 1905, and the copy of the contract inclosed in the letter.

Mr. Dunne, the attorney for Dr. Perrin, then asked the witness:

"Q. I find, Mr. Hunt, on looking at this copy of the contract, that there is attached thereto a paper headed 'Affidavit'? A. Yes, sir. Q. I want to know from you whether in the communication that you received, which you say was signed by Dr. Perrin, the affidavit and the copy of the contract were attached, and reached you with that letter of Dr. Perrin's? * * * A. Yes, sir. These papers came with it. * * * The Court: Let them be read into the record. Mr. Dunne: You are going to read all those papers into the record? The Court: Only those that he offers in evidence. Mr. Black: I am going to read the letter and the contract 'A.' The papers will be here if you want to use them."

The letter was then read as follows:

"Williams, Arizona, September 14, 1905.

"Mr. George C. Hunt, Roswell, New Mexico.

"Dear Sir: I send herewith the statement of Mr. Williams, covering as I believe all the points you suggested.

"If the statement does not cover any point, I would thank you to advise me.

"When I reached Williams my brother had returned home from Washington. He tells me that Mr. Richards and Mr. Hitchcock will not be in Washington until the first of October, so I will delay my going until then.

"Yours truly, E. B. Perrin.

"Dict. 1 Enc. W.

"Since writing above, I have thought best to also enclose a statement from my brother, which I enclose herewith. E. B. P."

Mr. Black then offered in evidence and read the contract between Edward B. Perrin and John A. Benson, substantially as set forth in the indictment.

On cross-examination Mr. Dunne said:

"In the first place, in connection with the cross-examination of this witness, I desire to offer in evidence the statement of Mr. Williams referred to in Dr. Perrin's letter to him inclosed therewith, and to which, and as a part thereof this so-called contract is annexed."

To this evidence the attorney for the United States objected on the ground that it was irrelevant, immaterial, and incompetent, and not cross-examination, and also that it might be considered a self-serving declaration, and made after a conversation with a government agent. To this objection he added that he understood that the writer of the statement was in the courtroom. "He is here," said Mr. Black. "If counsel desires his evidence upon the subject, he can put him upon the stand, and he will have the chance to cross-examine him." The court sustained the objection to the paper. Mr. Dunne moved the court to strike out the letter of Dr. Perrin, and the paper called "Copy" of the contract. This motion was denied.

Subsequently, Lawrence S. Williams was called as a witness for the defendant. He was asked by Mr. Dunne:

"Mr. Williams, do you recall a circumstance that a copy of a contract was put in evidence here at the beginning of this case by Mr. Devlin or Mr. Black? It was detached from a letter and a statement which had been sent by Dr. Perrin to Mr. Hunt? A. Yes, sir. Q. Mr. Williams, did you ever send that copy of the contract? A. I did."

The attorney for the United States objected. The court sustained the objection, and the witness was not permitted to testify further concerning this statement.

The statement here referred to was identified, and is in the record. It is the affidavit made by L. S. Williams inclosed in the letter of Dr. Perrin's to George C. Hunt, special agent of the General Land Office, dated September 14, 1905. In this affidavit Williams swears that he was employed by Dr. Perrin in the capacity of secretary and bookkeeper since December, 1902. He relates the transactions leading up to the contract between Benson and Perrin, dated October 31, 1904, and designated as "Contract A." He says:

"When this contract was drawn, Dr. Perrin, Mr. Charles P. Snell, who was also in Dr. Perrin's employ as legal adviser and timber cruiser, and myself retired to one of Mr. Benson's private offices to read over and confer about the same. Dr. Perrin read the contract aloud, and when he came to the word 'nominees' he wanted to know what the word implied, and how in our estimation Benson would proceed to get title to the land. Mr. Snell thought that the contract was all right and perfectly legal, and that it was up to Benson to furnish the nominees, and that all he (Perrin) wanted was a legal title to the land. When we returned to the room in which Benson was seated, Dr. Perrin again referred to the word 'nominees,' and asked Benson at the same time how he intended to get title to the land. Benson laughingly replied: 'Never mind, Doctor, that is exactly what Hovey and others would like to know. Depend upon me; every step I take will be perfectly legal, and I will give you a perfect title.'"

Williams then states that on the 20th of November, 1903, another contract for 2,000 acres additional to be secured in the same manner as that in contract "A" was signed by Dr. Perrin. A copy of this contract was appended to the affidavit and marked "C." The affidavit

sets forth the payments made by Dr. Perrin to Benson in cash and forest reserve script for the lands referred to in these contracts, and the statement made by Dr. Perrin concerning the reason for turning over to Benson 8,000 acres of forest reserve scrip held by Dr. Perrin at that time, in exchange for state school indemnity locations which he was to receive from Benson. The affidavit then relates a statement made by Dr. Perrin in February, 1904, that he had conferred with Judge A. E. Bolton of San Francisco, and that the contracts with Benson were in all probability illegal ones; that he had gone to Benson, on threats that he would have Benson arrested, and had succeeded in getting another contract from him. A copy of a copy of this contract was attached to the affidavit, marked "C." This contract, dated February 4, 1904, contains an agreement on the part of Dr. Perrin to purchase lands from Benson to the amount of 14,000 acres; Benson to obtain a good title, under the provisions of the act of Congress of June 4, 1897—the forest reserve act. The agreement also provided that:

"For that purpose said Perrin has paid said Benson thirty-two thousand ($32,000) dollars, to cover payment for his services, the surveying fee for selecting the land, and the expenses and costs in paying for said lands in the procuring title therefor, during the time specified in this contract, under said law, or under any law by which title can now, or at any time during the life of this contract, be legally obtained."

Dr. Perrin was called as a witness in his own behalf, and was shown this contract, dated February 4, 1904, and was asked this question: "Was this paper, Dr. Perrin, intended by you as a substitute and supersession of the October and November agreements?" To which question the witness answered, "It was." Thereupon the United States by its attorney moved to strike out said answer, which motion the court granted. Thereafter, during the direct examination of Dr. Perrin, and after his identification of the signatures to this contract of February 4, 1904, bearing the signature of Dr. Perrin and also the signature of John A. Benson, the documents were offered in evidence. The attorney for the United States objected, and the court sustained the objection. To the rulings of the court in the progress of the trial excluding the affidavit of Williams and the contracts and the other documents inclosed in Dr. Perrin's letter of September 14, 1905, and denying defendant's motion to strike out Dr. Perrin's letter and the copy of the contract of October 31, 1903, the attorney for Dr. Perrin interposed exceptions and reserved exceptions to the rulings.

We are of the opinion that the court was in error in excluding the affidavit of Williams inclosed in the letter of Dr. Perrin to Hunt. The latter was a special agent of the General Land Office; he was a witness for the United States. He testified that he desired to get a statement from Dr. Perrin about the transaction with Benson, and obtained a verbal statement from Dr. Perrin, and in addition he received a letter from Dr. Perrin in which the latter said:

"I send herewith the statement of Mr. Williams covering as I believe all the points you suggested. If the statement does not cover any point, I would thank you to advise me."

The statement referred to in this letter consisted of the statement of Mr. Williams, who was employed as Dr. Perrin's secretary and bookkeeper, and this statement had attached to it copies of the contracts between Benson and Dr. Perrin relating to the transaction which was the subject of the investigation by the special agent, namely, the contracts of October 31, 1903, November 20, 1903, and February 4, 1904. The attorney for the United States detached the contracts from the Williams statement and offered in evidence the letter of Dr. Perrin, with the copy of the contract of October 31, 1903, withholding from the jury the statement of Williams to which the copy of this contract was attached, and to which it related; and withholding also the copies of the two remaining contracts of November 20, 1903, and February 4, 1904; both of these contracts relating to the transactions between Benson and Dr. Perrin, originating in the contract of October 31, 1903.

The letter and contract of October 31, 1903, were offered in evidence as containing a declaration or admission of the defendant Perrin as to the transaction in question. In such a case the rule is stated by the Supreme Court of the United States in Insurance Company v. Newton, 89 U. S. 32, 35, 22 L. Ed. 793:

"Every admission is to be taken as an entirety of the fact which makes for the one side, with the qualifications which limit, modify, or destroy its effect on the other side. This is a settled principle which has passed by its universality into an axiom of the law."

This rule, together with its reason, is thus stated in Best's Law of Evidence, § 520:

"Where part of a document or statement is used as self-harming evidence against a party, he has a right to have the whole of it laid before the jury, who may then consider, and attach what weight they see fit to any self-serving statements it contains."

To the same effect is Taylor on Evidence, par. 725.

In the case of Lombard v. Chaplin, 98 Me. 309, 314, 56 Atl. 903, 905, it was said:

"It is claimed that the whole letter is inadmissible, even if a part of it had been put in evidence, as it was a self-serving, not self-disserving, statement made to a third party. If the writer of the letter was a witness only, it is true that the letter could be used only to contradict him and impeach his credibility, and not for the purpose of proving or disproving any fact material to the issue involved. But when the writer is also a party, this rule does not apply, for every statement in his letter, to whomsoever written, may be taken as an admission to prove or disprove any fact relevant to the issue.

"In the former case, where the writer is a witness only, his letter would be admissible only to contradict his present testimony. But in the latter case, where the writer is also a party, his statement may be used to contradict his present testimony, or as an admission of fact if material to the issue. In the case at bar, the extracts from the defendant's letter could not have been used to contradict his present testimony, for no such contradiction appeared or was claimed; hence they must necessarily have been used as admissions of fact on the part of the defendant. Considering this letter, then, as an admission previously made by the defendant, did counsel for the plaintiff, by introducing a part of it, thereby give the defendant the right to introduce the balance? We think he did. This court in Storer v. Gowen, 18 Me. 176, have held that: 'It is a principle well settled that the admissions of a party, when given in evidence, must be taken together, as well what makes in his favor as against him. Both are equal evidence to the jury, who will give every part of the testimony such credence as it may appear to deserve.' Ham-

matt v. Emerson, 27 Me. 308, 336, 46 Am. Dec. 598. In an early decision in Massachusetts, Whitwell v. Wyer, 11 Mass. 91, this is the language of the court: 'Where you rely upon a confession you must take it altogether.' And the same court says in O'Brien v. Cheney, 5 Cush. 148: 'The general principle for which the defendant contends, namely, that, when the admission of a part is offered in evidence, he is entitled to have the whole of what he said on the subject, at that interview, stated as a part of the evidence, is correct and is not denied.' See, also, Adam v. Eames, 107 Mass. 276; Dole v. Wooldredge, 142 Mass. 161, 7 N. E. 832.

"In regard to the admission of the defendant, the court says in Mattocks v. Lyman, 18 Vt. 102, 46 Am. Dec. 138: 'That the whole declaration of the party made at one time, as well that in his favor as that which is against him, must be received and weighed.' And in Moore v. Wright, 90 Ill. 473, the court holds that: 'Where a party's admissions are called for, the party calling for the same is bound to take all the other party said upon the occasion concerning the matter in dispute, whether it makes for or against him.' It is unnecessary to make further citations. The above, we think, is a fair statement of the practice both in this country and England with respect to the admissibility of admission as testimony."

It follows from this rule that with the letter of Dr. Perrin the whole of the statement should have been admitted in evidence, including the copies of the agreements attached to the statement; or if excluded because the author of the statement was present in court at the trial and could be called by the defendants as a witness and cross-examined by the prosecution, then when called he should have been permitted to testify concerning the matters set forth in such statement; or if the statement of Williams and his testimony relating thereto were properly excluded by the court, then surely Dr. Perrin should have been permitted to testify concerning his letter to Hunt inclosing the Williams' statement and the copies of the agreements.

Dr. Perrin was called as a witness in his own behalf and was asked: "Was this paper"—referring to the agreement of February 4, 1904—"intended by you as a substitute and supersession of the October and November agreements?" He answered that, "It was." But this answer was stricken out by the court on motion of the attorney for the United States. Dr. Perrin certainly could not be deprived of the right to testify concerning the agreement of October 31, 1903. That agreement was in evidence against him, and he had a right to make any explanation of it he saw fit. He had a right to say whether it had continued in effect, or whether it had been substituted or superseded by another agreement. It was contended on the part of the defendants that the agreement of February 4, 1904, was perfectly innocent, and was substituted for the former agreements when it was found that they might be construed as illegal. What weight the jury would give to such testimony or such contention was another question, and in no way affected his right to have the evidence laid before the jury. "A court or jury are not bound to give equal credit to all parts of a statement or admission; they may believe a part and disregard the rest. The rule only requires that what is in favor of the party making the admissions should be fairly and liberally considered and weighed with the other evidence." Jones on the Law of Evidence, § 295.

Evidence on behalf of the United States was introduced tending to show that in pursuance of the agreement of October 31, 1903, Benson had filed or procured to be filed in the office of the Surveyor General

of the state a number of applications for the purchase from the state of certain lands of the United States, to be taken by the state in lieu of lands included in certain forest reserves of the United States. These applications numbered 29, and were introduced in evidence over the objections of the defendants and marked Exhibits 4, and 6 to 33, inclusive. Twenty of these applications were dated from October 10, 1903, to November 18, 1903, and called originally for 12,159.60 acres, including the two applications mentioned in the indictment; and nine applications were dated from February 13, 1904, to April 14, 1906, and called originally for 5,694.46 acres. These nine applications, exhibits numbered 8, 22, 23, 24, 28, 29, 30, 32, and 33, were all made subsequent to the contract of February 4, 1904, and the question arises: Did not the admission of these nine applications dated subsequently to February 4, 1904, as evidence against the plaintiff in error, open the door for the admission of the agreement of February 4, 1904? We are of the opinion that it did. We think it was for the jury under proper instructions to determine what weight should be given to that agreement in connection with the two previous agreements and the applications for land made subsequent to that date.

There are a number of other errors assigned which we do not think it necessary to review. We have carefully considered the rulings of the court in each case, and we are of the opinion that there was no prejudicial error in any of them.

For the errors we have pointed out, the judgment will be reversed, with direction to grant a new trial.

GILBERT, Circuit Judge (dissenting). I submit that the doctrine that every admission is to be taken as an entirety, and that, where a part of a document or statement is used as self-harming evidence against a party, he has the right to have the whole of it laid before the jury, has no application whatever to the ruling of the trial court in excluding from the evidence the contract of February 4, 1904, and the affidavit of Williams made on September 15, 1905. The indictment charged that the plaintiff in error and another did on October 31, 1903, enter into a conspiracy to defraud the United States of large tracts of land, under the agreement made on that day, which was set forth in hæc verba, and it alleged that on November 4, 1903, as overt acts done to carry out the conspiracy, the alleged conspirators filed two false, fraudulent, and fictitious applications for the purchase of certain designated parcels of land. To prove one of the facts so alleged in the indictment, the government offered in evidence a copy of the agreement of October 31, 1903. The copy so offered had come lawfully into the possession of the District Attorney. It was the best evidence of the allegation so made in the indictment. It was an instrument which was complete in itself, and it referred to no other instrument. But it is said that it had become so indissolubly connected with two other papers that it could not be severed from them for evidential purposes against the plaintiff in error. What is the tie that it is said so to bind these three papers together? It is that the plaintiff in error had voluntarily surrendered to an officer of the government his contract of October 31, 1903, together with his contract of February 4, 1904, and the affidavit

of his secretary of date September 15, 1905; and the theory seems to be that, because the papers were surrendered at the same time, the introduction of one of them by the prosecution entitled the plaintiff in error to the introduction of the other two, no matter at what time they were made or signed, for the reason that they were all parts of a single admission. What is the admission of the plaintiff in error that was proven in this case? It is not his letter of September 15, 1905, for that letter contains no admission. If any admission of his was received in evidence, it was that he entered into the contract of October 31, 1903. Had he declined to deliver up that contract, it may be doubted whether the prosecution could have proved the terms thereof, for he could have refused to furnish it as evidence against himself. But he voluntarily surrendered it, and the argument is that because he surrendered with it two other papers of a later date he was entitled to have the latter go in evidence with the first. But it is no part of the admission that he made the contract of October 31, 1903, that he afterwards made a different contract to supersede it, nor is the affidavit of his secretary any part of that admission—an affidavit made two years after the date of the first contract for the purpose of explaining it and the method in which operations had been conducted thereunder.

The substantive facts to be proved by the government were that the plaintiff in error and Benson entered into the agreement which is set forth in the indictment, and that thereunder they made fraudulent applications to obtain lands. How could it affect the proof of that agreement, and of the 20 applications shown to have been made under it, to prove the terms of a later agreement which was intended to supersede the first? In Wigmore on Evidence, § 2113, it is said:

"The opponent against whom an utterance has been put in may in his turn complement it by putting in the remainder in order to secure for the tribunal a complete understanding of the total tenor and effect of the utterance."

Here we may pause to inquire, would the affidavit of Williams and the contract of February 4, 1904, aid the court or the jury in arriving at a complete understanding of the total tenor and effect of the contract of October 31, 1903, and are those instruments useful in completing the sense of that contract? Says the same author, in section 2119:

"It follows from the general principle that a distinct or separate utterance is not receivable under this principle. The boundary line here is usually defined by saying that all that was uttered at the same time on the same subject is receivable."

How is it possible by any rule of construction or process of reasoning to reach the conclusion that these three papers, dissociated in time and subject, become utterances made at the same time and upon the same subject from the mere fact that they were surrendered by the plaintiff in error at the same time and in a single envelope, or were all referred to in a single letter? It is to be observed, also, that the defense introduced the original contract in evidence, and thereby cured the error, if error there was, in the introduction of the copy which was introduced by the prosecution.

But it is suggested that, irrespective of the question of its admissibility on the grounds above discussed, the contract of February 4, 1904, was admissible in evidence to show under what agreement the parties charged in the indictment made their applications for lands after the date of that instrument. This suggestion at first glance seems plausible, but on consideration it will be seen that it is without merit, and that there was, upon that ground, no reversible error in the ruling of the trial court which excluded such evidence. Under the agreement set forth in the indictment, the government proved, and it was not disputed, that 20 applications were made on or before November 18, 1903, including the two applications referred to in the indictment. The proof of the applications made after February 4, 1904, may be regarded as superfluous. It was offered, doubtless, for the reason that the 9 applications so made subsequent to February 4, 1904, were second applications for some of the lands which had already been covered by the first 20 applications, and were made for the acquisition of lands which were all within the scheme of the original contract, as shown by the map which was made part thereof. It is important to bear in mind that the offense charged was an unlawful conspiracy, not the act of unlawfully acquiring government land. To sustain the indictment it would have been sufficient, after proving the unlawful agreement, to prove one overt act done to carry out the conspiracy. It was unnecessary to adduce evidence of applications made after February 1, 1904. It would not have tended in the slightest degree to show innocence of the charge made in the indictment, if the defense had been permitted to prove that the applications made after February 4, 1904, were made under a legal contract. The proof of the applications made after the second agreement was entered into could not prejudice the plaintiff in error, nor could any explanation which he might have offered of those applications, or any proof under which they were made, affect the charge made in the indictment, and the evidence which was legitimately admitted to sustain it, for the court expressly charged the jury in that connection as follows:

"There has been introduced in evidence certain applications to purchase lands from the state of California, but I instruct you that unless the government has shown to your satisfaction and beyond a reasonable doubt that said particular applications, or some of them, were filed as a part of the contract set forth in the indictment, or in pursuance thereof, then you should disregard them entirely."

Can it be said that the second contract was admissible to prove the intent of the parties in making the first contract? If such is the law, it follows that it is in the power of all who conspire to acquire lands of the United States unlawfully to purge their conspiracy of its illegality by making a new and innocent agreement at any time before indictment, or indeed after indictment, provided it is shown that some of their applications for lands were made under the new agreement.

BENSON v. UNITED STATES. †

(Circuit Court of Appeals, Ninth Circuit. March 1, 1909.)

No. 1,562.

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

J. C. Campbell, for plaintiff in error.
Robt. T. Devlin, U. S. Atty., and A. P. Black, Asst. U. S. Atty.
Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. The plaintiff in error was indicted in the court below with Edward B. Perrin for a conspiracy to defraud the United States.

This case was heard upon objections to the indictment upon the record filed by his codefendant, Edward B. Perrin, No. 1,541. The only question raised in this case is the sufficiency of the indictment.

We held in the Perrin Case (just decided) 169 Fed. 17, that the indictment is sufficient; and upon the law of that case the judgment in this case is affirmed.

McELVAIN v. HARDESTY.

(Circuit Court of Appeals, Eighth Circuit. March 24, 1909.)

No. 2,783.

1. BANKRUPTCY (§ 184*)—TRANSFERS VOID UNDER STATE LAWS.

A contract for the sale of a saloon provided that the receipts of all sales should be deposited in a certain bank to the credit of the saloon, and used for no other purpose than the payment of the saloon indebtedness, necessary running expenses, and the balance of the purchase price, and in case of a failure on the part of the buyers to well and truly comply with the conditions of the agreement, the contract should be void and the saloon should become the property of the seller, with all moneys belonging thereto. *Held* that, whether such agreement was a conditional sale or chattel mortgage, it was one or the other, and was void until filed in the recorder's office of the county in which the mortgagors or vendors resided, as required by Rev. St. Mo. 1899, §§ 3404, 3410, 3412 (Ann. St. 1906, pp. 1936, 1940, 1945), especially as against subsequent creditors of the purchasers, whose claims were represented by the purchaser's trustee in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 276; Dec. Dig. § 184.*]

2. BANKRUPTCY (§ 160*)—PREFERENCES—INSOLVENCY.

Bankruptcy Act July 1, 1898, c. 541, § 60a, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445), provides that if the bankrupts at the time of the transfer in question were insolvent, and the effect of the transfer was to enable the transferee to obtain a greater percentage of his debt than any other creditors of the same class, such transfer constituted a preference. *Held*, that under the provision of the same section that the four months' time within which transfers by the bankrupt are presumed to be invalid shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required, the effect of a transfer by the bankrupts as constituting a preference must be judged as of the date it was filed for record, and if the bankrupts were then insolvent, and the transfer would enable the transferee to obtain a greater percentage of his debt than other simple contract creditors, it constitutes a preference.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 249–258; Dec. Dig. § 160.*]

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

† Rehearing denied May 26, 1909.

3. BANKRUPTCY (§ 160*)—PREFERENCES—INSOLVENCY.
A contract for the sale of a saloon required subsequent receipts to be used for the payment of running expenses, the indebtedness of the seller, and the balance of the purchase price, and declared that on default the contract should be void and the saloon become the property of the seller, with all moneys belonging thereto. When the buyers purchased, their capital amounted to only $500. They agreed to pay $3,900 for the saloon, including the seller's outstanding obligations, amounting to $2,600. In seven months they had lost their capital and had paid the seller's indebtedness, but in its place had incurred a like amount of unpaid indebtedness to their current merchandise creditors, when default was made in payment of one of the purchase-money notes, whereupon the seller recorded his contract on July 7, 1905, and took possession, after which the buyers became bankrupts. *Held*, that the buyers were insolvent when the transfer was recorded, and that such transfer constituted a preference.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 249–258; Dec. Dig. § 160.*]

4. BANKRUPTCY (§ 303*)—PREFERENCES—KNOWLEDGE OF INSOLVENCY.
Evidence *held* to show that the seller of a saloon business to the bankrupts, taking a lien thereon for an unpaid portion of the price, had knowledge of the bankrupt's insolvency at the time he filed his lien contract for record, and had reasonable cause to believe that the preference which was actually given him by the bankrupts in surrendering possession under such contract was intended by the bankrupts to constitute a preference.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 462; Dec. Dig. § 303.*]

5. BANKRUPTCY (§ 305*)—PREFERENCE—RESTORATION OF PROPERTY IN KIND.
Where property transferred by a bankrupt to a lien creditor pursuant to a voidable preference could not be restored in kind to the trustee, the latter could recover its value.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 466–468; Dec. Dig. § 305.*]

6. BANKRUPTCY (§ 205*)—PREFERENCES—CREDITORS—LIABILITY.
Where a seller of a saloon business to the bankrupts, at the time of retaking possession under a lien contract, constituting a voidable preference, accounted to the bankrupts for the difference between his debt and the fair value of the property, such seller was not accountable to the bankrupt's trustee for the difference so paid, whether it was returned by the bankrupts or paid over to another creditor.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 234; Dec. Dig. § 205.*]

7. BANKRUPTCY (§ 303*)—VOIDABLE PREFERENCE—GOOD WILL.
In a suit by a bankrupt's trustee to recover the value of the property of a saloon business retaken by a lien creditor pursuant to a contract of sale, constituting a voidable preference, evidence *held* insufficient to show that the business, at the time defendant resumed possession thereof, had any appreciable good will, and hence the court erred in charging defendant for the value thereof.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 462; Dec. Dig. § 303.*]

8. BANKRUPTCY (§ 293*)—PREFERENCES—ACTION BY TRUSTEE—JURISDICTION.
Bankruptcy Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445), confers plenary jurisdiction on courts of bankruptcy, as well as other courts therein mentioned, of an action by a bankrupt's trustee to recover the value of property taken by a lien creditor pursuant to a voidable preference.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 410–412; Dec. Dig. § 293.*]

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

A. L. Oliver (R. B. Oliver, R. B. Oliver, Jr., and Charles B. Faris, on the brief), for appellant.

Benson C. Hardesty (Sterling H. McCarty, on the brief), for appellee.

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

ADAMS, Circuit Judge. The trustee of the partnership estate of Crawford & Carter in bankruptcy brought this action in equity to annul the transfer by the firm of its stock of liquors and other saloon property to the defendant, McElvain, and to recover their value on the ground, among other things, that the transfer constituted a voidable preference within the meaning of Bankr. Act July 1, 1898, c. 541, §§ 60a, 60b, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445), as amended by Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799 (U. S. Comp. St. Supp. 1907, p. 1031). The learned trial court sustained the contention of the trustee and rendered a judgment against the defendant for the value of the property transferred including $600 for the supposed value of the good will of the business. Hence this appeal.

Many of the material facts are uncontroverted. All the parties to the original transaction were saloon men familiar with the business as carried on in Caruthersville, Mo., the scene of the present controversy. In December, 1904, McElvain owned the saloon and sold it, with an unexpired license to carry on the business, to Crawford & Carter for $3,900. They had little money but apparently much confidence. They paid $500 in cash, which constituted all their means, executed and delivered to McElvain their eight promissory notes each for $100 payable monthly, and assumed and agreed to pay McElvain's maturing obligations for supplies which he had purchased while owning and operating the saloon, amounting to about $2,600. McElvain continued to carry on the saloon business in two other places in the same town. Simultaneously the following agreement was executed and delivered:

"This agreement made and entered into this 9th day of December, 1904, by and between J. M. McElvain, party of the first part, and H. C. Carter and G. C. Crawford, of Caruthersville, Missouri, parties of the second part, witnesseth: That whereas, the said party of the first part has this day sold and delivered to the said parties of the second part the Climax saloon, in the city of Caruthersville, Missouri, upon the following terms and conditions: Conditioned, that the said parties of the second part assume all indebtedness of the said Climax saloon, and fully pay off and discharge same as fast as said indebtedness matures, and that the said party of the first part own and collect all debts due said Climax saloon up to this date, and that all sales of said Climax saloon be deposited in the Bank of Caruthersville, in the city of Caruthersville, Missouri, to the account of the Climax saloon, and no part of said sales to be used, by the said parties of the second part for any other purpose, other than the payment of the indebtedness of said saloon and the necessary running expenses of the same, together with eight promissory notes given the said party of the first part, for one hundred dollars each, one due every thirty days from date, being the purchase money of said saloon, and in case of a failure on the part of the said parties of the second part to well and truly comply with the conditions of the agreement, fully pay off and discharge all of said indebtedness as the same matures, then the contract to

be void, and the said saloon herein sold to become the property of the said party of the first part together with any and all moneys belonging to said saloon, either in the Bank of Caruthersville or elsewhere. Witness whereof that the said parties have hereunto set their hands the day and year aforesaid.

"[Signed] J. M. McElvain,
"G. C. Crawford,
"H. C. Carter."

The firm took possession and operated the saloon for about seven months until July 13, 1905. During that period they paid between $2,400 and $2,500 of the vendor's debts and also two or three of the purchase-money notes. The balance of those maturing were dishonored. In the seven months they had so reduced their total indebtedness to the vendor of $3,400 that only $730 remained unpaid.

The agreement of December 9th, although signed by the parties, was never acknowledged and was not filed for record or recorded in the recorder's office of Pemiscot county, wherein Caruthersville was situated and the vendors resided, until July 7, 1905. McElvain then upon hearing of the dishonor of one of the firm's checks out of solicitude for the balance of $730 due him on the purchase price caused it to be filed for record. Immediately upon taking this step he demanded payment of his notes then overdue and upon refusal asserted his right alleged to exist under the agreement of December 9th to the possession and ownership of the saloon and contents, and this right seems to have been accorded to him by the firm. An inventory and valuation were then taken, showing stock on hand of the value of $1,072. McElvain took this property which constituted all the assets of the firm as well as of its individual members at that figure, and gave to the firm his promissory note for $342, the excess over his own debt then due. This note was immediately transferred to J. S. Wahl in part payment of a debt due by the firm to William J. Lemp for which Wahl was surety. During these seven months while the firm was paying over $2,600 of McElvain's merchandise debts and some of the purchase-money notes, it purchased new goods to replenish its stock from wholesale houses to the amount of over $3,600, and at the time of cessation of business had paid on account thereof about $1,000, leaving a balance of over $2,600 still unpaid. This sum of money represents the debts now due to the creditors of the estate of the bankrupts, and these debts were all contracted while McElvain withheld his agreement from the record and on the faith of the firm's being the real as they were the ostensible owners of the saloon. The saloon and property therein which the firm transferred and delivered to McElvain constituted all their assets, so that unless a recovery be had in this action the merchandise creditors of the firm with claims amounting to $2,600 will have no participation in the firm's assets. On October 30, 1905, the firm and its individual members were adjudicated bankrupts on a petition filed by their creditors against them on October 2, 1905. The filing of the agreement for record and the transfer to McElvain were therefore within four months before the filing of the petition in bankruptcy.

Whether this agreement measured by the rules laid down by us in Re Columbus Buggy Co., 143 Fed. 859, 74 C. C. A. 611, and Dunlap v. Mercer, 156 Fed. 545, 86 C. C. A. 435, be a chattel mortgage or a

conditional sale, about which much argument was indulged, we deem it unnecessary to decide. It was clearly one or the other, and in either case the law of Missouri made it invalid and void against creditors of the mortgagors or vendors, until recorded or filed in the recorder's office of the county in which the mortgagors or vendors resided. Sections 3404, 3410, 3412, Rev. St. Mo. 1899 (Am. St. 1906, pp. 1936, 1940, 1945). This is particularly true as against subsequent creditors like those represented by the trustee in this case who incurred their debts on the faith of an apparent unencumbered and unconditional ownership by their debtors of their property. Collins v. Wilhoit, 108 Mo. 451, 18 S. W. 839; State, to Use of Mayer, v. O'Neill, 151 Mo. 67, 52 S. W. 240; Oyler v. Renfro, 86 Mo. App. 321; Landis v. McDonald, 88 Mo. App. 335; Harrison & Calhoun v. South Carthage Min. Co., 95 Mo. App. 80, 68 S. W. 963, s. c. 106 Mo. App. 32, 79 S. W. 1160; Gilbert Book Co. v. Sheridan, 114 Mo. App. 332, 89 S. W. 555; First Nat. Bank of Buchanan County v. Connett, 142 Fed. 33, 73 C. C. A. 219, 5 L. R. A. (N. S.) 148.

From the foregoing it appears that the law of the state of Missouri required a recording or registering of the agreement of December 9th in order to validate it as against the creditors of Crawford & Carter.

Section 60a of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]) provides that if Crawford & Carter were, at the time of the transfer in question, insolvent, and if the effect of the transfer was to enable the transferee to obtain a greater percentage of his debt than any other creditors of the same class, such transfer constituted a preference. The same section provides that the four months' time there referred to shall not expire until four months after the date of the recording or registering of the transfer if by law such recording or registering is required.

In view of the foregoing the effect of the transfer to McElvain is to be judged as if made on the 7th day of July, 1905, when it was filed for record. If Crawford & Carter were then insolvent, and if the effect of the enforcement of the transfer was to enable McElvain to obtain a greater percentage of his debt than any other of their simple contract creditors, the transfer constituted a preference within the meaning of the bankruptcy law.

There can be no doubt of the firm's insolvency at that time. It embarked in business seven months before with a capital of $500 only. They had then lost their capital and had paid $2,600 indebtedness to McElvain, but had incurred a like amount of unpaid indebtedness to their current merchandise creditors. As a result they had lost all their capital and had merely substituted several creditors for one. They were hopelessly insolvent on July 7, 1905, and without any doubt the effect of the transfer, if held good, would enable McElvain to obtain a greater percentage of his debt than other like creditors would get. He would get practically all of his debt, and they practically nothing.

Notwithstanding the fact that the transfer constituted a preference, it was not voidable by the trustee, and he could not recover the prop-

erty transferred or its value unless the transferee had reasonable cause to believe a preference was thereby intended to be given to him. Section 60b of the Bankruptcy Act. As, for the purposes of this case, the transfer is to be treated as made on the date the agreement was recorded, so the transferee's belief or cause for belief concerning it must relate to that time. The evidence of two witnesses including Carter, one of the firm, strongly tends to show that McElvain had full knowledge of the hopelessly insolvent financial condition of the firm when he recorded the agreement and took possession of the saloon. Other witnesses, including McElvain, testify to the contrary. A careful consideration of all the evidence satisfies us that the testimony of the two witnesses referred to was correct. It comports with the probable and harmonizes with all the facts and circumstances of the case. McElvain lived in the same town as his creditors and carried on the saloon business on his own account in two other places. It was a small town of only about 2,000 inhabitants, where familiarity with the business and financial condition of competitors in trade is not uncommon. He was deeply interested in the firm's business. His personal interest in seeing that his old debts and his purchase money should be paid made it a reasonable thing for him to inquire about and become familiar with the affairs, purposes, and intentions of his debtors.

Moreover, if McElvain did not have actual knowledge of the insolvent condition of his debtors, we think in the circumstances of this case he is constructively chargeable with that knowledge. He took a transfer of all his debtors' property—of a going concern—in satisfaction of a debt. This in itself was an unusual thing, and the reasons which actuated it must have sprung from a fear or suspicion of danger. Solvent and prosperous business houses do not commonly pay debts that way. He knew of his own dishonored notes. He knew that his debtors could not have carried on active business for seven months and thereby make enough to pay over $2,600 upon his own indebtedness assumed by them without purchasing supplies. These facts and many others disclosed by the record were sufficient to put him as an ordinarily prudent man upon inquiry as to his debtor's solvency and to charge him with all the knowledge he could have acquired by the exercise of reasonable diligence. In re Eggert, 102 Fed. 735, 43 C. C. A. 1; Pittsburgh Plate Glass Co. v. Edwards, 148 Fed. 377, 78 C. C. A. 191; Houck v. Christy, 152 Fed. 612, 81 C. C. A. 602, 605, and cases cited. If he had resorted to the most obvious sources of information and had made inquiries of his debtors, or if he had exercised the right commonly exercised by creditors of examining the account books of their creditors, he would have quickly ascertained what Carter testifies to be true, that: "The size of his pile was $1.80"; that "Crawford had a horse and buggy and possibly a colt"; and that these were the only assets available for them to pay an indebtedness of $2,600 due to their general creditors.

On the testimony disclosed by this record we have no doubt that McElvain had reasonable cause to believe that the preference which was actually given him was intended by his debtors for that purpose.

Inasmuch as the property transferred cannot be restored in kind to the trustee, the latter under the statute is entitled to recover its value. It seems to be agreed that the valuation of $1,072 put upon the property when the inventory was taken is substantially correct. This being in excess of McElvain's debt in the sum of $342, he at the time and as a part of the transaction accounted to the firm for that excess and cannot be held accountable to the trustee for it. The defendant did not accept the transfer to that extent, and the learned trial court improperly included it in the sum awarded to the trustee. Whether the firm retained it or paid it over to another creditor is immaterial. The trial court also allowed a recovery of the sum of $600 for the good will of the business of Crawford & Carter claimed to have been transferred to McElvain. Without expressing any opinion as to when and under what circumstances, if at all, the good will of a business may be "property" within the meaning of section 60a and 60b of the Bankruptcy Act, we content ourselves by stating the conclusion reached that, if the saloon ever had any good will of value known to the law, it had been utterly destroyed by the methods pursued and the results achieved by the bankrupts and McElvain during the seven months of their relationship to it. The evidence satisfies us that there was no good will of value at the time of the transfer, and that the allowance of anything in favor of the trustee on that account was erroneous.

Defendant's contention that the court of bankruptcy had no jurisdiction to grant the relief sought in this action is untenable. Section 60b of the Bankruptcy Act, which gave the right, conferred plenary jurisdiction upon the court of bankruptcy as well as upon other courts there mentioned to enforce it. Other questions which were argued by counsel for appellant have been carefully considered and are found to be without merit.

The decree must be reversed, and the cause remanded to the trial court with directions to enter a decree for $730, instead of $1,672, and in all other respects to conform to the terms of the decree appealed from.

It is so ordered.

WASHINGTON TRUST CO. OF CITY OF NEW YORK v. DUNAWAY et al.

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

No. 1,627.

1. RAILROADS (§ 163*)—MORTGAGES—VALIDITY—ALASKA RAILROAD ACT.
By Act May 14, 1898, c. 299, 30 Stat. 409 (U. S. Comp. St. 1901, p. 1575), Congress granted right of way over public lands of the United States in Alaska to any railroad company complying with its provisions, which required the filing of a preliminary map of the location of its road, and within a year after its approval a map and profile of definite location of at least a 20-mile section, and the same each year until completion. It provided that the filing of the preliminary survey and map should during the ensuing year have the effect to render all the lands on which such

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

survey should pass subject to such right of way. Also, that mortgages executed by any company acquiring right of way thereunder should be recorded with the Secretary of the Interior, and should be a lien upon all the rights and property of the company as therein expressed, and that the right of way of a company should not be assigned or transferred until at least one-fourth of the proposed mileage of its road had been constructed, except by mortgages given to aid in its construction. There was also a provision that, on proof that actual surveys had been previously made or construction commenced, rights under the act should relate back to the date of such survey or commencement of work. The Council City & Solomon River Railroad Company, under its then corporate name, filed its preliminary map of location under said act in 1903, and afterward commenced the actual construction of its road. In 1905 it executed a mortgage on all of its property then owned or to be thereafter acquired to secure bonds to be used for construction purposes, which mortgage was recorded as required by the act. It had not at that time complied with the provision requiring the filing of map and profile of definite survey, but the time for doing so and for completion of its road was afterward extended by special act of Congress with which it complied. *Held* that, having in view the purpose of the legislation to encourage the building of roads, the mortgage was within the scope of its provisions and constituted a valid lien on the company's property.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 505; Dec. Dig. § 163.*]

2. RAILROADS (§ 165*)—MORTGAGES—RECORDING—ALASKA RAILROAD ACT.

Act May 14, 1898, c. 299, 30 Stat. 411 (U. S. Comp. St. 1901, p. 1578), granting right of way for railroads over lands of the United States in Alaska, provides, in section 6, that "all mortgages executed by any company acquiring a right of way under this act, upon any portion of its road that may be constructed in said District of Alaska shall be recorded with the Secretary of the Interior and the record thereof shall be notice of their execution and shall be a lien upon all the rights and property of said company as therein expressed, and such mortgage shall also be recorded in the office of the Secretary of the District of Alaska and in the office of the Secretary of the state or territory wherein such company is organized." *Held*, that such provisions contemplated a mortgage on the road as an entirety, including right of way, roadbed, track, rolling stock, and appurtenant property, and that the general provisions of the subsequent Alaska Code of June 6, 1900 (Carter's Ann. Codes Alaska, §§ 514, 515), requiring chattel mortgages to be recorded in the precinct where the mortgagor resides and where the property is, and to be renewed each year, did not apply to such a railroad mortgage nor repeal the special provisions for its recording.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 165.*]

3. STATUTES (§ 162*)—REPEAL BY IMPLICATION—SPECIAL AND GENERAL ACTS.

A special statute is not repealed by implication by a later general statute, although the latter is broad enough in its terms to include the same subject-matter, unless they are manifestly inconsistent.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 235; Dec. Dig. § 162.*]

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

This is an appeal from an order of the District Court of Alaska, Second division, refusing a preliminary injunction.

The case shows that the appellee Alice Dunaway recovered in that court a judgment against the Council City & Solomon River Railroad Company for $7,500 as damages sustained by her while a passenger upon its railroad, upon which judgment an execution was issued and levied by the appellee Powell,

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

as United States marshal for the Second division of the District of Alaska, upon certain locomotives, cars, and other articles of personalty of the railroad company used by it in the operation of its road. The marshal having advertised the property for sale to satisfy the judgment and costs, the appellant, by virtue of a mortgage executed to it by the railroad company prior to the institution of the action for damages, brought the present suit to obtain an injunction preventing the sale of the property by the marshal.

The pleadings show that the Council City & Solomon River Railroad Company was organized under the laws of the state of New Jersey, and was originally incorporated March 27, 1902, under the corporate name of the "Western Alaska Construction Company," but that on the 17th day of February, 1905, its original corporate name was, pursuant to the laws of the state of New Jersey, changed to "Council City & Solomon River Railroad Company"; that by its charter the corporation was, among other things, authorized "to survey, locate, construct, operate, own and maintain a railroad with one or more main tracks, together with all necessary or convenient sidetracks, spurs, switches and turnouts, from a point at or near the mouth of Solomon river within or adjacent to the limits of Solomon City in the territory of Alaska, in the United States of America, northeastwardly to a point within or adjacent to the limits of Council City in said territory, and thence to such point within or adjacent to the limits of said Council City as may be convenient or necessary for the purpose of there connecting said railroad with other railroad or railroads now or hereafter found in or adjacent to said Council City"; that the company, for the purpose of availing itself of the rights granted by an act of Congress entitled, "An act extending the homestead laws and providing for right of way for railroads in the District of Alaska, and for other purposes," approved May 14, 1898 (Act May 14, 1898, c. 299, 30 Stat. 409 [U. S. Comp. St. 1901, p. 1575]), did, on the 20th day of February, 1903, file with the Secretary of the Interior a duly certified copy of its articles of incorporation and due proof of its organization thereunder, all of which was approved by the Secretary of the Interior and accepted for filing in his office on the date last mentioned, and that thereafter, to wit, July 2, 1903, the company filed with the Secretary of the Interior a preliminary actual survey and plat of its proposed route, together with plats of its station and terminal grounds, all in duplicate, in accordance with the provisions of section 4 of the aforesaid act of Congress, which preliminary survey and plat were approved and filed in the office of the Secretary of the Interior, and duplicates thereof were thereafter and during the year 1903 forwarded to and filed with the register and receiver of the land office of the United States at Juneau, Alaska; that the company thereafter commenced the actual construction of its road along the line of said route, and thereafter, to wit, April 9, 1904, an act of Congress (33 Stat. 165, c. 1135) was passed, entitled "An act for the relief of the Western Alaska Construction Company's Railroad," providing that the time of the company to comply with the provisions of sections 4 and 5 of chapter 299 of the aforesaid act of May 14, 1898, "in acquiring and completing its railroad now under construction in Alaska, is hereby extended as follows:

"First. The time to file the map and profile of definite location of its first section of at least twenty miles with the register of the land office in the District of Alaska, as provided in said sections four and five, is hereby extended to and including the thirty-first of December, nineteen hundred and four.

"Second. The time to complete the first section of at least twenty miles of its railroad as provided in said section five, is hereby extended to and including within one year after the filing and approval of the definite location of said section of said railroad as in said chapter and by this act is provided; and such railroad company shall be entitled to all the benefits conferred upon it by the provisions of such act upon its due compliance with all the provisions thereof, excepting only the provisions thereof, relating to the filing of the map and profile of definite location of its first section of not less than twenty miles of its road within twelve months after the filing with the Secretary of the Interior of a preliminary actual survey and plat of its proposed route, as prescribed in said sections four and five of said act, and the

provision thereof relating to the completion of the said first section of its road within one year, as originally provided in section five of said act: Provided, that such railroad company shall file with the proper register of the land office for the District of Alaska, a map and profile of the first section of its road of at least twenty miles on or before December thirty-first, nineteen hundred and four, and shall complete such section of its said road within one year after such definite location has been approved by the Secretary of the Interior, as provided in said section five of said act."

That on the 11th day of January, 1906, Congress passed an act entitled, "An act to aid the Council City and Solomon River Railroad Company," reading as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:

"That the time of the Council City and Solomon River Railroad Company to comply with the provisions of sections four and five of chapter one hundred and ninety-nine of the Laws of the United States, entitled 'An act extending the homestead laws and providing for a right of way for railroads in the District of Alaska, and for other purposes,' approved May 14th, 1898, in acquiring and building its railroad now under construction in Alaska, is hereby extended as follows:

"First. That the time to file the map and profile of definite location of its first section of at least twenty miles with the register of the land office in the District of Alaska, as provided in said sections four and five, is hereby extended to and including the thirty-first day of December, nineteen hundred and six.

"Second. That the time to build the first section of at least twenty miles of its railroad, as provided in said section five, is hereby extended to and including the thirty-first day of December, 1906, and the time for building its entire railroad, as provided in said section five, is hereby extended to and including December thirty-first, nineteen hundred and nine.

"Third. That it shall be lawful for the Council City and Solomon River Railroad Company to hereafter operate its railroad in the District of Alaska for a period to and including December thirty-first, nineteen hundred and nine, without the payment of the license fee of one hundred dollars per mile per annum on each mile operated, as provided in section twenty-nine of chapter one of the act entitled 'An act for making further provision for a civil government for Alaska, and for other purposes,' approved June sixth, nineteen hundred." Act Jan. 11, 1906, c. 4, 34 Stat. 6.

On December 20, 1906, the Council City & Solomon River Railroad Company filed with the register of the land office at Juneau a map and profile of a 20-mile section of its railroad as definitely fixed, which map and profile was thereafter, to wit, June 26, 1907, approved by the Secretary of the Interior; that 20-mile section being completed by the railroad company prior to December 31, 1906.

The mortgage under which the appellant claims was executed to it as trustee on the 1st day of May, 1905, and was given to secure an issue of $350,000 of the company's bonds, negotiable in form and bearing interest, and which mortgage was in the usual form of corporate mortgages given for like purposes. It purported to cover all of the realty and personalty of the mortgagor and all of its after-acquired property. It was duly acknowledged, and contained the affidavit of the secretary of each of the companies that it was made in good faith to secure the payment of the bonds, without any design to hinder, delay, or defraud creditors. It was recorded with the Secretary of the Interior, in the office of the Secretary of the District of Alaska, and with the Secretary of the State of New Jersey. It does not appear that it was ever filed, recorded, or indexed as a chattel mortgage in the Nome recording district, or that any affidavit of renewal of the mortgage was made, pursuant to the provisions of the act of June 6, 1900, regarding the making of chattel mortgages in Alaska.

Section 2 of the act of May 14, 1898, granted, among other things, the right of way through the lands of the United States in the District of Alaska "to any railroad company duly organized under the laws of any state or territory, or by the Congress of the United States, which may hereafter file for record

with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization under the same, to the extent of one hundred feet on each side of the center line of said road," with certain provisions not important to be mentioned.

Section 5 of the act of May 14, 1898, is, in part, as follows:

"That any company desiring to secure the benefit of this act shall, within twelve months after filing the preliminary map of location of its road, as hereinbefore prescribed, whether upon surveyed or unsurveyed lands, file with the register of the land office for the district where such land is located, a map and profile of at least a twenty mile section of its road, or a profile of its entire road, if less than twenty miles, as definitely fixed, and shall thereafter, each year, definitely locate and file a map of such location as fixed of not less than twenty miles additional of its line of road until the entire road has thus been definitely located, and upon approval thereof by the Secretary of the Interior, the same shall be noted upon the record of said office, and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way," etc.

Section 6 of the act of May 14, 1898, is, in part, as follows:

"That all mortgages executed by any company acquiring a right of way under this act upon any portion of its road that may be constructed in said District of Alaska shall be recorded with the Secretary of the Interior, and the record thereof shall be notice of their execution, and shall be a lien upon all the rights and property of said company, as therein expressed, and such mortgage shall also be recorded in the office of the Secretary of the District of Alaska, and in the office of the Secretary of the state or territory wherein such company is organized."

And by section 8 of the same act it is, among other things, provided as follows:

"The right of way herein and hereby authorized shall not be assigned or transferred in any form whatever prior to the construction and completion of at least one-fourth of the proposed mileage of such railroad * * * as indicated by the map of definite location, except by mortgages or other liens that may be given or secured thereon to aid in the construction thereof; provided, that where within ninety days after the approval of this act proof is made to the satisfaction of the Secretary of the Interior that actual surveys, evidenced by designated monuments, were made, and the line of a railroad * * * located thereby, or that actual construction was commenced on the line of any railroad, * * * prior to January twenty-first, eighteen hundred and ninety-eight, the rights to inure hereunder shall, if the terms of the act are complied with as to such railroad, * * * relate back to the date when such survey or construction was commenced; and in all conflicts relative to the right of way or other privileges of this act, the person, company or corporation having been first in time in actual survey or construction, as the case may be, shall be deemed first in right."

Albert Fink, Ira D. Orton, J. C. Campbell, W. H. Metson, F. C. Drew, C. H. Oatman, and J. A. MacKenzie, for appellant.

Charles E. Shepard, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge (after stating the facts as above). Since the record shows that practically all of the rolling stock and other personalty used in the operation of the road in question was covered by the levy and proposed sale by the marshal, it does not admit of doubt that, if the appellant's mortgage is valid as against the appellee's judgment, the mortgage security would be impaired and largely destroyed by the sale under the levy. The real question in the case, therefore, is, whether or not the mortgage is valid as against the judgment creditor. The appellee insists that it is not, for the reason that it was not made by a company "acquiring a right of way" under the provisions of section

6 of the act of May 14, 1898; was prohibited by the provisions of section 8 of that act; and that, even if valid as between the parties thereto, the mortgage, in so far as concerned the personal property covered by it, was void as to the creditors of the mortgagor, because the holder of the mortgage did not conform to the provisions of the statute in Alaska in regard to chattel mortgages, which are to the effect that chattel mortgages must be filed in the recording district where the chattels are situated, and that each year an affidavit must be made and filed one month before its expiration showing that the mortgage debt has not been paid (if such be the fact), in order to continue the life of the mortgage.

It is contended that no right of way was or could be acquired prior to the filing and approval of the definite route of the road, and that until that was done no mortgage was authorized. The provisions of the act in question do not, we think, sustain that contention. The terms of the grant contained in section 2 are in præsenti, and by section 4 it is provided that any company embraced by the act—

"by filing with the Secretary of the Interior a preliminary actual survey and plat of its proposed route shall have the right at any time within one year thereafter to file the map and profile of definite location provided for in this act, and such preliminary survey and plat shall, during the said period of one year from the time of filing the same, have the effect to render all the lands on which said preliminary survey and plat shall pass, subject to such right of way."

The next section (5) provides that any company desiring to secure the benefits of the act shall, within 12 months after filing the preliminary map of location of its road, file with the register of the land office for the district a map and profile of at least a 20-mile section, or a profile of its entire road, if less than 20 miles, as definitely fixed, and shall thereafter each year definitely locate and file a map of such location of not less than 20 miles additional until the entire road has been thus definitely located, and upon approval thereof by the Secretary of the Interior the same shall be noted upon the records of his office, and that thereafter all lands over which such right of way shall pass shall be disposed of subject to such right of way:

"Provided, that if any section of said road shall not be completed within one year after the definite location of said section was approved, or if the map of definite location be not filed within one year, as herein required, or if the entire road shall not be completed within four years from the filing of the map of definite location, the rights herein granted shall be forfeited as to any such uncompleted section of said road, and thereupon shall revert to the United States without further action or declaration, the notation of such uncompleted section upon the records of the land office shall be cancelled, and the reservation of such lands for the purposes of said right of way, stations and terminals shall cease and become null and void without further action."

In respect to this road, as has been seen, the time for the filing of the map and profile of definite location of the first 20-mile section was extended to December 31, 1906, and the time for building the entire road to December 31, 1909, by virtue of the acts of April 9, 1904, and January 11, 1906.

The record shows that the appellant under its then corporate name did on the 20th of February, 1903, file with the Secretary of the Inte-

rior a duly certified copy of its articles of incorporation and due proof of its organization thereunder, which were approved by the Secretary, and that thereafter, to wit, July 2, 1903, the company filed with the Secretary of the Interior a preliminary actual survey and plat of its proposed route, together with plats of its station and terminal grounds in duplicate, in accordance with the provisions of section 4 of the act of May 14, 1898; which preliminary survey and plat were approved and filed in the office of the Secretary of the Interior, and duplicates thereof thereafter, and during the year 1903, forwarded to and filed with the register and receiver of the land office at Juneau, Alaska, after which the company commenced the actual construction of its road along the line of the said route. It is true that the map and profile of the definite location of the road had not, nor had any portion of it, then been filed with or approved by the Secretary of the Interior; but the time for doing that had been extended by Congress to December 31, 1906. Congress, of course, well knew the then difficulties in the way of locating, as well as building, a railroad in that remote region, with but a few months in a year in which such work could be done with any degree of ease or economy, and with almost the entire population of the sparsely settled country intent on the hunt for gold. Accordingly, it not only extended the time for the filing of the map and profile of the definite location of the appellant's road, but by section 8 of the act of 1898 conferred upon any railroad company the benefits of that act that had prior to January 21, 1898, either actually commenced the construction of a line of railroad or had made actual survey therefor, evidenced by designated monuments along its line, provided that, within 90 days after the approval of the act of May 14, 1898, proof be made to the satisfaction of the Secretary of the Interior of such actual construction or actual survey. And in further pursuit of its manifest purpose to aid in the building of such roads, and the consequent opening up and developing of the Territory, Congress, by section 8 of its act of May 14, 1898, in prohibiting, as it did, the assigning or transferring in any form whatever of the right of way therein and thereby authorized prior to the construction and completion of at least one-fourth of the proposed mileage of such roads, as indicated by the map of their definite location, expressly excepted from such inhibition "mortgages or other liens that may be given or secured thereon to aid in the construction thereof," thereby, in our opinion, authorizing the mortgaging in aid of such construction of a road, partly constructed, as was the case here, with the right of way, the actual preliminary survey of which had been made, approved, and filed in accordance with the provisions of the act of May 14, 1898, and the time for the filing and approving of the definite location of which Congress extended by subsequent acts, within which time the requisite acts are shown to have been performed in the present case.

It remains to consider whether the mortgage in question is invalid as against the appellee, because of the failure of the appellant to comply with the provisions of the Alaska statute of June 6, 1900, relating to chattel mortgages. That depends upon whether the appellant company was authorized by the act of May 14, 1898, to mortgage,

as it did do by the mortgage in question, the road as an entirety—right of way, roadbed, track, rolling stock, and appurtenant property.

The provision of section 6 of the act of 1898, in relation to that matter, is in these words:

"That all mortgages executed by any company acquiring a right of way under this act, upon any portion of its road that may be constructed in said District of Alaska, shall be recorded with the Secretary of the Interior, and the record thereof shall be notice of their execution, and shall be a lien upon all the rights and property of said company, as therein expressed, and such mortgage shall also be recorded in the office of the Secretary of the District of Alaska, and in the office of the Secretary of the state or territory wherein such company is organized."

Here was a road partly constructed, with a right of way granted in præsenti, actually surveyed preliminarily in accordance with the statute, which preliminary survey was filed and approved as required thereby, prior to the execution of the mortgage, and subsequently definitely located within the extended time allowed by Congress.

By section 8 of the act of 1898, as we have seen, Congress authorized the mortgaging of such a road to aid in its construction prior to the completion of one-fourth of its proposed mileage, and when, by section 6 of the same act, it declares that such a mortgage "shall be a lien upon all the rights and property of said company as therein expressed," we think the provision manifestly covers the road as an entirety. And since by the same statute the record of such a mortgage in the office of the Secretary of the Interior, in that of the Secretary of the District of Alaska, and in that of the Secretary of the state or territory wherein it is organized, is made notice of its execution, such recordation, in our opinion, must be held notice to all the world.

Under the construction we have thus placed upon the act of Congress of May 14, 1898, it is clear that the provisions of the Alaska statute of June 6, 1900, in relation to chattel mortgages, do not apply to the appellant's mortgage, unless it be, as is contended on behalf of the appellee, that the provisions of the act of May 14, 1898, concerning the recordation of such railroad mortgages, and the effect thereof, were repealed by the chattel mortgage provisions of the act of June 6, 1900. Hammock v. Trust Co., 105 U. S. 77, 26 L. Ed. 1111; Illinois Trust & Savings Bank v. Seattle Electric Railway & P. Co., 82 Fed. 936, 27 C. C. A. 268.

At the time that Congress by its act of May 14, 1898, provided that mortgages executed under and pursuant to its provisions should be recorded in the office of the Secretary of the Interior, in that of the Secretary of the District of Alaska, and in the office of the Secretary of the state or territory where the mortgagor company was organized, and that such recordation "shall be notice of their execution and a lien upon all of the rights and property of said company as therein expressed," there was in force in Alaska its act of May 17, 1884 (Act May 17, 1884, c. 53, 23 Stat. 24), entitled "An act providing a civil government for Alaska," by section 4 of which the clerk of the court provided for by that act was made—

"ex-officio recorder of deeds and mortgages and certificates of location of mining claims and other contracts relating to real estate, and register of wills for said district, and shall establish secure offices in the towns of Sitka

and Wrangel, in said district, for the safe keeping of all his official records and all records concerning the reformation and establishment of the present status of titles to lands, as hereinafter directed"

—with a provision to the effect that the District Court thereby created—

"may direct, if it shall deem it expedient, the establishment of separate offices at the settlements of Wrangel, Oonalashka, and Juneau City, respectively, for the recording of such instruments as may pertain to the several natural divisions of said district most convenient to said settlements, the limits of which shall, in the event of such direction, be defined by such court"

—such offices to be in charge of certain commissioners provided for by the act, one of whom was required to reside at Sitka, one at Wrangel, one at Oonalashka, and one at Juneau City, each of whom the act provides shall, among other powers—

"have the powers of notaries public, and shall keep a record of all deeds and other instruments of writing acknowledged before them, and relating to the title to or transfer of property within said district, which record shall be subject to public inspection."

The act of May 17, 1884, also provided:

"That the general laws of the state of Oregon now in force are hereby declared to be the law in said district, so far as the same may be applicable and not in conflict with the provisions of this act or the laws of the United States."

Thus, while by the general organic Act of Alaska provision was made for the execution and recordation of deeds, mortgages and other instruments relating to real property, Congress, in enacting the statute of May 14th, 1898, departed from those provisions and specifically provided in and by the latter act the offices in which mortgages upon railroad properties, executed in pursuance of its provisions, should be recorded, and the effect of such execution and recordation. To hold that such special provision enacted by Congress, relating to and embracing a particular class of property, was repealed by implication by the passage by the same legislative body of its general act of June 6, 1900, would not only do violence to the general rule upon the subject, but an examination of some of the provisions of that later general act in relation to chattel mortgages shows that they are inapplicable to the mortgages contemplated by and provided for by Congress in its act of May 14, 1898. For example, two of the sections of the act of June 6, 1900, are as follows:

"Every mortgage of personal property together with the affidavits of the parties thereto or a copy thereof, certified to be correct by the person before whom the acknowledgment has been made, must be filed in the office of the recorder of the precinct where the mortgagor resides and of the precinct where the property is at the time of the execution of the mortgage; or in case he is not a resident of the district, then in the office of the recorder of the precinct where the property is at the time of the execution of the mortgage; and the recorder must, on receipt of such mortgage or copy, endorse thereon the time of receiving the same, and file and keep the same in his office for the inspection of all persons, and shall enter in a book properly ruled and kept for that purpose, the names of all the parties—the names of the mortgagors alphabetically arranged—the consideration thereof, the date of its maturity, and the time of filing the same.

"Every mortgage filed as provided in this chapter shall be void as against the creditors of the person making the same, or against subsequent purchasers or mortgagees in good faith, after the expiration of the term of one year from the filing thereof, unless within thirty days next preceding the expiration of the term of one year a true copy of such mortgage, with a verified statement exhibiting the interest of the mortgagee in such property at the time the same is renewed, as claimed by virtue of such mortgage, is again filed in the office where the original was filed; and the effect of such renewal shall be to extend the lien of the mortgage as against the creditors, purchasers and encumbrancers of the property for the further term of one year." Sections 314, 315, pt. 5, c. 31, Carter's Ann. Codes Alaska.

The appellant, being a corporation of the state of New Jersey, never was a resident of any precinct in Alaska, and the property in question was and is not only of such a character that it was not confined to any particular precinct but the mortgage itself covered after-acquired as well as then existing property.

But apart from these considerations, it is, as said and shown by the Supreme Court in Rodgers v. United States, 185 U. S. 83–87, 22 Sup. Ct. 582, 583, 46 L. Ed. 816—

"a canon of statutory construction that a later statute, general in its terms and not expressly repealing a prior special statute, will ordinarily not affect the special provisions of such earlier statute. In other words, where there are two statutes, the earlier special and the later general—the terms of the general broad enough to include the matter provided for in the special—the fact that the one is special and the other is general creates a presumption that the special is to be considered as remaining an exception to the general, and the general will not be understood as repealing the special, unless a repeal is expressly named, or unless the provisions of the general are manifestly inconsistent with those of the special. In Ex parte Crow Dog, 109 U. S. 556, 570, 3 Sup. Ct. 396, 405, 27 L. Ed. 1030, this court said: 'The language of the exception is special and express; the words relied on as a repeal are general and inconclusive. The rule is, "Generalia specialibus non derogant." "The general principle to be applied," said Bovill, C. J., in Thorpe v. Adams, L. R. 6 C. P. 135, "to the construction of acts of Parliament, is that a general act is not to be construed to repeal a previous particular act, unless there is some express reference to the previous legislation on the subject, or unless there is a necessary inconsistency in the two acts standing together." "And the reason is," said Wood, V. C., in Fitzgerald v. Champenys, 30 L. J. N. S. Eq. 782, 2 Johns. & Hem. 31, 54, "that the Legislature having had its attention directed to a special subject, and having observed all the circumstances of the case and provided for them, does not intend by a general enactment afterwards to derogate from its own act when it makes no special mention of its intention so to do." '

"In Black on Interpretation of Laws, 116, the proposition is thus stated: 'As a corollary from the doctrine that implied repeals are not favored, it has come to be an established rule in the construction of statutes that a subsequent act, treating a subject in general terms and not expressly contradicting the provisions of a prior special statute, is not to be considered as intended to affect the more particular and specific provisions of the earlier act, unless it is absolutely necessary so to construe it in order to give its words any meaning at all.'

"So, in Sedgwick on the Construction of Statutory and Constitutional Law, the author observes, on page 98, with respect to this rule: 'The reason and philosophy of the rule is that, when the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms or treating the subject in a general manner, and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the latter act such a construction, in order that its words shall have any meaning at all.'

"And in Crane v. Reeder, 22 Mich. 322, 334, Mr. Justice Christiancy, speaking for the Supreme Court of that state, said: 'Where there are two acts or provisions, one of which is special and particular, and certainly includes the matter in question, and the other general, which, if standing alone, would include the same matter and thus conflict with the special act or provision, the special must be taken as intended to constitute an exception to the general act or provision, especially when such general and special acts or provisions are contemporaneous, as the Legislature is not to be presumed to have intended a conflict.'

"Both the text-books and the opinion just quoted cite many supporting authorities."

We are of opinion that the appellant's mortgage is valid as against the appellee's judgment. The order is accordingly reversed, and the case remanded to the court below for further proceedings in accordance with the views above expressed.

HARROLD v. TERRITORY OF OKLAHOMA.

(Circuit Court of Appeals, Eighth Circuit. March 26, 1909.)

No. 2,600.

1. WITNESSES (§ 380*) — INVOLUNTARY CONFESSION INCOMPETENT TO IMPEACH ACCUSED.

An involuntary confession of an accused person, incompetent to prove the case of the prosecutor in chief, is incompetent to impeach the accused after he has testified in his own behalf relative to other subjects only, (1) because such a confession is unworthy of belief, and (2) because its introduction would violate the constitutional guaranty that the accused shall not be compelled to testify against himself.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1211; Dec. Dig. § 380.*]

2. WITNESSES (§§ 305, 380*)—WAIVER BY ACCUSED BY TESTIFYING OF GUARANTY AGAINST COMPULSION TO TESTIFY LIMITED TO LEGAL CROSS-EXAMINATION.

The waiver by an accused person testifying in his own behalf of his constitutional guaranty against being compelled to testify against himself does not extend beyond a legal cross-examination upon the subjects of his direct examination.

Impeaching questions relative to the involuntary confession not treated in the direct examination of the accused, and the introduction of such a confession to contradict the answers to such questions, violate the constitutional guaranty.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1053–1057, 1211; Dec. Dig. §§ 305, 380.*]

3. WITNESSES (§ 269*)—CRIMINAL LAW (§ 1170½*)—CROSS-EXAMINATION—LIMITATIONS—HOW FAR DISCRETIONARY.

The party against whom a witness is called has the right to a full and fair cross-examination of him upon the subjects of his direct examination.

The party on whose behalf a witness is called has the right to restrict his cross-examination to the subjects of his direct examination.

The violation of these rights is not discretionary with the courts, but is reversible error.

It is only beyond the limits of the exercise of these rights that the extent of the cross-examination of witnesses is within the discretion of the courts.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 949; Dec. Dig. § 269;* Criminal Law, Cent. Dig. § 3133; Dec. Dig. § 1170½.*]

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

4. CRIMINAL LAW (§ 736*)—COMPETENCY OF CONFESSION FOR COURT—EVIDENCE CONCERNING INADMISSIBLE TO JURY.

It is the duty of the court to determine whether or not an alleged confession by an accused person was voluntary or involuntary, and it is error to permit the introduction of the evidence upon that question before the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1219; Dec. Dig. § 736.*]

(Syllabus by the Court.)

In Error to the Supreme Court of the Territory of Oklahoma.

For opinion below, see 18 Okl. 395, 89 Pac. 202.

S. H. Harris, W. F. Wilson, and Claude Nowlin, for plaintiff in error.

Charles West and W. C. Reeves, for defendant in error.

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

SANBORN, Circuit Judge. The defendant below was indicted, tried, and convicted of stealing two steers. Many errors in the trial are assigned, and, among others: (1) That over the timely objection and exception of the accused the court permitted evidence upon the question whether or not a confession he was alleged to have made was free and voluntary to be introduced before the jury; (2) that after the court had decided that it was involuntary and had excluded it from the evidence, and after the accused had testified in his own behalf, wherein he said nothing relative to the alleged confession, it allowed the prosecutor to ask him on cross-examination whether or not he had made the statements in the alleged confession to the county attorney and others; and (3) that after he had denied that he made them the court permitted the introduction in evidence of proof of the confession.

These rulings question two established principles of criminal jurisprudence: First, a confession by the accused of his guilt or of facts tending to establish it, obtained by the compulsion or inspiration of hope, fear, or any other sort of inducement, is incompetent evidence against him because it is not worthy of belief (1 Wigmore on Evidence, § 822, and cases cited at pages 932, 933); and, second, no person "shall be compelled in any criminal case to be a witness against himself" (5th Amend. Const. U. S.; Wilson's Ann. St. Okl. § 5157; Bram v. United States, 168 U. S. 532, 542, 557, 558, 559, 565, 18 Sup. Ct. 183, 42 L. Ed. 568; Sorenson v. United States, 143 Fed. 820, 823, 824, 74 C. C. A. 468, 471, 472). The existence of these rules is not denied, but it is contended that they are limited in their effect to the evidence for the prosecution in chief, and that they have no application to that offered during the cross-examination of the accused or in rebuttal of his answers to impeaching questions. The two rules are not coextensive in effect, for an accused person may waive his constitutional privilege under the second rule and submit to examination without making hearsay or other incompetent evidence admissible to convict or to impeach him.

Let it, therefore, be conceded, for the purpose of the consideration of

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

the effect and extent of the first rule, that when the defendant testified in his own behalf he waived his privilege to decline to be a witness against himself under the second rule. Did that waiver make his incompetent confession admissible evidence against him under the first rule? The reason for the first rule is that confessions induced by hope or fear inspired by promises, threats, or surrounding circumstances are likely to be untrue, are unreliable, incredible, and, therefore, not evidence of the truth.

In 2 Hawkins, Pleas of the Crown (8th Ed.) p. 595, § 34, there is an admirable statement of the law upon this subject, which seems to have been copied from a note to the sixth edition of that work, and which reads in this way:

"And as the human mind under the pressure of calamity is easily seduced, and liable, in the alarm of danger, to acknowledge indiscriminately a falsehood or a truth, as different agitations may prevail, a confession, whether made upon an official examination or in discourse with private persons, which is obtained from a defendant either by the flattery of hope, or by the impressions of fear, however slightly the emotions may be implanted, is not admissible evidence; for the law will not suffer a prisoner to be made the deluded instrument of his own conviction."

In Warickshall's Case, 1 Leach, Cr. C. (3d Ed.) 298, the court said, in 1783:

"A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and therefore it is admitted as proof of the crime to which it refers. But a confession forced from the mind by the flattery of hope or by the torture of fear comes in so questionable a shape when it is to be considered as evidence of guilt that no credit ought to be given to it, and therefore it is rejected."

In Reg. v. Doyle, 12 Ont. 354, Wilson, C. J., in delivering the opinion of the court, said:

"The reason the confession in such a case is not admissible is that in law it cannot be depended upon as true; for one in such a case may say, and is likely to say, that which is not the truth if he thinks it to his advantage to do so."

In Commonwealth v. Morey, 1 Gray (Mass.) 462, Shaw, C. J., said:

"The ground on which confessions made by a party accused, under promises of favor or threats of injury, are excluded as incompetent is, not because any wrong is done to the accused in using them, but because he may be induced, by the pressure of hope or fear, to admit facts unfavorable to him without regard to their truth, in order to obtain the promised relief or avoid the threatened danger, and therefore admissions so obtained have no just and legitimate tendency to prove the facts admitted."

In State v. Novak, 109 Iowa, 717, 79 N. W. 465, the opinion reads:

"The reason for the rule excluding involuntary confession is not based on the thought that truth thus obtained would not be acceptable, but because confessions thus obtained are unreliable. The rule is in the interest of safe and reliable evidence. * * * The essence of the rule is that when the confessions are made the conditions as to hope or fear are such as to make them unsafe as evidence."

The Statutes of Oklahoma (Wilson's Rev. & Ann. St. 1903) provide (section 5494):

"That a person charged with crime, shall at his own request, but not otherwise, be a competent witness and his failure to make such request shall not create any presumption against him nor be mentioned at the trial."

Now the confession of this defendant was incompetent evidence against him. Did the fact that he availed himself of the privilege accorded to him by this statute make it competent? If so, did that fact make all incompetent evidence admissible against him? Did it make the confession and all other facts tending to establish his guilt provable against him by hearsay? Did it make his disclosure regarding his guilt if any, to his attorney for the purpose of his defense, admissible in evidence against him? All these questions must be answered in the negative, because the reason of the rule, and, therefore, the rule itself, apply with at least as much force to an involuntary confession after, as before, it is denied by the testimony of the accused. When it is offered by the prosecutor in chief, it is incompetent evidence to overcome the simple presumption of the defendant's innocence, because it is unworthy of belief. It cannot be more worthy of belief, or more competent to overcome both that presumption and the testimony of the defendant, after he has denied that he ever made it. Shephard v. State, 88 Wis. 185, 59 N. W. 449; Morales v. State, 36 Tex. Cr. R. 234, 36 S. W. 435, 846; Wright v. State, 36 Tex. Cr. R. 427, 37 S. W. 732, 734; Walton v. State, 41 Tex. Cr. R. 454, 55 S. W. 566.

The privilege granted to an accused person of testifying on his own behalf would be a poor and useless one indeed if he could exercise it only on condition that every incompetent confession induced by the promises, or wrung from him by the unlawful secret inquisitions and criminating suggestions, of arresting or holding officers, should become evidence against him.

The opinions of the courts in Commonwealth v. Tolliver, 119 Mass. 312, 315, Hicks v. State, 99 Ala. 169, 13 South. 375, State v. Broadbent, 27 Mont. 342, 71 Pac. 1, Quintana v. State, 29 Tex. App. 401, 16 S. W. 258, 25 Am. St. Rep. 730, Phillips v. State, 35 Tex. Cr. R. 480, 34 S. W. 272, in which the opposite conclusion has been reached, have been read and thoughtfully considered, but they present no argument which persuades that the general rule and the reason for it which have been stated are not sound. And the cases from Texas have been overruled by the later decisions of the Court of Criminal Appeals of that state which have been cited above.

Many authorities in which no question of the introduction of an involuntary confession or of other incompetent evidence was presented have been cited to the conceded general rule that an accused person who takes the stand in his own behalf waives his privilege of silence and subjects himself to cross-examination and impeachment to the same extent as any other witness. Fitzpatrick v. United States, 178 U. S. 304, 315, 20 Sup. Ct. 944, 44 L. Ed. 1078; Sawyer v. United States, 202 U. S. 150, 165, 166, 26 Sup. Ct. 575, 50 L. Ed. 972; State v. Ober, 52 N. H. 459, 13 Am. Rep. 88; Yanke v. State, 51 Wis. 464, 8 N. W. 276; Mitchell v. State, 94 Ala. 68, 10 South. 518; Rains v. State, 88 Ala. 91, 7 South. 315; Cotton v. State, 87 Ala. 103, 6 South. 372; Norris v. State, 87 Ala. 85, 6 South. 371; Clarke v. State, 78 Ala. 474, 56

Am. Rep. 45; Clarke v. State, 87 Ala. 71, 6 South. 368. But neither this rule, nor the opinions cited in support of it, are in conflict with the conclusion which has been reached. None of them maintains that any witness may be impeached or contradicted by incompetent evidence. They illustrate the familiar and lawful practice of impeaching witnesses by competent proof of contradictory statements regarding material facts, but not by incompetent proof of contradictory statements, such as hearsay, nor by proof of incompetent contradictory statements, such as proof of privileged communications containing such statements. Involuntary confessions of accused persons are inadmissible to impeach them as witnesses on the same ground that hearsay and all other incompetent evidence is inadmissible to impeach other witnesses, because they are unworthy of belief.

And right here is the limitation of the waiver by an accused person of his constitutional privilege under the second rule by testifying, and here is the evidence of the violation of that rule in this case. He may not "be compelled in any criminal case to be a witness against himself." When he testifies as a witness he waives this privilege of silence and subjects himself to cross-examination and impeachment to the same extent as any other witness would subject himself thereto in the same situation, but no farther. He may be cross-examined upon the subjects of his direct examination, but not upon other subjects; impeaching questions relative to facts not collateral to the issue—that is to say, relative to facts which the prosecutor is entitled to prove as a part of his case—may be lawfully propounded to him (Wharton's Criminal Evidence [9th Ed.] § 484), but such questions relative to facts that may not be so proved may not be asked him; and he may be impeached by competent proof of statements made by him contradictory of his answers to such lawful questions, but not by proof of answers contradicting unlawful questions. For these are the limits of the cross-examination and of the lawful evidence of impeachment of other witnesses. An accused person who testifies to the single fact that a bill of sale or a deed was signed by the grantor does not thereby waive his privilege to refuse to testify upon every other material issue in his case. He waives his privilege of silence upon the subjects relative to which he testifies, but upon no other.

Statements in the opinions of courts are called to our attention to the effect that the limit of cross-examination is discretionary with the trial court, but it is only discretionary without the limits of the right of the party against whom a witness is called to a full and fair cross-examination of him upon the subjects of his direct examination, and the right of the party in whose behalf he testifies to restrict his cross-examination to the subjects of his direct examination. This question has repeatedly received the studious and thoughtful consideration of this court (Mine & Smelter Supply Co. v. Parke & Lacey Co., 107 Fed. 881, 884, 47 C. C. A. 34, 36; Sauntry v. United States, 117 Fed. 132, 135, 55 C. C. A. 148, 151; Kansas City Star Co. v. Carlisle, 108 Fed. 344, 364, 47 C. C. A. 384, 404), and it adheres to the conclusion that the true rules and the reasons for them are stated in Resurrection Gold Mining Co. v. Fortune Gold Mining Co., 129 Fed. 668, 674, 64 C.

C. A. 180, 186, in substantially these words: A fair and full cross-examination of a witness upon the subjects of his examination in chief is the absolute right, and not the mere privilege, of the party against whom he is called, and a denial of this right is a prejudicial and fatal error. It is only after this right has been substantially and fairly exercised that the allowance of cross-examination becomes discretionary with the trial court. Gilmer v. Higley, 110 U. S. 47, 50, 3 Sup. Ct. 471, 28 L. Ed. 62; Chandler v. Allison, 10 Mich. 460, 473; Heath v. Waters, 40 Mich. 457, 471; Sperry v. Moore's Estate, 42 Mich. 353, 361, 4 N. W. 13; Martin v. Elden, 32 Ohio St. 282, 287; Wilson v. Wagar, 26 Mich. 452, 456, 458; Reeve v. Dennett, 141 Mass. 207, 6 N. E. 378; Taggart v. Bosch (Cal.) 48 Pac. 1092, 1096; New York Iron Mine v. Negaunee Bank, 39 Mich. 644, 660; Jackson v. Feather River W. Co., 14 Cal. 19, 24; Wendt v. Chicago, St. P., M. & O. Ry. Co., 4 S. D. 476, 484, 57 N. W. 226.

The converse of this rule is equally controlling. The party on whose behalf a witness is called has the right to restrict his cross-examination to the subjects of his direct examination, and a violation of this right is reversible error. If the cross-examiner would inquire of the witness concerning matters not opened on the direct examination, he must call him on his own behalf. Railroad Company v. Stimpson, 14 Pet. 448, 460, 10 L. Ed. 535; Houghton v. Jones, 1 Wall. 702, 706, 17 L. Ed. 503; O'Connell v. Pennsylvania Co., 118 Fed. 989, 991, 55 C. C. A. 483; Moxie Nerve Food Co. v. Beach (C. C.) 35 Fed. 466; Woods v. Faurot, 14 Okl. 171, 175, 77 Pac. 346; Montgomery v. Ætna Life Ins. Co., 97 Fed. 913, 916, 38 C. C. A. 553, 557; Safter v. United States, 87 Fed. 329, 330, 31 C. C. A. 1, 2; Mine & Smelter Supply Co. v. Parke & Lacey Co., 107 Fed. 881, 884, 47 C. C. A. 34, 36; McCrea v. Parsons, 112 Fed. 917, 919, 50 C. C. A. 612, 614; Merchants' Life Ass'n v. Yoakum, 98 Fed. 251, 260, 39 C. C. A. 56, 65; Sauntry v. United States, 117 Fed. 132, 135, 55 C. C. A. 148, 151; Goddard v. Crefield Mills, 75 Fed. 818, 820, 21 C. C. A. 530, 532; 1 Greenleaf, Ev. § 445; 8 Enc. of Pl. & Prac, 104; Hopkinson v. Leads, 78 Pa. 396; Fulton v. Bank, 92 Pa. 112, 115; People v. Edwards, 139 Cal. 527, 73 Pac. 416; People v. Keith, 136 Cal. xix, 68 Pac. 816; Stevens v. Walton, 17 Colo. App. 440, 68 Pac. 834, 835; People v. McLean, 135 Cal. 306, 67 Pac. 770, 771; Acklin v. McCalmont Oil Co., 201 Pa. 257, 50 Atl. 955, 956; State v. Hawkins, 27 Wash. 375, 67 Pac. 814; Bowsher v. Chicago, B. & Q. R. Co., 113 Iowa, 16, 84 N. W. 958, 960; Missouri Pac. R. Co. v. Fox, 60 Neb. 531, 83 N. W. 744, 752; Boucher v. Clark Pub. Co., 14 S. D. 72, 84 N. W. 237, 240; Stubbings v. Curtis, 109 Wis. 307, 85 N. W. 325, 327; Lake Erie & W. R. Co. v. Miller, 24 Ind. App. 662, 57 N. E. 596, 598; State v. Savage, 36 Or. 191, 60 Pac. 610, 615, 61 Pac. 1128; Baker v. Sherman, 71 Vt. 439, 46 Atl. 57, 62; Pennsylvania Co. v. Kennard Glass & Paint Co., 59 Neb. 435, 81 N. W. 372, 376, 377; Posch v. Southern Electric R. Co., 76 Mo. App. 601; People v. Dole, 122 Cal. 486, 55 Pac. 581, 585, 68 Am. St. Rep. 50; State v. Ballou, 20 R. I. 607, 40 Atl. 861, 862; Fisher v. Porter, 11 S. D. 311, 77 N. W. 112, 114; State Bank v. Waterhouse, 70 Conn. 76, 38 Atl. 904, 908, 66 Am. St. Rep. 82; East Dubuque v. Burhyte, 173 Ill. 553, 50

N. E. 1077, 1078; Ernst v. Estey Wireworks Co., 21 Misc. Rep. 68, 46 N. Y. Supp. 918, 920; Thalheim v. State, 38 Fla. 169, 20 South. 938, 946; Devine v. Railway Co., 100 Iowa, 692, 69 N. W. 1042; Crenshaw v. Johnson, 120 N. C. 270, 26 S. E. 810.

The reason of the rule is that a witness during his cross-examination is the witness of the party who calls him, and not the witness of the party who cross-examines him. Wilson v. Wagar, 26 Mich. 457, 458; Campau v. Dewey, 9 Mich. 417, 418. The cross-examiner has the right to bind his opponent by the testimony of the witness upon cross-examination relative to every subject concerning which his opponent examined him in the direct examination, but he has no right to bind his opponent by the testimony of the witness during the cross-examination upon subjects relative to which his opponent did not inquire. If the cross-examiner would investigate these subjects by the testimony of the witness, he may, and he must, make him his own witness and stand sponsor for the truth of his testimony. It is discretionary with the court to permit the cross-examiner to do this at the time he is conducting the cross-examination, because the time and the manner of the trial are within the discretion of the court. It is discretionary with the trial court to permit leading questions to be put to a hostile witness upon his direct examination. But the line of demarcation which limits a rightful cross-examination is clear and well defined, and it rests upon the reason to which attention has been called. It is the line between subjects relative to which the witness was examined upon the direct examination and those concerning which he was not required to testify. It exists because within that line the party who calls the witness stands sponsor for the truth of his testimony, while without that line he does not. It does not vary, at the discretion of the court, with any convenience or necessity of court or counsel, because no convenience or necessity can be conceived of which would not enable the cross-examiner to make the witness his own, and because to subject the rule to the discretion of court or counsel is to abrogate it.

The impeaching questions asked the defendant, and the involuntary confession introduced to contradict his answers, were beyond the limits of legal cross-examination of him, or of any other witness in his situation, because they did not relate to the subjects of his direct examination, and because they were not germane to any fact which the prosecutor was entitled to prove as a part of his case. Hence the defendant did not waive his constitutional and statutory right to refuse to testify concerning the statements in his confession, and the propounding of the questions concerning them, and the introduction of the involuntary confession, were violations of that right.

Was it error for the trial court to permit the introduction before the jury in the prosecutor's case of the testimony upon the question whether or not the confession was free and voluntary? It was not the province of the jury to consider or determine that issue. It was the duty of the court alone to hear and decide it. The burden was upon the prosecutor to prove to the court that the confession was voluntary, that it was not influenced by compulsion, hope, fear, or other inducement of any sort, and, if the evidence failed to establish that fact beyond a

reasonable doubt, it was the duty of the court to reject the confession. Bram v. United States, 168 U. S. 532, 555, 565, 18 Sup. Ct. 183, 42 L. Ed. 568; Reg. v. Warringham, 2 Den. C. C. 447n; Reg. v. Thompson, 2 Q. B. 12. Every accused person has the right to the exclusion of his confession until this proof and decision are made. It is clear that the proof upon the question whether the confession is voluntary or involuntary, which generally consists of the examination and cross-examination of witnesses, cannot be presented without detailing much of the substance and some of the contents of the confession, or, if the confession is in fact incompetent, without the practical introduction of the incompetent confession in evidence before the jury in order to determine its incompetency. This was done in the case in hand. Such a practice is nothing but a farcical evasion of the rule of evidence and of the constitutional guaranty which exclude an involuntary confession. A decision that such a confession is incompetent and inadmissible is of little avail to a defendant after officers of the law have testified to the method of its procurement and to much of its contents, and the only rational way to protect and enforce the rights of the accused is to exclude from the jury all the evidence relative to the competency of the confession, at least until the court has found it competent.

Many other errors are alleged, but sufficient has been said to show that the case must be again tried, and it is useless to consider other questions.

The conclusions are, an involuntary confession of an accused person, incompetent to prove the case of the prosecution in chief, is incompetent to impeach the accused after he has testified in his own behalf upon other subjects only: First, because such a confession is unworthy of belief; and, second, because its introduction would violate the constitutional guaranty that the accused shall not be compelled to testify against himself.

The question whether or not the accused made the confession, or any part of it, asked him on cross-examination, to lay the foundation for impeachment by proof of contradictory statements in the confession, is not competent cross-examination where the accused has not testified regarding it, because it is not germane to the subjects of his direct examination, and because the prosecutor could not prove the statements in the confession as a part of his case in chief. It is the duty of the court to determine whether or not an alleged confession was voluntary or involuntary, and it is error to permit the introduction of the evidence upon that question before the jury.

The judgments below must be reversed, and the case must be remanded to the proper court with instructions to grant a new trial, and it is so ordered.

ADAMS, Circuit Judge (specially concurring). The question discussed in the foregoing opinion concerning the limitation upon the right of cross-examination of a witness is not new to this court. In the cases of Resurrection Gold Min. Co. v. Fortune Gold Min. Co., 129 Fed. 668, 64 C. C. A. 180, and Ballief v. United States, 129 Fed. 689, 64 C. C. A. 201, the judges then sitting entertained and expressed different opin-

ions concerning it. The writer of the main opinion in the first-mentioned case declared that:

"The party on whose behalf the witness is called has the right to restrict his cross-examination to the subjects of his direct examination, *and a violation of this right is reversible error.*"

The majority of the sitting judges in separate opinions showing careful research and consideration disapproved of that pronouncement, and particularly of that portion of it underscored to the effect that to violate the right "is reversible error." It is only that part of the foregoing opinion which repeats and reaffirms that declaration to which I am unable to give my assent. I am unwilling to overule the judgment of the majority on that question, for two reasons: First, because I think, for the reasons stated by them, they were right in holding that in the matter of cross-examining a witness a reasonable discretion should, in the interest of a practical and effective administration of justice, be accorded to the trial judge, and should be reviewable and reversible only in case of its prejudicial abuse; and, second, because the question is at best a matter of practice, which, having been once settled, should not be disturbed except for some commanding reason which does not now appear.

NOBLE v. C. CRANE & CO.

(Circuit Court of Appeals, Sixth Circuit. April 15, 1909.)

No. 1,900.

1. MASTER AND SERVANT (§ 116*)—INJURIES TO SERVANT—DEFECTIVE SCAFFOLD —IMPROPER MATERIALS.

Plaintiff, an experienced carpenter, was injured by the collapse of a temporary scaffold constructed by plaintiff and fellow carpenters in the erection of a sawmill in defendant's lumber yards. The scaffold was constructed according to the directions of defendant's foreman out of certain hemlock pieces lying on the third floor of the building. Plaintiff did not construct the part of the scaffold that broke, and had no knowledge of its defective condition. While the carpenters were directed to use the material designated, there was other material in the yards that could have been secured by merely requesting the foreman to furnish it in case any of that designated was found unsuitable. *Held*, that the foreman's directions only amounted to an order to use such part of the material as was suitable and was nearest at hand, and that defendant was not negligent.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 207; Dec. Dig. § 116.*]

2. TRIAL (§ 165*)—DIRECTION OF VERDICT.

It is the duty of the judge, on a motion to direct a verdict, to take that view of the evidence most favorable to the party against whom it is moved, and from such inferences, reasonably and justifiably to be drawn therefrom, determine whether or not a verdict might not be found for the party having the burden of proof, and, if not, he should direct the verdict against such party.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 402; Dec. Dig. § 165.*]

3. TRIAL (§ 143*)—DIRECTION OF VERDICT—CONFLICTING EVIDENCE.

A mere dogmatic assertion, which does not appeal to the reason of the court nor have substance and relevant consequence, is not sufficient to con-

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

stitute a conflict of evidence which will prevent the direction of a verdict, but a conflict of evidence, to have such effect, must be positive and real.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 342, 343; Dec. Dig. § 143.*]

4. MASTER AND SERVANT (§ 116*)—INJURIES TO SERVANT—DEFECTIVE SCAFFOLD—EMPLOYER'S LIABILITY ACT.

Rev. St. Ohio 1908, §§ 4238-18, 4238-19, 4238-0, 4238-01, do not create a liability on the part of a master for injuries sustained by a servant resulting from defective scaffolding, where there is no evidence of the master's negligence.

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

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

Edward Colston, for plaintiff in error.

Chas. H. Stephens and Chas. H. Stephens, Jr., for defendant in error.

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

TAYLER, District Judge. This action was prosecuted in the court below by the plaintiff in error to recover from C. Crane & Co., a corporation, the damages sustained by him in consequence of the breaking of a scaffold on which he was working, which resulted in his falling some 40 feet to the ground, whereby his leg was broken and other injuries were received. At the close of the plaintiff's testimony, the court, on the motion of the defendant, directed a verdict for the defendant. Error is prosecuted to the judgment which was entered on the verdict.

The plaintiff was a carpenter of seven or eight years' experience, and was employed with other carpenters in the work of erecting a new sawmill in the extensive lumber yards of the defendant in the city of Cincinnati. After the frame of the mill had been completed, it became necessary, in the prosecution of the work, to cover the roof with tar paper. This work was done by the carpenters. To enable them to put the tar paper along the edge of the roof, a temporary scaffold was built by the plaintiff and the three other carpenters associated with him in the work of erecting the building. The scaffolding, some 55 feet long, consisted of planks supported by five brackets or outriggers composed of 2x6 hemlock pieces, 8 or 10 feet long, projecting about 5 feet from the side of the building. These 2x6 outriggers were securely nailed to the upright 12x12 timbers, which constituted the framework of the mill. While the plaintiff and two other carpenters were standing on the scaffolding, nailing tar paper to the edge of the roof, one of these 2x6 hemlock supports, because of a defect in it, broke close to the building, and the scaffold gave way, with the result already stated.

Plaintiff himself put up two of the five supports, but had nothing to do with putting in that which was defective, and knew nothing of its defective condition.

The liability of the employer depends upon the manner in which it performed its duty to furnish to the plaintiff and his fellow workers on the scaffold suitable and safe materials with which to erect the scaffold. Other questions appear in the pleadings, but not in the proof. The plaintiff in error contends that the defendant did not perform this duty, either as defined by the common law or by the statutes of Ohio.

The testimony developed this situation. The defective support or outrigger was one of several pieces of 2x6 hemlock which were lying on the third-story floor of the building which was being constructed. Similar scaffolds were erected on opposite sides of the building. These pieces had been left over from supplies brought up from the yard from time to time for the general purposes of constructing the building. Just how many pieces there were when the time came for building the scaffold does not appear, but in view of the testimony and the motion for a verdict it must be assumed that there were no more than were necessary to build the scaffold.

One of the witnesses, Sesher, testifies that McMullin, the foreman, told him to take the 2x6 hemlock pieces that were lying on the third-story floor and build the scaffold out of it. This instruction Sesher conveyed to the plaintiff and to the other carpenters engaged in the work. The same witness testified that if at any time he wanted additional material he would go and tell McMullin and the latter would have it there, and that he did not know of any carpenters with him who had any authority to go out into the yard and get material without orders from McMullin. Noble, the plaintiff, testified that he had no authority to go out into the yard or into the mill to select lumber for the scaffold.

The testimony of the plaintiff and of his other witnesses shows very clearly what was the custom in this lumber yard respecting the ability and opportunity of workmen to obtain needed lumber. Plaintiff says that he knew of nothing to prevent the carpenters from asking to have more lumber brought up, and that there were laborers whose business it was to bring it up as the carpenters needed it. Practically all of the plaintiff's witnesses testified that it was easy for the carpenters to get any lumber they wanted; all that was needed was to ask for it. One of the laborers or helpers testified that he was ready to bring up any amount of lumber, including 2x6 hemlock pieces, that was needed; that that was what he was there for, and if it was not there he was to go and get it. All they had to do, he said, was to call for it, and they got it. To the same general effect is the testimony of other witnesses. There is no contradiction except such as may be inferred from the testimony already referred to, and that is in no proper sense contradiction.

These references put the plaintiff's case in its strongest possible form, and allow every reasonable inference in his favor to be drawn from them.

It is claimed by plaintiff's counsel that this instruction of McMullin, coupled with what the plaintiff says as to his authority to go out and get additional lumber, limited the workmen to the use of the material referred to by the foreman, and that they were bound to use it, whether it was safe and suitable or not. More definitely interpreted, the

claim means this: That the foreman intended, and so directed, that these three or four carpenters, skilled in the work of building and using scaffolds, with knowledge of the kind of material needed for and suited to such construction, and skilled judges of the quality and strength of lumber, should build a scaffold, on which they themselves were to work, out of a limited and certain pile of lumber, and that they could not have any other lumber out of which to build it if it should appear, when about to be used, to be insufficient or unfit for such purpose.

Such an interpretation of such an instruction, which we must assume to have been given exactly as Sesher tells it, seems to us to be forced and unreasonable. There is no real or substantial conflict anywhere in the testimony. We are required, if we sustain plaintiff's contention, to come to the strained and unnatural conclusion that, in spite of this testimony offered by the plaintiff, these intelligent carpenters, building their own scaffold, were helpless to select or to send for other material than that pointed out by the foreman. We are compelled, if we give weight to the contention of plaintiff, to declare that under the circumstances narrated by plaintiff's testimony, involving, as we have said, no contradiction, no reasonable opportunity was furnished to these workmen to obtain suitable material out of which to construct a scaffold.

Counsel for plaintiff in error formulate their claim upon these facts as follows:

"Defendant cannot escape liability by claiming, as it does, that the direction to use this material given by it to these men was qualified. Defendant cannot maintain that these men should have understood that if the material they were thus directed to use should turn out, on examination by them, to be unfit, they should discard it and demand other material. The direction to use this material was not thus limited, and, had it been so limited, that would not relieve the defendant of liability, because such direction would have imposed upon these men the duty and responsibility of inspecting the lumber and of exercising judgment as to its fitness. That duty was one resting upon the master, and he could not delegate it."

This argument would appeal to us with more force if the persons to whom this so-called direction was given were not carpenters; if the scaffold had not been for their own use; if they were persons innocent of any knowledge of the quality or kind of material needed for such work; if they had been at work at a place remote from any supply of suitable material, instead of in the midst of a lumber yard of vast dimensions, with an unlimited amount of proper material available and men at hand to bring it to them.

The so-called direction to such men under such circumstances was no more than a direction to use such available and suitable material as was nearest at hand, with perfect freedom, according to the custom existing and according to the natural and necessary conditions and apparent opportunities, to go or send into the yard for any other pieces which might be needed. Indeed, the situation would not be wanting in analogy if the foreman had directed these carpenters to make use of a keg of nails on the third floor, and it happened that there was an insufficient quantity of nails of suitable quality with which to build the scaffold, and in consequence of the scaffold being insecurely nailed it broke and injury resulted to the men who built it.

When we analyze the testimony given by plaintiff's witnesses, we find no real conflict in it.

Under these circumstances, what was the duty of the trial court? In the case of McGuire v. Blount, 199 U. S. 142 (26 Sup. Ct. 1, 50 L. Ed. 125) the court says, at pages 147, 148:

"It is strenuously urged that, whatever the merits of the controversy, there was sufficient proof to require the trial court to submit the case to a jury; but no rule is better established in this court than that which permits a presiding judge to direct a verdict in favor of one of the parties when the testimony and all the inferences which the jury could justifiably draw therefrom would be insufficient to support a different verdict. It is clear that, where a court would be bound to set aside a verdict for want of testimony to support it, it may direct a finding in the first instance, and not await the enforcement of its view by granting a new trial."

We hold that in this case "all the inferences which the jury could justifiably draw" from the testimony would be insufficient to support a verdict for the plaintiff.

The leading cases on this question were cited and commented upon by Judge Lurton in the case of Mt. Adams & E. P. Inclined Ry. Co. v. Lowery, 74 Fed. 463, 20 C. C. A. 596. After an elaborate discussion and criticism of authorities, this rule is laid down at page 477 of 74 Fed., at page 610 of 20 C. C. A.: That it is the duty of the judge, on a motion to direct a verdict—

"to take that view of the evidence most favorable to the party against whom it is moved to direct a verdict, and from that evidence, and the inferences reasonably and justifiably to be drawn therefrom, determine whether or not, under the law, a verdict might be found for the party having the onus. If not, he should, upon the ground that the evidence is insufficient in law, direct a verdict against that party."

And again, on the same page, occurs the following:

"Whenever there is evidence of so positive and significant a character as, if uncontradicted, would support a verdict, it is the duty of the court to submit the case to the jury, under proper instructions."

The rule thus laid down in these two quotations was explicitly approved in the case of Insurance Co. v. Randolph, 78 Fed. 754, 24 C. C. A. 305, where the opinion was written by Mr. Justice Harlan, sitting as a member of this court.

In the case of Minahan v. Grand Trunk Western Ry. Co., 138 Fed. 37, 70 C. C. A. 463, is another extended discussion by Judge Severens of the same subject. The court, after having declared that the trial court ought not to direct a verdict "where there is positive conflict in the evidence upon an issue material to the controversy," continues:

"And by 'evidence' we mean something of substance and relevant consequence, and not vague, uncertain, or irrelevant matter not carrying the quality of 'proof' or having fitness to induce conviction."

So that it is the duty of the court to direct a verdict unless the conflict is positive. The conflict must be real, not merely apparent. A mere dogmatic assertion, which does not appeal to the reason of the court, which does not have substance and relevant consequence, which does not have fitness to induce conviction, is not proof, even

if uncontradicted, and does not interfere with the duty of the court to direct a verdict.

The claim is also made on behalf of the plaintiff that the defendant is liable for this injury by reason of the provisions of the statutes of Ohio (Rev. St. 1908) sections 4238–18, 4238–19, 4238–0, 4238–01, which we here quote as follows:

"(4238–18). Section 1. (Scaffolding and apparatus to be kept safe for employés). A person or corporation employing or directing another to do or perform any labor in the erection, repairing, altering, or painting any house, building or structure within this state, who shall knowingly or negligently furnish or erect or cause to be furnished for erection for and in the performance of said labor, such unsuitable or improper scaffolding, hoists, stays, ladders or other mechanical contrivances as will not give proper protection to the life and limb of any person so (employed or) engaged, or if any such scaffolding or staging swung or suspended from an overhead support or supports shall be more than twenty feet from the ground or floor, the same shall be deemed unsuitable and improper and as not giving proper protection to the life and limb of any person employed or engaged thereon, unless such scaffolding or staging shall, when the same is in use, have a safety-rail rising at least thirty-four inches above the floor or main portion of such scaffolding or staging, and extending along the outside thereof, and properly attached thereto, and unless such scaffolding or staging shall be provided with braces so as to sustain the weight of a man's body leaning against it, and prevent the scaffold or staging from swaying from the building or structure (89 v. 380).

"(4238-19). Sec. 2. (Penalty.) That any person or corporation by any of its officers who shall violate any of the provisions of this act shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not exceeding five hundred dollars, or by imprisonment in the county jail not to exceed three months, or both, at the discretion of the court. (89 v. 380.)

"(423S–0). Section 1. (Employers' liability for personal injury to employé notwithstanding negligence of fellow-servant). An employer shall be responsible in damages for personal injury caused to an employé, who is himself in the exercise of due care and diligence at the time, by reason of any defect in the condition of the machinery or appliances 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, entrusted by him with the duty of inspection, repair, or of seeing that the machinery or appliances were in proper condition. (95 v. 114, April 4, 1902.)

"(4238–01). Section 1. (Act qualifying the risks to be deemed as assumed by employés.) In any action brought by an employé, or his legal representative, against his employer, to recover for personal injuries, when it shall appear that the injury was caused in whole or in part by the negligent omission of such employer to guard or protect his machinery or appliances, or the premises or place where said employé was employed, in the manner required by any penal statute of the state or United States in force at the date of the passage of this act, the fact that such employé continued in said employment with knowledge of such omission, shall not operate as a defense; and in such action, if the jury find for the plaintiff, it may award such damages not exceeding, for injuries resulting in death, the sum of five thousand dollars, and for injuries not so resulting, the sum of three thousand dollars, as it may find proportioned to the pecuniary damages resulting from said injuries; but nothing herein shall affect the provisions of section 6135 of the Revised Statutes.

"Nothing herein contained shall be construed as affecting the defense of contributory negligence; nor the admission of evidence competent to support such defense. (97 v. 547.)"

We have already held that no negligence on the part of the master was proved in this case, and there is no substantial evidence from which any such fact could be fairly or reasonably inferred. The fundamental condition of the application of all these sections is the negli-

gence of the master. Since that did not exist, the statutes are inapplicable. An appreciation of this fact prevents the misconception that there is any analogy between this case and the cases of Chambers v. American Tin Plate Co., 129 Fed. 564, 64 C. C. A. 129, Henry J. Spieker Co. v. Ferguson, 15 O. C. D. 671, and other cases to the same effect cited by counsel for plaintiff in error.

It results, therefore, that the judgment of the Circuit Court will be affirmed.

HARPER & BROS. et al. v. KALEM CO. et al.

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

No. 159.

1. COPYRIGHTS (§ 7*)—DRAMATIZATIONS.

There may be several dramatizations of the same story, each capable of being copyrighted.

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

2. COPYRIGHTS (§ 50*)—DRAMATIZATIONS—SALE.

The owner of a copyrighted story, having assigned or sold the right of performing a particular copyrighted drama therefrom, could lawfully give to another the sole right of performing a different dramatic composition of the story, while the first dramatic assignee would have no right to make another dramatization.

[Ed. Note.—For other cases, see Copyrights, Dec. Dig. § 50.*]

3. COPYRIGHTS (§ 9*)—MOVING PICTURE PHOTOGRAPH.

A series of photographs of a dramatization of a copyrighted story of Ben Hur, to be used in a moving picture machine, constituted a single picture, capable of copyright as such.

[Ed. Note.—For other cases, see Copyrights, Dec. Dig. § 9.*]

4. COPYRIGHTS (§ 55*) — MOVING PICTURES — COPYRIGHTED STORY — INFRINGEMENT.

Since pictures of the dramatization of Ben Hur only represent the artist's idea of what the author has expressed in words, they do not, as a photograph, infringe the copyrighted book or drama.

[Ed. Note.—For other cases, see Copyrights, Dec. Dig. § 55.*]

5. COPYRIGHTS (§ 55*)—MOVING PICTURE EXHIBITION.

A series of films, constituting a picture of an artist's conception of the copyrighted story Ben Hur, when placed on an exhibiting machine, which reproduces the action of the actors and animals, was a dramatization of the story, which, when sold and offered for sale by defendant for public exhibitions, at which an entrance fee is charged, constituted a contributory infringement, subject to injunction.

[Ed. Note.—For other cases, see Copyrights, Dec. Dig. § 55.*]

6. COPYRIGHTS (§ 4*)—STATUTES—CONSTRUCTION—"WRITINGS."

Const. U. S. art. 1, § 8, provides that Congress shall have power to promote the progress of science and useful arts by securing for a limited time to authors and inventors an exclusive right to their "writings" and discoveries. *Held*, that the word "writings" includes maps, charts, engravings, etchings, prints, paintings, drawings, chromos, statues, models, designs, photographs, and the negatives thereof, dramatizations of copyrighted works, and may also be extended to moving pictures, tending to reproduce an artist's conception of an author's situation as described in words.

[Ed. Note.—For other cases, see Copyrights, Dec. Dig. § 4.*

For other definitions, see Words and Phrases, vol 8, p. 7542.]

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*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 Southern District of New York.

Drury W. Cooper and Frank L. Dyer, for appellant.

Dittenhoefer, Gerber & James (David Gerber, of counsel), for appellees Klaw & Erlanger.

John Larkin, for appellees Harper & Bros. and L. Wallace.

Before COXE, WARD, and NOYES, Circuit Judges.

WARD, Circuit Judge. The late Gen. Lew Wallace wrote a story called "Ben Hur," the copyright of which belongs to the complainants Harper & Bros. The complainants Klaw & Erlanger caused the story to be dramatized, and Harper & Bros. duly copyrighted the dramatization and thereupon granted Klaw & Erlanger the sole right of producing the same upon the stage. The defendant the Kalem Company also employed a writer to read the story, without having any knowledge of the copyrighted drama, and to write a description of certain portions of it. It then produced persons and animals, with their accoutrements, to perform the actions and motions so described. During this performance a film of celluloid was rapidly moved across the lens of a high-speed camera, on which a series of negative photographs were taken, from which a positive film suitable for exhibition purposes was reproduced. These positive photographs were contained on one film, about 1,000 feet long, which, being driven at great speed across the lens of an exhibiting machine, projects all the motions of the original actors and animals in succession upon a screen. The defendant advertises this film as suitable for giving public exhibitions of the story of Ben Hur, and sent advertisements to, among other persons, proprietors of theatoriums. At least 500 exhibitions have been given in such theatoriums; an entrance fee being charged. The defendant did not reproduce the whole story, but only certain of the more prominent scenes, such as the wounding of the Roman procurator, Ben Hur in the galleys, the chariot race, and others. It does not itself give any public or private exhibitions, but simply sells or licenses the use of the films. A final decree granting a perpetual injunction was entered in the court below, from which this appeal is taken.

Section 4952, Rev. St. U. S. (U. S. Comp. St. 1901, p. 3406), gives the author of a book, and his assigns, not only the sole right of printing, but also the sole right of dramatizing it, and in case of a dramatic composition the sole right of performing or representing it publicly. Section 4964 (page 3413) subjects any one who shall dramatize a copyrighted book without the written consent of the proprietor to the payment of damages. Section 4966 (page 3415) provides that any one who publicly performs or represents a copyrighted dramatic composition without the owner's consent shall be liable for damages not less than $100 for the first and $50 for every subsequent performance, and if his conduct be willful and for profit he shall also on conviction be imprisoned for not exceeding one year.

Two questions are raised: First. Did the defendant, by taking this series of photographs, dramatize Ben Hur, in violation of Harper &

Bros.' sole right to dramatize the book under section 4952? Second. Is the exhibition of these photographs by means of an exhibiting machine in theatoriums, where an entrance fee is charged, a public performance or representation of a dramatic composition, in violation of the rights of Harper & Bros., as owners of the copyright of the book and of the dramatic composition, and of the rights of Klaw & Erlanger, as owners of the performing right, under section 4966. There may be several dramatizations of the same story, each capable of being copyrighted. Harper & Bros., having given Klaw & Erlanger the sole right of performing the particular copyrighted drama, can give some one else the sole right of performing a different dramatic composition of the story (Drone on Copyright, p. 597); whereas, Klaw & Erlanger, who are the owners only of the right publicly to perform the particular copyrighted drama, have no right to make another dramatization. Consequently infringing the copyrighted drama is a different thing from infringing the owner's right to dramatize the copyrighted book.

Answering the first question: The series of photographs taken by the defendant constitutes a single picture, capable of copyright as such (Edison v. Lubin, 122 Fed. 240, 58 C. C. A. 604; American Mutoscope Co. v. Edison [C. C.] 137 Fed. 262); and as pictures only represent the artist's idea of what the author has expressed in words (Parton v. Prang, 3 Cliff. 537, Fed. Cas. No. 10,784), they do not infringe a copyrighted book or drama, and should not as a photograph be enjoined. This distinction between infringement of a copyright of a book and of the performing rights is like the distinction in respect to an infringement between perforated music rolls and sheet music discussed in the case of White-Smith Co. v. Apollo Co., 209 U. S. 1, 28 Sup. Ct. 319, 52 L. Ed. 655, where the court said:

"There is no complaint in this case of the public performances of copyrighted music, nor is the question involved whether the manufacturers of such perforated music rolls, when sold for use in public performances, might be held as contributory infringers."

Coming now to the second question: When the film is put on an exhibiting machine, which reproduces the action of the actors and animals, we think it does become a dramatization, and infringes the exclusive right of the owner of the copyrighted book to dramatize it, as well as his right as owner of the copyrighted drama, and of Klaw & Erlanger's right as owners of the performing right publicly to produce it. In other words, the artist's idea of describing by action the story the author has written in words is a dramatization. It is not necessary that there should be both speech and action in dramatic performances, although dialogue and action usually characterize them. Judge Blatchford said on this point, in Daly v. Palmer, 6 Blatchf. 256, Fed. Cas. No. 3,552:

"To act, in the sense of the statute, is to represent as real, by countenance, voice, or gesture, that which is not real. A character in a play who goes through with a series of events on the stage without speaking—if such be his part of the play—is none the less an actor in it than one who, in addition to motions and gestures, uses his voice. A pantomine is a species of theatrical entertainment, in which the whole action is represented by gesticulation, without the use of words."

And this court, in the case of Daly v. Webster, 56 Fed. 483, 4 C. C. A. 10, said:

"Upon the main point of the case, namely, whether the combination or series of dramatic events (apart from the dialogue) which makes up the particular scene or portion of the play claimed to be infringed is a dramatic composition, and as such entitled to protection under the copyright laws, it is necessary to add but little to the exhaustive opinion of Judge Blatchford, reported in Daly v. Palmer, 6 Blatchf. 256, Fed. Cas. No. 3,552. The same scene in the same play is elaborately discussed by him, and in his conclusion that it is a dramatic composition we concur. In plays of this class the series of events is the only composition of any importance. The dialogue is unimportant, and as a work of art trivial. The effort of the composer is directed to arranging for the stage a series of events so realistically presented, and so worked out by the display of feeling or earnestness on the part of the actors, as to produce a corresponding emotion in the audience. Such a composition, though its success is largely dependent upon what is seen, irrespective of the dialogue, is dramatic. It tells a story which is quite as intelligible to the spectator as if it had been presented to him in a written narrative."

It can hardly be doubted that, if the story were acted without dialogue, the performance would be a dramatization of the book; and we think that, if the motions of the actors and animals were reproduced by moving pictures, this would be only another form of dramatization. If the defendant had taken a series of moving pictures of the play as actually performed by Klaw & Erlanger, the exhibition of them would certainly be an infringement of the dramatic composition, because it would tell the story as they tell it, within the decision of Daly v. Palmer and Daly v. Webster, supra.

It is next objected that the defendant cannot be held as a contributory infringer, because its films are capable of innocent use; e. g., exhibitions for private amusement. This fact only compels the complainants to prove that the defendant does promote a guilty use of them. Inasmuch as it advertises the films as capable of producing a moving picture spectacle of Ben Hur, and sends its advertisements to proprietors of theatoriums with the expectation and hope that they will use them for public exhibitions, charging an entrance fee, and inasmuch as many of these proprietors have so used them, the defendant is clearly guilty of contributory infringement.

Finally, the defendant relies upon section 8, article 1, of the Constitution, that Congress shall have the power "to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." It is argued from this that, as these moving pictures only express the artist's conception of the author's ideas as expressed in the words of the copyrighted book or dramatic composition, they cannot be said to infringe the author's rights. But the history of the copyright law does not justify so narrow a construction of the word "writings." The first copyright law of 1790 (Act May 31, 1790, c. 15, 1 Stat. 124), included maps and charts as well as books. In 1802 (Act April 29, 1802, c. 36, 2 Stat. 171) copyright was extended to engravings, etchings, and prints. In 1856 (Act Aug. 18, 1856, c. 169, 11 Stat. 138) it was extended in the case of copyrighted dramatic compositions to the right of publicly performing the same. In 1870 (Act July 8, 1870, c. 230, 16 Stat. 212) it was extended to paintings, drawings, chromos, statues, models,

designs, photographs, and the negatives thereof, and authors were also allowed to reserve the right to dramatize their works. In 1891 (section 4952, Rev. St. U. S.) authors and their assigns were given the exclusive right to dramatize their copyrighted works. The construction of the word "writings" to cover these various forms of expression, and also to cover the right of giving public performances, has been acquiesced in for over 50 years. In view of this fact, we have no difficulty in concluding that moving pictures would be a form of expression infringing not the copyrighted book or drama, but infringing the author's exclusive right to dramatize his writings and publicly to perform such dramatization.

Decree affirmed.

UNITED STATES v. UNION PAC. R. CO.

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

No. 2,873.

1. PLEADING (§ 34*)—CONSTRUCTION—GENERAL AND SPECIFIC ALLEGATIONS.
A general averment in a pleading is always controlled and limited by specific allegations on the same subject-matter.
[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 68; Dec. Dig. § 34.*]

2. CARRIERS (§ 37*)—INTERSTATE CARRIERS OF LIVE STOCK—TWENTY-EIGHT HOUR LAW—"WILLFULLY."
In Act June 29, 1906, c. 3594, 34 Stat. 607 (U. S. Comp. St. Supp. 1907, p. 918), known as the "28-hour law," which prohibits carriers of live stock from keeping the same confined in cars, etc., for more than 28 consecutive hours without unloading for rest, water, and feeding, unless prevented by storm or by other accidental or unavoidable causes which cannot be anticipated or avoided by the exercise of due diligence and foresight, and imposes a penalty on any carrier which "knowingly and willfully" fails to comply with its provisions, the word "willfully" is not used as implying a vicious or evil intent, but as meaning intentionally or voluntarily.
[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 95; Dec. Dig. § 37.*
For other definitions, see Words and Phrases, vol. 8, pp. 7468–7481, 7835–7836.]

3. CARRIERS (§ 37*)—CARRIERS OF LIVE STOCK—VIOLATION OF TWENTY-EIGHT HOUR LAW—DEFENSES.
A great and unusual press of business does not, unexplained and of itself, excuse the confinement of live stock by a railroad company beyond 28 hours limited by Act June 29, 1906, c. 3594, 34 Stat. 607 (U. S. Comp. St. Supp. 1907, p. 918), nor constitute a defense to an action to recover the penalty for its violation.
[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 95; Dec. Dig. § 37.*]

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

Timothy F. Burke (George P. McCabe and Edward T. Clark, on the brief), for the United States.

John W. Lacey, for defendant in error.

Before VAN DEVANTER, HOOK, and ADAMS, Circuit Judges.

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

ADAMS, Circuit Judge. This was an action at law instituted by the United States to recover a penalty from the defendant railroad company, a carrier of interstate commerce, for alleged violation of Act Cong. June 29, 1906, 34 Stat. 607, c. 3594 (U. S. Comp. St. Supp. 1907, p. 918), which prohibits confinement of live stock in cars for more than 28 hours without unloading for rest, water, and feeding. The petition stated facts constituting a cause of action under the statute, and particularly stated that the railroad company confined the live stock "knowingly and willfully." The answer contained an admission that defendant received the stock for carriage, that it was confined en route, and not unloaded for a period of more than 36 hours. It then averred as follows:

"And defendant denies that its failure to unload the said live stock in accordance with law was in any way willful or from avoidable cause which could have been anticipated by the exercise of due diligence and foresight; but, on the contrary, avers that the said failure was wholly caused by the great and unusual press of business both on the tracks of the defendant and at its stockyards, causing delays at the meeting points of its trains, and failures of its engines, both those carrying the cars aforesaid and those drawing other trains which affected and delayed the train carrying the said live stock and alone caused the said live stock to be confined beyond the time limited by law."

The sufficiency of this answer as a defense was challenged by demurrer, which was overruled, and, plaintiff declining to plead further, final judgment was rendered in favor of the defendant. Due exception having been preserved, the case is brought here by writ of error for review. Did the answer state a defense? Section 1 of the act of June 29, 1906, provides that no railroad engaged in interstate commerce in the transportation of cattle, sheep, swine, or other animals shall, without the written request of the owner or person in custody thereof, "confine the same in cars * * * for a period longer than twenty-eight consecutive hours without unloading the same in a humane manner into properly equipped pens for rest, water, and feeding, for a period of at least five consecutive hours, unless prevented by storm or by other accidental or unavoidable causes which cannot be anticipated or avoided by the exercise of due diligence and foresight." The provisions of section 2 are immaterial for our present inquiry. Section 3 provides "that any railroad" engaged in interstate commerce "* * * who knowingly and willfully fails to comply with the provisions of the two preceding sections shall for every such failure be liable for and forfeit and pay a penalty of not less than one hundred nor more than five hundred dollars." Section 4 provides "that the penalty created by the preceding section shall be recovered by civil action. * * *" From the foregoing it appears that section 1 creates a duty to be performed by carriers and that section 3 imposes a penalty not for the failure to perform the duty, but only when the carrier "knowingly and willfully" fails in that regard. The defendant by not denying the averment of the petition in that regard admitted that it "knowingly" failed to unload the stock.

It is contended that the answer puts in issue the allegation of the petition that defendant's failure to unload the stock was willful and the allegation that defendant was not prevented from unloading the

stock by an unavoidable cause which could not have been anticipated by diligence and foresight, and that as a result of these denials of material averments an issue of fact was joined which necessitated the overruling of the demurrer. The answer, after admitting that the stock was not unloaded, and denying that the company's failure to unload was willful or from avoidable cause, proceeded in an unbroken sentence to declare as follows:

"But, on the contrary, avers that the said failure was wholly caused by the great and unusual press of business, * * * which alone caused the said live stock to be confined beyond the time limited by law."

It is a familiar principle of pleading and one repeatedly recognized by this court that a general averment is always controlled and limited by specific allegations on the same subject-matter. Boatmen's Bank v. Fritzlen, 68 C. C. A. 288, 135 Fed. 650, 659; Hayes-Young Tie Plate Co. v. St. Louis Transit Co., 70 C. C. A. 1, 137 Fed. 80.

Applying this rule, the conclusion follows that the denial of willfulness or avoidable cause must be treated as limited or explained by the words which immediately follow it, and that the pleading taken as a whole means that by reason of the alleged great and unusual press of business which "wholly" and "alone" caused the failure to unload the cattle, and for that reason only there was no willfulness, but there was an unavoidable cause.

Does the fact that the defendant, as a sole result of a great and unusual press of business which occasioned delays at its meeting points and inability of its engines to do the work, knowingly confined live stock committed to it for transportation more than 28 hours without unloading it, amount to a denial of the allegation of willfulness? Counsel for defendant contend that the word "willfully" as employed by the statute necessarily implies an evil purpose or bad motive, and have in their brief collected and reviewed many cases dealing with the meaning of this word. We find no occasion, however, to follow them through this maze of authority. The word is here employed in connection, not with a crime or offense malum in se, but with an offense purely statutory subjecting the offender to a civil action only. In view of our former rulings on this question, we are of opinion and so hold that as here employed the word means only the intentional doing of an act forbidden by the statute.

We held in Armour Packing Co. v. United States, 82 C. C. A. 135, 153 Fed. 1, 14 L. R. A. (N. S.) 400, that:

"A simple purpose to do the act forbidden, in violation of the statute, is the only criminal intent requisite to a conviction of a statutory offense which is not malum in se."

The Supreme Court (209 U. S. 56, 28 Sup. Ct. 428, 52 L. Ed. 681), reviewing the same case, said:

"While intent is in a certain sense essential to the commission of a crime, and in some classes of cases it is necessary to show moral turpitude to make out a crime, there is a class of cases within which we think the one under consideration falls, where purposely doing a thing prohibited by statute may amount to an offense, although the act does not involve turpitude or moral wrong."

We approved and applied this definition in the case of Chicago, St. P., M. & O. Ry. Co. v. United States (C. C. A.) 162 Fed. 835, and discover no reason for departing from it in this case. To hold that some evil purpose or bad motive must be shown in order to constitute a cause of action under section 3 of the act of June 29, 1906, would in our opinion thwart the obvious purpose of the legislation. It can hardly be conceived that any reputable carrier would deliberately and designedly because of ill will or other malevolent feeling towards the dumb animals or their owners fail to conform to the reasonable and humane requirement of the law. If the law be operative only to restrain the possible exercise of such evil and perverse disposition, it would have little, if any, scope of operation. The real purpose of the legislation in our opinion was to alleviate the condition of dumb animals in transit. The desire to curtail expense and promote economy of operation naturally encourages indifference to if not a disregard of every impediment to quick and cheap transportation. The act of June 29, 1906, we think, was aimed at this natural propensity, and is a condemnation of indifferent more than malevolent conduct. So far as the dumb animals are concerned, the effect is the same in either case. They would suffer just as much if deprived of rest, water, and food by indifference of the carrier as they would by his malevolence. The meaning we ascribe to the word "willfully" gives a reasonable scope of operation to the act, while the meaning contended for by defendant's counsel practically nullifies it. The answer admits that the defendant knowingly—that is, intentionally—kept the live stock confined in cars without unloading for more than 28 hours, and did this merely because of a great and unusual press of business as there stated. This in our opinion is an admission that it was willfully done within the true meaning of the statute. Otherwise we must concede, which we cannot do, that a mere press of business justifies a disregard of the law.

Did the great and unusual press of business as described in the answer amount as a matter of law to "an accidental or unavoidable cause which could not be anticipated or avoided by the exercise of due diligence and foresight" within the true meaning of section 1 of the act in question? We think not. It might constitute, when taken in connection with other facts and circumstances attending a transportation of live stock, some evidence of such a cause; but in itself it cannot in our opinion constitute that cause. If it could a transportation company would have it in its power to create, ad libitum, a cause which would justify its disobedience of the law. The pleadings do not raise the question whether a press of business may not in some circumstances not reasonably to have been anticipated be so great and unusual as to justify continuous confinement of live stock beyond 28 hours. We therefore refrain from expressing any opinion on that subject. All we are called upon to decide, and all we do decide, is that a great and unusual press of business does not, unexplained and of itself, excuse confinement of live stock beyond the time limited by law.

It results that the facts as pleaded in the answer constitute no defense, and that the Circuit Court erred in overruling the demurrer. The judgment is therefore reversed, with directions to sustain the demurrer.

ST. LOUIS & S. F. R. CO. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. March 17, 1909.)

No. 2,818.

1. COURTS (§ 274*)—TRANSPORTATION OF LIVE STOCK—TWENTY-EIGHT HOUR LAW—ACTION TO RECOVER PENALTY—VIOLATION OUT OF THE LIMITS OF A STATE—JURISDICTION.

Neither section 2 of article 3 of the Constitution nor the sixth amendment thereto operates to require that an action to recover a penalty incurred out of the limits of a state, under the 28-hour law (Act June 29, 1906, c. 3594, 34 Stat. 607 [U. S. Comp. St. Supp. 1907, p. 918]), be brought or tried in the district wherein the violation occurs; and such an action lawfully may be brought and tried in the district wherein the defendant resides or carries on business, as is provided in section 4 of that law.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 274.*]

2. CARRIERS (§ 37*)—LIVE STOCK SHIPMENT—PENAL SECTION CONSTRUED.

The words "knowingly and willfully" in the penal section of the 28-hour law (Act June 29, 1906, c. 3594, 34 Stat. 607 [U. S. Comp. St. Supp. 1907, p. 918]) cannot be disregarded, because they describe an essential element of every right to the penalty therein prescribed.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 37.*]

3. CARRIERS (§ 37*)—LIVE STOCK SHIPMENTS—"KNOWINGLY" DEFINED.

"Knowingly," as used in the penal section of the 28-hour law (Act June 29, 1906, c. 3594, 34 Stat. 607 [U. S. Comp. St. Supp. 1907, p. 918]), means with a knowledge of the facts which taken together constitute the failure to comply with the statute, as is the case where one carrier receives from another a car loaded with cattle, and, with knowledge of how long they then had been confined in the car without rest, water, or food, prolongs the confinement until the statutory limit is exceeded.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 37.*

For other definitions, see Words and Phrases, vol. 5, pp. 3937–3939.]

4. CARRIERS (§ 37*)—LIVE STOCK SHIPMENTS—"WILLFULLY" DEFINED.

"Willfully," as used in the penal section of the 28-hour law (Act June 29, 1906, c. 3594, 34 Stat. 607 [U. S. Comp. St. Supp. 1907, p. 918]), means purposely or obstinately, and is designed to describe the attitude of a carrier who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 37.*

For other definitions, see Words and Phrases, vol. 8, pp. 7468–7481, 7835–7836.]

(Syllabus by the Court.)

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

W. F. Evans, E. P. Mann, and J. T. Woodruff, for plaintiff in error.

Leslie J. Lyons, Asst. U. S. Atty. (A. S. Van Valkenburgh, U. S. Atty., on the brief).

Before SANBORN and VAN DEVANTER, Circuit Judges, and W. H. MUNGER, District Judge.

VAN DEVANTER, Circuit Judge. This was an action to recover a penalty for an alleged failure to comply with the provisions of section 1 of the act of June 29, 1906, c. 3594, 34 Stat. 607 (U. S. Comp.

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

St. Supp. 1907, p. 918), known as the "28-hour law." The verdict and judgment were against the defendant, and it prosecutes this writ of error.

The alleged failure to comply with the statute occurred in what was then the Indian Territory, and not in the district wherein the action was brought and tried. Because of this, it is urged that the Circuit Court was without jurisdiction; the argument being that a failure to comply with the statute is a crime, that an action to enforce the penalty, even though civil in form, is in effect a criminal prosecution, and therefore that section 2 of article 3 of the Constitution and the sixth amendment thereto require that the trial of such a case be had in the district wherein the failure occurs. There is at least one sufficient reason why this objection to the jurisdiction must fail. Section 2 of article 3 declares in respect of the place of trial for crimes:

"But when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed."

And the Supreme Court, in passing upon the effect of that section and of the sixth amendment, has repeatedly held that a crime committed against the laws of the United States, out of the limits of a state, is not local, but may be tried at such place as Congress shall designate by law. United States v. Dawson, 15 How. 467, 487, 14 L. Ed. 775; United States v. Jackalow, 1 Black, 484, 486, 17 L. Ed. 225; Cook v. United States, 138 U. S. 157, 181, 11 Sup. Ct. 268, 34 L. Ed. 906. In section 4 of the 28-hour law Congress has directed that the action to recover a penalty incurred thereunder be brought in the district where the failure occurs, or in that wherein the defendant resides or carries on business. The defendant is a Missouri corporation, and carries on business within the district wherein the action was brought and tried. If, then, it were conceded, which it is not, that such a failure is a crime and that an action to recover the penalty therefor is in effect a criminal prosecution, the jurisdiction of the Circuit Court in this instance would still be beyond question.

The government's petition, when stripped of details not here material, charged that the defendant, while carrying upon its railroad certain cattle in transit from Comanche in the Indian Territory to National Stockyards in Illinois, failed to comply with the provisions of section 1 of the act before named, in that it unloaded the cattle into a pen at Seneca, an intermediate station, for rest, water, and feeding when the pen was not properly equipped for these purposes, because, first, it was too small to enable the cattle to obtain required rest; second, there were no water troughs or other facilities in the pen for watering cattle; and, third, there were no hay racks or feed troughs therein into which hay or other feed could be placed for cattle, and that in so failing to comply with the statute the defendant acted both knowingly and willfully. The answer denied each and all of these allegations.

As properly reflecting the position taken by the government in the course of the trial, we extract the following from its brief in this court:

"The issues were confined in this very narrow compass, to wit: Were the cattle unloaded by plaintiff in error into pens properly equipped for rest, feed, and water? No question is presented * * * as to con-

finement of the cattle for a period greater than that allowed by law, and no question is involved as to the manner of the unloading, or as to the quantity or quality of the feed and water furnished; the sole question being as to whether or not the plaintiff in error unloaded the cattle into pens properly equipped for rest, feed, and water as required by statute."

At the conclusion of all the evidence the defendant requested that a verdict be directed in its favor, and error is assigned upon the denial of that request. It will be assumed, but without so deciding, that the statute is directed not merely against the continuous confinement of cattle in cars beyond the prescribed period of 28 or 36 hours, as the case may be, without rest, water, or food, but also against unloading them for rest, water, and feeding into pens not properly equipped therefor, that the pen into which these cattle were unloaded was not properly equipped in the sense of the statute, and that ordinarily to unload cattle into such a pen for rest, water, and feeding is to fail to comply with the statute; and, with these matters so disposed of, we will consider only whether there was any substantial evidence from which the jury reasonably could have found that the defendant knowingly and willfully failed to comply with the statute in this instance. We say "knowingly and willfully" because, as was recently said by Judge Adams in speaking for this court, "it appears that section 1 creates a duty to be performed by carriers, and that section 3 imposes a penalty not for the failure to perform the duty, but only when the carrier 'knowingly and willfully' fails in that regard." United States v. Union Pacific R. R. Co. (C. C. A.) 169 Fed. 65. The qualifying words cannot be disregarded. They mean something, and whatever that may be is an essential element of every right to the penalty. "Knowingly" evidently means with a knowledge of the facts which taken together constitute the failure to comply with the statute, as is the case where one carrier receives from another a car loaded with cattle, and, with knowledge of how long they then had been confined in the car without rest, water, or food, prolongs the confinement until the statutory limit is exceeded. "Willfully" means something not expressed by "knowingly," else both would not be used conjunctively. And presumptively it means something not expressed by "willingly," else the change from that word would not have been made when the old statute (Rev. St. §§ 4386–4390 [U. S. Comp. St. 1901, pp. 2995–2997]) was being re-enacted. Crawford v. Burke, 195 U. S. 176, 190, 25 Sup. Ct. 9, 49 L. Ed. 147; Hopper v. Denver, etc., Co., 84 C. C. A. 21, 24, 155 Fed. 273, 276. But it does not mean with intent to injure the cattle or to inflict loss upon their owner because such intent on the part of a carrier is hardly within the pale of actual experience or reasonable supposition. United States v. Union Pacific R. R. Co., supra. So, giving effect to these considerations, we are persuaded that it means purposely or obstinately and is designed to describe the attitude of a carrier, who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements.

The evidence was practically free from contradiction, and established these facts: The pen at Seneca afforded approximately 48 square feet of space for each animal, or about the space embraced in an ordi-

nary stall in a stable. The ground therein was dry and in good condition, and the surrounding fence was sufficient. Cattle unloaded therein could be watered by driving them along a public lane to a creek distant 515 yards from the pen, and they could be fed in the pen by strewing hay about upon the ground. These cattle were watered and fed in that way, but not as advantageously as if proper facilities for supplying their needs had been present in the pen. Seneca was a small waystation, and the pen there was seldom used for resting, watering, and feeding cattle, and then only in cases of emergency. The defendant maintained extensive and properly equipped pens for those purposes at Monett and Springfield, which are respectively 43 and 87 miles east of Seneca. When these cattle were loaded into the cars at Comanche, which was on the line of a connecting carrier, the period of confinement was extended from 28 hours to 36 hours at the written request of the person in custody of the cattle, and that was done in the reasonable expectation on the part of both the custodian and the connecting carrier that the cattle could be carried to Monett or Springfield within that period. And when the cattle were started from the connecting point, at which they were delivered to the defendant, there remained enough of the 36 hours to justify a reasonable expectation that the run to Monett or Springfield could be completed within that time. No storm or bad weather intervened, but other occurrences in the course of the run produced such delays that 35 of the 36 hours were gone when the cattle reached Seneca. Monett could not be reached within the remaining hour, and it was in that situation that the cattle were unloaded at the Seneca pen for rest, water, and feeding. They were not unloaded, rested, watered, or fed between Comanche and Seneca. When the defendant obtained knowledge of how long the cattle had been confined in the cars without rest, water, or food before they were delivered to it was not shown, save as it appeared that it had knowledge thereof when they reached Seneca.

There was no claim that the occurrences producing the delay after the run from the connecting point was begun should have been foreseen before that run was undertaken, or that the defendant did not exercise reasonable diligence to reach Monett within the 36 hours, or that the cattle were carried by any properly equipped pen after it became reasonably certain that Monett could not be reached within that period, or that the defendant did not maintain properly equipped pens sufficient in number and location to meet the requirements of the traffic reasonably to have been anticipated, or that it should have proceeded with the cattle to Monett instead of unloading them at Seneca, but, on the contrary, the sole claim was that the pen was not properly equipped in the sense of the statute. Indeed, after filing the petition, the government seems to have proceeded as if the qualifying words "knowingly and willfully" were not in the penal section, and in its brief in this court it is said:

> "The issue in the case is confined to the one proposition, viz.: Was or was not the pen into which these cattle were unloaded by the defendant company properly equipped for resting, watering, and feeding? If it was not, then the defendant company is guilty."

The same omission occurred in the court's charge to the jury; no reference being made therein to the qualifying words of the penal section or to their effect upon the government's asserted right of recovery.

Without question the defendant at the time of unloading the cattle into the pen at Seneca had full knowledge of its size and state of equipment and designed to use it in resting, watering and feeding the cattle, but considering the unexpected situation or emergency in which the defendant, without any claimed fault on its part, was required to act, and considering the fitness of the pen for use in such an unexpected situation or emergency, we are of opinion that it reasonably cannot be said that the defendant had a free will or choice and either intentionally disregarded the statute or was plainly indifferent to its requirements. Indeed, it would better comport with reason to say that in the circumstances the defendant manifested a disposition to respect the statute as nearly as it could, rather than to disregard or be indifferent to it. It follows, as we think, that the request for a directed verdict in the defendant's favor ought to have been sustained.

The judgment is accordingly reversed, with a direction for a new trial.

UNITED STATES v. ST. LOUIS, I. M. & S. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. March 25, 1909.)

No. 2,792.

1. COURTS (§ 356*) — FEDERAL COURTS.— PRACTICE — TRIAL TO DISTRICT COURT WITHOUT A JURY—REVIEW.

Where an action at law in a District Court, triable by jury under Rev. St. § 566 (U. S. Comp. St. 1901, p. 461), is by consent of the parties tried to the court without a jury, no question of fact or law decided upon or in connection with the trial is subject to re-examination in an appellate court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 937; Dec. Dig. § 356.*

Jurisdiction of Circuit Court of Appeals in general, see notes to Lau Ow Bew v. United States, 1 C. C. A. 6; United States Freehold Land & Emigration Co. v. Gallegos, 32 C. C. A. 475.]

2. COURTS (§ 356*)—FEDERAL COURTS—PRACTICE—REVIEW.

Rev. St. §§ 649, 700 (U. S. Comp. St. 1901, pp. 525, 570), providing for waiving a jury and for the review of judgments rendered in causes where there is such a waiver, relate exclusively to trials in the Circuit Courts, and there are no similar provisions in respect of trials in the District Courts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 937; Dec. Dig. § 356.*]

(Syllabus by the Court.)

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

William G. Whipple, U. S. Atty., and Powell Clayton, Asst. U. S. Atty., for plaintiff in error.

T. M. Mehaffey and J. E. Williams, for defendant in error.

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

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

VAN DEVANTER, Circuit Judge. By its complaints in four separate actions in the District Court, the United States sought to recover from the St. Louis, Iron Mountain & Southern Railway Company penalties for nine alleged failures to comply with Act June 29, 1906, c. 3594, 34 Stat. 607 (U. S. Comp. St. Supp. 1907, p. 918), known as the "28-hour law." The defendant answered in each case, putting in issue all the allegations of the complaint, and the cases, after being consolidated for purposes of trial, were tried to the court pursuant to a written stipulation waiving a jury. The judgment entry shows that the court, "having heard the evidence," found for the defendant as to two of the alleged failures and for the plaintiff as to the others, but with the qualification that the latter constituted three, and not seven, failures, and then rendered judgment accordingly. About a month thereafter a bill of exceptions was tendered by the plaintiff and allowed by the court, wherein it was recited that "subsequently to the said trial and the judgment of the court" a so-called agreed statement of facts was entered into by the parties. This agreed statement, after saying, "It is hereby stipulated and agreed by and between the above-named parties that the evidence adduced on the trial of said cause fully sustained the findings of fact herein set forth as distinguished from the conclusions of law," sets forth what purports to be a special finding of the facts with conclusions of law thereon, and then recites that the plaintiff excepted to the conclusions of law and to the application of them to the facts as found. Apparently it was because of these conclusions of law that the court found, as shown in the judgment entry, that what was charged as seven failures constituted but three. The case is now here upon a writ of error sued out by the plaintiff, and its only contention is that the court erred in its conclusions of law relating to the number of failures.

None of the complainants alleged in terms or in effect that the defendant "knowingly and willfully" failed to comply with the statute (see United States v. Union Pacific R. R. Co., 169 Fed. 65, and St. Louis & San Francisco R. R. Co. v. United States, 169 Fed. 69, both recently decided by this court), and the purported special finding is not shown otherwise than in the bill of exceptions (see Insurance Co. v. Boon, 95 U. S. 117, 124, 24 L. Ed. 395; United States v. Cleage, 161 Fed. 85, 88 C. C. A. 249; United States v. Sioux City Stockyards Co. [C. C. A.] 167 Fed. 126), but, if these matters be put out of view, there is yet an insuperable objection to the consideration of the contention made by the plaintiff. It is that in actions at law in the courts of the United States, if the questions of fact are by consent of the parties determined by the court without a jury, no ruling made in that connection can be reviewed upon a writ of error, in the absence of a statute providing otherwise. In a limited sense sections 649 and 700 of the Revised Statutes (U. S. Comp. St. 1901, pp. 525, 570) do provide otherwise in respect of the Circuit Courts, but those sections are in terms confined to the Circuit Courts, and there is no like provision in respect

of the District Courts. As illustrating that this is so, it is enough to refer to the case of Rogers v. United States, 141 U. S. 548, 12 Sup. Ct. 91, 35 L. Ed. 853. That was an action at law in a district court which was tried to the court pursuant to a written stipulation waiving a jury. The court "heard the testimony of the witnesses," made special findings of the facts with its conclusions of law thereon, and thereupon gave judgment for the plaintiff. A bill of exceptions was also allowed embodying the evidence, the court's ruling upon a motion for a peremptory finding for the defendant in the nature of a directed verdict and the exception to that ruling, as also other exceptions to the findings and decision, and the case was afterwards taken by the defendant to the Supreme Court upon a writ of error. That court held, although the question was not raised by counsel, that all it could do, in view of the mode of procedure which the parties had chosen to follow, was to affirm the judgment. In the course of the opinion it was said:

"There was no statute in existence which provided for the trial in the District Court by the court without a jury. It is provided by section 566 of the Revised Statutes (U. S. Comp. St. 1901, p. 461) that 'the trial of issues of fact in the District Courts, in all causes except cases in equity and cases of admiralty and maritime jurisdiction, and except as otherwise provided in proceeding in bankruptcy, shall be by jury.' The provision for waiving a jury in section 649 of the Revised Statutes (U. S. Comp. St. 1901, p. 461) applies only to the Circuit Court, as does also a special provision of section 700, in regard to the review by this court of a case tried in the Circuit Court by the court without a jury. There are no similar provisions in regard to trials without a jury in the District Court to those found in sections 649 and 700 in respect to Circuit Courts. It is true that in the District Court, in a suit otherwise triable by a jury, the parties may, by stipulation, waive a jury and agree on a statement of facts and submit the case to the court thereon for its decision as to the law. Henderson's Distilled Spirits, 14 Wall. 44, 53, 20 L. Ed. 815. That might have been done also in the Circuit Court without any statute to that effect. Campbell v. Boyreau, 21 How. 223, 226, 227, 16 L. Ed. 96. This, however, is not the finding of issues of fact by the court upon the evidence. The provisions of sections 649 and 700 relate wholly to such finding, and not at all to the action of the court upon an agreed statement of facts."

And then, referring to the authority of the federal appellate courts in reviewing judgments at law prior to the enactment of the statute embraced in Rev. St. §§ 649, 700, it was further said:

"The extent of that authority was settled by the case of Campbell v. Boyreau, before cited. That was a suit at law in a Circuit Court. The whole case having been submitted to the court upon the trial, and a jury having been expressly waived by agreement of parties, evidence was offered on both sides. The court found the facts, and then decided the questions of law arising upon such facts, and gave judgment for the plaintiff. The defendants sued out a writ of error from this court. There were in the record bills of exceptions, which showed exceptions by the defendants to the admissibility of evidence, and exceptions to the construction and legal effect which the court gave to certain instruments in writing. But this court held that, in the mode of proceeding which the parties had seen proper to adopt, none of the questions, whether of fact or of law, decided by the Circuit Court, could be re-examined by this court upon a writ of error. The opinion of this court, delivered by Chief Justice Taney, cited to that effect Guild v. Frontin, 18 How. 135, 15 L. Ed. 290, Suydam v. Williamson, 20 How. 427, 432, 15 L. Ed. 978, and Kelsey v. Forsyth, 21 How. 85, 16 L. Ed. 32, and said: 'The finding of issues of fact by the court upon the evidence is altogether unknown to a common-law court, and can-

not be recognized as a judicial act. Such questions are exclusively within the province of the jury; and if, by agreement of parties, the questions of fact in dispute are submitted for decision to the judge upon the evidence, he does not exercise judicial authority in deciding, but acts rather in the character of an arbitrator. And this court, therefore, cannot regard the facts so found as judicially determined in the court below, nor examine the questions of law as if those facts had been conclusively determined by a jury or settled by the admission of the parties. Nor can any exception be taken to an opinion of the court upon the admission or rejection of testimony, or upon any other question of law which may grow out of the evidence, unless a jury was actually impaneled, and the exception reserved while they were still at the bar. The statute which gives the exception in a trial at common law gives it only in such cases. And, as this court cannot regard the facts found by the judge as having been judicially determined in the court below, there are no facts before us upon which questions of law may legally and judicially have arisen in the inferior court, and no questions, therefore, open to our revision as an appellate tribunal. Consequently, as the Circuit Court had jurisdiction of the subject-matter and the parties and there is no question of law or fact open to our re-examination, its judgment must be presumed to be right, and on that ground only affirmed.' "

That decision was followed and applied by this court in the recent case of United States v. Cleage, supra.

As here, by consent of the parties, the trial was to the District Court without a jury, and the court "heard the evidence" and based its findings and judgment thereon, and as the case was not submitted upon an agreed statement of facts for the court's decision of the questions of law thereon, it follows that none of the questions decided by the court in determining the facts or in applying legal conclusions to them are open to re-examination upon this writ of error.

The judgment is accordingly affirmed.

WISCONSIN CENT. RY. CO. et al. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. March 15, 1909.)

No. 2,710.

1. CARRIERS (§ 38*)—DISCRIMINATION—REBATING—INDICTMENT.

A grain company made certain shipments of grain over defendant's road from Minneapolis to Milwaukee to the grain company's brokers, who received the consignments, paid the freight, and afterwards sold the grain for the shipper's account. Thereafter the grain company presented to defendant the receipted freight bills paid by the consignees with other papers, on which defendant, according to a pre-existing agreement, refunded elevator charges to the grain company. *Held*, that defendant at the time it paid such rebate had actual knowledge that the freight had been paid by the consignees acting for the grain company, and that such facts therefore sustained an indictment charging the railroad company with paying a rebate to the grain company from freight charges before then "received from the grain company."

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 38.*]

2. CARRIERS (§ 32*)—INTERSTATE COMMERCE—REGULATION—DISCRIMINATION—REBATES.

Where an interstate carrier returned to a shipper of grain after payment of the freight an amount equal to elevator charges at the point of

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

shipment, and the carrier had not published or filed any schedule showing that it had absorbed such elevation charge as a part of its rate between the points in question, the carrier was guilty of granting rebates prohibited by Elkins Act, § 1 (Act Cong. Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1907, p. 880]).

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 32.*]

3. CRIMINAL LAW (§ 1177*)—APPEAL—PUNISHMENT—PREJUDICE.

Where the judgment did not exceed that which might have been pronounced on any one of the counts of the indictment, it would not be disturbed if warranted by any count, however unwarranted it might have been on the others.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1177.*]

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

See, also, 151 Fed. 84.

Walter D. Corrigan (Thomas H. Gill, on the brief), for plaintiffs in error.

Paul A. Ewert (Charles C. Houpt, on the brief), for the United States.

Before HOOK and ADAMS, Circuit Judges, and AMIDON, District Judge.

ADAMS, Circuit Judge. The railway company and its general and assistant general freight agents were indicted for granting rebates to the Spencer Grain Company in violation of section 1 of the act of February 19, 1903 (chapter 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1907, p. 880]), known as the "Elkins Act." Each of the 17 counts of the indictment charged the shipment of grain by the grain company over defendant's line from Minneapolis to Milwaukee, the payment of freight charges according to the legal rate, 7½ cents per 100 pounds, as published and filed in defendant's tariffs and schedules then in force, and the subsequent refunding by defendants to the grain company of ½ cent per bushel on the grain shipped. The defendants were found guilty and bring the case here by writ of error for re-examination.

It is uncontroverted: That the railway company was a common carrier engaged in the transportation of property in interstate commerce; that it received the shipments of grain for transportation as charged; that it accepted the legal freight rates and charges therefor as set forth in its tariffs and schedules; that it subsequently paid the grain company one-half cent per bushel on all the grain shipped.

The contentions of fact are that there was no refunding of freight charges by the railway company to the shipper, but, on the contrary, that there was a proper and lawful payment for services performed or expenditures incurred in the elevation of the grain from the cars of railroad companies arriving from western grain fields into elevators in Minneapolis and the subsequent reloading of that grain into cars of the defendant railway company going east. It is admitted that the railway company paid the elevation charges, but it is claimed that it did so pursuant to a custom which had prevailed in Minneapolis whereby elevation charges for actual service performed by the elevators in

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

handling grain originating west of the Mississippi river were absorbed in the freight charges. It is also admitted that pursuant to this custom the grain in question was transferred either out of cars bringing it in from the west directly through the elevator or out of the elevator where it may have been stored for a time into the cars of the defendant railway company for transportation. There is no pretense that the railway company had published or filed any schedule showing that it had absorbed the elevation charge as a part of its rate from Minneapolis to Milwaukee. As to that service the schedule was silent.

The foregoing facts bring this case broadly within the principles announced by us in Railway Company and Pearce v. United States, 84 C. C. A. 93, 155 Fed. 945. Owing to the fact that the opinion in that case had not been published before the argument was prepared in this case, many of the questions there decided were again debated by counsel; but, as we discover no reason for departing from the conclusions then reached, we do not deem it necessary to restate them here. We held in that case that the absorption of a charge for elevation service required at the end of the defendant's line of railroad in order to make a delivery to a connecting carrier for further transportation was not, in the absence of a schedule showing the absorption, justifiable, and approved of the submission to the jury of the issue whether the transaction as actually conducted had the effect of reducing the cost of transportation below the scheduled rates, and whether the defendants intended that such an effect should follow as a result of what they did. There is no difference in principle between that case and this. The elevation charge absorbed in that was for services rendered at the end of the transportation, while that absorbed in this case was for services rendered at the beginning of the transportation. Accordingly we refrain from discussing the many questions there discussed and decided which are now again presented to us and reaffirm the principles then announced.

There are, however, some questions peculiarly applicable to this case, to which we will briefly refer. There is abundant evidence that the consignees were the agents or brokers of the Spencer Grain Company, that they received the consignments of grain, paid the freight thereon to the railway company, and afterwards sold the grain for account of the grain company; but it is said that there is no evidence that the defendant railway company or its officers had any knowledge of these facts and particularly had any knowledge of the fact that the consignees paid the freight for account of the grain company. This issue becomes important, for, unless the railway company was aware of the last-mentioned fact, it could not have intentionally paid to the Spencer Grain Company the sum of one-half cent per bushel which it did pay, as a rebate from freight charges before then received from the grain company, as charged in the indictment. After a careful consideration of the proof on this point we entertain no doubt that the railway company actually knew before it paid the agreed one-half cent per bushel to the grain company that the freight had been paid by the consignees at Milwaukee acting for the latter company; in other words, that the freight had actually been paid by the grain company. Papers were

presented to the railway company by the grain company as vouchers to secure the refunding of the elevation charge which contained, among other things, the receipted freight bills paid by the consignees in Milwaukee. Proof of this kind, taken in connection with the pre-existing agreement between the railway company and the grain company for the refunding of elevation charges on shipments made by the latter company over its line, is certainly sufficient evidence to go to the jury to show that the railway company knew that payment of freight bills on shipments made by it to its consignees were made for its account.

Some significance is attached to the name given to the rate of 7½ cents per 100 pounds on shipments to Milwaukee and Chicago. It was called in the tariff schedules "proportional freight tariff on grain and flax seed when originating west of the Mississippi river." The proof shows that there was no joint tariff or arrangement of any kind existing between the railway company and any other connecting carriers operating west of Minneapolis. In such circumstances we fail to discern any advantage to the railway company by the use of that inaccurate designation of its tariff.

Whatever position the railway company through its counsel may have taken at the trial of this cause, the important and material facts of the case were frankly disclosed by the general freight agent of the railway company while testifying as a witness. He said:

"We got grain—when we solicited grain, it was on the assumption, even if it was not directly expressed to the shipper, that we would assume any disability that was against us—against the shipper."

And when asked what he meant by "disability," he said:

"Disability in the way of terminal charges of any kind—where we could not place our road upon a parity with other roads. If we had not been able to do that, the shipper would not give us the business."

Again he was asked the question:

"Will you state for what purpose you put in or authorized to put in the assumption of elevation charges upon grain shipments from Minneapolis?"

And to this question he made this answer:

"To equalize our physical disadvantage here in securing business."

This frank admission closely assimilates the present case in its most substantial features to that of the Railway Company and Pearce v. United States. We there said:

"There is evidence tending to show that the sole purpose and object of absorbing the cost of elevation by the railway company was to enable it to get its fair share of the initial transportation of grain destined for Lake Erie ports. * * * In our opinion, the fact that other railroads competing for the over the lakes business absorbed the elevation charge, and that it was necessary for the defendant company to do so to secure participation in that business cannot alter the legal effect of what was done. We suppose the main reason which in times past moved railroad companies to make rebates or concessions in individual cases was to secure business for their lines, and that the spirit of competition in the race for business brought about the practice of so granting rebates and concessions. This practice, we understand, was the vice aimed at in the recent legislation which has for its main object the equalization of rates between given points for the same service."

These observations are entirely apposite to the case now before us and require no amplification.

There are in this case 67 assignments of error. They present in many and different ways the questions presented and disposed of in the Railway Company and Pearce Case. They therefore require no further attention at our hands at the present time.

The learned trial judge fairly submitted to the jury several issues of fact leading up to the final issue, and then left it to the jury to say whether the payment by the railway company of the one-half cent per bushel to the grain company had the effect of causing the grain in question to be transported from Minneapolis to Milwaukee at a less rate than that shown in the published and filed tariffs, and whether the railway company paid that sum of money to the grain company knowing and intending that it would and should have that effect. This charge fairly submitted to the jury the substantial and controverted issue of fact in the case. The verdict against the defendants on this issue is supported by abundance of direct testimony as well as by inferences deducible from established facts consistent, in our opinion, with the conclusion reached.

Considerable attention is given in the argument and brief of the railway company to counts 4, 5, 6, 7, 8, and 9 of the indictment, known as the "Commons & Co. counts." It is claimed that the grain which is the subject of those counts was billed out in the name of Commons & Co. without any knowledge on the part of the railway company or its officers of the interest of the Spencer Grain Company in the shipments. This issue was fairly submitted to the jury and found by them against the defendants, and we think there was ample evidence to support their finding.

However this may be, there was a general verdict of guilty on all of the 17 counts of the indictment, and only one judgment was pronounced against the defendants. As this judgment did not exceed that which might have been pronounced on any one of the counts, it should not be disturbed if warranted on any count, however unwarranted it might have been on others. Claassen v. United States, 142 U. S. 140, 12 Sup. Ct. 169, 35 L. Ed. 966, and Clement v. United States, 79 C. C. A. 243, 149 Fed. 305, 312 and cases cited.

In view of the conclusions reached in the former case, it would be useless to take up seriatim the many questions presented by the assignment of errors in this case. Their solution is necessarily involved in the conclusions then reached and now reaffirmed. We have, however, considered them sufficiently to satisfy us that no prejudicial error was committed against the defendants.

The judgment is affirmed.

CHAPMAN v. YELLOW POPLAR LUMBER CO. et al.

(Circuit Court of Appeals, Fourth Circuit. February 11, 1909.)

No. 826

LOGS AND LOGGING (§ 3*) — CONTRACT TO CONVEY TREES — CONSTRUCTION AND OPERATION—SUIT TO ENFORCE—DEFENSES.

Complainant conveyed certain standing trees to officers of defendant lumber company by an absolute conveyance, taking back an agreement for a reconveyance on his performance of a contract to furnish to defendant's mills a certain number of logs therefrom at prices therein stated. A part of the trees had been purchased by complainant from a third person under a contract which was executory, which fact was known to defendant. Complainant instituted a suit in equity for breach of the logging contract, pending which the parties made a settlement of all matters between them except complainant's claim for damages, and by which defendant agreed to "forthwith release and cause to be reconveyed all the standing trees" covered by the original conveyance from complainant, including those held under such executory contract. The vendor in such contract and defendant had previously joined in securing the turning over of all the property to defendant by a receiver appointed at the instance of complainant. Having failed to reconvey the trees, complainant filed a supplemental bill in the pending suit to enforce the contract, and for an accounting with respect to trees alleged to have been converted by defendant. *Held* that, having taken title and maintained its possession of the trees with knowledge of the terms of the contract by which they had been held by complainant and covenanted in the settlement to reconvey the same, defendant was bound to protect the title by fulfilling the contract, and could not set up as a defense that the title had been forfeited for noncompliance with its requirements.

[Ed. Note.—For other cases, see Logs and Logging, Dec. Dig. § 3.*]

Appeal from the Circuit Court of the United States for the Western District of Virginia.

J. F. Bullitt (Bullitt & Kelly, on the brief), for appellant.

George S. Wright and Harvey T. Hall (Robert E. O'Hanly, on the brief), for appellees.

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

DAYTON, District Judge. In view of the fact that the matters in controversy here, in one form or another, have been in litigation for near 15 years, and have thrice before this been before this court by appeal or writ of error (74 Fed. 444, 20 C. C. A. 503; 89 Fed. 903, 32 C. C. A. 402; 143 Fed. 201, 74 C. C. A. 331), a very brief statement of facts will be necessary.

Chapman, the plaintiff and appellant, by various contracts secured control of two parcels of timber trees, one of 42,000, known as the "Pack trees," the other 32,000, known as those "controlled by him individually," situate in Wise, Dickenson and Buchanan counties, Va. On February 9, 1893, by deed absolute upon its face, he sold and conveyed these trees to Green and O'Connell, officers and agents acting for the defendant lumber corporation. On the same day he entered into a stocking contract to cut and deliver, at fixed points, from these

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

trees 50,000,000 feet of logs; upon terms now immaterial to state. On the same day, and as a part of the transaction, Green and O'Connell executed and delivered to him a contract whereby they agreed, upon his faithful performance of his logging contract, to convey back to him all their interest in these two lots of trees. Chapman filed the original bill herein, charging the defendant lumber company and its officers with breach of this stocking contract of his by preventing him from executing it and refusing to pay for logs delivered under it, and claiming $9,000 for logs delivered and $100,000 for damages for its breach, and demanding a reconveyance of the trees. The bill was supported by attachment sued out by reason of the nonresidence of the defendants. The court below refused to maintain in equity the claim for damages. He instituted his action at law, which, after twice being before this court, was determined adversely to him.

Pending this equity suit an agreement was entered into, August 16, 1895, whereby all matters in controversy between parties were settled except this claim of Chapman's for damages for the breach of the contract, and the defendant corporation bound itself to "forthwith release and cause to be reconveyed all the standing trees conveyed or mortgaged by said Chapman to Green and O'Connell" except the Pack trees, title to which was retained to secure the debt of $5,050 ascertained by the agreed settlement to be due from Chapman to the corporation. This debt was subsequently paid by Chapman, and these Pack trees were conveyed back to him and enter no longer into the controversy. The company wholly failed to convey back the other lot of 32,000 trees, and thereupon, December 23, 1899, Chapman filed his supplemental bill, alleging this failure to convey back these trees, that 16,000 of them had been purchased by Chapman from Bitely, and of these 16,000 "Bitely trees" the defendant company had, since the compromise agreement and its contract therein to reconvey, converted the greater number thereof to its own use. An accounting was prayed for of such trees so converted. Upon this bill and answers thereto denying its material allegations, charging Chapman to have no title by reason of his contract of purchase from Bitely, of the forfeiture by him of such contract, and the reinvestment in Bitely of the right to said trees, the court below, among other things, referred the cause to a master to ascertain and report the trees standing at the time of the compromise agreement, how many had been purchased or handled thereafter or converted by the lumber company, and their reasonable value at the time. The master made his report, exceptions were taken thereto by the defendant corporation, sustained by the court below, the learned judge then presiding ruling that the supplemental bill could only be maintained for the purpose of requiring a reconveyance of the standing trees from Green and O'Connell, and not for an accounting for those converted by the lumber company since the compromise agreement. This decree was entered July 19, 1904. Chapman appealed from this, and on July 20, 1906, this court reversed it, holding that under the allegations of the supplemental bill Chapman was entitled to such accounting, but without directly passing upon the facts as found by the master sustaining Chapman's demand. Thereupon the cause came on to be heard again before the

same judge, sitting specially, upon the master's report, exceptions filed thereto, and evidence therewith; whereupon on December 21, 1907, a decree was again entered sustaining defendant's exceptions to the master's report, and upon the merits dismissing the plaintiff's bills and supplemental bill, and dissolving the injunction that had been awarded in course of the proceeding against the defendant company's judgment for something over $4,000 costs adjudged against Chapman in the defense of the action at law until his claim in equity could be determined. From this decree Chapman has again appealed to this court.

It will be seen that the issue has narrowed itself down to one almost wholly of fact. With all due respect to the learned judge rendering this last decree, and who is so earnest and sincere that he has frankly said that "after giving the case the most mature consideration, and the fullest examination, especially in the light of the opinion of the Circuit Court of Appeals rendered herein on the 6th day of February, 1903, the court does not find the slightest reason for changing the conclusions heretofore announced on the merits of the case, upon which it was the purpose and object of the opinion filed on the 29th day of October, 1903, to pass, as well as upon the several legal phases of the case considered by the Circuit Court of Appeals in its opinion," we are constrained to hold that he is in error. Incidentally, it is to be remembered that the former decree, reversed by this court, had been rendered upon the merits of the cause and not upon a demurrer to the supplemental bill, and while this court contented itself with basing its reversal upon the denial of the court below of the plaintiff's right to maintain the supplemental bill for an accounting at all, yet it is hardly to be assumed that it would have done so for this reason, if, upon the examination of the whole record then before it, it had been of the opinion that the evidence wholly failed to justify any finding in this particular in plaintiff's favor. But aside from this, we are constrained to wholly disagree with the opinion of the court below that Green and O'Connell and the lumber company can set up and successfully defend this demand by saying that Chapman had forfeited his contract with Bitely and no interest was remaining to convey back. This was not the case when on February 9, 1893, Chapman conveyed by deed absolutely these trees to Green and O'Connell for the lumber company. That this was an absolute conveyance of these trees made by Chapman when his contract with Bitely was in full force cannot be questioned. There was, under every fair construction of law and of the facts, no ground to claim forfeiture of this contract with Bitely when on December 11, 1893, Bitely joined with the lumber company and its officers, Green and O'Connell, in seeking and securing the court below to turn over "all the property" then in the receiver's hands and authorize the company and its said officers to "perform the contract," referring to the stocking contract, to secure the performance of which Chapman had conveyed absolutely these trees. It is untenable to urge that this sale, absolute on its face, of these trees, was only a security, creating no obligations on the part of the grantees to protect Chapman's rights and interest therein. That it was designed as security to secure the completion of Chapman's

stocking contract there can be no question, but at the same time, by a separate contemporaneous writing, these grantees assumed a trust obligation on their part to reconvey these trees to Chapman when the contract was completed. This reconveyance was dependent upon conditions that might or might not arise, and no principle of equity or good conscience would authorize or justify these grantees, by either their own negligent or willful acts, in defeating the arising of these conditions requiring them to reconvey. They knew when they took the deed of sale from Chapman the terms of the contract with Bitely by which he held these trees. They knew the conditions by which this contract was to be saved from forfeiture. When they took over the property with this trust to reconvey, they did so with the legal responsibility attached to keep the title to the trees intact by complying with the necessary conditions of the Bitely contract. This was true not only by reason of this contract with Chapman, but it was doubly true after the court of equity had assumed control of the matter, and at their instance and that of Bitely had required the turning over of the property to the lumber corporation "to perform the contract." This control so given by the contract and by the court was not disturbed until conditions did arise whereby the obligation to reconvey on the part of the lumber company to Chapman became imperative. This was upon the execution of the compromise agreement of August 16, 1895, in which it bound itself to "forthwith release and cause to be reconveyed all the standing trees conveyed or mortgaged by said Chapman to Green and O'Connell."

What was to be conveyed? A mere forfeited, worthless, and dead paper title? Not so. If any costs or expenses had been incurred by Green, O'Connell, and the lumber company in preserving the property, in complying with the conditions of the Bitely contract up to this time, they had the right to demand recompense from Chapman possibly therefor, and it is to be assumed from the terms of the contract settling all matters of controversy but one fully set forth that they did consider and include this, but it is never to be admitted that by their own negligence and wrong they could allow this property, in their possession both by contract and by the court's order, to become forfeited and valueless. Nor can they be heard to defend that they never understood their contract with Chapman to mean other than that the trees were to stand as security for the performance of the stocking contract, with possession never in them in fact but remaining in Chapman, whose duty was therefore to comply with the terms of the Bitely contract necessary to avoid forfeiture. When men and corporations make contracts, the law imposes upon them the obligation to understand their legal effect and requirements. The sale by Chapman to Green and O'Connell, as we have said, is an absolute deed of sale without condition carrying immediate possession. The contract of Green and O'Connell to convey back in no way disturbs such possession, but sets forth only such obligation to reconvey upon conditions subsequent. Therefore, if any forfeiture of the Bitely trees occurred while the title thereto remained in Green, O'Connell, and the lumber company prior to the compromise agreement, they are completely estopped from defending on account thereof. After the compromise agreement made, the matter presents

the simplest solution. The company bound itself to "forthwith release and convey back all the standing trees conveyed or mortgaged by said Chapman to Green and O'Connell." It is carefully to be noted that this language does not require a reconveyance only by the company of "all the right, title, and interest" it then had in the trees. The clear and very manifest purpose of this language was to require it to convey back with the same good and unforfeited title by which it derived, under Chapman and the court, all the trees so derived, that were then standing on the ground uncut. If they were not in condition to do this, it was their own fault. They in legal effect bound themselves to do so. But instead of "forthwith reconveying" they utterly failed to so convey, wholly neglected to care for the trees, allowed numerous of them to be cut into logs by various persons, and then bought these logs, or a considerable portion thereof, from these outside parties. This was the grossest negligence on their part, and practically the only excuse they can give now is that they were not asked to reconvey under their obligation in the contract to do so, and they never understood themselves to be in possession of the trees under their deed from Chapman and the order of the court. This will not avail them. In this case the master with much labor and ability has discussed the legal propositions involved, supporting his views with numerous citations of authority which in our opinion fully sustain them. We therefore refrain from further discussion of the legal principles, contenting ourselves with a reference to this discussion of the master incorporated in the record.

Finally, we are constrained to disagree with the court below in its ruling that the evidence upon which the master's findings are based is so vague and uncertain as to not warrant them. While it is to be admitted that it is not wholly complete and satisfactory, it is to be remembered that the reason of it being so is wholly the fault of the lumber corporation and its officers. As we have shown herein, they, by the legal terms of their contract with Chapman and those of the court's order, were in possession of these trees; it was their duty to see to it that they were not either cut, carried off, or willfully destroyed, because they were bound to forthwith reconvey them to Chapman. If any were so cut and taken away, it was their duty to know, because it was their duty to account for them. The burden of proof was upon them as to this.

Under such circumstances, we think the master was very conservative indeed both as to the number of the trees found taken since the compromise agreement, and as to their value when so taken. It follows that the decree of the court below complained of must be wholly reversed and annulled; the cause must be remanded to the court below with instructions to reinstate the injunction of October 10, 1900, and also the attachment sued out in the cause; to overrule all the exceptions to the master's report made by both plaintiff and defendant and confirm said report in toto; to ascertain from said master's report, or from a supplemental one required to be made by him, the defendant company to be liable to the plaintiff Chapman for 5,510 trees of the value of $3 each, less the amount which under the Bitely contract with Chapman would be due Bitely and for which he would have a lien, and

which because of such lien the company would be entitled to retain from Chapman and pay to said Bitely in discharge of such lien, also less the judgment for costs enjoined, and decree the balance with interest from the year 1898 (when said trees were cut) to be paid to Chapman, with all costs of said equity cause arising under the supplemental bill, including the costs of the master's report, and the petition filed for injunction to be then perpetuated. And costs in this court are awarded appellant Chapman.

Reversed.

LOW et al. v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. April 14, 1909.)

No. 1,885.

1. JURY (§ 11*)—TRIAL BY JURY—FEDERAL COURTS.
   There is no statute providing for trial by a federal court without a jury, except in cases of equity or maritime jurisdiction, or when so provided by the bankrupt law.
   [Ed. Note.—For other cases, see Jury, Cent. Dig. § 21; Dec. Dig. § 11.*
   Right to trial by jury in federal court, see notes to O'Connell v. Reed, 5 C. C. A. 603; Vany v. Pierce, 26 C. C. A. 528.]

2. JURY (§ 11*)—TRIAL BY JURY—FEDERAL DISTRICT COURT.
   Under the express provisions of Rev. St. § 566 (U. S. Comp. St. 1901, p. 461), the trial of issues of fact in a federal District Court, save in the excepted cases, must be by jury.
   [Ed. Note.—For other cases, see Jury, Cent. Dig. § 21; Dec. Dig. § 11.*]

3. JURY (§ 29*)—TRIAL BY JURY—WAIVER OF JURY—STATUTES.
   Rev. St. § 649 (U. S. Comp. St. 1901, p. 525), providing that issues of fact in civil actions in any Circuit Court may be tried and determined by the court without a jury whenever the party or their attorneys file a stipulation waiving a jury, applies only to Circuit Courts.
   [Ed. Note.—For other cases, see Jury, Dec. Dig. § 29.*]

4. CRIMINAL LAW (§ 1022*)—WRIT OF ERROR—REVIEW—FINDINGS OF DISTRICT JUDGE.
   A judge of a federal District Court having neither statutory nor common-law authority to hear a criminal case without a jury on a plea of not guilty, he would be regarded in so doing as an arbitrator only, and his conclusions of fact could not be reviewed on a writ of error.
   [Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1022.*]

5. CRIMINAL LAW (§ 1134*)—WRIT OF ERROR—SCOPE OF REVIEW.
   Where the Circuit Court of Appeals had no jurisdiction to review the conclusions of fact of a trial judge hearing a criminal case without a jury, it could not consider the sufficiency of the evidence to support any judgment, or any matter of form in respect to the indictment, nor the action of the court on the admission or rejection of evidence, nor any question arising out of or upon the evidence, but was limited to defects which should have prevented the rendition of the judgment for which it should be arrested.
   [Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1134.*]

6. JURY (§ 21*)—JURY TRIAL—"CRIMES"—"INFAMOUS."
   Const. U. S. art. 3, § 2, requires that the trial of all crimes except in the cases of impeachment shall be by jury, and the sixth amendment declares that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury, and the fifth amendment

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

provides that for an infamous offense one shall not be required to answer unless on the presentment or indictment of a grand jury. *Held*, that an offense is "infamous" if it involves imprisonment for more than one year with or without hard labor, and that a "crime" within such provisions is not necessarily an infamous offense, but includes every offense of a serious or atrocious character, involving the possible infliction of long terms of imprisonment, which offenses must be tried by a jury.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 134–141; Dec. Dig. § 21.*

For other definitions, see Words and Phrases, vol. 2, pp. 1736–1740; vol. 8, p. 7623; vol. 4, p. 3573.

Trial by jury in criminal prosecutions, see note to West v. Gammon, 39 C. C. A. 275.]

7. JURY (§ 21*)—TRIAL BY JURY—CRIMES.

Defendants were indicted for unlawfully carrying on the business of a rectifier without having paid the special tax required by law, in violation of 1 Rev. St. Supp. p. 60, § 3242, for which defendants might have been fined $500 and imprisoned for two years. The second count was for the unlawfully rectifying in violation of Rev. St. § 3317 (U. S. Comp. St. 1901, p. 2164), for which a punishment of not less than $1,000 nor more than $5,000 fine, and imprisonment for not less than six months nor more than two years, might be imposed. The third count was for omitting to put up signs as required by section 3279 (page 2126), the punishment for which was a fine of $500. And the fourth count was for violating Rev. St. § 3326 (page 2169), prohibiting the changing of stamps and shifting of distilled spirits, under which the maximum punishment is a fine of $1,000 and imprisonment for a year. *Held*, that such offenses involving imprisonment were crimes for which accused could only be punished after a conviction by a jury under Const. art. 3, § 2, providing that the trial of all crimes except in the case of impeachment shall be by jury.

[Ed. Note.—For other cases, see Jury, Dec. Dig. § 21.*]

8. JURY (§ 29*)—TRIAL BY JURY—CRIMINAL CASES—WAIVER.

In a prosecution for a crime within Const. art. 3, § 2, providing that the trial of all crimes except in case of impeachment shall be by a jury, accused and the district attorney may not waive a jury trial by agreement.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 197, 198; Dec. Dig. § 29.*]

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

This is a writ of error to the District Court for the Southern District of Ohio. The plaintiffs in error were indicted jointly, entered a plea of not guilty, waived a jury, and were tried upon the evidence submitted to the District Judge, and adjudged guilty upon some counts and not guilty upon others. There were two indictments, one of which contained four counts, the other three counts. These indictments were consolidated by order of the court and heard together. The defendants were adjudged guilty under the first and third counts of the indictment numbered 496, and not guilty under the second and fourth counts. The sentence against each under the first count was a fine of $250 and costs and imprisonment in jail for 30 days, to be remitted upon payment of fine and costs, and to pay a fine of $500 each and costs upon the conviction under the third count.

They were both adjudged guilty under the third count of the indictment numbered 512, and each of the defendants sentenced to pay a fine of $500 and costs. Upon the other two counts of that indictment they were adjudged not guilty.

The first count of indictment 496, and upon which there was a verdict of guilty, was under section 3242, 1 Rev. St. Supp. p. 60, and was for unlawfully carrying on the business of a rectifier without having paid the special tax

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

required by law. There might have been a fine of $500 and imprisonment for two years under that count. The second count under that indictment was drawn under section 3317, Rev. St. (U. S. Comp. St. 1901, p. 2164), for unlawfully rectifying, etc. The punishment under this section is a fine of not less than $1,000 nor more than $5,000, and imprisonment for not less than six months nor more than two years. The third count was for not putting up the signs required under section 3279, Rev. St. (U. S. Comp. St. 1901, p. 2126). The punishment under this section is a fine of $500. The fourth count was under section 3326, Rev. St. (U. S. Comp. St. 1901, p. 2169). Under this section there might have been a maximum punishment of a fine of $1,000 and imprisonment for one year.

There were three counts under the indictment numbered 512, all being drawn under section 3326, Rev. St., relating to acts similar in character but to different packages from those mentioned in the fourth count of the other indictment, and subject to the maximum punishment already mentioned as applicable to offenses under section 3326.

Levi Cooke, Warwick M. Hough, and Arthur B. Hayes, for plaintiffs in error.

Sherman T. McPherson, for the United States.

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

LURTON, Circuit Judge (after stating the facts as above). 1. The defendants and the government waived a jury, and the case was heard upon the evidence by the court, and a general judgment rendered of guilty upon certain counts and not guilty upon others. Aside from the fact that this was a criminal and not a civil case, there is no statute which provides for a trial by the court without a jury, except in cases of equity or maritime jurisdiction, or when so provided by the bankrupt law. The trial of issues of fact in the District Court, save in the excepted cases, must be by jury. Section 566, Rev. St. (U. S. Comp. St. 1901, p. 461). Section 649 of the Revised Statutes (U. S. Comp. St. 1901, p. 525), which provides for the waiving of a jury, applies only to the Circuit Court. The judge of the District Court had no statutory or common-law authority to hear even a civil action without a jury, and must therefore be regarded only as an arbitrator, and his conclusions of fact not reviewable upon writ of error. Rogers v. United States, 141 U. S. 548, 12 Sup. Ct. 91, 35 L. Ed. 853; United States v. Louisville & Nashville Railroad Company (decided by this court February 2, 1909) 167 Fed. 306. For the reason indicated, we may not inquire into the sufficiency of the evidence to support any judgment, or any matter of form in respect to the indictment, nor review the action of the court below upon the admission or rejection of evidence, nor any question of law arising out of or upon the evidence.

But if there appears upon the record proper, the process, the pleadings, and the judgment, defects which should have prevented the rendition of the judgment, and for which it should have been arrested, such apparent defect or insufficiency in law is equally fatal upon writ of error. Kentucky Life Ins. Company v. Hamilton, 63 Fed. 93, 99, 11 C. C. A. 42; Bond v. Dustin, 112 U. S. 604, 5 Sup. Ct. 296, 28 L. Ed. 835.

2. We come, then, to the question of the jurisdiction of the court below to pronounce judgment upon offenses of the serious character

covered by the indictments against the defendants in error without a plea of guilty or a verdict of a jury upon the facts. Section 2 of article 3 of the Constitution requires that "the trial of all crimes, except in cases of impeachment, shall be by jury," and the sixth amendment requires that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury," etc. These provisions are to be construed in the light of the common law as it existed when the Constitution was adopted, and the constitutional right of trial by jury limited to that class of cases, civil and criminal, which at the common law were triable by jury. Callan v. Wilson, 127 U. S. 540, 8 Sup. Ct. 1301, 32 L. Ed. 223; Capital Traction Company v. Hof, 174 U. S. 1, 19 Sup. Ct. 580, 43 L. Ed. 873; Schick v. United States, 195 U. S. 65, 24 Sup. Ct. 826, 49 L. Ed. 99.

That this provision does not apply to such "petty offenses" as at the common law were triable without a jury, by a tribunal legally constituted for that purpose, is clear. Such "petty offenses" are not "crimes" within the meaning of the Constitution. It is for that reason that it is now well settled that a defendant may waive a jury when charged only with a "petty offense." Schick v. United States, 195 U. S. 65, 24 Sup. Ct. 826, 49 L. Ed. 99.

Were the plaintiffs in error charged with mere "petty offenses" within the common-law meaning, or were they charged with "crimes" within the third article of the Constitution? Under some of the counts there might have been a sentence for a term of two years in prison, Indeed, under one of the counts upon which the plaintiffs were found guilty they might have been given a term of two years and a fine of $5,000. Under section 5541, Rev. St. (U. S. Comp. St. 1901, p. 3721), any sentence for a period longer than one year may be executed in a penitentiary, in place of a jail, workhouse, bridewell, or other place of confinement deemed less degrading.

To be a "crime" within the meaning of section 2 of article 3 of the Constitution, it is not essential that it shall be of the grave character described as an "infamous offense" in the fifth amendment, which provides that for such offenses one shall not be required to answer unless upon the presentment or indictment of a grand jury. An offense is "infamous" not because of its character as respects commonly accepted standards of morality, but because of the character of the punishment which may be inflicted. Thus, without regard to the inherent morality of an offense, it is "infamous" within the fifth amendment if it involves imprisonment for more than one year, with or without hard labor. Ex parte Wilson, 114 U. S. 417, 5 Sup. Ct. 935, 29 L. Ed. 89; Mackin v. United States, 117 U. S. 348, 6 Sup. Ct. 777, 29 L. Ed. 909. Neither is the test as to whether an offense is a "crime" within the third article determined by the punishment which was ultimately awarded. Thus, a crime is "infamous" if an infamous punishment might have been inflicted under the charge. Mackin v. United States, 117 U. S. 348, 351, 6 Sup. Ct. 777, 29 L. Ed. 909.

That the indictments against the plaintiffs in error included offenses for which a term of imprisonment for more than one year might

have been imposed is determinative of the fact that they were not "petty offenses," such as might have been heard by a tribunal authorized by law to act without a jury, or such as might have been presented upon information and without presentment or indictment by a grand jury. The word "crime" as used in the jury clause of the third article of the Constitution manifestly included every offense which involves results of so grave a character. Its meaning has been defined not only with seeming historical accuracy, but apparently in an authoritative way, by the Supreme Court in Callan v. Wilson, 127 U. S. 540, 549, 8 Sup. Ct. 1301, 1303, 32 L. Ed. 223, where Mr. Justice Harlan, speaking for the court, said:

"The word 'crime,' in its more extended sense, comprehends every violation of public law; in a limited sense it embraces offenses of a serious or atrocious character. In our opinion, the provision is to be interpreted in the light of the principles which, at common law, determined whether the accused, in a given class of cases, was entitled to be tried by a jury. It is not to be construed as relating only to felonies, or offenses punishable by confinement in the penitentiary. It embraces as well some classes of misdemeanors, the punishment of which involves or may involve the deprivation of the liberty of the citizen. It would be a narrow construction of the Constitution to hold that no prosecution for a misdemeanor is a prosecution for a 'crime' within the meaning of the third article, or a 'criminal prosecution' within the meaning of the sixth amendment."

In Schick v. United States, cited above, the charge against Schick was by "information." The offense was one against the oleomargarine act (Act Aug. 2, 1886, c. 840, 24 Stat. 209 [U. S. Comp. St. 1901, p. 2228]) for purchasing or receiving oleomargarine which had not been branded or stamped according to law. The "penalty" was $50 for each offense. The court said, "So small a penalty for violating a revenue statute indicates only a petty offense." Referring to other provisions of that act, which subjected the party convicted to a fine of not more than $1,000 and imprisonment for not more than two years, the court, by Mr. Justice Brewer, said that:

"These provisions of the same statute must be classed among serious criminal offenses, and can be prosecuted only by indictment, while the violations of the cases before us were prosecuted by information."

The offenses which the plaintiffs in error were called to answer were obviously serious criminal offenses involving the possibility of long terms of imprisonment. They were, therefore, "crimes" within the meaning and intent of the constitutional mandate that "the trial of all crimes, except in cases of impeachment, shall be by jury."

This provision is not one merely extending a privilege or guaranteeing a right. It is all that and more. The "trial" of every such crime "shall be by jury." It goes to the constitution of the tribunal, and a "trial" for a "crime" which is not "by jury" is not a trial by any tribunal known to the Constitution.

In Callan v. Wilson, the conviction was by a police court in the District of Columbia. The constitution of that court did not include a jury. But from its judgments there was an appeal to a superior court in which a defendant might have a trial by jury. Callan was tried upon an "information" charging him with a conspiracy to prevent others from pursuing their lawful occupations, and sentenced to

pay a fine of $25, and, in default, to suffer imprisonment in jail for 30 days. He did not appeal, and, making default in the payment of his fine, was imprisoned. To test the validity of the sentence upon a conviction not based upon the verdict of a jury, he sued out a writ of habeas corpus. The court held that the offense with which he was charged was not such a petty offense as to be triable at common law without a jury, but a serious misdemeanor and a crime under the provisions of the Constitution, and triable only by jury. The right to appeal to a tribunal where he might have a jury trial was held not to save the jurisdiction, but that one accused of such a crime was entitled to enjoy his right of trial by jury "from the first moment." "In such cases," said Justice Harlan, speaking for the court, "a judgment of conviction, not based upon a verdict of guilty by a jury, is void."

The suggestion that the effect of the sixth amendment is to modify the force and effect of the jury clause in the third article by converting a constitutional requirement into a privilege which an accused may exercise or not, as he may elect, is not tenable. It is based upon the verbiage of the amendment in its first line, to wit: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial," etc. That amendment, as we historically know, originated in the earnest desire to secure, in a definitive way, the common-law procedure in criminal trials. Without unanswerable reasons it should not be construed as authorizing so grave a change in the constitutional tribunal of trial as would result if trial by jury may be waived at the option of the accused. The plain purpose of that amendment was to declare those rights appurtenant to jury trial which had from ancient times surrounded an accused. The rights and privileges so declared, says Judge Story, in his Commentaries on the Constitution, § 1791, "do but follow the established course of the common law." The accused is not only to "enjoy" jury trial, but a speedy trial and a public trial, by an impartial jury of the locality, be confronted by the witnesses against him, have compulsory process for his own witnesses, and, finally, the right to be assisted by counsel. The court, in Callan v. Wilson, said:

"We do not think that the amendment was intended to supplant that part of the third article which relates to trial by jury. There is no necessary conflict between them."

Again, the court said:

"And as the guaranty of a trial by jury, in the third article, implied a trial in that mode and according to the settled rules of the common law, the enumeration, in the sixth amendment, of the rights of the accused in criminal prosecutions, is to be taken as a declaration of what those rules were, and is to be referred to the anxiety of the people of the states to have in the supreme law of the land, and so far as the agencies of the general government were concerned, a full and distinct recognition of those rules, as involving the fundamental rights of life, liberty, and property."

The right to waive a right does not exist when the matter concerns the public as well as the individual. Thus, the waiver of the trial of a crime by jury involves the setting on one side of the tribunal constituted by law for that purpose and the substitution by consent of

one unknown to the law. It is not competent for the accused and the district attorney to change by consent the constitution of the tribunal provided for the trial of crimes. Between the waiver of a jury in a civil case and its waiver in a trial for crime there are fundamental differences. The one involves only property rights of the parties, rights over which they have dominion. The other involves the liberty or life of the citizen. This is a matter over which the accused has not dominion. The state, the public, are concerned that neither shall be affected save by due process of law. A crime is a "breach of public rights and duties," which, says Blackstone, affect "the whole community, in its social and aggregate capacity." 3 Black. Comm. 2, 4, and 5. "The end they have in view is the prevention of similar offenses, not atonement or expiation of crimes committed. The penalties or punishments, for the enforcement of which they are means to the end, are not within the discretion or control of the parties accused; for no one has a right by his own voluntary act to surrender his liberty or part with his life." Cancemi v. People, 18 N. Y. 128, 137. Undoubtedly the accused has a right to waive everything which pertains to form and much which is of the structure of a trial. But he may not waive that which concerns both himself and the public, nor any matter which involves fundamentally the jurisdiction of the court. The jurisdiction of the court to pronounce a judgment or conviction for crime, when there has been a plea of not guilty, rests upon the foundation of a verdict by a jury. Without that basis the judgment is void.

It is accordingly ordered that the judgments in this case be set aside and the case remanded, with direction to award a new trial.

BOARD OF COM'RS OF SHAWNEE COUNTY, KAN., v. HURLEY et al.

(Circuit Court of Appeals, Eighth Circuit. April 2, 1909.)

No. 2,864.

1. BANKRUPTCY (§ 308*)—CLAIMS—DIVIDENDS—PAYMENTS AFTER BANKRUPTCY BY THIRD PARTIES DO NOT REDUCE.

The obligee in a bond, or the holder of a claim upon which several parties are personally liable, may prove his claim against each of the estates of those who become bankrupt, and may at the same time pursue the others at law, and he may recover notwithstanding payments after the bankruptcy by other obligors or by their estates dividends from each estate in bankruptcy upon the full amount of his claim at the time the petition in bankruptcy was filed therein, until from all sources he has received full payment of his claim, but no longer.

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

2. BANKRUPTCY (§ 359*)—VESTING EQUITABLE ESTATE IN CREDITORS IN PROPORTION TO CLAIMS.

The filing of a petition in bankruptcy vests in each creditor of the bankrupt an equitable estate in such a proportion of his property as the creditor's claim bears to the entire amount of the provable claims.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 359.*]

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

3. APPEAL AND ERROR (§ 878*)—PARTIES ENTITLED TO ALLEGE ERROR—CROSS-ERRORS NOT COGNIZABLE IN FEDERAL APPELLATE COURTS.

An appellee who does not take an appeal, and a defendant in error who does not sue out a writ of error, cannot confer jurisdiction upon an appellate court to consider or review decisions adverse to him upon questions suggested by an assignment, or by an argument of cross-errors, nor can he be heard upon such questions. He may be heard only in support of the order, decree, or judgment below.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3573–3580; Dec. Dig. § 878.*]

(Syllabus by the Court.)

Appeal from the District Court of the United States for the District of Kansas.

Edwin A. Austin (John J. Schenck, on the brief), for appellant.

John S. Dean, for appellees.

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

SANBORN, Circuit Judge. On November 21, 1902, the First National Bank of Topeka, Kan., as principal, and Charles J. Devlin and others, as sureties, gave a bond to the county of Shawnee in the state of Kansas conditioned, among other things, that the bank should repay the money deposited with it by the county on demand. On July 3, 1905, the bank was insolvent, and a receiver was appointed by the Comptroller of the Currency who took possession of its property. On July 6, 1905, a petition in bankruptcy against Charles J. Devlin was filed upon which he was subsequently adjudged a bankrupt. At the time this petition was filed the bank was indebted to the county on account of deposits made with it in the sum of $32,731.05. On July 7, 1905, the county demanded payment of this amount from the bank, and it failed to pay any part of it. The county then proved its claim for this amount against the estate of Devlin, and on October 19, 1905, it was tentatively allowed, subject to a reconsideration upon the filing of other objections. Between the date of the filing of the petition and March 24, 1908, the county received in dividends upon its claim out of the property of the insolvent bank $26,839.46, and the referee thereupon allowed its claim for the remainder $5,891.59, only, and his action was confirmed by the District Court. The county has appealed and has assigned as error that the court refused to allow its claim for the $32,731.05 owing at the time the petition in bankruptcy was filed and to order the payment of dividends upon that amount.

In their brief counsel for the appellees argue that no part of the claim of the county was provable because it was contingent and unliquidated, contingent because Devlin was liable to pay in case of the default of the bank only, and there had been no default on July 6, 1905, since no demand of payment was made of the bank until the next day, and unliquidated because the condition of the bond was that the bank, in addition to paying back the money deposited when demanded, should file with the county clerk each month a statement of the amount on hand during the previous month and of the amount of interest accrued

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

thereon and should discharge all duties imposed upon it by law, and the amount of the damages for its failure to comply with these terms was undetermined. But the referee and the District Court decided these questions against the trustees, this court has no jurisdiction of them and they are here dismissed because the trustees took no appeal. An appellee who does not take an appeal, and a defendant in error who does not sue out a writ of error, cannot confer jurisdiction upon an appellate court to consider or review rulings adverse to him upon questions suggested by an assignment or an argument of cross-errors. He cannot be heard upon such questions in the appellate court. He may be heard only in support of the order, decree, or judgment below. The Maria Martin, 12 Wall. 31, 40, 20 L. Ed. 251; Guarantee Bank of North America v. Phenix Ins. Co., 124 Fed. 170, 172, 173, 59 C. C. A. 376, 378, 379; Building & Loan Ass'n v. Logan, 66 Fed. 827, 828, 14 C. C. A. 133, 134; Clark v. Killian, 103 U. S. 766, 769; United States v. Blackfeather, 155 U. S. 180, 186, 15 Sup. Ct. 64, 39 L. Ed. 114; The Stephen Morgan, 94 U. S. 599, 24 L. Ed. 266; Cleary v. Ellis Foundry Company, 132 U. S. 612, 614, 10 Sup. Ct. 223, 33 L. Ed. 473; Bolles v. Outing Company, 175 U. S. 262, 268, 20 Sup. Ct. 94, 44 L. Ed. 156; Pauly Jail Building & Mfg. Co. v. Hemphill County, 62 Fed. 698, 703, 10 C. C. A. 595, 600.

A single question remains: Is the claim of a creditor against the estate of a surety in bankruptcy upon which the principal has made partial payments after the date of the filing of the petition in bankruptcy entitled to allowance at and to dividends upon the amount owing upon it when the petition was filed, or upon the amount remaining unpaid upon it when the final allowance of it is made, or when the respective dividends are paid? In the discussion of this question preferences, securities consisting of pledged or mortgaged property, such as are required to be surrendered or applied upon claims by the bankruptcy law, are laid out of consideration, and what is said has no reference to rights under them, because no such rights are in issue here. Laying out of view then such preferences and securities, the status of claims at the time of the filing of the petition in bankruptcy, and not at any subsequent time, fixes the rights of their owners to share in the distribution of the estate of the bankrupt. Bankr. Act, July, 1898, c. 541, § 63a(1), 30 Stat. 562 (U. S. Comp. St. 1901, p. 3447); Swarts v. Siegel, 117 Fed. 13, 15, 54 C. C. A. 399, 401; In re Bingham (D. C.) 94 Fed. 796. On that date the property of the bankrupt passes from his control to the court or to its receiver, and thence to the trustee in trust for the creditors of the bankrupt in proportion to the amounts of their claims at that time. On that date there vests in each creditor as a cestui que trust an equitable estate in such a part of the property of the bankrupt as the amount of his provable claim at that time bears to the entire amount of the provable claims against the estate. On that date the bankruptcy law deprives the creditor of all his common-law remedies to collect his debt out of the property of his debtor and to collect subsequent interest on his claim against that property, and gives him in lieu thereof this equitable estate in the property of the bankrupt. Thus the filing of a petition upon which a subsequent adjudication of

bankruptcy is rendered places all the property of the bankrupt "which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him" in custodia legis. Section 70a(5), 30 Stat. 566 (U. S. Comp. St. 1901, p. 3451). From that hour the bankrupt is divested of the power to appropriate it to the payment of his debts or to use and dispose of it at will, and that authority is vested in the District Court. Every suit against him upon a provable claim is stayed from the date of the filing of the petition. Section 11a, 30 Stat. 549 (U. S. Comp. St. 1901, p. 3426). Every person is forbidden to receive from the bankrupt any material amount of property after that date with intent to defeat the act. Section 29b, 30 Stat. 554 (U. S. Comp. St. 1901, p. 3433). Every intentional preference after that date is voidable. Section 60b, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445). Upon the filing of the petition the court may take immediate possession of the property if the bankrupt is neglecting it so that it is deteriorating in value. Section 69a, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3450). And upon the appointment of the trustee all the property of the bankrupt which, prior to the filing of the petition, he could have transferred, or which could have been siezed or sold under judicial process against him, passes to this officer of the court. Section 70a(5). Indeed, the condition at the time of the filing of the petition measures the extent of the estate and the rights of all creditors of the bankrupt and all parties interested in the property throughout all the provisions of the law. Sections 1(10), 3b, 9b, 29b(4), 63a(1), 30 Stat. 544, 546, 549, 554, 562 (U. S. Comp. St. 1901, pp. 3419, 3422, 3426, 3447).

Counsel for the trustees argue, however, that the claimant should be limited to a dividend on the unpaid balance of its claim: (1) Because Devlin was liable on the bond for the damages which the county sustained from the failure of the bank to repay the deposit only, and these damages were but $5,891.59, since the estate of the bankrupt paid $26,839.41 after the bankruptcy of Devlin; (2) because at the time of the final allowance of the appellant's claim a judgment could not have been recovered against Devlin, if living, for more than this unpaid balance and interest; and (3) because the estate of the bank and the estate of Devlin were both under administration in the court below, and that court had the right, and it was its duty, to require the estate of the principal debtor to exonerate the estate of the surety and to protect the latter against the obligation of the bond.

1. To the first reason presented there are two answers: First, there vested in the county when the petition in bankruptcy was filed an equitable estate in such a portion of the property of Devlin as $32,731.05, the amount then owing by Devlin on its claim, bore to the amount of all the provable claims against his estate, and the county is entitled to the same proportion of the proceeds and dividends from that property until its claim is fully paid, because its equitable estate in this property is not diminished or changed by payments which it subsequently obtains upon its claim from other sources. Merrill v. National Bank of Jacksonville, 173 U. S. 131, 147, 19 Sup. Ct. 360, 43 L. Ed. 640; Chemical National Bank v. Armstrong, 59 Fed. 372, 8 C. C. A. 155, 28 L. R.

A. 231; Miller's Appeal, 35 Pa. 481. Second, the obligation of Devlin was to pay all the damages which the county sustained by the failure of the bank to repay the deposit, and when the petition in bankruptcy was filed and the rights of the creditors of Devlin were fixed those damages were $32,731.50, for the bank had then failed to pay any of the deposit. Neither Devlin nor any of his other creditors had any legal or equitable right to take from the county any moneys subsequently paid to it by the bank upon the county's claim, and they had no better right to take out of or to derive any benefit from his property on account of such subsequent payments, for the obligation and the trust in favor of the county's claim rested on Devlin and on his property and not upon the county. The amount of the damages when the petition was filed was $32,731.50. Eighty-two per cent. of this amount was subsequently paid by the estate of the bank. Suppose that the estate of Devlin will pay a dividend of 10 per cent. on the provable claims of the creditors. If that dividend is paid on the claim of the county as it stood when the petition was filed, the county will receive $3,273.10. If it is paid on the unpaid balance of that claim, the county will receive $589.16. Who will receive the difference, $2,463.94? The other creditors of Devlin. They will take out of the estate of the surety, by whose right alone they are entitled to any of his property, $2,463.94, which the county would otherwise receive solely because the county, after the filing of the petition in bankruptcy, collected $26,839.41 out of the estate of the principal debtor. No principle of law or equity occurs to us that will sustain such a result. Devlin, the surety, and his other creditors, were alike estopped by the obligation of the bond he signed, and by his agreement therein to see that the bank paid the claim of the county from deriving any benefit from the payments made by the principal debtor until the entire claim which Devlin had guaranteed was paid. Swarts v. Fourth National Bank, 117 Fed. 1, 12, 54 C. C. A. 387, 398.

2. It is true that, if Devlin had been living when the claim of the county was finally allowed, no judgment could have been recovered against him at that time for more than the balance of the claim remaining unpaid; but, after the filing of the petition in bankruptcy, the claim against Devlin and the claim against his estate in bankruptcy were not identical. The former was a chose in action; the latter was an equitable estate. The one was a claim in personam; the other a claim in rem. The former was measured by the terms of the contract and, subject to Devlin's probable discharge in bankruptcy, drew interest according to the terms of the contract, and if no discharge should be granted was suable. The latter was an equitable right to such a share of the property of the bankrupt as its amount at the filing of the petition bore to the amount of all the provable claims against that property. It drew no interest after the petition was filed because it was an equitable estate and not a personal claim, and, while subsequent payments by the principal debtor reduced the claim against Devlin, they did not affect the equitable estate in his property which the county held until the full payment of that claim had been received by it.

3. The answer to the third reason presented by counsel for the trus-

tees is that while a court of equity administering the estates of principal and surety may, within the limits fixed by the law, require payment out of the estate of the former in preference to payment out of the estate of the latter, upon the principle that where a creditor has a claim to two funds he may be required to exhaust one of them in aid of other creditors who can only resort to the other, the exercise of this power is prohibited in this case by the equitable principle that it may never be used where it trenches on the rights or operates to the prejudice of the party entitled to both funds (Merrill v. National Bank of Jacksonville, 173 U. S. 131, 138, 19 Sup. Ct. 360, 43 L. Ed. 640; Story's Equity Jurisprudence [13th Ed.] § 633; In re Bates, 118 Ill. 524, 9 N. E. 257, 260, 59 Am. Rep. 383), the court may not take from the county its rightful dividends for the benefit of the other creditors of either the principal or surety on its bond, and by the rule that the creditors of the bank other than the county are entitled under the bankruptcy law to the same dividends on their claims that the bank is entitled to receive upon its bond. The arguments advanced by counsel for the trustees in support of the rule that dividends upon claims against bankrupts should be reduced in proportion to the payments made thereon by third parties after the bankruptcy are not persuasive. That rule would require a reconsideration and reallowance of the claims of creditors upon which any third party is liable every time he makes a payment, or at least before each dividend after any such payment has been made. It would result in much confusion and delay and it should not be adopted unless established rules of law and of practice require such action. None have been called to our attention which compel or even persuade to such a course, and our conclusion is:

The obligee in a bond, or the holder of a claim, upon which several parties are personally liable, may prove his claim against the estates of those who become bankrupt and may at the same time pursue the others at law, and, notwithstanding partial payments after the bankruptcy by other obligors or their estates, he may recover dividends from each estate in bankruptcy upon the full amount of his claim at the time the petition in bankruptcy was filed therein until from all sources he has received full payment of his claim, but no longer. In re Babcock (Mr. Justice Story) 2 Fed. Cas. 289, 291 (No. 696); Ex parte Farnsworth, 8 Fed. Cas. 1055, 1056, (No. 4,672); In re Hicks, 12 Fed. Cas. 113, 114 (No. 6,456); In re Howard, 12 Fed. Cas. 625, 627 (No. 6,750); Downing's Assignee v. Traders' Bank, 2 Dill. 136, 144, 7 Fed. Cas. 1008, 1011 (No. 4,046); In re Souther, 22 Fed. Cas. 815 (No. 13,184).

The order of the court below is reversed, and the case is remanded to the District Court, with directions to allow the county's claim at $32,731.05 and to pay dividends on that amount until from all sources the claim is paid in full, but no longer.

FULCO et al. v. SCHUYLKILL STONE CO.†

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

No. 47.

1. TREATIES (§ 8*)—ITALIAN TREATY—CONSTRUCTION.

Italian Treaty 1871 (17 Stat. 846) art. 3, provides that the citizens of each of the contracting parties shall receive, in the states and territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or shall be granted to the natives, on their submitting themselves to the conditions imposed on the natives, and article 23 (page 856) declares that the citizens of each party shall have every access to the courts in order to maintain and defend their own rights without any other conditions, restrictions, or taxes than such as are imposed on the natives, etc. *Held*, that such sections do not create in Italian subjects not resident in the United States any new or substantial rights of person or property to be enforced in the United States; their purpose, so far as they concern rights of person or property of nonresident Italians, being limited to the prevention of invidious discriminations in favor of citizens of the United States and against subjects of Italy, with respect to the enjoyment or enforcement in the United States of privileges and rights of person and property, arising and existing wholly independently of such provisions.

[Ed. Note.—For other cases, see Treaties, Dec. Dig. § 8.*]

2. COURTS (§ 366*)—FEDERAL COURTS—RULES OF DECISION—DECISIONS OF HIGHEST STATE COURT.

Whether a nonresident alien may recover for wrongful death of an alien resident in Pennsylvania depends on the statutes of that state, aside from the Italian treaty, as to which the federal courts sitting in Pennsylvania are bound by the decisions of the Pennsylvania Supreme Court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 957; Dec. Dig. § 366.*

Conclusiveness of judgment between federal and state courts, see note to Kansas City, Ft. S. & M. R. Co. v. Morgan, 21 C. C. A. 478; Union & Planters' Bank v. City of Memphis, 49 C. C. A. 468.]

3. DEATH (§ 31*)—RIGHT TO SUE—NONRESIDENT ALIEN.

A nonresident alien is not entitled to the benefit of Act Pa. April 15, 1851 (P. L. 674), §§ 18, 19, nor Act April 26, 1855 (P. L. 309) § 1, giving a right of action to members of the family of a person whose death has been caused by the wrongful act of another.

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

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

For opinion below, see 163 Fed. 124.

M. A. Vite, for plaintiffs in error.

Thomas Leaming, for defendant in error.

Before GRAY, Circuit Judge, and BRADFORD and LANNING, District Judges.

BRADFORD, District Judge. This writ of error was taken for the reversal of a judgment in favor of the defendant in the circuit court of the United States for the eastern district of Pennsylvania, in an action of trespass brought by Francesco Fulco and Nicola Fulco,

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

† See, to same effect, Maiorano v. Baltimore & Ohio R. Co., 213 U. S. 268, 29 Sup. Ct. 424, 53 L. Ed. —.

subjects of Italy, against the Schuylkill Stone Company, a corporation of Pennsylvania, for the recovery of damages for the death of Vincenzo Fulco, their son, while employed at work in a stone quarry operated by the defendant in Montgomery County in that state through its alleged negligence. The judgment was rendered on demurrer to the declaration or statement of claim. It is therein stated that "the plaintiffs are aliens, residents of Nicosia, in the Province of Catania, Italy, and subjects of the King of Italy," and it is further alleged that "under and by reason of certain treaties made and existing between His Majesty, the King of Italy, and the United States of America, they are entitled to recover their loss and damage by reason of the death of their son, as is provided by law in the state of Pennsylvania for natives and citizens of this state and of the United States." It does not appear that either of the plaintiffs was at the time of the death of their son or at any time since has been in or a resident of the United States; and the argument of the case proceeded on the assumption that both plaintiffs were and continuously have been aliens and non-residents so far as this country is concerned. It does not appear from the statement of claim that Vincenzo Fulco, the son, was a minor at the time of the injury causing his death, and in the absence of an allegation to that effect it cannot be assumed that he was.

Section 18 of the Pennsylvania Act of April 15, 1851 (P. L. 674), provides:

"No action hereafter brought to recover damages for injuries to the person by negligence or default shall abate by reason of the death of the plaintiff; but the personal representatives of the deceased may be substituted as plaintiff, and prosecute the suit to final judgment and satisfaction."

Section 19 of the same act, among other things, provides:

"Whenever death shall be occasioned by unlawful violence or negligence and no suit for damages be brought by the party injured during his or her life, the widow of any such deceased, or if there be no widow, the personal representatives may maintain an action for and recover damages for the death thus caused."

Section 1 of the Pennsylvania Act of April 26, 1855 (P. L. 309), provides:

"The persons entitled to recover damages for any injury causing death, shall be the husband, widow, children or parents of the deceased, and no other relatives, and the sum recovered shall go to them in the proportion they would have taken his or her estate in case of intestacy and that without liability to creditors."

Actions in Pennsylvania to recover damages for injuries resulting in death, aside from the existing treaty of commerce and navigation between the United States and Italy, signed, ratified and proclaimed in 1871 (Act Feb. 26, 1871, 17 Stat. 845) are governed by the above quoted provisions. The treaty contains, among other things, the following provisions:

"Article III. The citizens of each of the high contracting parties shall receive, in the states and territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or shall be granted to the natives on their submitting themselves to the conditions imposed upon the natives. * * *"

"Article XXIII. The citizens of either party shall have free access to the courts of justice, in order to maintain and defend their own rights, without any other conditions, restrictions, or taxes than such as are imposed upon the natives. They shall therefore be free to employ, in defence of their rights, such advocates, solicitors, notaries, agents and factors, as they may judge proper, in all their trials at law; and such citizens or agents shall have free opportunity to be present at the decisions and sentences of the tribunals in all cases which may concern them, and likewise at the taking of all examinations and evidences which may be exhibited in the said trials."

The foregoing articles are the only provisions of the treaty necessary for our consideration; for it is admitted on both sides, and we think properly, that if the right of action claimed by the plaintiffs exists by virtue of the treaty it must be derived from one or both of these two articles. But they nowhere create or undertake to create in subjects of Italy, not resident in the United States, new and substantial rights of person or property to be enforced in this country. So far as they concern rights of person or property of non-resident Italians their purpose plainly is limited to the prevention of invidious discriminations in favor of citizens of the United States and against subjects of Italy with respect to the enjoyment and enforcement in the United States of privileges and rights of person and property, arising and existing wholly independently of those provisions. Their essential nature so far as they relate to privileges and rights of person and property is anti-discriminative,—not creative; article III providing, in substance, that the citizens or subjects of each of the two countries should receive in the other protection and security "for their persons and property," and should "enjoy in this respect the same rights and privileges" as those of "the natives, on their submitting themselves to the conditions imposed upon the natives," and article XXIII providing, in substance, that the citizens or subjects of either party should have free access to the courts of justice "in order to maintain and defend their own rights, without any other conditions, restrictions, or taxes than such as are imposed upon the natives." Both articles are predicated on the existence of privileges, rights or property on the part of the alien not created by or derived from those provisions, but constituting the subject-matter which it was their purpose to protect and enforce. It is evident, therefore, that unless the plaintiffs, as non-resident aliens, are, under the statutes of Pennsylvania, and aside from the treaty, clothed with a right to recover damages resulting from the death of Vincenzo Fulco the judgment below must be affirmed. Whatever might be the views of the court on this point were it res integra, we feel bound by the decisions of the Supreme Court of Pennsylvania on the proper construction and effect of local statutes of that state to hold that no such right is vested in the plaintiffs. Deni v. Penna. R. Co., 181 Pa. 525, 37 Atl. 558, 59 Am. St. Rep. 676; Maiorano v. Baltimore & O. R. Co., 216 Pa. 402, 65 Atl. 1077, 116 Am. St. Rep. 778; Zeiger v. Pennsylvania R. Co., 158 Fed. 809, 86 C. C. A. 69; Zeiger v. Pennsylvania R. Co. (C. C.) 151 Fed. 348. The judgment below must be affirmed, with costs, and it is accordingly so ordered.

HAYES v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. March 17, 1909.)

No. 2,920.

1. BANKS AND BANKING (§ 256*)—"FALSE ENTRY"—LOANS AND DISCOUNTS.
A national bank, of which defendant was cashier, was in straitened circumstances, so that the president, cashier, and assistant cashier had not drawn their salaries for five months. Each of the officers having overdrawn his individual account with the bank to the amount of their unpaid salaries, the bank examiner required the overdraft to be made good, and to accomplish this the officers induced F., who was solvent, to execute his note to the bank for their accommodation, and this was discounted and entered as a loan and discount; the proceeds being credited to the officers' individual accounts to make good the overdrafts. *Held*, that the note, while accommodation paper so far as the officers of the bank were concerned, was enforceable against the maker by the bank, and hence its inclusion in a report made by the cashier to the Comptroller of the Currency as a loan and discount of the bank did not constitute the making of a "false entry," in violation of Rev. St. § 5209 (U. S. Comp. St. 1901, p. 3497).

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 256.*

For other definitions, see Words and Phrases, vol. 3, pp. 2656, 2657; vol. 8, p. 7660.]

2. CRIMINAL LAW (§ 552*)—CIRCUMSTANTIAL EVIDENCE—WEIGHT.
Circumstantial evidence, to be sufficient to sustain a conviction, must rise to that degree of convincing power which satisfies the mind of guilt beyond a reasonable doubt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1260, 1261; Dec. Dig. § 552.*]

3. BANKS AND BANKING (§ 256*)—ASSETS—INCREASE—FALSE ENTRIES.
If the officer of a bank procured a note to be given to it by an irresponsible person, with intent of apparently increasing the bank's assets, and should thereafter make an entry in a report required by law to the Comptroller of the Currency, including such note as a bona fide asset of the bank, with either of the intents denounced by Rev. St. § 5209 (U. S. Comp. St. 1901, p. 3497), such entry would be a false entry within such section, though the paper was in actual existence.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 256.*]

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

E. G. McAdams (J. H. Grant, on the brief), for plaintiff in error.

Isaac D. Taylor (John Embry, on the brief), for defendant in error.

Before ADAMS, Circuit Judge, and RINER and AMIDON, District Judges.

ADAMS, Circuit Judge. Defendant Hayes was charged in the indictment with having violated the provisions of section 5209, Rev. St. (U. S. Comp. St. 1901, p. 3497), by making a false entry in a report made to the Comptroller of the Currency on November 17, 1904, concerning the condition of the First National Bank of Lexington, Okl., of which he was cashier. The false entry charged to have been made concerned the amount of loans and discounts of the bank on the 10th

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

day of November, 1904. He was convicted, and brings the case here for review.

Whether or not there was a false entry in fact depends upon whether a certain note made by one Ray Farmer, amounting to $1,125, was properly treated in the report as a loan and discount. The counsel for the government make this concession in their brief:

"The whole case depends upon the evidentiary fact whether the note for $1,125, purporting to have been given by one Ray Farmer, which entered into and contributed to the aggregate of loans and discounts reported and alleged to be false, was a loan or discount of the bank."

The facts are practically undisputed. For some time prior to November 10th the financial condition of the bank had been dubious and uncertain. The president, James, the cashier, Hayes, and the assistant cashier, Ingram, had not drawn their salaries for about five months. The total amount of the unpaid salaries was $1,125. The reason for not drawing them was that the addition of that amount to the expense account would show an impairment of the capital of the bank. Each of those officers, having individual accounts in the bank, had overdrawn the same in the aggregate to the amount of their unpaid salaries, namely, $1,125. Some time before November 10th a bank examiner, on looking over the affairs of the bank, required the overdrafts to be made good. To accomplish this the officers got Mr. Farmer to execute his note to the bank for their accommodation, had it discounted by the bank and entered in the books as a loan and discount like any other note of that character, and had the proceeds credited to their individual accounts, thereby making good their overdrafts.

The evidence discloses that Farmer was induced to make the note, after a full explanation of the condition of the bank, for the purpose of raising a fund to cancel the overdrafts. The note was accommodation paper so far as the officers were concerned. As between them and Farmer, the former were the principal debtors and the latter was the surety only; but, as to the bank, Farmer was the principal, if not the only, debtor, and without any doubt became liable to the bank for the amount of the note, which had been discounted at his request in order to enable his friends to make good their overdrafts and thus conform to the requirements of the bank examiner.

The testimony has all been very carefully examined, and we fail to find anything indicating that this was a sham transaction in any other sense than that it was an accommodation note. There is no substantial evidence tending to show that Farmer was insolvent or unable to respond to the demand of the bank for the payment of the note at any time, or that there was any understanding between him and the officers of the bank that he should not be held on the note if they should be unable to protect him from liability by paying it or taking care of it themselves. It is true there are some declarations proved against the defendant in this case to the effect that Farmer "was not supposed to pay the note," and the bank examiner testified, six months after the note was given, that he asked defendant Hayes about it, and that the latter then said:

"It was no obligation of Ray Farmer; that it was an accommodation note of himself, Mr. Ingram, and Mr. James, but Ray Farmer was not liable."

After reading the testimony, and considering all the declarations of Hayes relied upon to show that the note was not a genuine or real transaction, we have reached the conclusion that, giving full force and effect to all his declarations, they are referable to the accommodation character of the note solely, and, so treating them, they clearly and truthfully express the legal relations between Farmer and the persons for whose accommodation the note was made, namely, that as between them Farmer was not supposed to pay it—that as between them Farmer was not liable. In view of this kind of testimony and of the relation of the parties, we have concluded that there is no substantial testimony in this case which warranted the jury in finding that this was a mere sham transaction, devised for a wrongful purpose, and with the intent that under no circumstances should Farmer be liable to the bank on it.

While evidence, to convict of crime, may be circumstantial and inferential in its character, it must always rise to that degree of convincing power which satisfies the mind beyond a reasonable doubt of guilt. This can never be the case when the evidence as produced is entirely consistent with innocence in a given transaction. We are of opinion that all the evidence relied on to show that there was an understanding that the Farmer note should be treated differently from any other accommodation paper held by any bank among its assets, when taken in connection with the admitted facts of this case, is entirely consistent with an innocent regarding of the paper in November, 1904, as a proper and lawful item of loans and discounts.

It may be conceded that if the officers of the bank procure a note to be given to the bank by an irresponsible person, with the intent of apparently, but not really, magnifying the bank's assets, and should thereafter make an entry in a report required by law to be made to the Comptroller of the Currency, including such note as a bona fide asset of the bank, with either of the intents denounced by section 5209, such an entry, even though of a paper in actual existence would be a false entry, within the meaning of section 5209. This, we think, would not contravene the doctrine of Coffin v. United States, 156 U. S. 432, 15 Sup. Ct. 394, 39 L. Ed. 481, and other like cases. But such concession does not help the government in this case. There was no substantial testimony tending to show that the note here involved as the subject of the false entry was any such sham affair as stated in the concession just made.

Believing that there was no case against the defendant on the merits, and that the court erred in not giving the instruction for a peremptory verdict of not guilty as requested by his counsel, we refrain from considering the legality of the constitution of the grand jury which indicted the defendant, and other questions of a dilatory or technical character, which were exhaustively argued by counsel.

The judgment of the District Court is reversed, with directions to grant a new trial.

SECURITY MUT. LIFE INS. CO. v. KLEUTSCH et al.

(Circuit Court of Appeals, Eighth Circuit. March 17, 1909.)

No. 2,913.

1. INSURANCE (§ 668*)—PREMIUMS—PAYMENT—QUESTION FOR JURY.
In an action on a life insurance policy, evidence *held* to justify submission to the jury of the question whether the last annual premium had been paid.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1742; Dec. Dig. § 668.*]

2. INSURANCE (§ 646*)—PREMIUMS—FORMAL RECEIPT—BURDEN OF PROOF.
Delivery of a formal receipt for the payment of a life insurance premium is strong prima facie proof that the premium has been paid, and places the burden on the insurance company of showing that the receipt had been issued by mistake, and that there had been in fact no payment.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1657; Dec. Dig. § 646.*]

3. TRIAL (§ 62*)—EVIDENCE—REBUTTAL.
Where, on an issue of payment of a life insurance premium, defendant proved that insured habitually paid his debts by check, and that there was no check drawn by him for the premium in question, evidence that insured habitually carried considerable sums of money on his person, and had been known frequently to pay obligations in cash, was proper rebuttal.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 149; Dec. Dig. § 62.*]

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

Arnott C. Ricketts (Halleck F. Rose, on the brief), for plaintiff in error.

Thomas S. Allen (Adolphus R. Talbot, on the brief), for defendants in error.

Before ADAMS, Circuit Judge, and RINER and AMIDON, District Judges.

ADAMS, Circuit Judge. This was a suit to recover on a policy of life insurance, and the only defense was that the policy had lapsed by reason of the nonpayment of an annual premium. The insured died July 16, 1901, and unless the annual premium of $201, which fell due November 28, 1900, had been paid, the policy was void. This simple question of fact is all there is in this case. The defendants in error, who were the plaintiffs below, introduced in evidence a formal and genuine writing, executed by the secretary of the defendant company, acknowledging to have received from the insured the required premium. The insurance company sought to destroy the force of this receipt by the introduction of evidence tending to show that it was a reformed receipt rendered necessary by the fact that the insured in February, 1900, induced the company to change a 20-payment life policy

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

which he then had to a 10-payment life policy, and that the recital found in the receipt that it was for the annual premium of $201 due November 28, 1900, was a mistake brought about by some confusion incident to making the change in the character of the policy. The plaintiffs introduced testimony claimed by them to countervail this evidence of the defendant.

The first contention is that the trial court erred in refusing to peremptorily instruct a verdict in favor of the defendant. To this view we are unable to give our assent. The formal receipt for the premium falling due November 28th is not only some evidence that it was received, but it is usually and properly regarded as evidence of a satisfactory and convincing character, and should not be lightly disregarded on a claim of mistake. Admissions against interest, and especially admissions in writing of that character, are usually and properly difficult to overcome. Notwithstanding this, the rule is well settled that a receipt may be explained, and, if found to be the result of a mistake, it should be disregarded. The burden, however, rests heavily upon any one assailing a receipt to show such a mistake. This burden the defendant undertook to carry in this case; and, while it made proof strongly tending to show a mistake as claimed, we are not able to say that it was sufficient to overcome the strong prima facie force and effect of the written document. We cannot say that the proof is so strong that all reasonable persons, in the exercise of a sound judgment, would regard it as sufficient. Moreover, the issue of fact presented in this case has been found by three juries on separate trials in favor of plaintiffs' contention. This case was twice tried on this issue in the state court of Nebraska before it ultimately found its way into the federal court. On the first trial in the court below the jury disagreed, and on the second trial, after being charged as favorably to the defendant as the case in any aspect warranted, it found a verdict for the plaintiffs. It is to the interest of justice that there be an end of litigation; and after four separate trials, and three verdicts in favor of the plaintiffs, in this case, we should hesitate, if otherwise so disposed, to hold that there was no evidence to support such verdict.

It is next urged that the learned trial court erred in admitting proof in rebuttal of payments in cash by the insured of divers personal debts at or about the time the annual premium in question became due. We think the defendant made that kind of testimony admissible and relevant by its testimony tending to show that the insured habitually paid his debts by checks. To prove that the insured paid no premium to defendant in November, 1900, the defendant offered evidence tending to show that it was his habit to pay all his bills, even as little as for $1 in checks drawn on a bank, and that there was no check drawn for the premium in question. To rebut the inference naturally arising from such testimony, the plaintiffs were permitted to show by several witnesses that the insured was in the habit of carrying considerable sums of money in his pocket, and that he had been known frequently to pay obligations in cash. This kind of evidence was in our opinion proper rebuttal of the evidence offered by the defendant, and the court com-

mitted no error in admitting it. It tended strongly to overcome the inference which the defendant invoked by its testimony.

Finding no reversible error, the judgment is affirmed.

UNITED STATES v. J. R. SIMON & CO.

(Circuit Court of Appeals, Second Circuit. April 13, 1909.)

No. 189 (4,617).

1. CUSTOMS DUTIES (§ 33*)—CLASSIFICATION—DRAWNWORK—EMBROIDERED.
Without proof that such is the case, it will not be held that, in Tariff Act July 24, 1897, c. 11, § 1, Schedule J, par. 339, 30 Stat. 181 (U. S. Comp. St. 1901, p. 1662), the term "embroidered" includes drawnwork articles to which ornaments have been added, at the open spaces at the corners where the threads have been withdrawn; the ornamentation consisting of a Maltese cross, or a wheel, or spider web, in conventional design.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. §§ 88–96; Dec. Dig. § 33.*]

2. CUSTOMS DUTIES (§ 33*)—LACE—EMBROIDERY—LEGISLATIVE DISTINCTION.
Though, from an artistic point of view, lace may be embroidery, this consideration cannot control the dutiable status of imports, because in successive tariff acts Congress has made a distinction between the two.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 33.*]

(Syllabus by the Court.)

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 (G. A. 6,452; T. D. 27,644), which sustained the collector's classification of certain importations under Tariff Act July 24, 1897, c. 11, § 1, Schedule J, pars. 339, 346, 30 Stat. 181 (U. S. Comp. St. 1901, pp. 1662, 1663)

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

Walden & Webster (W. Wickham Smith, of counsel), for appellees.

Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. The relevant paragraphs are:

"339. Laces, lace window curtains, tidies, pillow shams, bed sets, insertings, flouncings, and other lace articles; handkerchiefs, napkins, wearing apparel, and other articles, made wholly or in part of lace, or in imitation of lace; nets or nettings, veils and veilings, etamines, vitrages, neck rufflings, ruchings, tuckings, flutings, and quillings; embroideries and all trimmings, including braids, edgings, insertings, flouncings, galloons, gorings, and bands; wearing apparel, handkerchiefs, and other articles or fabrics embroidered in any manner by hand or machinery, whether with a letter, monogram, or otherwise; tamboured or appliquéed articles, fabrics or wearing apparel; hemstitched or

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

tucked flouncings or skirtings, and articles made wholly or in part of rufflings, tuckings, or ruchings; all of the foregoing, composed wholly or in chief value of flax, cotton, or other vegetable fiber, and not elsewhere specially provided for in this act, whether composed in part of india rubber or otherwise, sixty per centum ad valorem: Provided, that no wearing apparel or other article or textile fabric, when embroidered by hand or machinery, shall pay duty at a less rate than that imposed in any schedule of this act upon any embroideries of the materials of which such embroidery is composed."

"346. Woven fabrics or articles not specially provided for in this act, composed of flax, hemp, or ramie, or of which these substances or either of them is the component material of chief value, weighing four and one-half ounces or more per square yard, when containing not more than sixty threads to the square inch, counting the warp and filling, one and three-fourths cents per square yard; containing more than sixty and not more than one hundred and twenty threads to the square inch, two and three-fourths cents per square yard; containing more than one hundred and twenty and not more than one hundred and eighty threads to the square inch, six cents per square yard; containing more than one hundred and eighty threads to the square inch, nine cents per square yard, and in addition thereto, on all the foregoing, thirty per centum ad valorem: Provided, that none of the foregoing articles in this paragraph shall pay a less rate of duty than fifty per centum ad valorem. Woven fabrics of flax, hemp, or ramie, or of which these substances or either of them is the component material of chief value, including such as is known as shirting cloth, weighing less than four and one-half ounces per square yard and containing more than one hundred threads to the square inch, counting the warp and filling, thirty-five per centum ad valorem."

The merchandise consists of table covers, bureau covers, doilies, and similar articles of Japanese linen, which have been ornamented, usually with a single or double border, by drawing out certain of the warp or filling threads and tying and looping them with other threads to form figures, producing openwork effects. They are in all respects similar goods to those which were before this court in United States v. Ulmann, 139 Fed. 3, 71 C. C. A. 415, and were held to be dutiable, not under paragraph 339, but under paragraph 346. It was there pointed out that Congress for tariff purposes had in the act in question made a distinction between articles "made wholly or in part of lace, or in imitation of lace," and articles which "have drawn threads."

Upon the argument of the case at bar, counsel for the government did not make the contention that the articles were "lace or in imitation of lace," but insisted that they should be classified under paragraph 339 by virtue of the following clause therein contained:

"Wearing apparel, handkerchiefs and other articles or fabrics embroidered in any manner by hand or machinery, whether with a letter, monogram or otherwise."

It appears that when these borders are formed by drawing out threads there is necessarily left at each of the four corners an open space, which it is desirable to fill, both because it is more ornamental to fill it, and because, when filled, the article is less liable to distortion when in use. In filling one of these open spaces, the surrounding edge is first "stayed" by "button-hole stitching," so as to have a foundation for lines of additional thread which are drawn from corner to corner; and as one of the witnesses said:

"When we get the required number, which gives us something as a foundation, we can add line upon line, line upon line, and darn back and forth, as you would darn a stocking."

In the characteristic sample upon which the witnesses were particularly examined, these added ornaments, one in each of the four corners of each border, were designated as "X" (a conventional Maltese cross) and "Z" (a conventional wheel or spider web). Counsel for the government contends that X and Z, although superimposed, not upon any part of the fabric, but upon a vacant space, constitute embroidery, and that therefore the article has been "embroidered by hand with a letter, monogram, or otherwise." The difficulty with this contention, however, is that there is no testimony that X and Z are embroidery, which is not surprising, because the case was apparently tried on the theory, insisted upon by the government, that X and Z were "lace," or an "imitation of lace," and the point now urged seems to be an afterthought. The board reached the conclusion "that lace is embroidery." However this may be from an artistic point of view, we cannot accept it as controlling because in successive tariff acts Congress has made a distinction between the two. Without some proof that the application of X and Z to the flax articles ornamented with drawn threads has "embroidered" them, we cannot classify them under the clause relied upon.

The decision of the Circuit Court is affirmed.

UNITED STATES v. SWAN & FINCH CO. (two cases).

(Circuit Court of Appeals, Second Circuit. April 20, 1909.)

Nos. 252–256 (3612, 4802, 4811, 4938–4940, 5038, 5082, 5238).

CUSTOMS DUTIES (§ 38*)—CLASSIFICATION—PETROLEUM PRODUCTS—COUNTERVAILING DUTY.

Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 626, 30 Stat. 199 (U. S. Comp. St. 1901, p. 1685), provides a countervailing duty on "the products of crude petroleum produced in any country which imposes a duty on petroleum or its products exported from the United States." *Held*, that this is not applicable where the product is manufactured in a country imposing no duty on such products imported from the United States, though the petroleum used originated in a country imposing a duty on American petroleum.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 38.*]

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

Actions by the United States against the Swan & Finch Company (two cases), F. A. Marsily & Co., the National Aniline & Chemical Company, and Smith & Nichols.

The decisions below affirmed decisions by the Board of United States General Appraisers, which had reversed the assessment of duty by the collector of customs at the port of New York, except that one

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

decision by the board, which had affirmed the assessment, was reversed.

The following provision in Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 626, 30 Stat. 199 (U. S. Comp. St. 1901, p. 1685), is involved:

"626. Oils: * * * Petroleum, crude or refined: Provided, that if there be imported into the United States crude petroleum, or the products of crude petroleum produced in any country which imposes a duty on petroleum or its products exported from the United States, there shall in such cases be levied, paid, and collected a duty upon said crude petroleum or its products so imported equal to the duty imposed by such country."

The court below filed the following opinion in the Swan & Finch Cases:

PLATT, District Judge. The importations in question consisted of refined petroleum imported from Great Britain. The crude petroleum from which this merchandise was produced originated in Russia. The Board of General Appraisers sustained the importers' claim that under the proviso in paragraph 626 of the act of 1897 petroleum products are not subject to the countervailing duty there provided, where the country of production imposes no duty on such products imported from the United States. The government contends that a duty should be assessed equal to that imposed on the crude petroleum by the country from which it originated.

The decisions of the Board in the above-entitled suits are affirmed, on the authority of United States v. Downing, 146 Fed. 56, 76 C. C. A. 376.

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

Brooks & Brooks (Frederick W. Brooks, of counsel), for appellee Swan & Finch Co.

Comstock & Washburn (Albert H. Washburn, on the brief), for appellees National Aniline & Chemical Co. and Smith & Nichols.

Hatch & Clute, for appellees F. A. Marsily & Co.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

PER CURIAM. Decisions of Circuit Court affirmed.

MORTON TRUST CO. v. AMERICAN CAR & FOUNDRY CO.

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

No. 7.

PATENTS (§ 328*)—INVENTION—BOLSTER FOR RAILWAY CARS.

The Schoen patent, No. 574,116, for a bolster for railway cars, 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 District of New Jersey.

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

Charles Neave, for appellant.
Paul Bakewell, for appellee.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

PER CURIAM. In the court below this was a suit by bill in equity which charged the defendant with infringement of patent No. 574,116, dated December 29, 1896, issued to Charles T. Schoen, for a bolster for railway cars. The claim relied upon is as follows:

"2. A box-girderlike bolster, having its body composed of a lower member deepest at its center and tapering thence toward its ends and having its upper longitudinal edges flanged or projected outwardly, and a top member also having its lower edges provided with outward lateral projections or flanges, the flanges of the two members being riveted together, substantially as described."

This is a claim for the bolster itself, and not only did the Rapley patent and the Schoen patent No. 529,809 show bolsters which, as was held below, left nothing for invention to accomplish in devising this one, but it is likewise true that box girders were in common use for other purposes when the patent in suit was applied for, and all that the patentee appears to have done was to make such a girder available for use as a bolster by merely placing it in the obviously suitable position. We think this did not involve invention, and consequently that the court below was right in deciding that there was no patentable novelty in the claim relied upon.

The decree dismissing the bill, with costs, is affirmed.

GLAUBER v. H. MUELLER MFG. CO.

(Circuit Court of Appeals, Seventh Circuit. January 19, 1909. Rehearing Denied February 19, 1909.)

No. 1,471.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—VALVE MECHANISM FOR WATER FAUCETS.

The Glauber patent, No. 586,996, for an improvement in liquid shut-offs, consisting of a valve mechanism for water faucets in which a primary valve "substantially disk-shaped" is mounted on the stem of the main valve of a size to practically close the passage in advance of the main valve, which prevents hammering in the pipes from two sudden closing, discloses invention, and the claims are sufficiently broad to cover other means that are mere mechanical equivalents. The patent *held* infringed by a device which differs from that described only in that the primary valve was plug-shaped and integral with the stem, instead of removable.

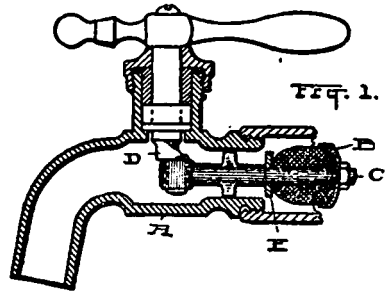
[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

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

The decree appealed from dismissed the bill for want of equity. The bill is to restrain infringement of Letters Patent No. 586,996, issued July 27th, 1897,

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

to Joseph H. Glauber, for an improvement in Liquid Shut-Offs. Figure 1 of the drawing of the patent is as follows:



The particular thing to be overcome, and the way in which, under the patent, it is overcome, is set forth in the patent as follows:

It is well known that generally in dwellings and buildings where water is supplied under pressure there is a constant tendency to what is known as "hammering" or "pounding" in the pipes. In some places this is more noticeable than in others, but it is liable to occur anywhere if the pressure is sufficient, and especially if the water be turned off suddenly. I am of course aware that I am not the first person who has attempted to remedy this very disagreeable effect, and I also know that various devices and mechanism having this purpose in view have been made and patented, but I am not aware that any existing patent is based on the right remedial theory or that any inventor has before disclosed a construction which wholly overcomes the trouble. I have myself discovered that a very slight departure from my theory and construction will totally defeat the remedy, and the invention therefore calls for exactness of construction and detail to make it effective.

To this end the invention consists in a primary closing-valve having a certain function and effect before the main valve is seated, all substantially as shown and described, and particularly pointed out in the claims.

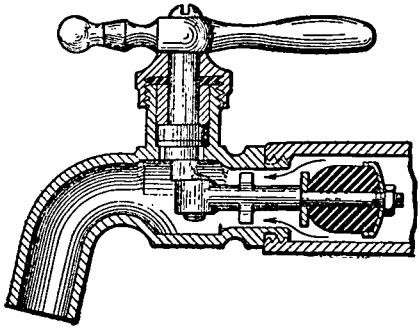
In the accompanying drawings, Figure 1 is a longitudinal sectional elevation of what is known as a "bib" cock or faucet embodying my invention, and Fig. 2 is a sectional elevation of another form of bib-cock in which the invention appears. Fig. 3 is a section elevation of a float-valve mechanism for water-closet tanks to which the invention is adapted. Fig. 4 shows a series of graduated disks which constitute the primary valve in the foregoing views.

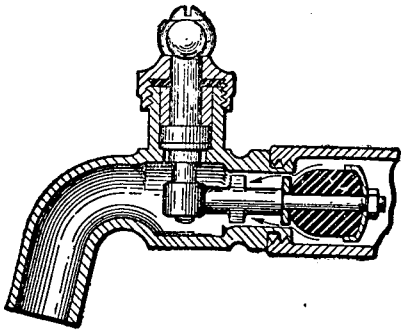
Referring now to Fig. 1, A represents the barrel of the faucet, and B the main valve, supported on the stem or spindle C, supported on the crank-shaft D, all of which is a common construction. The valve B presumably is of rubber or its equivalent, and it is adapted to be drawn into the end of barrel A and to be seated therein and cut off the flow of water through the faucet. As shown, the valve is open its full distance.

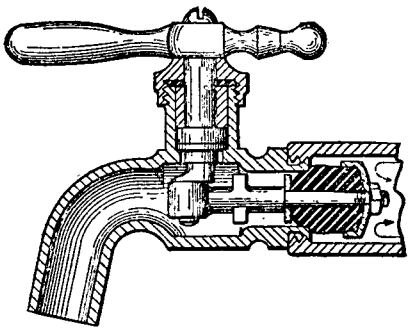
Now, if the valve B were used alone, as it generally is, there would be inevitable pounding or hammering in the pipes under usual conditions. The barrel and valve shown are old and well known and their association with hammering in the pipes is equally common. Hence the primary valve E, which in this instance has the form of a disk, is placed on the valve-spindle C in advance of valve B. This disk requires to be carefully adapted to the barrel A, so as to practically close the fluid-passage through the same and yet leave a very slight passage for the fluid round about its edge. This passage has to be carefully ascertained, so that it will allow a mere film or very thin sheet of water to pass and not a volume or heavy flow. If the latter occurs the pipe will inevitably pound when the main valve shuts off the flow altogether. It is the sudden shutting off of the water that produces the hammering, but to prevent this more than a graudal closing of the passage is needed. For example, the use of a conical valve with its point in advance will not accomplish the desired result. Other expedients besides conical valves have been tried and failed, and evidently for the reason that they did not comprehend the principle by which alone the result can be controlled. This principle necessitates the sudden, not gradual, closing of the fluid-passage to a practically shut off condition and with only enough escape to relieve the present tension or pressure induced by such sudden action. If the pressure in the pipes be high, as usual, a very slight sheet of water will relieve the strain. This then closes the body of water off, and then the main valve can come safely and quietly to the remainder of the task and close off the sheet or film of water so escaping and the work is done and all noise is absolutely avoided.

Claim 1 (the claim sued upon) is as follows:

"1. The casing provided with a fluid-passage and valve-seat, said passage being of the same cross-section at all points beyond said seat, in combination with a valve-stem, a main valve and a substantially disk-shaped primary valve on said stem of a size to practically close the liquid-passage in advance of the main valve, said primary valve constructed to conform around its entire periphery to the wall of the said water-passage and to close the same evenly all around, substantially as described."







In the brief of appellant, the Glauber valve, when completely open; when at a half stroke; and when completely closed, is shown as follows:

Other patents cited are as follows:

No. 144,097, Oct. 28, 1873, P. Hille.

No. 182,015, Sept. 12, 1876, W. S. Blake.

No. 186,863, Jan. 30, 1877, T. Miekle.

No. 200.871, March 5, 1878, Mueller & Gross.

No. 216,661, June 17, 1879, H. H. Craigie.

No. 251,726, Jan. 3, 1882, Mueller & Gross.

No. 270,355, Jan. 9, 1883, P. White.

No. 299,888, June 3, 1884, P. White.

No. 354,148, Dec. 14, 1886, J. H. Johnson.

No. 412,789, Oct. 15, 1889, H. F. Probert.

No. 418,377, Dec. 31, 1889, P. Mueller.

No. 493,774, March 21, 1893, A. P. Howes.

No. 548,977, Oct. 29, 1895, F. W. Foster.

No. 556,133, March 10, 1896, W. Bunting.

No. 571,023, Nov. 10, 1896, W. Scott.

No. 573,530, Dec. 22, 1896, J. Porteous.

No. 662,013, Nov. 20, 1900, O. Mueller.

Further facts are stated in the opinion.

W. Clyde Jones and Charles C. Linthicum, for appellant.

Albert H. Adams, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

GROSSCUP, Circuit Judge (after stating the facts as above). Appellee's primary valve, instead of being a disk, as described in the

Glauber patent, is plug shaped; and instead of being removable from the stem, is integral with the stem. Upon these differences chiefly the argument of non-infringement is based. But these are differences of construction only. Appellee's device performs the same function, and brings about the same result, as the Glauber patent. The function is the prevention of the sudden shutting off of the water column or other fluid under pressure, thereby relieving the strain, for an interval, during which the water or fluid column continues to flow in a sheet or film around the primary valve—the result being the prevention of hammering; so that whether the appellee's device is an infringement of the Glauber patent or not, depends upon the scope of that patent; for if the Glauber patent is for the mere specific form of performing that function, embodied in the disk shaped primary valve, and further limited by its removability, appellee's device is not an infringement; but if the Glauber patent is more generic—embodies a discovery carried out by suitable mechanical means or their equivalent—appellee's device, notwithstanding the slight difference in form, is an infringement.

With that in view it is to be noted that the removability of the Glauber patent is no essential part of his combination. It is introduced because, as the patent says "it enables me to adapt the valve to faucets of different sizes and kinds, and it also enables me to place the primary valves on faucets now in use, so that old faucets can be equipped with them, and made as good as new ones, so far as hammering is concerned," which makes it a mere incidental advantage, not a function of the combination.

Nor is the Glauber patent limited to the peculiar form of disk shown in figure 1. The description in the claim is "a substantially disk shaped primary valve." "Disk" as described in the Century Dictionary is "any flat or approximately or apparently flat circular plate or surface." A plug shaped device, such as appellee uses, may have a disk shaped face or "surface"; and there is nothing in the proceedings in the patent office that limit this definition; for though in his letter to the patent office appellant describes his disk as a "plain, thin disk," it evidently was not that, that differentiated it in the opinion of the patent office from the prior art, but the new function set forth, viz.: that "its edge is the same all around, and it fits quite closely in the water passage, and depends on a very slight leakage all around, to relieve the hammering."

The truth is, that the gist of appellant's patent is a discovery—the discovery that there will be no hammering in water valves if, instead of a sudden closing of the water column under pressure, the pressure is relieved by means of a continuation, for a brief interval, of a thin sheet or film around a primary valve. True, prior inventors had some inkling of this discovery, groping their way toward it with primary disks that were perforated, or were open at the edges—devices, however, that failed of their object. Glauber was the first to complete the discovery—to see that not only must the volume of water under pressure not be suddenly shut off, but that the gradual shutting off must be by means of a film or sheet that would permit the periphery of the column, for the interval needed, a continued flow.

Why this manner of relief prevents hammering—whether it is be-

cause the integrity of the column under pressure is not broken up, as perhaps it would be in the case of perforations or notches at the edges —is not a thing on which we need to speculate. What this record makes certain is the fact that it does for the first time prevent hammering; and that man is entitled to a patent who, being the first to hit upon a way of bringing about the fact, embodies it in mechanical form, ready to be presented to the world; and this we think Glauber has done, his claim being broad enough to cover other means that are mere mechanical equivalents of the means that he has set forth.

We have considered appellee's contention of "prior use" as also the contention that the patent is too indefinite, but do not regard them as presenting any obstacle to the conclusion to which we have come.

The decree of the Circuit Court is reversed with instructions to enter a decree sustaining the validity of claim 1 of the patent, and finding the appellee's device an infringement thereof, and for an injunction and other relief accordingly.

HENTSCHEL v. CARTHAGE SULPHITE PULP CO. et al.

(Circuit Court, N. D. New York. March 29, 1909.)

No. 7,152.

1. PATENTS (§ 51*)—PATENTABILITY—PRIOR PUBLIC USE.

The use of a composition for lining pulp digesters in the practical lining of digesters for use in a number of different plants by persons to whom it had been disclosed without secrecy was a public use, which, if continued for more than two years, would bar a patent whether such use was known to the inventor or not, unless the delay was for the purpose of perfecting the invention.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 66, 72; Dec. Dig. § 51.*

Priority and continuance of public use of invention as affecting patentability, see note to Eastman v. Mayor, etc., of City of New York, 69 C. C. A. 646.]

2. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—COMPOSITION FOR LINING PULP DIGESTERS.

The Hentschel patent No. 719,216, for a composition for digester linings, is void for anticipation, and also because of prior public use of the composition by others than the patentee for more than two years before application for the patent. Also *held*, that infringement was not proved, conceding the patent validity.

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

In Equity. Suit to restrain alleged infringement of United States letters patent No. 719,216, dated January 27, 1903, on application filed September 16, 1902, and issued to Ernst Hentschel, for composition for digester linings and for an accounting.

Albert F. Forthmiller (Walter E. Ward, of counsel), for complainant.
W. B. Van Allen (Henry Schreiter, of counsel), for defendants.

RAY, District Judge. The patent in suit is for a composition used to line digesters, usually, if not always, used in the manufacture of

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

pulp for the manufacture of paper. The patent has two claims, reading as follows:

"(1) The herein-described composition as a lining for digesters, consisting of litharge, Portland cement, quartz or crushed fire-brick, glycerin and silicate of soda.

"(2) The herein-described composition as a lining for digesters, consisting of litharge, Portland cement, quartz or crushed fire-brick, and glycerin and silicate of soda, in about the proportions of two hundred pounds of litharge, one hundred pounds of Portland cement and one hundred pounds of quartz or crushed fire-brick, and a mixture of about twenty gallons of glycerin and about four and one-half gallons of silicate of soda added to said quantity of the aforesaid materials in a dry state."

The two claims differ only in the fact that claim 2 gives the proportions of the ingredients used to form the composition. As this claim follows the specifications which must be read with claim 1, I fail to see any difference in the claims. The composition is claimed as "a lining for digesters" only. The ingredients named, except the glycerin and silicate of soda, are thoroughly mixed dry; the fluid, glycerin, and the silicate of soda are thoroughly mixed by themselves, and then added to the said dry mixture so as to thoroughly moisten and reduce the said dry materials to a thin pasty consistency. A digester before being lined consists of a metal shell. In the complainant's described process of lining and using his composition he proceeds as follows: First, there is a lining of brick next the shell; second, there is a second lining of brick at a little distance from the first, thus leaving a space between the two linings; third, this last-mentioned space is filled with this composition in a liquid state and is allowed to harden. It is claimed that this hardened mixture formed of the ingredients named in about the proportions named is inpenetrable by the acids employed in treating the paper stock, and acid-proof, so that whatever of the acid percolates through the inner brick lining is prevented from reaching the second and outer brick lining and the shell itself. The object of the invention and composition is to prevent the acid reaching the shell. Other compositions have been used in substantially the same way for the same purpose. The invention resides in the selection and mixing of these particular ingredients in the manner mentioned and in about the proportions mentioned.

The defenses urged are noninfringement and anticipation, and public prior use and description thereof in printed publications more than two years prior to complainant's invention. Utility and efficiency is not denied.

I do not think the patentee has limited himself to the described mode of using the composition. The claims are for the composition and its use in a lining for digesters. Any one can use it elsewhere. The claims are limited in that respect. They may be so limited by the prior art as to be void for want of patentable invention, and they may be limited by that art to substantially the same proportions of the ingredients mentioned. The function of the composition made from these ingredients is to prevent the acid used in the treatment given the paper stock or paper pulp in the digester from percolating through the brick lining and reaching the metal.

Prior Art.

The German patent to Guido Baerwaldt, No. 70,477, dated January 31, 1893, after pointing out the effect of the acid on the brick lining and on the metal shell of the digester, says:

"To obviate this defect, is the object of this invention. To this end various substances are used for the lining of the digester shell, which are either combined together and applied on the shell, or applied singly one after the other, to produce a fully acid-proof and heat-resisting lining on the shell of the digester, and there are used, for this lining, cement, either alone, or mixed with crushed quartz, glass, chamotte, or the like, and litharge with glycerin."

We have in the patent in suit: (1) Litharge; (2) Portland cement; (3) quartz or crushed fire brick; (4) glycerin; (5)silicate of soda.

In the German patent: (1) Litharge; (2) cement; (3) crushed quartz, or glass or chamotte (crushed fire brick); (4) glycerin; (5) silicate of soda (water glass).

The German patent also says:

"In constructing this lining it is proceeded as follows: [after cleaning the metal] And then a layer of cement, mixed with water, alkali, or caustic potash, water glass, milk lime, or the like is applied some centimeters in thickness, wherefor either wholly pure cement may be used, or a mixture of cement and quartz sand, or powdered glass or chamotte or the like. Before this foundation layer of cement has set a grout of litharge and glycerin is rubbed hard into it (or onto it) and a layer of this litharge and glycerin composition is made to cover the cement layer to a certain thickness."

All the ingredients of the complainant's patented composition are found in the composition of this German patent. Complainant says "Portland cement," and the German patent says "cement." The combination of these ingredients in lining a digester is different. In the Hentschel patent they are all made into a grout, all mixed together and made into a plastic compound and then, in effect, applied to a brick lining which is next the metal; while in the Baerwaldt (German) patent all the materials except the litharge and glycerin are made into a plaster and plastered on the thoroughly cleaned metal, and then the litharge and glycerin are made into a grout and applied to the said plaster coat, either by rubbing it hard "onto" or hard "into" the same. If by rubbing the litharge and glycerin mixture into the plaster, before it sets, they are made to commingle, the one absorbing the other, there is little difference in the two compositions. If the litharge and glycerin mixture is simply rubbed hard onto the plaster so as to form an outer coating thereto, we do not have a mixture of all the ingredients such as is described in the complainant's patent. Another difference is noted: Complainant mixes all the ingredients, except the glycerin and silicate of soda dry, and then mixes the two latter ingredients, and then adds this mixture to the first, while Baerwaldt mixes his cement and quartz with the silicate of soda—and this is not a dry mixture—and then mixes and adds the litharge and glycerin. The German patent says nothing as to the proportions of these ingredients. "Chamotte" is the same as crushed fire brick, and "water glass is silicate of soda dissolved in water." Soluble glass is a simple silicate of potash or soda, or of both these alkalis. (Ure's Dictionary.)

Hentschel confines himself to Portland cement, while Baerwaldt uses,

so far as appears, any kind of hydraulic cement; that is, any that will set or harden under or when mixed with water. This would include Portland cement, one of the two kinds well known in Europe. It must be kept in mind, however, that this is not a patent for a process, but for a composition.

It is self-evident that in view of the prior art there was no invention in the mere selection of these various ingredients to form a mixture or composition for the purpose mentioned. Every one had the right to use them in combination for the purpose mentioned. It may have required some judgment and experience, and undoubtedly did, to combine them in proper or suitable proportions so as to have the composition resist the acid. And whether to use the one hydraulic cement or another is not taught by the Baerwaldt patent. For some purposes and in some combinations one hydraulic cement may be and often is the full equivalent of another, but this is not universally true. However, the prior art gave Portland cement as the preferred and best and most efficient for making digester linings. Patent to Stebbins, No. 528,400, dated October 30, 1894, "Digester," calls for a lining of lead next the metal shell and "a heat-absorbing and acid-resisting lining composed of Portland cement, asbestos, lampblack, sulphate of barium, litharge, and silicate of soda in suitable proportions." This patent also shows and describes the following construction: (1) Metal shell; (2) lead lining; (3) a mixture lining composed of Portland cement, asbestos, and broken, burned brick clay made acid-resisting by the addition of noncorrosive substances, such as lampblack, sulphate of barium, litharge, and silicate of soda; (4) a lining of blocks made from brick clay free from magnesia, lime, or other ingredients that would be affected by the acids, hydraulic pressed, hard burned, and porous and set in cement; (5) a further composition filling, composed preferably of a mixture of Portland cement and crushed stone or sand with a large portion of silica, to which for imparting the acid-resisting quality is added noncorrosive substance, such as lampblack, sulphate of barium, and litharge; (6) a lining of blocks, brick, or tile made from fire clay or other suitable material and combined with the filling. These linings counteract the variations in temperature. In patent to Norton, No. 480,934, dated August 16, 1892, in a digester, we have a lining composed of pulverized fire brick, seggar, stoneware, glass or glass sand, asbestos fiber, sulphate of baryta, Portland cement, and an aqueous solution of about 36° Baume of silicate of soda, all thoroughly mixed. The Curtis patent, No. 485,810, of November 8, 1892, for paper-pulp digester, shows an intermediate lining next the metal shell composed of asbestos and cement made plastic and applied to the shell, and then the cement lining composed of Portland cement and ground glass or quartz, with or without a percentage of soluble glass, the cement being carbonized by the absorption of carbonic acid gas, whereby it is converted into an artificial stone. For the same purpose in digesters, and to resist the acid, we have Portland cement, silicate of alumina, ground blue slate, silicate of soda or water glass, in Austrian patent to Kellner, dated February 5, 1891; and ground slate, ground glass, Portland cement,

and silicate of soda, or water glass, in patent to Kellner, dated July 7, 1891. He says the addition of the ground glass and the use of the weak solution of water glass (or silicate of soda), instead of the plain water, to form the cement, will be found greatly to increase the insolubility of the lining and to improve its acid-resisting qualities.

The application for this Hentschel patent was rejected October 28, 1902, on Stebbins, No. 528,400, and Mixer, No. 326,317, of September 15, 1885, "Manufacture of Artificial Stone or Marble," which shows a composition of soda alum or potash alum, 4 pounds; salt of sodium, preferably bicarbonate of sodium, 4 pounds; soluble glass, 3½ pounds; bichromate of potash, 2 pounds; ferrous sulphate, 2 pounds. The above solution to be mixed with a mixture of about four pounds each of glycerin and litharge. In his specifications Mixer said:

"The peculiar properties of the glycerin and litharge in connection with the foregoing solution"—the entire composition—"cause the stone to become extremely hard."

The examiner said:

"It is thought that the glycerin added in applicant's composition is merely for the purpose of further hardening the composition [that of Stebbins, which is the same as complainant's, except it contains no glycerin], but its use involves no invention, in view of Mixer, 326,317, September 15, 1885 (106-30-Soluble Silicates). It is held, therefore, that the addition of glycerin to Stebbins' composition would involve no invention."

There was no reference to Baerwaldt, heretofore described, who did have glycerin—that is, all of complainant's ingredients—used for the same purpose. The applicant, Hentschel, under date of December 8, 1902, called the attention of the Patent Office to some minor differences, to the fact that the Mixer patent was in a different art, and that Stebbins' did not contain any glycerin, and then said:

"In the composition employed by applicant as a digester lining, the glycerin appears to insure the expansion and contraction of the material of the composition with the material of the digester lining so as thereby to maintain an acid-tight joint."

The claims were thereupon allowed and the patent issued. I think it was allowed upon the statement as to the action of the glycerin in the composition. I do not see that the art of making artificial stone to put under a building or other structure, or in a cellar, or inside buildings, is not analogous to the art of making artificial stone with which to construct the lining of a digester. It is artificial stone whether used in one place or another.

If the attention of the Patent Office had been directed to the Baerwaldt patent, I do not think the Hentschel patent would have been granted. Lead in such linings, next the metal shell, had been in use a long time on account of its acid-resisting qualities. Lead is found in glass, and by mixing and heating finely ground litharge and olive oil, adding water to make up for evaporation, in a short time we get a plaster of lead. The American Cyclopedia (Ed. 1881) says that glycerin is largely used in the preparation of cements. (See "Glycerin.")

The evidence in this case shows that several persons in the United States, prior to the application for the patent in suit, had been using these various ingredients as a mixture or composition for lining digesters. There was a written or printed formula for their mixing, giving proportions.

The Baerwaldt patent, granted in 1893, was about nine years old when Hentschel applied for his in the United States. He is conclusively presumed to have been acquainted with the prior art, but he, as well as Gast, claims to have discovered the utility of these elements in digester linings by experiments about 1900–02. Arthur Grunwald, a witness for the complainant, says that he came to this country in 1893, about two years after John J. Gast, his uncle, another witness for complainant, came here; that he met Hentschel, the complainant, at Palmer Falls, in August, 1893, at the residence of his said uncle, John J. Gast, and that Hentschel was living with Gast. In 1900 Hentschel was running a hotel at Palmer Falls. He now lives at Muskegon, Mich., where he owns a hotel and acts as agent of the Muskegon Brewing Company. At one time he worked for the Non-Antem Company, who put in digester linings. Before coming to the United States, and about 1889—that is, when he was about 10 years of age—Grunwald visited his uncle Gast, at Rietschen, Germany, who was then foreman over the sulphite mill at that place, and there met Hentschel. Hart, himself, says that from 1890 to about 1903 he was in the employ of the Hudson River Pulp & Paper Company, and before that in the sulphite pulp and paper making business at Ritchen, O. L., Germany. Hentschel was a lead burner by trade, and for some years after coming to the United States was in the employ of the Non-Antem Digester Company and engaged more or less in repairing digester linings. It is somewhat significant that we find these Germans who had been in this business in Germany using the materials described in the Baergaldt German patent of 1893 for lining digesters and repairing the linings of digesters in the United States. I do not think either of these men, not shown to have any chemical knowledge, adopted these materials by chance, or because of any knowledge they had of their properties gained otherwise than by a practical knowledge of the art gained by working in it and what was told them by others. I am not favorably impressed with Gast as a witness. He was called as a witness by both parties to this litigation. His evidence shows a prior public use of this composition, substantially as set forth in the patent, more than two years prior to the application filed by Hentschel, unless such use can be found to have been merely experimental, and experiments of Hentschel and those working with him and under his directions. The defendant claims that instead of this having been an experimental use by Hentschel, who concededly was working for and under others, it was the use of the mixture or composition by him, Gast, and others, pursuant to the suggestions and directions of his employers and superiors, who had a printed or written formula which guided the workmen. Prior public use must be shown, not by a mere preponderance of evidence, but by clear and satisfactory evidence and beyond a reasonable doubt. If, however, the complainant would show

that this invention antedated his application for a patent, he must show that fact by a preponderance of evidence. Webster Loom Co. v. Higgins, Fed. Cas. No. 17,342, 4 Ban. & A. 88, 15 Blatch. 446, 16 Off. Gaz. 675.

There is no doubt here that this combination of these elements, and of all of them, in substantially the same proportions—that is, this composition—was made and in public use where the public could see it, and see how the various substances composing it were combined and in what proportions, long before the complainant applied for his patent. There was a mill known as the J. & J. Rogers Mill, at Ausable Forks, N. Y., where one Geo. E. Hall was superintendent. Geo. H. Chobbott was foreman of the work, James Rogers was manager, James M. Sheffield was secretary and treasurer, and Charles H. Bruce a mason who worked on the digester lining. Hall says that in 1896 or 1897 at this Rogers Mill it became necessary to enlarge it, and that a digester was put in and lined with Non-Antem lining; that he watched carefully and noticed that after it had been in use some 30 to 60 days the workmen went into the digester and pointed all joints between the bricks "with a mixture composed of litharge, quartz, or sand made into a stiff paste with glycerin"; that the old digesters lined with the Curtis and Jones lining began to show great wear, and he saw that it was necessary to reline some or all of them; that he called in Chabbott, who was in full charge of the digesters and acid plant, and they came to the conclusion that the backing of the Curtis and Jones lining was practical and would resist the acid, but that the tiling in front of it was not suitable for the intended purpose; that they concluded to put in a facing of digester brick, such as were used in the Non-Antem lining, but that in the course of investigations and experiments which they made they concluded that:

"Brick, instead of being laid in the ordinary cement mortar, laid in a mixture of litharge and sand made into a stiff paste with the glycerin would be made more serviceable than if the brick were laid in cement mortar and the joints covered with the litharge mixture. This digester was lined with the brick facing, and, instead of using a cement mortar, the litharge, sand, and glycerin were used."

He also says they lined or partially relined more than one. He also says that he left the Rogers Company and went with the International Company; that the good reports as to the results of the use of the above materials, not only in those digesters but others, led him to believe this was one of the best linings that could be made to resist the action of the acid in cooking wood in the sulphite process. Also:

"Litharge being somewhat expensive, more so than cement or sand, it struck me that some money could be saved in lining a digester if something could be substituted for a part of the litharge, and for this reason cement was suggested and instructions given to this effect, and Mr. Connors was told to try the proportion of one-third each, sand, litharge, and cement, and mix same to a stiff paste with glycerin, and if he thought necessary to add silicate of soda, but this would be left to his judgment, as I did not know what action or what effect the addition of cement to the litharge might have. To answer the question it was the experience that I had at the Rogers Mill which proved so satisfactory that led me to give instructions to line the digester at Palmer Falls as I did."

He also says in substance that silicate of soda was also used there in one of the digesters. Also:

"Q. 32. Are you able to state in what other mills of the International Paper Company digesters were lined or relined, using such compositions as you directed to be used in the Palmer Falls mill? A. Ft. Edward Mill, Piercefield Mill, Watertown Mill, Niagara Falls Mill, South Gardiner, Maine, Rumford Falls Mill, Berlin, N. H., and Bellows Falls, Vt. Q. 33. Please state what, if anything, you know about a certain letter or circular referred to in the testimony of some other witnesses herein as 'Hall's Letter of Instruction for Lining of Digesters'? A. I cannot give the date; can only say that a letter of general instructions as to the care, repairing, examination of fittings, and general instructions as to the operation of such digesters was sent out by me to the different mill superintendents; such instructions was supposed to be given to the different foremen or managers of sulphite mills by the manager or superintendent. Q. 34. Was this Hall's letter of instruction composed by you or under your direction? A. Yes."

He says he left Rogers in December, 1897. I find nothing improbable or questionable in this; on the other hand, it is probable and thoroughly corroborated. He also says the glycerin makes a bond between the litharge and cement, and combines with litharge and cement to make a paste; also that the use of silicate of soda in the combination hastens the work—makes it set or harden more quickly.

Hugh Connors, superintendent of construction of the International Paper Company, says, in substance, that he was at Palmer Falls in 1899, 1900, and 1901, in the employ of said company, which then owned the mill formerly owned by the Hudson River Pulp & Paper Company, and knew Hall, who was superintendent; that at Palmer Falls, about 1899, they cut out a Non-Antem lining and put in a cement lining—hydraulic Portland cement—

"composed of three inches of cement plastered on the shell, one course of brick laid in a composition of litharge, sand, cement, glycerin, and silicate of soda, with one inch of grout between the brick and the cement plastering."

He says he acted as foreman of the construction of this relining, and that it was done under the instructions of Hall, as he understood it; that he received the instructions from Hall or Curtis; that more than one was relined in this manner and with this composition. He says Gast gave no orders. Gast was foreman of the sulphite mills, but this work was done under authority of the construction and maintenance department. I find no ground or reason for doubting the truthfulness or accuracy of this testimony.

Connors also testified to the letter of instructions from Hall for relining, amongst other things, and says it called for one part cement, one part litharge, one part of sand or quartz, and enough glycerin to make a stiff mortar, and silicate of soda if needed. It was in the files of the office at Palmer Falls, and its existence is corroborated. The same composition was used for pointing. The same composition was used at Rumford Falls, Me., about 1900. Between the fall of 1899 and April, 1900, the witness lined a digester at Ft. Edward; between February 1, and March 1, 1902, one was lined at Niagara Falls; and after March 1st, and right along, digesters were lined at Watertown, N. Y., at Bellows Falls, Vt., South Gardiner, Me., and Austin, Pa., or pointed, all with this same mixture. There is corroboration of all this,

and in 1896 and 1897 J. J. Rogers & Co. purchased acid-proof brick, glycerin, litharge, and silicate of soda, and produced the invoices. Portland cement, sand, and crushed fire brick can be obtained almost anywhere at almost any time. Hentschel himself gives no testimony in the case, and did not verify the bill. Gast seems to act as an agent, although Grunwald, who gave testimony for the complainant verified the bill as agent of Hentschel. Gast says that Hentschel first disclosed or told him the composition named in the patent in suit in the year 1900, although he cannot tell the exact date.

The application for the Hentschel patent was filed September 16, 1902. Going back two years takes us to September 16, 1900. This mixture of litharge, Portland cement, quartz or sand, glycerin, and silicate of soda had been used in 1896, 1897, 1899, and early in 1900, quite generally in the digesters of the International Company, and in at least two of those of J. J. Rogers & Co., and this use was not under the direction of or the result of any experimentation of Hentschel or Gast. I find nothing contradictory, or suspicious, or improbable in the testimony of Hall and Connors, but I cannot say the same of Gast and Grunwald. Both show interest and a willingness to vary in order to meet the exigencies of the case. Gast was asked this very plain question by counsel for the complainant:

"Q. 6. C. R. 72. Was it possible to determine if such composition [referring to that described in the patent] would be successful in lining a digester until it was actually tested in lining a full-sized digester? A. It certainly was."

Here was a plain, distinct answer to a plain, distinct question, one free from all ambiguity, one not at all complicated. This answer was not satisfactory. The exigencies of the case demanded evidence that a long time should be required for experimental work. This question immediately followed:

"Q. 7. C. R. 72. Is there any other answer that you want to make to that question? A. Yes, but I had to wait till the chance had come, and it did come."

I fail to see why he had to wait for a chance for some other answer. I do not think the witness meant that, but in that answer gave his full explanation, which was that, while he could tell whether the mixture was a success or not before lining a full-sized digester, he had to wait in order to make a test with a full-sized digester until the opportunity came to line a full-sized digester, and that such opportunity did actually come later. But then followed a question and the answer thereto, which shows clearly how ready Gast was to adopt any self-serving suggestion and make his testimony conform thereto:

"Q. 8. C. R. 72. Do you mean to be understood that it was necessary to test it in lining a full-sized digester before you could pronounce it a success? A. Yes."

It seems to me the witness should have been left to give his own meaning and explanation and qualify his prior answers if he desired so to do. This question put the desired answer in the mouth of this willing and interested witness. Courts would be unjust to litigants and bring the administration of justice into deserved contempt should they

place reliance on such answers to such questions, and without close scrutiny allow them to determine litigations where the facts, as here, are sharply in controversy. This manner of drawing out evidence was condemned by the Supreme Court of the United States. Smith & Griggs Mfg. Co. v. Sprague, 123 U. S. 265, 8 Sup. Ct. 122, 31 L. Ed. 141, where the question was the same as here. However, it is self-evident that such linings in such digesters, like any lining therein, could not be pronounced a definite success as to durability until one had been put in complete and tried or tested by time and use. The question and answer shows how ready the witness was to adopt suggestions and comply with their demands. Gast says (C. R. p. 75, answer to Q. 21) that after two years' experiment Hentschel told him, Gast, to apply for a patent. He also says that this composition was disclosed to Geo. E. Hall and Hugh Connors at the time it was put on.

"Q. 22. Was this composition disclosed to George E. Hall and Hugh Connors at the time it was put on; that is, did they know about what the composition was composed of and how it was used when it was put on? A. Yes."

As their experiments, if they were experiments, of Gast and Hentschel, ran back into 1896 and 1897, some five years, and during that time Hall and Connors were publicly using the composition in all parts of New York where digesters were used, and in Maine, Vermont, and Pennsylvania, it seems to me that the uses of it by them were not experimental, but quite public and general. There was no injunction of secrecy. The composition, so far as there is any proof of infringement by this defendant, was as complete in 1897 as in 1902. Its utility and durability may not have been as completely demonstrated. But all the ingredients were used in composition in substantially the same proportions for the purpose of lining digesters in the same way the defendant lined and lines its digesters in many places and in four different states by Hall and Connors in the digesters of the International Company, independent of Hentschel and Gast. And there is no proof that Hentschel or Gast was experimenting or changing ingredients or the proportions of those first used. At best they were waiting to see if the composition was durable. "By the provisions of the statutes, if the invention was in public use or on sale in this country with or without the consent of the inventor more than two years before his application was filed, the grant of a patent is barred. * * * The bar of public use arises from use by the inventor himself or by others, but in either case it must be such as makes the invention accessible by some members of the public. Public use, however, does not mean a general adoption or use by the public as distinguished from a secret use. Exhibition of a design is a public use. A single instance of public use by a single individual will operate as a bar. General and continuous use is unnecessary. The bar arises whether or not the inventor knows of or consents to the public use. To constitute public use the invention must have been complete. This does not mean, however, that the machine embodying it must have been perfect, but merely that it shall have been sufficiently perfect to be practically applied to its intended purpose. * * * Use of the invention in secret, either by the inventor or his agents under an injunction of secrecy, is not a public use. But

permitting another to use the invention without any injunction of secrecy is public use, although the use may have been concealed from others. Use of an invention in public, however, in its natural and intended way, is a public use, although from its nature it is concealed from the general view of the public." 30 Cyc. 865–867, and numerous cases there cited; Andrews v. Hovey, 123 U. S. 267, 8 Sup. Ct. 101, 31 L. Ed. 160; Same v. Same, 124 U. S. 694, 701, 708, 709, 719, 8 Sup. Ct. 676, 31 L. Ed. 557; Shaw v. Cooper, 7 Pet. 292, 320, 323, 8 L. Ed. 689; Pennock v. Dialogue, 2 Pet. 1, 7, 16, 7 L. Ed. 327; Grant v. Raymond, 6 Pet. 218, 244, 248, 8 L. Ed. 376; Gill v. U. S., 160 U. S. 426, 430, 16 Sup. Ct. 322, 40 L. Ed. 480; Manning v. Cape Ann Isinglass, etc., 108 U. S. 462, 2 Sup. Ct. 860, 27 L. Ed. 793; Elizabeth v. American N. P. Co., 97 U. S. 126, 24 L. Ed. 1000; Brush v. Condit, 132 U. S. 39, 10 Sup. Ct. 1, 33 L. Ed. 251.

There was nothing fraudulent, piratical, or surreptitious in this use of this composition by Connors, Hall, and others on complainant's own theory and testimony. There was, according to Gast, an open disclosure; nothing said to the effect that a patentable discovery had been made or that experiments were being made to test the efficiency of the composition. Hentschel does not speak on the subject or explain why he did not apply for a patent sooner, or how he came to disclose his invention, or claim that he delayed for the purpose of making experiments. There is no evidence of any changes in the composition or in the proportions to bring it to a higher state of perfection. Nothing was said indicating that it was to be used by Hall or Connors in perfecting the composition or by way of experiment. In Andrews v. Hovey, 123 U. S. 267, 8 Sup. Ct. 101, 31 L. Ed. 160, reconsidered and rehearing denied, 124 U. S. 694, 8 Sup. Ct. 676, 31 L. Ed. 557, the case turned on the question whether a limited public use by a person other than the patentee, more than two years prior to the application for the patent—driven well—to whom the inventor and subsequent patentee disclosed his invention or discovery, invalidated the patent. In Andrews v. Hovey, 124 U. S. 694, 708, 709, 8 Sup. Ct. 676, 31 L. Ed. 557, on application for rehearing, it appears that the patentee, Green, more than two years before he applied for his patent, gave Mudge and Saggett information of his invention. Saggett put down four wells, and Mudge put down five. They were not experimental wells. The court, Mr. Justice Blatchford giving the opinion, said, referring to the decision of the case in 123 U. S. 267, 8 Sup. Ct. 101, 31 L. Ed. 160:

"Our decision was that the patent was invalid, because the invention covered by it had been in public use more than two years before Green applied for the patent, without reference to the question whether he consented to such use or not."

The court quoted the section of Act March 3, 1839, c. 88, 5 Stat. 353, in question, viz., section 7 of that act, and said:

"The question involved arises upon the second clause of section 7 of the act of 1839," etc.

The second clause reads as follows:

"And no patent shall be held to be invalid by reason of such purchase, sale, or use prior to the application for a patent as aforesaid, except on proof of

abandonment of such invention to the public; or that such purchase, sale, or prior use has been for more than two years prior to such application for a patent."

The court said that the first clause of the section relates in no manner to the validity of the patent, and that "the second clause relates wholly to the validity of the patent." The court then reviewed all the cases bearing on the construction and meaning of the section, especially the second clause, stated the facts as to the use of the invention by Mudge and Saggett as above referred to, and said:

"But there is nothing that indicates in regard to these wells fraud, or piracy, or surreptitiousness in the sense of the decision in Kendall v. Winsor," 21 How. 322, 16 L. Ed. 165.

The court then said:

"Of course, Green, from the moment of the invention, had an inchoate property therein, which he could complete by taking a patent. The first clause of the seventh section of the act of 1839 gave to the persons for whom those wells were constructed a right to use them without the consent of Green, and the second clause of that section had the effect to make Green's patent invalid because of the use of the invention by those persons more than two years before he applied for his patent."

The court then goes on to review a large number of cases and says, page 715 of 124 U. S., page 684 of 8 Sup. Ct. (31 L. Ed. 557):

"The review we have given of the cases now cited on behalf of the appellants shows no adjudication by this court on the question involved, and a direct adjudication as to the effect of the second clause of the seventh section of the act of 1839, in accordance with that contended for by the appellants in only four cases in Circuit Courts (not including Andrews v. Carman, Fed. Cas. No. 371). To the contrary effect is the case of Egbert v. Lippmann, 15 Blatchf. 295, Fed. Cas. No. 4,306, commented on in the former opinion, 123 U. S. 270, 271, 8 Sup. Ct. 101, 31 L. Ed. 160."

Then, at pages 718 and 719 of 124 U. S., pages 685 and 686 of 8 Sup. Ct. (31 L. Ed. 557), on the question of the public use being with the consent and allowance of the inventor, the court says:

"The most plausible argument presented on the part of the appellants is, that, under sections 6, 7, and 15, Act July 4, 1836, c. 357, 5 Stat. 119, 123, a patent was invalid if the thing invented had been in public use or on sale, with the consent and allowance of the inventor, prior to his application for the patent; that section 7 of the act of 1839 was intended only to limit the effect on the validity of the patent of the acquisition of single specimens of the patented invention; that the interests of purchasers or constructors of such specific articles were the sole objects of that section; that the second clause of the section was intended only to provide that the patentee should hold his right against the general public unless there was proof of abandonment by him, or unless the purchase, sale, or prior use by or to individuals who had acquired such specific articles had been for more than two years prior to the application for the patent; that in this respect alone were the provisions of the act of 1836 intended to be modified; and that a defendant, in order to show the invalidity of a patent, under section 7 of the act of 1839, must show that he claims exemption from liability to the patentee because he purchased or constructed a specific article covered by the patent prior to the application therefor, and must show that the invention was abandoned, or that the purchase, sale, or prior use, or construction of the specific article occurred more than two years before the application for the patent, and with the consent and allowance of the inventor."

The opinion concludes:

"The second clause of the seventh section seems to us to clearly intend that, where the purchase, sale, or prior use referred to in it has been for more than two years prior to the application, the patent shall be held to be invalid, without regard to the consent or allowance of the inventor. Otherwise the statute cannot be given its full effect and meaning."

When the case was first before the court, Andrews v. Hovey, 123 U. S. 267, 8 Sup. Ct. 101, 31 L. Ed. 160, the court thoroughly discussed the same question with the same result, and also section 4886, Rev. St. (U. S. Comp. St. 1901, p. 3382), which embodies section 24, Act July 8, 1870, c. 230, 16 Stat. 201, which act took the place of the former law, and said:

"The language of section 24 of the act of 1870, now section 4886 of the Revised Statutes, is to the same effect, and carries out the policy inaugurated by the act of 1839. * * * In view of the fact that * * *, and of the further fact that section 24 of the act of 1870 re-enacts the second part of section 7 of the act of 1839, and does not contain a requirement that the public use or sale for more than two years prior to the application shall have been with the consent or allowance of the patentee in order to invalidate the patent, it may fairly be said that it was the view of Congress that section 7 of the act of 1839 did not require, as an element, the knowledge, consent or allowance of the applicant."

In Gill v. United States, 160 U. S., at page 430, 16 Sup. Ct., at page 324 (40 L. Ed. 480), the court quotes and approves Shaw v. Cooper, 7 Pet. 292, 323, 8 L. Ed. 689, where it was held:

"Whatever may be the intention of the inventor, if he suffers his invention to go into public use, through any means whatsoever, without the immediate assertion of his right, he is not entitled to a patent."

In Manning v. Cape Ann Isinglass & Glue Co., 108 U. S. 462, 465, 2 Sup. Ct. 860, 863, 27 L. Ed. 793, the court calls attention to the change in the law made by the statute of 1870 (16 Stat. 201, § 24), now section 4886, Rev. St., and said:

"It is the policy of the patent laws to forbid the issue of a patent for an invention which has been in public use before the application therefor. The statute of 1836, 5 Stat. 117, § 6, did not allow the issue of a patent when the invention had been in public use or on sale for any period, however short, with the consent or allowance of the inventor; and the statute of 1870—16 Stat. 201, § 24 (Rev. St. § 4886)—does not allow the issue, when the invention had been in public use for more than two years prior to the application, either with or without the consent or allowance of the inventor."

In Elizabeth v. Pavement Co., 97 U. S. 126, 135, 136, 24 L. Ed. 1000, the court, per Mr. Justice Bradley, discussed what constitutes public use that will defeat a patent. He said, in substance, that there are cases where long trial is necessary; and (page 135 of 97 U. S., 24 L. Ed. 1000):

"So long as he does not voluntarily allow others to make it and use it, and so long as it is not on sale for general use, he keeps the invention under his own control, and does not lose his title to a patent. * * * But if the inventor allows his machine to be used by other persons generally, * * * then it will be in public use * * * within the meaning of the law. * * * Had the city of Boston or other parties used the invention by laying down the pavement in other streets or places, with Nicholson's consent and

allowance, then, indeed, the invention would have been in public use, within the meaning of the law."

This was in 1877, while Andrews v. Hovey was in 1887, and after the limitations now a part of the Revised Statutes.

In the case now under consideration, conceding that Hentschel invented this composition—and the evidence shows he did not—it was completed, as fully completed as ever it was, in 1896 or 1897, and in actual public use by others, and he made no objection and did not apply for a patent until September, 1902. When this prior public use was shown, the burden was placed on complainant to show by full, complete, substantial, and convincing evidence that the delay in applying for a patent was for the purpose of perfecting an incomplete invention by tests and experiments. Smith & Griggs Mfg. Co. v. Sprague, 123 U. S. 249, 264, 8 Sup. Ct. 122, 31 L. Ed. 144; Clark Thread Co. v. Willimantic Linen Co., 140 U. S. 481, 492, 11 Sup. Ct. 846, 35 L. Ed. 521. This the complainant has wholly failed to do. In Smith & Griggs v. Sprague, supra, the court said:

"In considering the evidence as to the alleged prior use for more than two years of an invention, which, if established, will have the effect of invalidating the patent, and where the defense is met only by the allegation that the use was not a public use in the sense of the statute, because it was for the purpose of perfecting an incomplete invention by tests and experiments, the proof on the part of the patentee, the period covered by the use having been clearly established, should be full, unequivocal, and convincing."

And in Clark Thread Co. v. Willimantic Co., the court said:

"We conclude, therefore, that there is no proof on which reliance can be placed that Conant made his alleged invention before the publication of Weild's patent in England. After Weilds' patent was introduced into the case, showing with certainty the date of its publication, and such date anterior to the issue of Conant's patent, it was incumbent on the plaintiffs, in rebuttal, to show, if not with equal certainty, yet to the satisfaction of the court, that Conant's invention preceded that date. St. Paul Plow Works v. Starling, 140 U. S. 184, 11 Sup. Ct. 803, 35 L. Ed. 404, decided at this term."

Gast, when called by complainant in rebuttal, said he came from Germany in 1890, where he had been foreman in a sulphite and paper mill, and went to work for the Hudson River Pulp & Paper Company, at Palmer Falls, N. Y. That all digesters in Germany of which he had any knowledge were lined with lead only; that when he arrived at Palmer Falls the mill was not complete, and the digesters installed were lined with lead, bricks laid in cement, and that after running about six weeks the joints were pointed with litharge mixed with glycerin. That the digesters were constantly out of repair, leaking, and being repaired. This was the condition according to his testimony down to 1899 or 1900, when he says that Hentschel gave him the idea of his mixture mentioned in his patent.

"Q. 46. Did you experiment with different compositions to remedy these troubles? A. No, until Mr. Hentschel gave me that idea of his mixture mentioned in the patent. Q. 47. Can you state about how long it was before you commenced to test the composition in digester No. 2 that Mr. Hentschel first gave you the idea—that is, first told you—what his composition was? A. I can't remember the exact date, but it must be 1899 or in the very first days of 1900."

It appears, therefore, that Hentschel, giving credit to this testimony, knew of his composition prior to 1899 or early in 1900, for he then told Gast what it was. There is no evidence of any change in that composition. August 11, 1898, digester No. 4 had been relined, for it was started on that day. Digester No. 5 had been relined and started about the middle of June, 1898. Digester No. 3 was down for relining April 3, 1899, and ready and started August 14, 1899. These were at Palmer Falls. In addition to the evidence of Hall and Connors, James Rogers of the Rogers Mills testifies to the use of litharge, glycerin, and cement mixed together, and silicate of soda was used in mixing the mortar. The date of the use of the composition at Rumford Falls is fixed as March, 1901, by memoranda made on a door at the time and produced and put in evidence. It can be said that there is no proof that in these earlier uses of these materials they were mixed in the manner and in the proportions indicated in the patent in suit. This I think is true, but all the materials or their equivalents were used and mixed together for lining digesters, laying the brick and pointing seams, etc. There is no evidence in this case rising to the dignity of proof that the defendant has used the composition described in the complainant's patent. There is proof that it used a mixture for laying brick which on analysis was found to contain the materials of complainant's composition, except one, but not in his proportions. It seems from the evidence of Mallery that defendants' digester was lined with a Non-Antem lining, lead next the shell, and then brick laid up in some kind of cement. This brick was taken out, but the lead left. Then defendant put a coat of plaster composed of sand, cement, silicate of soda, and water on the old lead to the depth of about one inch and a half. A wall of brick was then laid up about three-fourths of an inch from the coat of plaster, and the space between the plastering and the brick wall was filled with a grout of sand, cement, silicate of soda, and water. This grout hardens like stone, forms an artificial stone, as is fully shown by the prior art, under the influence of the silicate of soda. There is no infringement in the use of these brick, or of this plaster or this grout. But the brick were laid up in a composition handed in to him and which on analysis by Prof. Ellery was found to contain the following:

Lead oxide or litharge, 35.15 per cent. (patent calls for 30 per cent.); glycerin, 17.19 per cent. (patent calls for 32 per cent.).

He also found: Iron and aluminum oxide, 3.05 per cent.; silica, 20.74 per cent.; lime carbonate, 21.17 per cent.; magnesia, .127 per cent.; sulphuric anhydride, .339 per cent.; alkali, .967 per cent.; water, 1.147 per cent.

This witness says that the ingredients usually found in Portland cement are iron, aluminum oxide, silica, lime carbonate, magnesia, sulphuric anhydride, and alkali. As the Portland cement uses up everything he found except the lead oxide, glycerin, and water, and as water is not silicate of soda, I do not find the slightest warrant in this analysis for a conclusion that the composition used by the defendant for laying brick ever contained any silicate of soda whatever.

Portland cements are now made in many varieties and of many differ-

ent ingredients, and where the same ingredients are used by different makers the quantities vary greatly, as various published works tell us and as the witness admits. See 4 Amercian Cyclopedia, "Cements." There is an absence of proof that defendant in making its mortar for laying brick used all the materials or ingredients of complainant's composition, and, clearly, the proof shows that if used they were not used in substantially the proportions named in the patent. The witness failed to point out how or why he concluded that silicate of soda was used in mixing defendants' composition used as mortar in laying the brick. Had he made a chemical analysis of Portland cement, he would have found everything he did find except lead oxide and glycerin. Lead oxide and glycerin do not show the presence of silicate of soda.

Infringement must be proved. It cannot be surmised. It is not enough to produce testimony sufficient to set the court guessing and speculating and surmising.

To establish infringement, it was necessary for the complainant to prove that defendant used a mixture composed of litharge, Portland cement, quartz, or crushed fire brick, glycerin, and silicate of soda. These materials or equivalent materials must have gone into the mixture or composition. Defendant did not infringe by using a composition containing Portland cement and the other materials named, leaving out silicate of soda, on the theory that, as Portland cement contains magnesia, carbonate, and silicate, therefore such substitute composition contains the chemical equivalents of the patented composition. This patent makes Portland cement an essential element, and quartz or sand, its equivalent, or crushed fire brick, an essential element. It also makes silicate of soda an essential element. The different materials named are to be combined, and if any one of them is left out in making the composition there is no infringement unless an equivalent material is substituted. It is not enough, with these claims as they are, that a larger quantity of Portland cement is just as good and better than the sand or quartz, or that much less cement and more sand will answer, or that silicate of soda may be omitted for the reason that Portland cement on analysis shows the same chemical ingredients. As a whole they are not equivalents. As to some of their chemical elements they are. Hentschel had the right to name the different materials that should make up his composition, and he has. Take the materials making up the complainant's composition and mix them together in the manner indicated, allow them to harden, and then analyze them. Is there proof here as to what would or should be found on making the analysis? Are we to assume that we would find the same chemical elements in the same quantities as would be found on making an analysis of the original materials or ingredients? Analyze a mixture of Portland cement and quartz and litharge and glycerin, would we find anything different from what was found? Would we find anything lacking that Ellery found? He could have named the chemical ingredients and their proportions that should make up his composition, but he did not. It is true that the witness Ellery says that the chemical results of mixing either quartz,

sand, or crushed fire brick with litharge, glycerin, silicate of soda, and Portland cement would be exactly the same (which is true except in degree), but that the chemical analysis would not be the same. This every one ought to know. There is nothing to show that silicate of soda was used in mixing defendants' mortar with which it laid the brick in its digester. William Warwick, who did the mixing of the mortar in question, and who alone knew and knows its ingredients, was not called as a witness. He was not shown to be in the employ of the defendants. No burden of proof was cast on defendants to show the composition used to lay the brick, as the complainant failed to show even a probable use by defendants of the materials of the patent in suit. It is true that Gast said the materials used at the defendants' mill was litharge, Portland cement, quartz or brick, glycerin, and silicate of soda. But he says his knowledge was from seeing, feeling, and tasting. He did not see the materials separately.

The complainant's brief contains this statement:

"It is true that Hentschel's composition was used in one digester more than two years prior to his application for a patent, but, as has already been shown, this was an experimental use; that in order to test it to see whether or not the composition would stand the great and severe strain to which it would be subjected it was necessary to actually line a digester with it and give it a trial. This was done in digester No. 4 at the Palmer Falls Mill in the summer of 1900, and the digester was started up July 27, 1900. The entire testimony in reference to it shows that it was an experimental use only. Mr. Gast went to the officers of the company and obtained permission to use it in the one digester."

It seems strange that Hentschel, the alleged inventor, took no part in this experimentation, if it was such. He made no requests to make experiments. He made no request that his discovery be kept secret. He communicated it to Gast, and, as we have seen, to Hall and Connors, and all commenced its use at about this time on complainant's own showing, but Hall and others did not confine their use of it to experiments. The complainant has not sustained the burden of showing that this conceded use of the composition in the early summer of 1900, more than two years prior to the filing of the application for a patent, was an experimental use. That it was experimental was suggested to Gast in substantially every question put to him.

"Q. 3. C. R. 71. Can you state when you first made experiments for Mr. Hentschel, or under his directions, of compositions containing the ingredients named in the patent? * * * Q. 4. Please describe such experiments? * * * Q. 9. When was the first experimental digester lined at Palmer Falls with the Hentschel composition? * * * Q. 16. Was the composition used in this digester entirely as an experiment to test the composition and see if it was successful or not?" etc.

In answer to question 4 (C. R. 72) he said:

"As soon as he told me his idea, which I found and thought it must be a success, I commenced to patch up, where there was a chance, an old Non-Antem digester lining which was very poor at that time, wherever I could, and I found that it was very durable. Q. 5. When was that? A. It was in 1900, or previous to that."

I do not find in all the evidence a suggestion that Hentschel and Gast, or that Hentschel and any other person, ever discussed the subject of

applying for a patent until about two years from July, 1900, when Gast says Hentschel told him to apply for one.

"Q. 21. Page 75, C. R. How long was it in use before either you or Mr. Hentschel to your knowledge pronounced it a success? A. After examining the same quite often during that time until about two years. Mr. Hentschel told me to apply for a patent."

No caveat was filed. Gast says that as soon as Hentschel told him his idea he commenced its use and "found it very durable." This was in 1900 or before that, and, as we have seen, later he puts the time in December, 1899, or the spring of 1900. That spring, such was their satisfaction that an entire digester was shut down May 25th, lined and completed and put to work on July 27th, and it was two years and two months after that that the patent was applied for. In the meantime Hall and others were using this very composition in lining digesters. If Hentschel and Gast were waiting, it was not with any idea of perfecting the composition. It had not shown any defects.

I think the following cases decisive that this was not an allowable delay for mere experiment or to perfect the invention: Root v. Third Avenue Railroad, 146 U. S. 210, 215, 216, 223, 224, 13 Sup. Ct. 190, 36 L. Ed. 946; Worley v. Tobacco Co., 104 U. S. 340, 343, 344, 26 L. Ed. 821; Hall v. MacNeale, 107 U. S. 90, 97, 2 Sup. Ct. 73, 27 L. Ed. 367; Egbert v. Lippman, 104 U. S. 333, 26 L. Ed. 755; Brush v. Condit, 132 U. S. 39, 48, 49, 10 Sup. Ct. 1, 33 L. Ed. 251; Eastman v. Mayor, etc., of City of N. Y. (C. C. A., 2d Circuit) 134 Fed. 844, 857, 858, 859, 69 C. C. A. 628.

In Eastman v. Mayor, etc., 134 Fed. 858, 859, 69 C. C. A. 642, 643, the court, per Coxe, C. J., laid down certain rules or conclusions, viz.:

"First. An inventor has a reasonable time in which to experiment for the purpose of perfecting the invention and demonstrating its utility.

"Second. The time thus spent, if in good faith, is no part of the two-year statute of limitations.

"Third. The experiments must be made in perfecting the invention as described and shown.

"Fourth. Experiments made in testing parts of the machine not covered by the invention will not have the effect of extending the two-year period.

"Fifth. As soon as the invention is completed, viz., 'in such a condition that the inventor can apply for a patent for it,' the two-year period begins to run, and the application must be made within this period.

"Sixth. The fact that the invention has been improved since its original embodiment does not demonstrate that it was then embryonic or incomplete.

"Seventh. When a clear case of prior public use is established, the burden is on the inventor to prove by a convincing proof that the use was experimental."

This composition was in a condition for patenting early in 1900. It was then demonstrated that it was acid-proof and durable. It had been used and tested a long time in repairing and relining digesters, and always with success. It had been pronounced a success by Hall, and he had directed its use in other digesters. July 27, 1900, as a result of trials and tests, a digester completely lined with it was put to work, but this patent was not applied for until September 16, 1902, two years and about two months thereafter, and during that time there was no sign of weakness, no giving way, no leakage, no defect, no change of

the composition. Two years' trial in a digester fully lined with it was not necessary. Hentschel could not prolong the limitation by arbitrarily saying that two years was necessary to demonstrate the durability of the composition. That could be determined, and had been determined, by the use made of it long before, commencing in 1899 or early in 1900. Apply rule 5 laid down by the learned court in the Eastman Case and the complainant's case falls. As was said by Judge Coxe in the Eastman Case, Hentschel "was not justified in delaying his application until the invention had reached a stage where improvements were no longer possible." In that case the court held:

"The use of an unpatented invention upon a machine in actual service, continued for years without any change therein, although it may have been experimental in the beginning, becomes a public use from the time the success of the invention is demonstrated, and a patent therefor issued on an application filed more than two years after such time is invalid."

Here, the use of the fully lined digester completed and put to work July 27, 1900, was not experimental in the beginning, for it was so lined as the result of the prior use of the composition in relining digesters out of repair and the demonstrated success attending it. In the Eastman Case the application was filed May 13, 1864, and Judge Coxe said (page 846 of 134 Fed., page 630 of 69 C. C. A.), "So that a well-established case of public use prior to May 13, 1862, will invalidate the patent." And at page 857 of 134 Fed., at page 641 of 69 C. C. A., it was found that the patent was perfected in January, 1862, for the reason Knibs said, "As soon as I saw the successful working of it on the J. C. Osgood I applied to Mr. Norton as to what course to pursue." Can there be any question here that Hentschel was in a position to apply for a patent on this composition actually tested for months and proved a success even before it was put in the digester in May, 1900? In Hall v. MacNeale, the court said (page 97 of 107 U. S., page 79 of 2 Sup. Ct. [27 L. Ed. 367]):

"The invention was complete in those safes. It was capable of producing the results sought to be accomplished, though not as thoroughly as with the use of welded steel and iron plates."

In this case the composition had been proved to be capable of performing its function, resisting the acid in a digester in actual operation. Gast says he was sure it was a success and found it to be a success even before a digester was wholly lined with it. In Worley v. Tobacco Co., at page 343 of 104 U. S., 26 L. Ed. 821, the court said:

"In 1871 his invention was complete, and in his opinion successful, and was adhered to from that date without change."

There, as here, there were further experiments.

In Root v. Third Avenue Railroad, supra, the invention was for the construction of cable railways. The statement of the case contains the following:

"In explanation of his delay in applying for the patent, he testified that, before he began the construction of the road, one of the projectors expressed a doubt in regard to the durability of such a structure, and a fear that the jar of street traffic, as well as that of the cars, would in time loosen the ribs and separate them from the surrounding concrete, and the structure

would thus fail; that doubts were expressed also by others; that, while the plaintiff believed that there was more than an even chance of its proving a durable and desirable structure, he still had some doubt in his own mind, which was somewhat increased by the doubts expressed to him by others, in whom he had confidence; that, as causes which would contribute to the destruction of the road, * * * and that there was no way of determining these matters but by a trial in a public street through a long period of time.

"He was asked whether his own doubts as to the durability of the structure were present at any time after the road was in operation, and if so, when, and by what they were caused. He answered 'Yes,' and said that during the spring of 1879 the road was extended from Fillmore street to Central avenue by a wooden structure not nearly so durable or costly as the original road; that in preparing for the extension he had occasion to dig out and around, so as to expose some of the old structure; that he saw therein some indication of the loosening of the yokes in the concrete; and that he had some little fear at that time that some trouble might arise in that respect. He further testified that the reason he did not apply for the patent within two years from the time when he first put the structure into use was that, if it proved weak or undesirable, he did not want any patent; and he did not feel certain enough of that fact until the year 1881.

"But it did not appear that he expressed his doubts to the projectors of the road, either before its construction was commenced, or during its construction, or while he remained its superintendent after it was completed; or that he communicated to any one what he noticed during the spring of 1879, or that he entertained any fear arising therefrom."

The court, in examining and commenting on the Nicholson Paving Case, said:

"This court held that, if the invention was in public use or on sale prior to two years before the application for the patent, that would be conclusive evidence of abandonment and the patent would be void; but that the use of an invention by the inventor, or by any other person under his direction, by way of experiment and in order to bring the invention to perfection, had never been regarded as a public use of it. * * * So long as he does not voluntarily allow others to make it and use it, and so long as it is not on sale for general use, he keeps the invention under his own control, and does not lose his title to a patent. * * * But if the inventor allows his machine to be used by other persons generally, either with or without compensation, or if it is with his consent put on sale for such use, then it will be in public use and on public sale within the meaning of the law. * * * The proprietors of the road alone used the invention, and used it at Nicholson's request, by way of experiment. The only way in which they could use it was by allowing the public to pass over the pavement. Had the city of Boston, or other parties, used the invention, by laying down the pavement in other streets and places, with Nicholson's consent and allowance, then, indeed, the invention itself would have been in public use, within the meaning of the law; but this was not the case."

Then turning to the case under consideration, the court said:

"It cannot be fairly said from the proofs that the plaintiff was engaged in good faith, from the time the road was put into operation, in testing the working of the structure he afterwards patented. He made no experiments with a view to alterations; and we are of opinion, on the evidence, that sufficient time elapsed to test the durability of the structure, and still permit him to apply for his patent within the two years. He did nothing and said nothing which indicated that he was keeping the invention under his own control."

Applying all this to the case in hand, and we find that Hentschel made his invention known to others, Hall and Connors, and imposed no secrecy. They went to using it, as did Gast, and various digesters were pointed up with it and in part relined. Results were satisfactory to all.

Hall and Connors used it at other and distant points more than two years before the patent was applied for in lining digesters. They were doing it for the company they represented, and not for or under the direction of Hentschel. Hentschel allowed them to do this. He did not file a caveat. He made no experiments with a view to changes. Hentschel said nothing and did nothing to indicate that he was keeping his invention under his own control. This court has examined this case in all its aspects, and given careful consideration to the arguments of complainant's counsel, reading all the evidence. The evidence has failed to satisfy me that Hentschel had anything to do with the invention of the composition. But, conceding that he did, and would have had a valid patent had he applied in time, on the evidence of complainant, and especially on the whole evidence, I am convinced beyond all doubt that the composition was in public use and permitted by Hentschel to go into public use more than two years prior to the filing of the application for a patent, and that the patent is void. But conceding its validity, the proof is not sufficient to establish infringement.

There will be a decree dismissing the bill, with costs.

JACOBS MFG. CO. v. T. [illegible]MOND MFG. CO.

(Circuit Court, E. D. New York. March 27, 1909.)

1. PATENTS (§ 26*)—INVENTION—COMBINATION OF OLD ELEMENTS.

The combination of a well-known and unpatentable idea with a particular form of device described in an expired patent cannot be made the basis for a valid patent for a new term when no new use or device is shown, except in that the particular combination has never been made between exactly the same elements before, and when the same use has been shown in connection with equivalent devices differing only in immaterial respects.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 27–30; Dec. Dig. § 26.*]

2. PATENTS (§ 328*)—INVENTION—DRILL-CHUCK.

The Jacobs patent, No. 709,014, for a drill-chuck having means for opening and closing the tool-holding jaws with a key, construed, and *held* void for lack of invention in view of the prior art. Claim 3 also *held* not infringed if conceded validity.

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

In Equity.

Redding, Kiddle & Greeley (William B. Greeley and William A. Redding, of counsel), for complainant.

Briesen & Knauth (Arthur v. Briesen and Hans v. Briesen, of counsel), for defendant.

CHATFIELD, District Judge. The present action arises on a patent obtained by one Arthur I. Jacobs for the use of a key with cogs or teeth to turn the sleeve or roughened band which is commonly and familiarly used in opening and closing the jaws of a chuck; that

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

is, an attachment to hold a drill at the extremity of the shaft of a lathe or other boring tool.

The Jacobs patent, on which the present claim of infringement is based, No. 709,014, was granted upon the 16th day of September, 1902. The patent specifies the use of the device at considerable length, and states that the object of the invention is to construct a strong chuck of the nature described, "with simple, cheap, and convenient means for opening and closing the tool-holding jaws." The specifications further show that the particular "simple, cheap, and convenient means" for which Jacobs desired a patent was, as has been indicated, a key, with gear-teeth, the key to be inserted in a socket, or to fit over a pin in the body of the chuck.

The claims of the patent are three in number. In claims 1 and 2 the form of the chuck itself, and also the use of a key of the above description, are specified, but no mention is made of an opening to be used as a key-seat, nor is there any description of the way in which the key is to be located, so that power may be applied by the gear-teeth. In claim 3 the description of the chuck and the use of the key is substantially similar to that in claims 1 and 2, but the chuck is said to have teeth upon the edge of the sleeve, "and a key-recess in the body back of the sleeve adapted to receive a toothed key, substantially as specified."

It is apparent from an examination of the specifications that "substantially as specified" was intended to refer to an opening in the body of the chuck itself. The drawings, particularly Fig. 2, indicate both the socket for the reception of this key, and the location of that socket with reference to the sleeve upon which the teeth to engage with those of the key are cut. The words, "in the body back of the sleeve," in claim 3, are interpreted by the solicitors for the complainant to mean inside of, that is, within or nearer the axis, and the key-seat, under that interpretation, could be at any desirable place throughout the entire portion of the chuck referred to as "the body." If claim 3 is to be construed thus broadly, it makes no difference whether claims 1 and 2 are distinguishable from claim 3; but if claim 3 is to be restricted to a key-recess back of—that is, toward the spindle end of—the chuck as shown by the drawings, then the meaning of claims 1 and 2 becomes more important, and will be discussed later.

The file-wrapper of the patent in question shows that all the claims were modified upon objection by the examiners in the Patent Office, and that, as finally allowed, no substantial difference exists between claims 1, 2, and 3, unless it be the location and shape of the key-seat above mentioned, for in all of them the bearing for the key must be understood, unless the claim should be open to the objection of being impracticable. The complainant contends that the necessity for a base or aperture for the insertion of the key is so apparent, and the meaning is so plain from the specifications of the patent, that claims 1 and 2 should be held to cover the use of a key such as that described, inserted at any place in the chuck convenient for allowing the teeth to engage with those on the sleeve. Wellman v. Midland Steel Co. (C. C.) 106 Fed. 221. The defendant contends that claims 1 and 2 are no broader than claim 3, if limited by the specifications, under the

doctrine of Snow v. Lake Shore & Michigan Southern Railway Co., 121 U. S. 617, 7 Sup. Ct. 1343, 30 L. Ed. 1004, and also claims that, unless a key-seat or location for the key is described, claims 1 and 2 are void for indefiniteness. This point becomes important when it is noted that in no chuck ever manufactured or placed upon the market has the key been applied back of, or on the spindle side of, the sleeve in question. To do this would necessitate the turning of the key to the left to tighten the jaws, unless, as the complainant ingeniously suggests, the sleeve should be fitted with a left-hand screw. But it is apparent that to construct a chuck by which the jaws would be tightened with a right-hand turning of the key, while a similar turning of the sleeve would loosen the jaws, would be an inconvenient and hardly advantageous or salable style of construction. The practicable method, and that which has actually been employed, is to locate the seat for the key below the sleeve—that is, toward the jaw-end of the chuck—and to have the key engage with teeth upon the lower side of the sleeve, thus securing a right-hand screw motion to all of the parts of the chuck.

Another extremely important point in the consideration of this case is that the idea of a chuck having jaws operating in recesses, which jaws move in and out by a thread, under the influence of some outward force, is old and has been the basis of many patents. Likewise, for years, upon small machines, and with small drills, the application of a sleeve, in which is cut the thread which shall move the jaws of the chuck in or out, is not only well known, but was made the basis of a valid patent, issued on February 8, 1876, under No. 173,152, to Thomas R. Almond, the assignor of the defendant herein. The Almond chuck, so called, was extremely successful, and for many years had the largest sale of any chuck in the market. Certain other chucks, such as the Cushman, the Whiton, and the Pratt & Whitney, were sold for substantially the same use, and all of the chucks in use while the Almond chuck predominated the market were operated by the roughened band or sleeve, to be turned with the hand, assisted by a wrench or spanner consisting of a piece of metal, a portion of which followed the arc of the circumference of the sleeve and contained upon its inner side a peg fitting into a hole in the surface of the sleeve. The object of the spanner was to tighten the sleeve, and thus the jaws of the chuck, to an extent beyond that possible by applying one's fingers directly to the sleeve itself. A moment's thought will show the point (agreed upon by the experts for both the complainant and the defendant) in which the use of a spanner proved to be objectionable, and which was actually removed, and the quickness and ease of operation (that is, in inserting and removing a drill or reamer) was benefited by the adoption of the toothed key. The spanner applies the force in the direction in which the sleeve is turned, and the use of the left hand is required in holding the chuck or the drill, while force is being applied to the sleeve by means of the spanner, in order to prevent the turning of the entire chuck. In addition, if the jaws of the chuck be loosened, under the old system, the drill or other tool, if the arm carrying the chuck were located in a vertical position, would fall out unless retained in place with the hand, and when both hands were oc-

cupied in working the spanner the drill would be much more apt to fall than if the left hand were free and the right hand alone needed to turn the key, which by its insertion in the body of the chuck itself would not only cause no tendency to turn the chuck, but would, of itself, hold the chuck against the turning of the sleeve. The experts, as has been said, for both parties to this suit agree in pointing out these matters of improvement and advantage in the method set forth in the Jacobs patent.

Further testimony has been introduced to show that the sale of the Jacobs appliances, which are manufactured under an assignment by Jacobs to the complainant corporation, has been large, has increased steadily, and the Jacobs chuck has supplanted, to a large extent, the Almond chuck of the spanner design. Recently the Almond chuck has been placed upon the market, with a geared or toothed key, instead of a spanner, and the present form of the Almond chuck is substantially like that put upon the market by the complainant corporation, with the exception that in the Almond chuck the jaw recesses are carried farther back and are left open, while in the Jacobs chuck the sleeve covers the upper end of the jaw recesses and the jaws work entirely within the body of the chuck.

It is claimed by the defendant that the open method of construction is advantageous because of the ease with which foreign particles may be removed, while the complainants contend that their method of construction is more desirable commercially, for the reason that dirt will be kept out and wear saved, if the upper or back end of the jaw recesses be entirely covered by the sleeve.

This is a question of competition and desirability of construction, rather than anything bearing upon the validity of the patents, as the location of these jaw recesses has nothing to do with the construction or operation of the chuck itself, nor of the use of a key for turning the sleeve. We must, therefore, determine three questions: (1) Is the present method of construction used by the defendant an infringement of the complainant's patent, that patent being valid? (2) Has the complainant specified and included in its claims a patentable combination, or has it merely attempted to control an old device, covered by previous patents, when used in other combinations; i. e., did the use of a key call for merely mechanical application, and not for the use of invention, if applied to the well-known Almond chuck? (3) If the application were patentable, and called for the exercise of invention, has the complainant's assignor obtained a patent limited to the undesirable device calling for the use of a key back of the sleeve as described in the third claim of the letters patent?

As to the first point, much discussion is unnecessary. The patent upon the Almond chuck had expired at the time Jacobs filed his application; there being at that time upon the market both the Almond chuck and the Cushman chuck, operating upon the same principle and with the same arrangement of parts. It will be assumed that Jacobs, in patenting a key for operating a chuck of exactly the same method of construction and arrangement, had in mind a chuck of the Almond type or form; and, in fact, Jacobs' letters patent state that his invention has for its object not the manufacture of the chuck,

but the making of a chuck of that nature with a certain method for opening and closing the tool-holding jaws. The Jacobs patent exactly describes the Almond chuck, in so far as the chuck itself is concerned, and the only difference is in the placing of teeth upon the edge of the sleeve, and the arrangement for using a key to engage those teeth. The hole for the spanner is shown upon a model chuck introduced in evidence, even where a key is also provided for. It may be assumed, therefore, that the Jacobs patent was an attempt to apply the old device of a key to an old and well-known form of chuck, for the purpose of controlling the manufacture of chucks fitted with this particular key device, and that it was not Jacobs' intention to attempt the repatenting of the chuck itself, on which the original patent had already expired.

It has been assumed throughout the case, and there is no ground for questioning the proposition, that the present form of the Almond chuck infringes the Jacobs patent, if valid, unless it be that the Jacobs patent is limited so as to cover the use of the key merely in the one position, back of or toward the spindle end of the chuck, as shown both in the Jacobs drawings, and as stated in his claims. This exception will be more specifically discussed under the third point, and need only be stated here.

The second question, whether the use of a key, in order to turn the sleeve of a chuck, was a novel and patentable idea at the time of obtaining the Jacobs patent, requires the examination of several of the patents introduced in the case, including those of Washburn, No. 82,571, September 29, 1868; Whiton, No. 58,704, October 9, 1866; Whiton, No. 83,349, October 20, 1868; and particularly Whiton, No. 203,571, May 14, 1878. These patents are particularly interesting, not only in that they are claimed to have involved the use of a key for opening and closing the jaws of a chuck like that in question, and thus to have prevented, for a number of years after the taking out of the Almond patent in 1875, any use by the defendant company of the key device, but also the defendant company in August, 1905, in reply to a letter from the solicitors for the complainant, stated that the Washburn and Whiton patents were the authority of the Almond Company for their manufacture and placing upon the market of Almond chucks fitted with a toothed key similar to those placed upon the market by the Jacobs Company.

The complainant brushes aside all of the patents relating to chucks operated or furnished with keys, whether these keys be fitted with a worm or teeth, because of essential differences in the internal formation of the chuck. His patent is based upon the simple combination of a chuck of the Almond design in its internal construction with a key such as had been used in patented chucks of a different style. When the claims were being examined in the Patent Office, the examiners especially rejected any attempt to patent the key itself, and this was acquiesced in by Jacobs. But at the suggestion of the examiners, the combination described in Jacobs' specifications and claims was limited to include the chuck described, "with means adapted to receive" the key. The Patent Office did not consider the question, so far as the file-wrapper shows, of the patentability of the idea now

under consideration, namely, the use of the key instead of some other means of turning the sleeve, but confined its examination to the question of whether any prior patent disclosed the use of such a key, with a chuck having an annular outwardly opening nut recess, with a sleeve encircling the body, and with teeth on the edge of the sleeve. The patent as issued, therefore, seems to have covered the combination of three things, a chuck like the Almond chuck, the placing of teeth upon the edge of the sleeve of said chuck, and the use of a key to engage the teeth upon the sleeve.

It may be remarked here that Whiton, in his patent of 1878, says:

"In nearly all drill-chucks the power to operate them is applied in the direction of the rotation of the chuck; consequently the chuck must be blocked or held from turning in some way while the power is being applied; but by the use of my invention the power is applied with great force at right angles to the rotation of the chuck; consequently it remains stationary without the use of blocking or other means of holding it in position."

This patent to Whiton covered a worm gear encircling the body of the chuck, with a key or detachable bearing, carrying a worm shaft, and, as shown by the language quoted, the object of the application of this worm gear was for exactly the same purpose, and in substantially the same way, as that now claimed by the Jacobs patent. This worm gear, of course, differs from the teeth of the Jacobs patent, but in the Washburn patent of September 29, 1868, No. 82,571, a key with teeth was shown, serving the same purpose as the key with the worm in the Whiton patent; and the two together would seem to completely anticipate the mere idea of applying the key to the turning portion of a drill-chuck, to obviate the difficulties pointed out in the Almond design.

If they had been giving full weight to the existence of these patents, and of various others set forth in the record, but which are not as typical as the two recited, the examiners in the Patent Office, and the expert called by the complainant, would have great difficulty in differentiating the ideas of the Jacobs patent from those of the Washburn and Whiton patents above referred to, if no examination of the interior construction of the chuck described by Jacobs had been made. And it is not considered that the combination of a well-known and unpatentable idea with a particular form of device described in an old and expired patent can be made the basis of a valid patent for a new term, when no use or device is shown except in so far as the particular combination has never been made between exactly the same elements before, and when the same use has been shown in connection with equivalent devices of a form differing in immaterial respects. Mast, Foos & Co. v. Stover Mfg. Co., 177 U. S. 489–491, 20 Sup. Ct. 708, 44 L. Ed. 856. Such a combination does not amount to a new application of an old device to an old form of construction, wherein there is novelty in the application itself. It is merely a different application, without novelty, except that the elements combined have not been united in one structure before.

For these reasons, it seems impossible to hold the Jacobs patent valid, whatever interpretation may be given to the claims therein contained.

It will be observed that Jacobs has specified an alternative form of key, which is to fit over a pin or pins upon the body back of the sleeve. Claim 3 is confined to a key inserted in a recess, and therefore the form of key to be used with a pin must be read upon claims 1 and 2. The patentee Jacobs, moreover, testified that by the words "back of the sleeve" he meant toward the spindle end of the lathe, and he therefore needs the aid of claims 1 and 2 if any other position of the key-seat is to be held patented by him. The contention, therefore, that the defendant's chuck, having teeth upon the jaw side of the sleeve, and recesses for the insertion of the key at that point, is an infringement of the complainant's claim 3. especially assuming that the mere use of the key has been anticipated, must be held unfounded; and the only remaining question, although perhaps rendered unnecessary, is to consider whether claims 1 and 2 are merely equivalent to claim 3, and whether, if not, they are too indefinite to be of any effect whatever.

As has been said, the description in the patent, and the devices set forth in the drawings, whereby pins may be employed, must be construed as referring to claims 1 and 2. The necessity of having some bearing or seat for the key is, like a fulcrum for a lever, a proposition that must necessarily be understood in any such description, and this court would therefore conclude that claims 1 and 2 may be considered sufficient in form to be the basis of a slightly different claim than that of claim 3, rather than to consider that a necessary element of description has been omitted.

Inasmuch, however, as the entire patent would seem to be invalid for the reasons above stated, decree must be for the defendant.

AMERICAN SULPHITE PULP CO. v. CROWN-COLUMBIA PULP & PAPER CO.

(Circuit Court, D. Oregon. March 1, 1909.)

No. 3,237.

1. PATENTS (§ 288*)—SUITS FOR INFRINGEMENT—EQUITY JURISDICTION.
The fact that a patent had but 48 days to run at the time of the commencement of a suit to enjoin its infringement does not deprive a court of equity of jurisdiction.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 465; Dec. Dig. § 288.*]

2. PATENTS (§ 288*)—SUITS FOR INFRINGEMENT—EQUITY JURISDICTION.
Allegations in a bill for infringement, showing that complainant derives his benefit from the patent through the granting of licenses, do not deprive equity of jurisdiction on the ground that he has an adequate remedy at law, where it also shows that there is no established license fee for all users and prays an accounting of profits.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 288.*]

3. PATENTS (§ 317*)—SUITS FOR INFRINGEMENT—PERMANENT INJUNCTION.
A bill for infringement filed before the expiration of the patent, showing that defendant has in its possession and is using infringing structures,

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

states grounds for the granting of a perpetual injunction against their further use even after the patent has expired.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 317.*]

In Equity. On demurrer to bill.

The purpose of this suit is to enjoin the infringement of a patent. By the averments of the bill it appears that the complainant is the owner of a patent upon an invention for pulp digesters. The life of the patent extended to January 27, 1908. The complainant claims a monopoly of the patent, but shows that it is ready, able, and willing, and now stands ready, able, and willing, to supply the entire demand for the market; that since the grant of the letters patent the complainant has given full and ample notice to all pulp manufacturers of the United States from time to time of its ownership thereof, and that infringers thereof would be prosecuted, and all parties have been fully notified of the complainant's purpose; that the patent right has been established by suits in equity heretofore instituted in the courts of the United States; that the invention and letters patent have been and still are of great benefit and advantage to the complainant; that the public has largely acquiesced in the rights of complainant; that nearly, if not quite, two-thirds of all the pulp manufacturers in the United States using the sulphite process have availed themselves of the benefit and advantages arising from said letters patent by taking licenses from the complainant; that in the course of negotiating and selling such licenses it has been necessary to bring, or threaten to bring, many suits, as the mills in which the sulphite process is carried on are scattered throughout widely separated portions of the country, and often in remote districts, and because of the further fact that in every case the structure involved is a closed vessel, and the nature and character of the lining could not be learned without the consent of the owners thereof, and that, in spite of the fact that complainant and its agents have been diligent in investigating the matter of the infringements of its letters patent, it has been physically impossible for it and them to the present time to take up and prosecute all litigation; that it has not been possible to establish, and that complainant has not established, a fixed, certain, and uniform license fee for said licenses, for the reason that it appeared to complainant to be inequitable and unjust to do so, but that complainant has sought to obtain and has obtained in every case a license fee satisfactory in amount, both to itself and to its licensee, with reference to the size and character of the work carried on, the particular circumstances of each case determining the reasonable fee for the licenses in question; that the defendant, contriving to injure and deprive the complainant of the benefit and advantages which might otherwise have accrued unto it from the issue of said letters patent, and prior to the filing of the bill herein, has manufactured and used pulp digesters without the license or allowance, and against the will, of the complainant, and is still wrongfully using such digesters, whereby defendant has realized large profits, but has refused, and still refuses, to pay complainant a reasonable license fee or any license fee; that the complainant has no fixed and established uniform license fee, such as to constitute a measure of damages in an action at law; that complainant has heretofore, and since the issue of said letters patent, and prior to the institution of this suit, notified the defendant in writing of its willingness, upon receipt of a reasonable royalty, to grant a license under said patent for the past and future use of the said invention, and has offered and now offers so to license the use thereof by the defendant. The prayer seeks a discovery and demands an injunction, both provisional and permanent, and an accounting and recovery for the use of the patent.

The defendant has interposed a demurrer to the bill, assigning the following grounds, to wit: (1) Because the bill does not show facts entitling complainant to any equitable relief. (2) Because the patent had only 48 days to run. (3) Because the patent has already expired. (4) Because the court has no jurisdiction of the bill.

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

Benner & Foster and A. L. Veazie, for plaintiff.
Cake & Cake and Franklin T. Griffith, for defendant.

WOLVERTON, District Judge (after stating the facts as above). The strong objection to the bill is that it does not state a case for equitable cognizance; the principal reason urged being that it appears from the averments thereof that the complainant has a plain, speedy, and adequate remedy at law.

Preliminarily, it should be stated that the suit was instituted December 10, 1907, and the defendant was required, under the subpœna, to answer the exigencies of the bill January 6, 1908. The complainant's patent expired January 27, 1908—48 days after the suit was instituted. While counsel for defendant call attention to the fact that no effort was made during the life of the patent to obtain a provisional injunction, they do not seem seriously to urge that that fact alone would defeat the suit. They do say, however, that the fact affords strong reason why the request in the bill for an injunction must be held to be a mere pretext, not to be seriously considered.

It is a rule of equitable procedure in patent cases that if, in the ordinary course of practice, there is time between the date of the institution of the suit and the expiration of the patent to apply for and obtain a provisional injunction, the other averments of the bill showing ground for equitable interposition, the court will entertain jurisdiction and proceed in the cause, notwithstanding it may be that the patent will expire presently, and before the controversy can be finally determined. Mr. Justice Blatchford sustained a bill where the patent had but 26 days to run (Toledo Mower & Reaper Co. v. Johnston Harvester Co. [C. C.] 24 Fed. 739), and dismissed another where the patent would survive but 4 days (Mershon v. J. F. Pease Furnace Co. [C. C.] 24 Fed. 741).

The Supreme Court, in Clark v. Wooster, 119 U. S. 322, 7 Sup. Ct. 217, 30 L. Ed. 392, affirmed the holding of the lower court, in sustaining a bill filed with the patent but 15 days to run, the court saying:

"If the case was one for equitable relief when the suit was instituted, the mere fact that the ground for such relief expired by the expiration of the patent would not take away the jurisdiction, and preclude the court from proceeding to grant the incidental relief which belongs to cases of that sort."

In a later case, Beedle v. Bennet, 122 U. S. 71, 75, 7 Sup. Ct. 1090, 1092, 30 L. Ed. 1074, the Supreme Court says:

"As the patent was in force at the time the bill was filed, and the complainants were entitled to a preliminary injunction at that time, the jurisdiction of the court is not defeated by the expiration of the patent by lapse of time before final decree."

See, also, to the same purpose, Busch v. Jones, 184 U. S. 598, 22 Sup. Ct. 511, 46 L. Ed. 707; Brooks v. Miller (C. C.) 28 Fed. 615; Ross v. City of Ft. Wayne, 63 Fed. 466, 11 C. C. A. 288; Chinnock v. Paterson, P. & S. Tel. Co. (C. C.) 110 Fed. 199; United States Mitis Co. v. Detroit Steel & Spring Co., 122 Fed. 863, 59 C. C. A. 589; Carnegie Steel Co. v. Colorado Fuel & Iron Co. (C. C. A.) 165 Fed. 195.

In the case at bar an order to show cause why the provisional in-

junction should not issue might have been set down for hearing upon 10 days' notice, or even less, so that there was ample time for complainant to have obtained the injunction prior to the expiration of the patent, and the cause is within the rule.

But to the main contention, having found that the proximity in time of bringing the suit to the time of the expiration of the patent does not in itself defeat the cause, is the cause one for equitable interposition? The same principles of equity affecting jurisdiction must be applied in patent right cases as in other causes where equitable relief is sought, and, if jurisdiction will not attach in one case, it will not usually attach in the other. This is conceded. But it is alleged that the bill shows that complainant's only benefit to be derived by the patent is from its use by the public, and that, if the public be enjoined, the revenue to be derived from the patent would cease. Hence it is insisted that it is not the real purpose to prevent any one from using the patent, but to require payment from such as do use it; and thus the owner can have no other remedy than the recovery of a license fee proportionate in amount to the value of the use. The law, it is claimed, in this view affords an adequate remedy. The reasoning is faulty. The bill alleges a monopoly of the patent, and shows, in effect, that complainant is able to supply the market, but is willing that the public may use the patent upon satisfactory arrangement with complainant for payment of the license fee. There has never been given authority to any one to use without the consent of the complainant, but parties have, contrary to the rights of the patentee, surreptitiously employed the patent right in their manufacturing institutions, which is tortious as to the complainant. The latter has the right to demand that such a practice cease. While having that right, it has also the right to require of the defendant an accounting for the profits earned by the user by reason of its tortious appropriation of the patent. Because the use is open to those who are willing to pay a license fee, it does not follow that any may use it without paying such fee, and so continue to use it in spite of the protest of the owner. Such a course of reasoning would entail a multiplicity of actions, to say the least, which, in itself, would be cause for invoking equitable interposition. This specific objection of counsel is pertinently answered in Peters v. Chicago Biscuit Co. et al. (C. C.) 142 Fed. 779. That case is in close analogy to this, and the reasoning of the learned judge is sufficient in itself to dispose of this case.

It seems to be thought that the allegation in the complainant's bill, as follows:

"That your orator has heretofore, and since the issue of said letters patent, and prior to the bringing of this suit, duly notified in writing the defendant herein, as hereinbefore set forth, of its willingness, upon the receipt of a reasonable royalty, to grant a license under said patent for the past and future use of the said invention and improvement, and has offered and now offers so to license the use thereof by this defendant"

—shows that complainant is seeking a license fee rather than injunctional relief. This, however, merely indicates complainant's previous practice in licensing the use of its patent; that is to say, a method by

which the market was supplied, with the use of the monopoly reserved in the complainant.

The further averments in the bill may now be considered. By the eleventh paragraph it appears that no fixed, certain, or uniform license fee has been established, and that the amount thereof has been dependent upon the size and character of the work being carried on and the particular circumstances of each case. By the twelfth paragraph, it further appears that the defendant has unlawfully realized large profits from the use of said patent, and continues in its refusal to pay complainant a reasonable or any license fee. By the fourteenth paragraph, that there has been established no uniform license fee such as to constitute a measure of damages in an action at law. Beyond all this, it appears that defendant has manufactured and used pulp digesters in its mill in infringement of complainant's patent, and is still willfully using the same, and will continue to so use them.

Applying the principle established by the previously cited authorities, namely, that the fact that the right of a permanent injunction is lost by an expiration of the patent pending the suit does not oust the court of jurisdiction, the cause being one for equitable relief in the first instance, would seem of itself to be decisive of the cause. Aside from this, there is still another cogent ground for equitable cognizance, the court having obtained jurisdiction by a timely commencement of the suit, which is, that the defendant has in its possession digesters constructed in pursuance of complainant's patent. As to these, the complainant has the right to have their further use by the defendant perpetually enjoined.

"The weight of authority seems to me," says Holt, District Judge, in Underwood Typewriter Co. v. Elliott-Fisher Co. (C. C.) 156 Fed. 588, 590, "to hold that goods manufactured during the life of a patent which infringed it cannot be sold or used after the expiration of the patent. The making of such goods during the existence of the monopoly which is created by that patent is in violation of the patent law, and, in my opinion, it is not until after the expiration of the patent that business rivals are at liberty to manufacture articles in conformity with the invention described in the patent for the purpose of selling them"—citing a number of authorities.

In Toledo Mower & Reaper Co. v. Johnston Harvester Co., supra, the court retained equitable jurisdiction on the ground, among other things, that the defendant had previously manufactured quantities of machines under the infringing patent, which it intended to put upon the market, and restrained any sale of such machines after the expiration of the patent. The weight of authority is in support of the position although holdings may be found to the contrary. American Diamond Rock-Boring Co. v. Sheldon (C. C.) 1 Fed. 870; American Diamond Rock-Boring Co. v. Rutland Marble Co. (C. C.) 2 Fed. 355; New York Belting & Packing Co. v. Magowan (C. C.) 27 Fed. 111.

The license fee not being fixed, which, by the nature of things, was not susceptible of uniform regulation in amount, and the realization of large profits from the use of the patent by defendant, to determine which an accounting is necessary, are potent factors in inducing equitable cognizance. Further than this, it would seem that a discovery is necessary to determine the dimensions of the digester or digesters that defendant was or may have been using.

The court is of the opinion, therefore, that the demurrer should be overruled.

I have not overlooked the authorities cited by counsel for defendant. These authorities, while sound in principle, do not seem to me to be applicable under the facts of the present controversy.

MITCHELL v. INTERNATIONAL TAILORING CO.

(Circuit Court, S. D. New York. March 15, 1909.)

1. EQUITY (§ 196*)—CROSS-BILL—NECESSITY TO ENTITLE DEFENDANT TO AFFIRMATIVE RELIEF.

It is the general rule in equity that a defendant can obtain affirmative relief, as by injunction, only by filing a cross-bill.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 450; Dec. Dig. § 196.*]

2. PATENTS (§ 294*) — SUIT FOR INFRINGEMENT—NOTICE OF SUIT SENT BY COMPLAINANT TO DEFENDANT'S CUSTOMERS—INJUNCTION.

An injunction denied to the defendant in a pending suit for infringement of a patent to restrain complainant from sending circulars to defendant's customers giving notice of the suit, and warning them against contributory infringement, where the statements made in such circulars were true, and there was no evidence of bad faith.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 294.*

Grounds for denial of preliminary injunctions in patent infringement suits, see note to Johnson v. Foos Mfg. Co., 72 C. C. A. 123.]

In Equity. On petition by defendant for injunction.

See, also, 170 Fed. 91.

Philipp, Sawyer, Rice & Kennedy, for complainant.

Kenyon & Kenyon, for defendant.

WARD, Circuit Judge. This is a petition by the defendant for an order restraining the complainant from issuing infringement notices. The complainant, owner of United States letters patent 861,747 and 861,749, issued July 30, 1907, for advertising devices, has brought suit against the defendant for infringement. A motion for preliminary injunction is pending, and the defendant has filed a demurrer.

The patented devices are in the form of a communication which contains a name and address, and their object is that this shall be preserved after the circular has been thrown away. To this end it is printed on an attractive picture, easily detached, or on a card inserted in the letter. The scheme is that the manufacturer of any article, say clothing, shall get from local clothes dealers a list of their customers, and to these customers the patented letters are sent, directly informing them that the manufacturer's goods can be had of the local dealer, whose name and address are inclosed. The bill charges that the defendant has sent out similar devices to customers of local ready-made clothes dealers. After beginning this action the complainant sent out infringement notices to the local dealers, or some of them, who had furnished mailing lists to the defendant, informing them that this action had been begun, that they would be treated as contributory infringers if it were found that they had so supplied the defendant, and

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

requesting them to authorize the complainant's attorney on their behalf to prevent these mailing lists from being so used. These notices have evidently caused more or less of a panic among the defendant's customers, and are clearly very embarrassing to its business. For this reason the defendant has filed this petition for an order restraining the complainant from continuing to send out such notices, pending the decision of the demurrer, and until the further order of the court.

The petition contends that the patents are obviously invalid and that the circularizing is done in bad faith. The general rule in equity certainly is that a defendant can obtain affirmative relief only by filing a cross-bill. 16 Cyc. 324. It is true that applications like this have been considered. New York Filter Co. v. Schwarzwalder (C. C.) 58 Fed. 577; Warren Featherbone Co. v. Landauer (C. C.) 151 Fed. 130. But injunctive relief was denied, and the question of practice was not raised. In Kelley v. Ypsilanti Co., 44 Fed. 19, 23, 10 L. R. A. 686, the question was raised, but not passed upon, because the injunction was denied.

Conceding that I have power to do so, I think I should not grant the relief prayed for. No opinion upon the patents need now be expressed, because at this stage of the case they must be taken to be valid. The papers submitted do not satisfy me that the complainant is acting in bad faith. The statements contained in its circulars are truthful, and it has in support of its patents brought suit in this circuit against the defendant, a manufacturer, and in the Circuit Court for the District of Indiana against a local dealer, who is alleged to have furnished the defendant with a mailing list of his customers. There is no reason to suppose that the complainant doubts the validity of his patents, and, if they are valid, local dealers who furnish mailing lists to the defendant, knowing or having reason to know that the defendant will use them for the purpose of circulating infringing devices, do contribute to the infringement.

As the complainant is acting within his rights, the prayer of the petition is denied.

NATIONAL PHONOGRAPH CO. et al. v. WALKER. †

(Circuit Court, E. D. Pennsylvania. March 31, 1909.)

No. 255.

PATENTS (§ 303*)—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

Whether the reservation by the manufacturer of a patented article of the right to fix the price at which such article may be sold at retail follows such article after it has been once sold to an actual user, is a question which will not be determined on a motion for a preliminary injunction.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 303.*]

In Equity. On motion for preliminary injunction.

Charles N. Butler, for the motion.

Duke Walker, in pro. per.

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

† For opinion on second motion for preliminary injunction, see 169 Fed. 1023.

J. B. McPHERSON, District Judge. By this motion the court is asked to go a step beyond New Jersey Patent Co. v. Schaefer (C. C.) 144 Fed. 437—indeed, beyond any other case of which I have knowledge—and to restrain the respondent summarily from selling patented phonograph records, although he had entered into no agreement with the complainants, and apparently bought the records in question not from licensed dealers, but from private persons who had been using them upon their own machines, and disposed of them under circumstances and for reasons that have not been disclosed. It may be that the restrictions concerning price which are now sought to be enforced follow the records indefinitely into the hands of successive purchasers; I have no present opinion on this subject; but, as the question involved is important and was not argued at the hearing of this motion, I prefer not to decide it until final hearing. The point was expressly reserved in Victor Talking Machine Co. v. The Fair, 123 Fed. 427, 61 C. C. A. 58, and I have been referred to no case in which it has been decided.

A preliminary injunction is refused.

In re GHAZAL.

(District Court, E. D. New York. February 24, 1909.)

BANKRUPTCY (§ 143*)—PROPERTY PASSING TO TRUSTEE—REWARD AWARDED TO BANKRUPT.

An award made by the Secretary of the Treasury to an informant as a reward for information leading to the seizure of smuggled goods, under Act June 22, 1874, c. 391, § 4, 18 Stat. 186 (U. S. Comp. St. 1901, p. 2019), although not paid over, is property of the claimant, and, being assignable, under Rev. St. § 3477 (U. S. Comp. St. 1901, p. 2320), is property which the claimant could have transferred, and passes to his trustee on his subsequent bankruptcy, under Bankr. Act July 1, 1898, c. 541, § 70a (5), 30 Stat. 565, 566 (U. S. Comp. St. 1901, p. 3451).

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 143.*]

In Bankruptcy.

Joseph S. Buhler, for trustee.
London, Davis & Medalie, for bankrupt.

CHATFIELD, District Judge. The bankrupt was the informant with relation to several customs seizures, and the facts both in relation to the petition in bankruptcy and the particulars of this matter are set forth in a former opinion. (D. C.) 163 Fed. 602. The only change in the situation is that after considerable deliberation the money awarded by the Secretary of the Treasury to Ghazal, for the reward in the first of the seizure cases, amounting to $428.93, has been paid to the trustee in bankruptcy, and the bankrupt has now applied to this court for the payment of the said reward to him, upon the ground that it is exempt, and is not property the title to which would pass to the trustee under the provisions of section 70 of the bankruptcy law (Act July 1, 1898, c. 541, 30 Stat. 565, 566 [U. S. Comp.

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

St. 1901, p. 3451]). This question was quite fully presented, and the cases relating thereto recited, at the time of the former opinion. It is unnecessary to restate them at this time, and as a general proposition it seems to this court that such claims are not legal rights nor equitable rights passing to an assignee in bankruptcy, before the Secretary of the Treasury has exercised his jurisdiction and discretion in the matter.

Whether or not Act June 22, 1874, c. 391, § 6, 18 Stat. 186 (U. S. Comp. St. 1901, p. 2019), is constitutional or otherwise (U. S. v. Queen [D. C.] 105 Fed. 269), all of the claims with which we are concerned at present are matters that must be judged from the provisions of sections 3 and 4; and it is difficult to see how an assignee or trustee in bankruptcy could argue that, if the Secretary of the Treasury had not passed upon the question of rewarding the informer, he could be compelled to exercise that discretion and grant the award to the bankrupt, for the benefit of the creditors or of the estate, if it seemed best to him to withhold the reward. It may be presumed that from the standpoint of public policy, the Secretary of the Treasury would in such cases consider that the reward was to be paid to encourage informers, not to pay informers' debts, and that the request of the informer would be necessary, as well as that of his creditors, to appeal to the Secretary's discretion.

But with relation to the fund as to which this motion is made the Secretary of the Treasury had exercised his discretion, and had determined that the informer was entitled to receive the amount paid over, before the petition in bankruptcy was filed. If the Secretary of the Treasury had paid this money to the informer, and the petition in bankruptcy had been filed, and the money seized before the informer had spent it, this court would not be prepared to hold that it was exempt, from the fact that it had been paid as a reward, in the absence of a statute creating such exemption; and it would seem that if the Secretary of the Treasury had determined the amount of the reward, and that the same should be paid, and a warrant had been drawn, the informer would then have a claim that could be enforced in some court, if withheld arbitrarily, and not by revocation of the decision of the Secretary of the Treasury.

Section 3477, Rev. St. (U. S. Comp. St. 1901, p. 2320), provides that such a claim is assignable, and hence must be then considered property of the claimant. This would bring the claim upon the first reward, at the time of the filing of the petition in bankruptcy, within the statement of Judge Story in the case of Comegys v. Vasse, 1 Pet. 193, 7 L. Ed. 108. This same distinction has been observed and approved in the case of Williams v. Heard, 140 U. S. 529, 11 Sup. Ct. 885, 35 L. Ed. 550.

It seems proper to hold, therefore, that the amount paid over by the Secretary of the Treasury to the trustee in bankruptcy would fall within the language of section 70, subd. 5, of the bankruptcy law, and would be property which, prior to the filing of the petition, could have been transferred by the bankrupt.

As to the other possible rewards, public policy seems to suggest that they should be exempt from debts.

In re GUILBERT.

(District Court, E. D. Pennsylvania. March 27, 1909.)

No. 2,489.

1. BANKRUPTCY (§ 414*)—OBJECTIONS TO DISCHARGE—FRAUDULENT CONVEYANCES—EVIDENCE.

On an application for a bankrupt's discharge, evidence *held* to sustain a finding that the bankrupt had procured certain property, in which he held an equitable interest, to be conveyed to his wife for the purpose of defrauding his creditors, and that he was, therefore, not entitled to a discharge.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 722; Dec. Dig. § 414.*]

2. BANKRUPTCY (§ 408*)—OBJECTIONS TO DISCHARGE—ASSETS—FAILURE TO SCHEDULE.

Where a bankrupt made oath to a schedule of his assets which did not include an equity in certain real estate, which he procured to be conveyed to his wife for the purpose of defrauding his creditors, he was not entitled to a discharge because of having falsely sworn that he had included all his property in the schedule.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 733; Dec. Dig. § 408.*]

In Bankruptcy. On report of referee.

See, also, 154 Fed. 676.

Joseph Hill Brinton, for objecting creditor.

Francis S. Cantrell, Jr., for bankrupt.

HOLLAND, District Judge. Specifications of objections were duly filed in this case and abandoned by the party. Subsequently, on the 11th day of July, 1907, Judge McPherson allowed one A. B. Guilbert, an objecting creditor, to prosecute these specifications of objections, previously filed, in forma pauperis under the act of July 20, 1892, c. 209, 27 Stat. 252 (U. S. Comp. St. 1901, p. 706), and pointed out which of them were in form to be considered. They are ten in number, the fourth and fifth of which charge the conveyance of certain properties, in the borough of Norristown, to the wife of the alleged bankrupt on December 4, 1905. The consideration of these properties, it is alleged, was paid by Thomas M. Guilbert, and conveyed to his wife for the purpose of defrauding his creditors.

An examination of the record shows that the bankrupt had an interest in the properties mentioned in the fourth and fifth specifications of objections, and that he placed them in his wife's name for the purpose of keeping them out of the reach of his creditors. The properties were owned by one Albrechi, and figured in a trade of property in the county of Montgomery. They were mortgaged for $3,000, and played a part in the transaction which was negotiated and conducted by the bankrupt as the real estate agent. Three or four properties were involved, together with some cash, and the bankrupt was entitled to a commission. He was paid $100, and the title to these properties was placed in the name of his wife, for which she paid nothing, and she held the title when the schedule of his property in bankruptcy was filed.

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

There was an effort to show that during the negotiations for the exchange by Guilbert, as agent, it was discovered that the properties mentioned in the fourth and fifth specifications had no value over and above the mortgage, and that they were simply given to Mrs. Guilbert to have somebody to hold the title; in other words, they were so worthless that neither Albrechi nor any of the other parties interested in the transaction cared to have the title in their names, and that Mrs. Guilbert was willing to have the burden thrust upon her. This is such an unusual and improbable story that the mere recital of it, in connection with the other facts and circumstances established by documentary evidence and the uncontradicted testimony of witnesses, is the most convincing proof of the fact that the transfer was intended as part compensation to Guilbert for his commission as agent in bringing about the exchange of the properties. There is no doubt about the fact that the bankrupt was a real estate agent, and that he took up this scheme of making this exchange in properties and went to very considerable trouble to carry it into effect, and as part of the result of his efforts we find that the title to these properties was placed in the name of his wife, for which she gave no consideration whatever. So that, whatever the value of the equities, it is plain they were to go to the bankrupt for value, and he placed the title in the name of a third party, as he had been doing with all his real estate for years, during all of which time he was indebted in a considerable amount. The objection raised to his discharge upon this ground should therefore be sustained.

And, further, the seventh specification charges the bankrupt with having committed an offense punishable by imprisonment in having made a false oath to his schedule of assets in his petition in bankruptcy in not having included his interest in these properties. However small the value of the equities in these properties was at the time of the filing of the petition, if they belonged to the bankrupt, it was his duty to schedule them as an asset. Having failed to do so, he could not truthfully swear that he had included all his property in the schedule, and in making such an affidavit he is guilty of having made an oath to a false statement.

The fourth, fifth, and seventh specifications of objections to the discharge of the bankrupt are sustained, and his discharge is refused.

H. B. WIGGINS SONS' CO. v. COTT-A-LAP CO.

(Circuit Court, D. Connecticut. April 16, 1909.)

1. MASTER AND SERVANT (§ 60*)—CONFIDENTIAL EMPLOYMENT—TRADE SECRETS.
Where a confidential employé learns his employer's trade secret in the course of the employment, such employé cannot make use of the secret to his employer's disadvantage, whether an agreement that he will not do so is expressed in the employment contract or only implied.
[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 60.*]

2. INJUNCTION (§ 56*)—TRADE SECRETS—DISCLOSURE.
Mere hiring of complainant's former confidential servant, who had acquired knowledge of the complainant's trade secret, by complainant's

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

business rival, in the absence of anything more than mere opportunity on defendant's part to learn and use complainant's secret, was insufficient to justify the issuance of an injunction, either against defendant or the employé, restraining the employé from imparting, and defendant from receiving or using, information concerning such secret in defendant's business, to complainant's prejudice.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 110; Dec. Dig. § 56.*]

In Equity. On motion for preliminary injunction.

Edwin J. Prindle, for complainant.
Henry C. White and Leonard M. Daggett, for defendant.

PLATT, District Judge. The bill herein was filed March 11, 1909, and upon affidavits accompanying the same a restraining order was granted. The motion now to be decided was heard April 13th upon more elaborate affidavits. The motion asks for an order enjoining the defendant during the pendency of the suit from "receiving or seeking to receive, or acquiring or seeking to acquire, from Robert W. Cornelison, any formula, process, or mechanical device or other manufacturing expedient" of the complainant, and from using the same in the manufacture of wall coverings.

The evidence shows that Cornelison is a consulting chemist, and as such was employed by the complainant in its business at Bloomfield, N. J., for a number of years. Under such employment his relations with the complainant were confidential and many secrets of the business came into his possession. The only secret specifically exploited is the formula for the backing upon the wall coverings and the process of applying such backing. The complainant claims that it owns a secret formula and process by which uniform backings of two colors only, one for the lighter and one for the darker faces, can be used on all wall coverings of the kinds made by it. He says that his backings will not penetrate to the face of the coverings, and because of that fact he can restrict the number of colors used on the backs as he does. This formula and process tends, he says, to promote economy and efficiency of manufacture.

In the case at bar there is a contract about the employment in which Cornelison agrees not to disclose trade secrets, but the law about such secrets is too plain to require extended comment. If one person has a trade secret which is valuable to him, and another person enters into confidential employment with him in and about the business which demands the use of that secret, and by such employment learns the secret, he cannot utilize his secret knowledge to the disadvantage of his employer. If he does so, he robs his employer. That is the contract relationship between them, and it makes no difference whether it is expressed in writing or not. If not expressed, it will be implied. In the case under discussion there is no doubt about the confidential employment and possession of trade secrets by Cornelison. He has now left the employment, and carries the secrets with him. He has accepted employment with a rival manufacturer of wall coverings.

The exact question before me is whether such a hiring of him by the

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

rival warrants a court of equity in resorting to so drastic a measure as the use of the injunctive power to prevent that rival from acquiring that secret knowledge. I cannot think that it does, unless the circumstances surrounding the hiring are such as to persuade one that the ulterior purpose in such hiring is evil. It appears that long ago two different managers of the defendant's business, which was then owned largely by other people, made efforts to learn the complainant's secrets by hiring from it men who knew some of the secrets. The defendant as then organized disavowed responsibility for the acts of its managers, and harmony seems to have reigned, as thoroughly as harmony can be expected to exist between avowed rivals, for a long time thereafter. The defendant as now organized and Dr. Cornelison state explicitly that there is no intention to derive any benefit from the doctor's secret knowledge gained while in complainant's employ.

If the injunction issues, it means that hereafter no man can work for one and learn his business secrets, and after leaving that employment engage himself to a rival in business, without carrying on his back into that business the injunctive mandate of a court of equity. There is nothing whatever in the facts of this case, except opportunity to do wrong and a suspicion in the mind of the rival that wrong will be done. The remedy asked for is an extraordinary one, and should not be lightly indulged in. The chancellor ought never to come into such a frame of mind that he assumes human nature to be essentially and inherently evil. Furthermore, the danger of irreparable injury is not manifest. Whether the secrets are given away or not can never be positively known, except by inspection of defendant's goods hereafter to be made. Whenever the outcome shall warrant it, the road to injunctive relief is plainly marked and easily followed.

Upon such facts as have been brought to my attention it is my duty to deny the motion for an injunction.

This memorandum has been written in the Cott-A-Lap case. It applies with equal, if not greater force, to the motion against Cornelison.

That motion is also denied.

In re BRADY.

(District Court, W. D. Kentucky. November, 1908.)

BANKRUPTCY (§ 462*)—ADJUDICATION—APPEAL—TIME—SCHEDULES—FAILURE TO FILE.

A bankruptcy adjudication was entered April 17th. The bankrupt, on April 28th, applied for a rehearing, on which the court gave an opportunity for further investigation of the facts and overruled a motion in an opinion delivered on June 9th, after which the bankrupt attempted to appeal from the order of adjudication, but without supersedeas. *Held*, that such appeal not having been taken within 10 days, as required by the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432]) § 25, and no supersedeas having been issued, was no answer to a rule to compel the bankrupt to file his schedules, but that, the appeal having been taken, an order requiring the filing of schedules

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

would be respited to allow the parties in interest to move to dismiss the appeal.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 924, 925; Dec. Dig. § 462.*

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

In Bankruptcy. On rule against the bankrupt to show cause why he should not be ordered to file his schedules.

James R. Duffin and G. B. Likens, for petitioner.

Barnes & Anderson and Norman Farrell, Jr., for bankrupt and others.

EVANS, District Judge. The bankrupt not having filed his schedules, on motion of creditors he was ruled to show cause why he should not be compelled to do so. He was served with a copy of the order, and at the return day named therein filed a response, and therein insisted, upon grounds which will sufficiently appear from what follows, that the rule should not be made absolute, but should be respited until his appeal in the case had been determined by the Circuit Court of Appeals. The creditors objected to the sufficiency of the response.

On June 9th last the court, in an opinion then delivered, stated its reasons for overruling the bankrupt's motion to set aside an order, entered on April 17th, adjudicating him a bankrupt. Under the express provisions of section 25 of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432]), an appeal from the order of adjudication, to be effectual, must have been taken within 10 days. It has been frequently decided that a motion or other proceeding looking to a rehearing cannot operate to expand the statutory period of limitation if made after the time allowed for appealing had expired. Conboy v. First National Bank, 203 U. S. 141, 27 Sup. Ct. 50, 51 L. Ed. 128, 16 Am. Bankr. Rep. 773; Mills v. Fisher & Co., 20 Am. Bankr. Rep. 237, 159 Fed. 897, 87 C. C. A. 77, 16 L. R. A. (N. S.) 656. Instead of availing himself of his right to appeal within the 10 days, the bankrupt, after that period had expired on April 27th (section 31 of the act), to wit, on April 28, 1908, undertook not to appeal, but to obtain, a rehearing of the case; and the court, pending that motion and before deciding it, being anxious to ascertain whether he was entitled to a rehearing, gave opportunity for further investigation of the facts, and, not being thereby convinced that any wrong had been done the bankrupt, in June overruled his motion to set aside the adjudication. All of this was done, however, for the purpose of enlightening the court upon the merits of the proceeding to set aside the adjudication, and not with any purpose of extending or enlarging the time for an appeal, the right to which had apparently been lost. In the very recent case of West v. McLaughlin's Trustee (C. C. A.) 20 Am. Bankr. Rep. 654, 162 Fed. 124, the Circuit Court of Appeals of this circuit had occasion to point out the distinction that while a limited time only was allowed for an appeal, the trial court, within its discretion, might afterwards hear and determine a motion or other pro-

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

ceeding for a rehearing of the matter. Whether the bankrupt's appeal, taken in June last, be too late or not is a question altogether for the court where the appeal is pending, and not at all for the trial court. Nevertheless, the considerations we have suggested will go far in influencing the court's discretion upon a motion such as the one we are now considering, whereby the bankrupt in substance asks that the rule requiring him to show cause why he should not be compelled to file his schedules be respited until his appeal can be determined. In his response the bankrupt also objects that the show-cause order was obtained without notice. As to this it will suffice to say that, while a notice might not have been improper, it was not at all necessary, because the show-cause order itself gives notice and affords an opportunity on a certain named future day to show cause why the special relief sought should not be granted. The order, per se, gives him his day in court, and, besides, the bankruptcy act expressly requires him to file his schedules without being ruled in the premises.

What we have already said will indicate why the pendency of the appeal should not control our discretion, and especially as the bankrupt deliberately declined to supersede the order of adjudication when he appealed from it. Without a supersedeas an appeal never suspends the execution of an order nor stops its enforcement.

If the bankrupt resides in Tennessee (which, by the way, was well enough shown to be the fact, and so stated in our former opinion), his exemptions, as his response insists should be the case, will most probably be governed by the law of that state, and all questions in that connection can be easily presented and determined when the schedules are filed and exemptions claimed. He was adjudicated a bankrupt in Kentucky because his principal place of business had been in that state, and not because of residence here.

We think the response of the bankrupt to the rule to show cause is altogether insufficient, but upon filing this opinion an order may be entered respiting the rule until December 22, 1908, in order to allow the parties in interest an opportunity, if so desiring, to move the Circuit Court of Appeals to dismiss the appeal as having been taken too late. After the action of that court thereon we shall know better how to proceed on the rule.

BECK v. JOHNSON et al.

(Circuit Court, W. D. Kentucky. April 13, 1909.)

1. REMOVAL OF CAUSES (§ 25*) — GROUNDS — CAUSE ARISING UNDER UNITED STATES LAWS.

Whether an action is removable as arising under the laws of the United States must be determined on the averments of plaintiff's petition alone.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 58, 59; Dec. Dig. § 25.*]

2. REMOVAL OF CAUSES (§ 19*)—CASE IN LAW OR IN EQUITY.

A case in law or in equity consists of the right of one party as well as the other, and is removable as arising under the Constitution or laws of the United States whenever its correct decision depends on the construc-

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

tion of either, or when the title or right set up by the party may be defeated by one construction of the Constitution or laws of the United States and sustained by the opposite construction.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 37; Dec. Dig. § 19.*]

3. DEATH (§ 47*)—PETITION—NEGLIGENCE.

Under the Kentucky practice to which federal courts sitting in that state are required to conform in suits at law by Rev. St. § 914 (U. S. Comp. St. 1901, p. 684), it is not essential for plaintiff, in an action for wrongful death, to state any more in his petition than that the death of his intestate was caused by defendant's negligence, a specification of the details of the acts constituting the negligence being unnecessary.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 61; Dec. Dig. § 47.*]

4. DEATH (§ 57*)—ISSUES AND PROOF.

In an action for wrongful death alleging negligence generally, evidence showing defendant's failure to observe a federal or state statute, or a federal, state, or municipal regulation, is admissible to prove negligence.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 74; Dec. Dig. § 57.*]

5. EVIDENCE (§§ 34, 47*)—JUDICIAL NOTICE—UNITED STATES LAWS—EXECUTIVE REGULATIONS.

State and federal courts take judicial notice of the laws and executive regulations of the United States.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 49, 50, 69; Dec. Dig. §§ 34, 47.*

Judicial notice of public laws and regulations, see note to Smith v. City of Shakopee, 44 C. C. A. 4.]

6. REMOVAL OF CAUSES (§ 19*)—GROUNDS—"LAWS OF THE UNITED STATES."

The phrase, "laws of the United States," as used in the removal acts, authorizing removal of a cause arising under the laws of the United States, means acts of Congress, and does not include executive rules and regulations, unless a recovery of damages is expressly authorized by statute for a disregard of such regulations.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 37; Dec. Dig. § 19.*]

7. COLLISION (§ 16*)—REGULATIONS—STATUTES—CONSTRUCTION.

Rev. St. § 4412 (U. S. Comp. St. 1901, p. 3020), requiring the board of supervising inspectors to establish regulations to be observed by steam vessels in passing each other, which are to be printed, signed, and posted, applies only to regulations to be observed by passing steam vessels.

[Ed. Note.—For other cases, see Collision, Dec. Dig. § 16.*

Signals of meeting vessels, see note to The New York, 30 C. C. A. 630.]

8. SHIPPING (§ 158*)—INJURIES—STATUTES—CONSTRUCTION.

Rev. St. § 4413 (U. S. Comp. St. 1901, p. 3020), provides that every pilot, engineer, mate, or master of any steam vessel who neglects or willfully refuses to observe the regulations established pursuant to section 4412 shall be liable for all damages sustained by a passenger in his person or baggage by such neglect. *Held*, that such section only authorizes a recovery of damages by passengers against pilots, engineers, mates, and masters, as distinguished from the owners of vessels.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 158.*]

9. PLEADING (§ 63*)—STATUTORY ACTION—PETITION.

Where plaintiff founds his right of action on a special statute, his petition must state facts showing that the action is within the terms of the statute.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 133; Dec. Dig. § 63.*]

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

10. SHIPPING (§ 158*)—REGULATIONS—STATUTES.

Act Cong. Jan. 18, 1897, c. 61, 29 Stat. 489 (U. S. Comp. St. 1901, p. 3029), provides that all vessels above 15 tons burden carrying passengers and propelled by gas, fluid, naphtha, or electric motors are subject to the provisions of Rev. St. § 4426 (U. S. Comp. St. 1901, p. 3029), relating to inspection, and requiring engineers and pilots therefor, and declaring that all vessels so propelled, without regard to tonnage, are subject to section 4412 (page 3020) and so much of sections 4233 (page 2893) and 4234 as the board of supervising inspectors shall deem applicable and practicable for such navigation. *Held*, that such provisions apply to vessels propelled by gas, fluid, naphtha, or electric motors, and do not relate to steam vessels employed in inland navigation.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 158.*]

11. COLLISION (§ 75*)—SIGNAL REGULATIONS—STATUTES—APPLICATION—"MERCANTILE MARINE."

Rev. St. § 4233 (U. S. Comp. St. 1901, p. 2893), providing that steam vessels, when towing other vessels, shall carry two bright, white masthead lights vertically, in addition to their side lights, which shall be of such a character as to be visible on a dark night with a clear atmosphere for at least 5 miles and show a uniform unbroken light over an arc of the horizon at 20 points of the compass. *Held*, that such section applied only to the navy and mercantile marine of the United States, "mercantile marine" being used to mean the merchant service or business of commerce at sea, and that the section did not apply to steam vessels engaged in towing on the inland rivers of the United States.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 105–108; Dec. Dig. § 75.*]

Heavrin & Woodward, for plaintiff.

J. E. Williamson, H. P. Taylor, and H. J. Peckinpaugh, for defendants.

EVANS, District Judge. This civil action at law for the recovery of $20,000 damages for the death of plaintiff's intestate was brought in the state court, and, having been removed by the defendants to this court, a motion to remand it has been made by the plaintiff. The petition for removal, after showing (as, indeed, the plaintiff's petition on its face had done) that the matter in dispute exceeds in value the sum of $2,000 exclusive of interest and costs, asserts that "the action is one arising under the laws of the United States," and is therefore within Removal Act March 3, 1875, c. 137, 18 Stat. 470 (U. S. Comp. St. 1901, pp. 508, 509). Whether or not this is correct is the sole question to be solved in passing upon the motion to remand.

The plaintiff's petition, after showing that R. D. Beck died intestate, and that plaintiff was appointed and qualified as his administrator by the proper state court, avers in paragraph 1 that on January 4, 1909, the defendant P. H. Johnson was the owner, and that the defendant T. K. Bowles, under the owner's employment, was the master, captain, or pilot, of the steamboat Samuel, and that:

"On or about the 4th day of January, 1909, while the defendant Bowles was employed by his codefendant Johnson as master and pilot of said boat, the Samuel, and while the defendant Bowles was acting in the line of his employment in the control, management, and direction of said boat, and while he was at the wheel piloting same, and in supreme command thereof, for his codefendant Johnson, who was then and there the owner thereof, the defendant Johnson, acting by and through his codefendant Bowles as aforesaid,

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

negligently and carelessly managed and operated the steamboat Samuel so as to cause the same, and the barges attached to same, to run against and over the raft which was tied up and anchored on the Ohio county shore of Green river, and on which the plaintiff's intestate was sleeping, and while plaintiff was exercising care of his own safety on Green river in Ohio county, Ky., thereby bruising, injuring, and drowning the said R. D. Beck, so that the said R. D. Beck did die, as a direct and proximate result thereof, within one hour thereafter, and this the defendant and each of them did in Ohio county, Ky., on or about the 4th day of January, 1909.

"Plaintiff states that the injuries above referred to were inflicted, and the collision above referred to occurred, about 11:30 p. m. on January 4, 1909, on Green river, in Ohio county, Ky., and that Green river is and was then a navigable stream, whose waters flowed into the Gulf of Mexico, and the said steamboat Samuel was then and there subject to the rules adopted by the board of the United States supervising inspectors, steamboat inspection service, February, 1907, which was approved by the Secretary of Commerce and Labor on February 25, 1907, under the authority of section 4412, Rev. St. U. S. (U. S. Comp. St. 1901, p. 3020), and of the act of Congress approved January 18, 1897, c. 61, 29 Stat. 489 (U. S. Comp. St. 1901, p. 3029); that the steamboat Samuel was then and there towing three barges in front of it by pushing against the same, and also towing one barge on each side of it, at the time and place of the injuries complained of; that the moon was shining brightly, and only a thin mist or fog was in existence at the time and place of the injury and collision hereinbefore set out; and that rule 13 of the United States board of supervising inspectors, above referred to, is as follows:

" 'Rule 13. In fog, mist, falling snow, or heavy rain storms, whether by day or by night, the signals described in this rule shall be used by steam vessels:

" '(a) A steam vessel under way in fog or thick weather shall sound at intervals of not more than one minute a prolonged blast of whistle, of from four to six seconds' duration, except that when towing one or more vessels, she shall sound three blasts of the whistle in quick succession.'

"And that rule 14 of the board above referred to is as follows:

" 'Rule 14. Every steam vessel shall, in thick weather, by reason of fog, mist, falling snow, heavy rain storms, or other causes, go at moderate speed.'

"And further, as a part of rule 14 of said board, on page 11 thereof:

" 'The lights for barges and canal boats when towed ahead or alongside of the steamer, as is customary upon rivers whose waters flow into the Gulf of Mexico, shall be as follows:

" 'When one barge is towed by a steamer, and such barge is towed ahead, such barge shall have a green light on the starboard bow and a red light on the port bow. When such barge is towed alongside of the steamer on the starboard side, such barge shall have a green light on the starboard bow. When such barge is towed alongside of a steamer, on the port side, such barge shall have a red light on the port bow. When two barges are towed alongside of a steamer, one on the starboard and one on the port side, the starboard barge shall carry a green light on the starboard bow, and the port barge shall carry a red light on the port bow. When two or more barges are towed ahead, the green light shall be placed on the starboard bow of the starboard barge, and a red light on the port bow of the port barge, and at a distance of not less than 10 feet above the surface of the water.

" 'The colored side lights referred to in the foregoing rules must be fitted within board screens, so as to prevent them from being seen across the bow, and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least two miles, and so constructed as to show a uniform and unbroken light over an arc of the horizon of 10 points of the compass, and so fixed as to throw the light from right ahead to 2 points abaft the beam on either side. The minimum size of glass globes shall not be less than 6 inches in diameter, and 5 inches high in the clear.'

"A copy of the rules of the board of the United States supervising inspectors is filed herewith as a part hereof, marked 'Pilot Rules.'

"That by Rev. St. U. S. § 4233 (U. S. Comp. St. 1901, p. 2893), steam vessels when towing other vessels are required to carry two bright white masthead

lights vertically in addition to their side lights, so as to distinguish them from other vessels, which masthead lights were required to be of such character as to be visible on a dark night with a clear atmosphere at a distance of at least 5 miles, and so constructed as to show a uniform and unbroken light over an arc of the horizon of 20 points of the compass.

"Plaintiff says that, at the time and place of the collision above referred to, the defendants, and each of them, acting jointly, negligently failed to, and did not, sound three blasts of the whistle in quick succession each minute immediately before or at the time of the collision, nor did the defendants, or either of them, sound any blast of the whistle; that the defendants, and each of them, negligently failed to, and did not, have any lights whatever on the barges she was towing, nor on any of said barges, and the same, nor any of them, were lights as required by law and the rules then and there in force, nor were the lights on said barges or boat, or any of them, visible on a dark night with a clear atmosphere at two miles or any distance, nor were they so constructed as to show a uniform or unbroken light over an arc of the horizon of 10 points of the compass, and the defendants and each of them negligently failed to and did not carry on the steamer Samuel, at the time and place of the collision, the white masthead lights required to be carried, and that the lights carried on the Samuel could not, on a dark night with a clear atmosphere, be visible at a distance of 5 miles, or any distance in excess of 200 yards; and the defendants, and each of them, negligently failed to, and did not, at the time and place of the collision and injuries aforesaid, go at a moderate speed, but negligently and carelessly operated said vessel at an excessive rate of speed, and under a full head of steam, and negligently and carelessly directed and controlled the course of same, and negligently and carelessly failed to and did not keep any lookout or use ordinary care to avoid the collision and injuries complained of; that the negligence hereinbefore complained of, and all of it, was the joint and concurrent negligence of the defendants, and each of them, by reason of which plaintiff's decedent was injured as hereinbefore set out, from which injuries the plaintiff's intestate did then and there die."

In paragraph 2 of the petition the plaintiff avers that:

"The defendant T. K. Bowles, at the time and place of the injuries complained of, in the collision hereinbefore set out, was grossly incompetent to manage, navigate, pilot or command the steamboat Samuel, and was unskilled in the management and navigation of steam vessels, and his incompetency was well known to himself and to his codefendant Johnson at and for many months prior to the time of the collision referred to in the first paragraph and the injuries to plaintiff's intestate; and that by reason of the incompetency and lack of skill of the said T. K. Bowles, acting in conjunction with the negligence set out in the first paragraph, the steamer Samuel was, by the joint negligence of each of the defendants, caused to push its barges and tows against and over the raft and the body of the plaintiff's intestate, inflicting the injuries which resulted in the death of said intestate, as is set out in the first paragraph."

For the present, viewing the administrator's right to recover damages for the alleged negligent killing of his intestate apart from the provisions of the statutes of the United States and the regulations prescribed thereunder referred to or set out in the petition, it may be said that that right rests upon section 241 of the state Constitution, which is as follows:

"Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then, in every such case, damages may be recovered for such death, from the corporations and persons so causing the same. Until otherwise provided by law, the action to recover such damages shall in all cases be prosecuted by the personal representative of the deceased person. The General Assembly may provide how the recovery shall go and to whom belong; and until such provision is made the same shall form part of the personal estate of the deceased person."

So far as the law of Kentucky goes, that section furnishes a clear basis for the claim of a personal representative to recover damages for the negligent killing of his decedent.

We all know, of course, that at common law no action for injuries resulting in death could be successful because of the maxim "Actio personalis moritur cum persona." Lord Campbell's act removed this obstacle in England, and probably most of the states have laws of a similar nature. In Kentucky former legislative enactments have been made permanent by the constitutional provision supra. But excepting in recent legislation in regard to persons employed by carriers engaged in interstate commerce, Congress has not, unless by section 4413, Rev. St. (U. S. Comp. St. 1901, p. 3020), presently to be noticed, dealt with the question otherwise than by section 721 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 581), which may have an important application, and which is as follows:

"The laws of the several states, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

Nearly, if not all, of the reported cases which have been tried in the federal courts involving a claim to damages where death ensued have been based upon local statutes. A great number of cases might be named, but it may suffice to note as instructive Dennick v. Railroad Co., 103 U. S. 17, 18, 26 L. Ed. 439, Stewart v. Baltimore & Ohio R. R. Co., 168 U. S. 448, 18 Sup. Ct. 105, 42 L. Ed. 537, and Railroad Co. v. Barron, 72 U. S. 104, 18 L. Ed. 591.

While we think it clear that in the direct and primary sense this action arises under the Constitution and laws of Kentucky, which give the right to maintain a suit for the negligent infliction of injuries resulting in death, we must nevertheless consider whether there is not a sense within which we are required to hold that it is an action arising under the laws of the United States, and therefore removable. The phrase, "arising under the Constitution and laws of the United States," is substantially as old as the government, and has many times been the subject of consideration and interpretation by the Supreme Court, though, so far as we can find, in no case precisely like this. The question whether an action arises under the laws of the United States must of course be determined upon the averments of the plaintiff's petition alone, and the test of its solution was originally stated by Chief Justice Marshall in Cohens v. Virginia, 6 Wheat. 379, 5 L. Ed. 257, thus:

"A case in law or in equity consists of the right of one party as well as the other, and may truly be said to arise under the Constitution or a law of the United States whenever its correct decision depends on the construction of either."

And in Osborn v. Bank of United States, 9 Wheat. 822, 6 L. Ed. 204, an action was said to arise under the Constitution or laws of the United States—

"when the title or right set up by the party may be defeated by one construction of the Constitution or laws of the United States but sustained by the opposite construction."

These general propositions have never been questioned in the many succeeding cases which have been adjudicated in the Supreme Court, but where different facts have called for it the opinions of the court in late cases introduce what may be regarded as qualifying elements. In Defiance Water Co. v. Defiance, 191 U. S. 190, 191, 24 Sup. Ct. 63, 66, 48 L. Ed. 140, an elaborate effort had been made in the bill of complaint to show that the action was one arising under the Constitution of the United States, and the Circuit Court proceeded upon the idea that the effort had succeeded, but the Supreme Court took a different view, and the Chief Justice, in delivering its opinion, said:

"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."

In Devine v. Los Angeles, 202 U. S. 332, 333, 26 Sup. Ct. 657, 50 L. Ed. 1046, the Chief Justice used this language:

"There being no diversity of citizenship, the jurisdiction of the Circuit Court could only be maintained upon the ground that the suit arose under the Constitution or laws or treaties of the United States, and a suit does not so arise unless it really and substantially involves a dispute or controversy as to the effect or construction of the Constitution or some law or treaty of the United States, upon the determination of which the result depends. And this must appear from the plaintiff's statement of his own claim, and cannot be aided by allegations as to the defenses which might be interposed."

In Minnesota v. Northern Securities Co., 194 U. S. 48, 24 Sup. Ct. 598, 48 L. Ed. 870, the action was begun in the state court. The complaint expressly claimed a decree declaring that the combination agreement complained of was in violation of the laws of the state of Minnesota and of the United States. The defendant filed a petition for the removal of the cause to the United States Circuit Court upon the ground that the action was one arising under the laws of the United States. The removal was made, and counsel for both sides supposed the case was a removable one. Page 62 of 194 U. S., page 601 of 24 Sup. Ct. (48 L. Ed. 870). The real purpose of the suit (page 65 of 194 U. S., page 602 of 24 Sup. Ct. [48 L. Ed. 870]) was to annul the combination agreement upon the ground that it was in violation alike of the laws of Minnesota and of the anti-trust act of Congress (Act July 2, 1890, c. 647, 26 Stat. 290 [U. S. Comp. St. 1901, p. 3200]). The court, after showing that if the acts complained of only violated the laws of Minnesota it could not be said that the action was one arising under the Constitution or laws of the United States, through Mr. Justice Harlan at pages 65, 66, of 194 U. S., at page 602 of 24 Sup. Ct. (48 L. Ed. 870), said:

"The contention, however, is that a case arising under the laws of the United States was presented by the allegation in the complaint that the combination and consolidation between the Great Northern and Northern Pacific Railway Companies and their control of their affairs and operations by the Northern Securities Company were also in violation of the anti-trust act of

Congress of July 2, 1890. An allegation in a complaint filed in a Circuit Court of the United States may, indeed, in a sense, confer jurisdiction to determine whether the case is of the class of which the court may properly take cognizance for purposes of a final decree on the merits. Newburyport Water Co. v. Newburyport, 193 U. S. 561, 24 Sup. Ct. 553, 48 L. Ed. 795, and Pacific Electric Ry. Co. v. Los Angeles, 194 U. S. 112, 24 Sup. Ct. 586, 48 L. Ed. 896 (decided at present term). But if, notwithstanding such an allegation, the court finds, at any time, that the case does not really and substantially involve a dispute or controversy within its jurisdiction, then, by the express command of the act of 1875, its duty is to proceed no further. That is manifest from the fifth section of that act, which provides: 'That if, in any suit commenced in a Circuit Court or removed from a state court to a Circuit Court of the United States, it shall appear to the satisfaction of said Circuit Court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said Circuit Court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed as justice may require, and shall make such order as to costs as shall be just.' 18 Stat. 470. That provision has not been superseded by any subsequent legislation."

And after further discussion the court (pages 72, 73, of 194 U. S., page 605 of 24 Sup. Ct. [48 L. Ed. 870]) said:

"For the reasons stated, we are of opinion that the suit does not—to use the words of the act of 1875—really and substantially involve a dispute or controversy within the jurisdiction of the Circuit Court for the purposes of a final decree. Western Union Tel. Co. v. Ann Arbor R. R. Co., 178 U. S. 239, 243, 20 Sup. Ct. 867, 44 L. Ed. 1052. That being the case, the Circuit Court, following the mandate of the statute, should not have proceeded therein, but should have remanded the cause to the state court."

But it is contended for the defendants that this case should be governed by other authorities. One of these is Mastin v. Chicago, etc., Ry. (C. C.) 123 Fed. 827, where Judge Philips, of the Western district of Missouri, upheld the removal of an action to recover damages alleged to have been sustained by reason of the shipment by defendant of diseased cattle into a state from a territory in violation of a law of the United States and also of the laws of the state and of the territory. In his opinion in that case, Judge Philips cited section 113 of Black's Dillon on Removal of Causes, where the rule was stated to be that:

"It is no obstacle to the removal of a cause as one arising under the Constitution and laws of the United States that it may involve other questions which are not of a federal character," etc.

The defendants also rely on the case of Nichols v. C. & O. R. R. Co., 105 S. W. 481, 32 Ky. Law Rep. 270, 17 L. R. A. (N. S.) 861, where the Court of Appeals of Kentucky, speaking through Judge Barker, held that a cause can be removed to the federal court where relief is claimed under the general law, and also under the provisions of the act of Congress known as the "Safety Appliance Act."

The defendants also cite the cases of Schlemmer v. Buffalo, etc., Ry. Co., 205 U. S. 1, 27 Sup. Ct. 407, 51 L. Ed. 681, and Ill. Cen. R. R. Co. v. Jones, 118 Ky. 158, 80 S. W. 484, but neither of them seems to throw any light on the question now under consideration.

We do not take issue with any case or authority which holds that a cause may be removed to the federal court where the pleading of the plaintiff therein shows upon statutes therein pleaded that there is a valid claim to relief alike upon federal and upon state laws, for then there is a case which in at least one aspect really and substantially involves a dispute or controversy as to the effect or construction of the Constitution or laws of the United States. What we are endeavoring to ascertain is whether the plaintiff's petition in this action shows such a state of case under such laws.

Under the Kentucky practice (to which section 914 of the Revised Statutes [U. S. Comp. St. 1901, p. 684] requires this court to conform in suits at law) it was not essential for the plaintiff to do more than state in general terms that the death of his intestate was caused by the negligence of the defendants. A specification of the details of the acts constituting the negligence was unnecessary. L. & N. R. R. Co. v. Wolfe, 80 Ky. 84; Chesapeake & O. Ry. Co. v. Dixon, 104 Ky. 608, 47 S. W. 615; Chesapeake & O. Ry. Co. v. Dixon, 179 U. S. 139, 21 Sup. Ct. 67, 45 L. Ed. 121. Under a pleading of that character, testimony showing a failure to observe the requirements of any federal or state statute, or any federal, state, or municipal regulation, would doubtless be admissible as tending to prove negligence, provided such statute or regulation was one which, properly construed, embraced or was applicable to the case stated by the plaintiff. The state courts as well as the federal courts must take judicial notice of the laws of the United States, and for some purposes judicial notice will be taken of executive regulations. Caha v. United States, 152 U. S. 211, 14 Sup. Ct. 513, 38 L. Ed. 415. Though it was therefore unnecessary to do so, the plaintiff in fact did plead certain specified statutes and regulations, and we can conceive of no reason therefor except that he either desired to base a right to relief upon them, or to specify the particulars and details of the negligence charged against the defendants. But whatever his motive, inasmuch as his averments respecting certain provisions of the laws of the United States and certain executive regulations are elaborately set out in his petition, we must follow the example of the Supreme Court in the Northern Securities Company Case, and by a process of elimination ascertain whether there is or can be a real or substantial controversy or dispute involved as to the effect or construction either of the federal statutes or of the executive rules and regulations specified in plaintiff's petition; our task, of course, being limited to them. If such real dispute is involved, the removal can be sustained; but if not, the case must be remanded.

Concerning rules and regulations made by executive officers under the authority of Congress, after careful consideration we have concluded that all of them which plaintiff relies upon, except those made under sections 4412 and 4413, should be entirely eliminated from consideration upon the ground that rules and regulations which are usually the modes prescribed for carrying into effect certain things directed by law to be done are not themselves "laws of the United States" within the meaning of that phrase in the removal act. In other words, we think that when Congress used that phrase it meant acts of Congress and

not executive rules and regulations, unless (as under sections 4412 and 4413) the recovery of damages was expressly authorized by statute for a disregard of the regulations made thereunder. We have not found any direct adjudication of this question, but in the case of United States v. Eaton, 144 U. S., at page 688, 12 Sup. Ct., at page 767, 36 L. Ed. 591, speaking through Mr. Justice Blatchford, the Supreme Court said:

"It would be a very dangerous principle to hold that a thing prescribed by the Commissioner of Internal Revenue as a needful regulation under the oleomargarine act, for carrying it into effect, could be considered as a thing required by law * * * in such manner as to become a criminal offense."

Equally, we think, it would be a dangerous and a licentious construction of the language of the removal act to say that an executive rule or regulation was a "law of the United States" within the meaning of that act, and for that reason we lay out of view all allegations as to executive rules and regulations, except as indicated, in considering the motion to remand. This, of course, also excludes from present consideration all averments of failure to comply with what such rules and regulations prescribe. As to the regulations made under section 4412, other considerations will eliminate them, as will be pointed out.

Taking up separately the statutory provisions referred to in plaintiff's petition, we find that direct reference is therein made:

First, to section 4412, Rev. St., which necessarily involves also section 4413. These sections are as follows:

"Sec. 4412. The board of supervising inspectors shall establish such regulations to be observed by all steam vessels in passing each other, as they shall from time to time deem necessary for safety; two printed copies of such regulations, signed by them, shall be furnished to each of such vessels, and shall at all times be kept posted up in conspicuous places in such vessels.

"Sec. 4413. Every pilot, engineer, mate, or master of any steam vessel who neglects or willfully refuses to observe the regulations established in pursuance of the preceding section, shall be liable to a penalty of fifty dollars, and for all damages sustained by any passenger, in his person or baggage, by such neglect or refusal."

It will be seen that section 4412 applies only to regulations to be observed by steam vessels in passing each other, and that section 4413 in express terms only authorizes the recovery of damages against such pilots, engineers, mates, and masters (but not against owners) as shall neglect or willfully refuse to observe such regulations, and gives a right to damages only to one who is a "passenger," but even as to passengers does not expressly authorize a recovery where death ensues. It in no way appears from plaintiff's petition that the defendant Johnson was either the pilot, engineer, mate, or master, who alone, being supposed to be in actual charge of the vessel, are within the language of these sections; and the petition also fails to show that plaintiff's intestate was a passenger upon either one of two steam vessels passing each other, so as to be within these sections. The deceased appears from the petition to have been a person asleep upon a raft which was tied up on one shore of Green river, and it does not appear that the raft was a steam vessel of any kind, nor that any precautions had been taken either by the deceased or those in charge of it to guard against danger.

If the plaintiff in any event could have had any right under these

sections, as actually presented, it can be said of his case, in the language of the Supreme Court in United States v. Perryman, 100 U. S. at page 238, 25 L. Ed. 645, that, "as the right is statutory, the claimant cannot recover unless he brings himself within the terms of the statute. This he has not done." As plaintiff's intestate was not a passenger, and especially not a passenger upon one of two steam vessels passing each other, his action cannot properly be said to arise under sections 4412 and 4413, nor under any regulations thereunder.

Second, to the act of Congress approved January 18, 1897, 29 Stat. 489, by which all vessels above 15 tons burden carrying passengers and propelled by gas, fluid, naphtha, or electric motors, are made subject to the provisions of section 4426 of the Revised Statutes relating to inspections of hulls and boilers, and requiring engineers and pilots, and by which also all vessels so propelled, without regard to tonnage, are made subject to section 4412 and to so much of sections 4233 and 4234 as the board of supervising inspectors shall deem applicable and practicable for such navigation. Inasmuch as all of these provisions, unless it be those embraced in section 4233, Rev. St., to which we shall allude further along, relate to vessels propelled by gas, fluid, naphtha, or electric motors, and to regulations making certain provisions applicable where practicable, they can have no application to this case, for it is nowhere claimed that the Samuel was in any wise propelled by either gas, fluid, naphtha, or electric motors. On the contrary, it is always in the plaintiff's petition spoken of as a steamboat, and such it doubtless was, as plaintiff's petition otherwise shows. Besides, any rules or regulations made by the board of supervising inspectors under the last clause of this act, whereby the board might endeavor to make section 4233 "applicable" where "practicable," are not parts of the act, and, as we have seen, are not laws of the United States within the meaning of the removal act.

Third, to section 4233 of the Revised Statutes, plaintiff's allegations as to which are as follows, viz.:

"That by the Revised Statutes of the United States, section 4233, steam vessels, when towing other vessels are required to carry two bright white masthead lights vertically in addition to their side lights, so as to distinguish them from other vessels, which masthead lights were required to be of such character as to be visible on a dark night with a clear atmosphere at a distance of at least five miles, and so constructed as to show a uniform and unbroken light over an arc of the horizon of 20 points of the compass."

The plaintiff then avers, among other things not relevant to this section, that the defendant negligently failed, on the occasion referred to, to carry two bright, white masthead lights of the description and power required by the section. These averments have required the court to inquire into the origin as well as the scope of section 4233, in order to ascertain whether that law of the United States imposed any duty upon the defendants out of a neglect of which plaintiff's cause of action could arise. The section as it now appears is a revision of Act April 29, 1864, 13 Stat. 58, c. 69 (U. S. Comp. St. 1901, p. 2893), entitled "An act fixing rules and regulations for preventing collisions on the water." The act expressly related to "steamships" instead of "steam vessels" as provided in the revision, but otherwise, so far as the pending question

is concerned, the revision is substantially the same as the act. Section 4233, like the act, opens with the provision that:

"The following rules for preventing collisions on the water shall be followed in the navigation of vessels of the navy and of the mercantile marine of the United States."

The fourth of the rules thus enacted into law by Congress contains the provisions as to masthead lights, etc., upon which plaintiff has based the allegations of the petition above copied. It is obvious, from the portion of the section above given, that it was intended to apply only to the vessels of the "navy and of the mercantile marine of the United States." The rules therein prescribed, and which are relied upon by the plaintiff in this connection, themselves inherently show that they were intended for the wide waters of the seas and for the ships that sail them. Of course, the Samuel did not belong to the "navy of the United States" within the meaning of the section, and we have been at pains to ascertain whether within that meaning it belonged to the "mercantile marine of the United States." We have not been able to find an adjudicated definition of the phrase, but in the Century Dictionary this is found: "Merchant service, the mercantile marine; the business of commerce at sea." As the dominant word in the phrase is "marine," we think this definition is correct, and, considering it in connection with all the language of section 4233, we have concluded that the latter does not, and that it was by no means intended that it should, embrace a steamboat on small inland waters like Green river. It would be difficult for two of the largest possible masthead lights to illuminate a five-mile space of the required arc amidst the forests and hills through which our little streams usually wind.

Upon these considerations we conclude:

First. That as section 241 of the state Constitution was ordained for the express purpose of authorizing the recovery of damages by a personal representative for the negligent killing of his decedent, this action is one arising under the Constitution of Kentucky.

Second. That excepting those made under sections 4412 and 4413 of the Revised Statutes, which provide in express terms for the recovery of damages in certain cases, none of the executive rules or regulations pleaded by the plaintiff are "laws of the United States," within the true intent and meaning of the language of the removal act in respect to actions arising under the laws of the United States.

Third. That as the provisions of the laws of the United States, viz., sections 4412 (and the rules and regulations made thereunder), 4413, and 4233, Rev. St. and Act Jan. 18, 1897, pleaded by the plaintiff in his petition, do not embrace and are not applicable to the case stated by the plaintiff—that is to say, to the case of a person injured on a floating collection of logs, which is what a raft is—this action cannot properly be said to be one arising under the laws of the United States.

Fourth. That there is, therefore, no real or substantial dispute involved in this suit as to the effect or construction of any of the laws of the United States referred to in plaintiff's petition; and, consequently,

Fifth. That this court has not jurisdiction of the case, and did not lawfully acquire it by the removal.

The motion to remand it to the state court must be sustained.

WESTERN UNION TELEGRAPH CO. v. JULIAN et al.

(Circuit Court, N. D. Alabama, S. D. April 19, 1909.)

1. COURTS (§ 303*)—JURISDICTION OF FEDERAL COURTS—"SUIT AGAINST STATE."
A suit against state officers charged with the enforcement of a statute of the state to enjoin the enforcement of such statute on the ground that it is in violation of the Constitution of the United States is not a suit against the state within the meaning of the eleventh constitutional amendment, and is within the jurisdiction of a federal court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 844½; Dec. Dig. § 303;* States, Cent. Dig. §§ 191, 192.

For other definitions, see Words and Phrases, vol. 7, p. 6778; vol. 8, p. 7809.

Federal jurisdiction of suits against state, see note to Tindall v. Wesley, 13 C. C. A. 165.]

2. CONSTITUTIONAL LAW (§ 18*)—CONSTRUCTION OF PROVISIONS—ADOPTION OF PROVISIONS FROM PRIOR CONSTITUTION.
When a constitutional provision has received a settled construction, and is afterward incorporated into a new or revised Constitution, it must be presumed to have been retained with a knowledge of that construction, and the courts will therefore feel bound to adhere to that construction.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 13; Dec. Dig. § 18.*]

3. COURTS (§ 366*)—FEDERAL COURTS—AUTHORITY OF DECISIONS OF STATE COURTS.
A clear and definite construction of a provision of a state Constitution by the highest court of the state is binding on all other courts, state or federal.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 954–957, 960–968; Dec. Dig. § 366.*

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.]

4. CONSTITUTIONAL LAW (§ 247*)—EQUAL PROTECTION OF LAWS—FOREIGN CORPORATIONS—CONSTITUTIONALITY OF STATUTE FORFEITING RIGHT TO DO BUSINESS.
Const. Ala. 1901, § 240, contained in an article relating to both foreign and domestic corporations, which provides that "all corporations shall have the right to sue, and shall be subject to be sued, in all courts in like cases as natural persons," puts all corporations, both foreign and domestic, on an equality with natural persons in respect to suits in any court, state or federal, and is violated by the provision of Code Ala. 1907, §§ 3642–3658, that any foreign corporation having been licensed thereunder to do business in the state shall forfeit such license if it remove a suit from a state to a federal court, no such restriction being imposed on natural persons or domestic corporations.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 247.*

Imposition of penalty, extra allowance of damages, costs, or fees as denial of equal protection of law, see note to Williamson v. Liverpool & London & Globe Ins. Co., 72 C. C. A. 547.]

5. CONSTITUTIONAL LAW (§ 247*)—EQUAL PROTECTION OF LAWS—FOREIGN CORPORATIONS.
The provision of Code Ala. 1907, §§ 3642–3658, relating to corporations, which requires the forfeiture of the license of any foreign corporation to do business in the state if it shall remove a case from a state to a federal court, is unconstitutional and void as denying to such corporations equal protection of the laws.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 247.*]

6. CORPORATIONS (§ 651*) — RIGHTS OF FOREIGN CORPORATION—ALABAMA CONSTITUTION.

Under Const. Ala. 1901, § 239, which provides that "any * * * corporation organized for the purpose * * * shall have the right to construct and maintain lines of telegraph and telephone within this state * * * and the Legislature by law of uniform operation shall provide reasonable regulations to give full effect to this section," a foreign corporation which has constructed and is operating telegraph lines in the state cannot be deprived of the right thereby given to maintain the same by any act of the Legislature, because it exercises also the right, given it by the Constitution and laws of the United States, to maintain suits in the federal courts or to remove causes thereto from the state courts, which is not within the power given to the Legislature by such section to regulate the business.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 651.*

Exclusion, regulation, and taxation of foreign corporations, see note to McCanna & Fraser Co. v. Citizens' Trust & Surety Co., 24 C. C. A. 13.]

7. CORPORATIONS (§ 651*) — FOREIGN CORPORATIONS—EXCLUSION FROM STATE—ESTOPPEL—VESTED RIGHTS.

While a state has sovereign power to exclude a foreign corporation from carrying on a local business within the state, where such a corporation has gone into the state and has acquired property and made contracts therein under the sanction of its Constitution and laws, the state is estopped to expel it either arbitrarily or because of the exercise of its lawful right to remove suits from the state to the federal courts.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2574, 2575; Dec. Dig. § 651.*]

In Equity. On motion for preliminary injunction.

The bill is exhibited by the Western Union Telegraph Company, a citizen of New York against Frank N. Julian, Secretary of State of Alabama, and the other defendants, clerks of circuit and city courts in the state of Alabama, all of whom are citizens of Alabama. It seeks to enjoin the execution of certain acts of the Legislature, forfeiting the right of a foreign corporation to do intrastate business if it remove a case from the state courts to the federal courts; the complainant, prior to the filing of the bill, having availed itself of its right, under the Constitution and laws, of removing certain suits brought against it in the state courts to the Circuit Court of the United States.

The statutes involved are contained in sections 3642–3658 of the Code of Alabama of 1907, which provide, in substance, that every foreign corporation, except insurance companies, before engaging in or transacting any business in this state, shall file in the office of the Secretary of State certain statements, and also designate a known place of business and an authorized agent thereat, and enact that, if such corporation engages in or transacts any business in this state without complying with the laws, it shall for each offense forfeit and pay to the state the sum of $1,000. These statutes also require such corporation to procure from the Secretary of State a permit allowing it to do business, for which a fee of $10 annually is required, and enact, if any business is done by such corporation within the state without first having procured the permit, that all contracts, engagements, or undertakings by or with such corporation, made without obtaining such permit, shall be null and void. It is further provided that the statutory inhibitions and requirements do not apply to foreign corporations engaged in carrying on business in interstate transactions only, and are not intended to prohibit or regulate transactions of interstate commerce, or business authorized under the laws and Constitution of the United States. The statutes further provide:

"Any foreign corporation or nonresident corporation, or corporation organized under or by authority of the laws of any other state or government other than the state of Alabama, doing business in this state, and having obtained a permit, as required by law, being sued in any of the courts of the state of

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

Alabama, which files or causes to be filed in such state court any petition, motion or plea, praying or asking that said cause be removed to any federal court, or which causes or procures the issuance of any writ, warrant, notice, citation or summons from any federal court removing said cause from such state court to any federal court, the clerk of the state court shall forthwith certify a copy of said petition, motion, plea, writ, warrant, notice, citation or summons to the Secretary of State, who shall thereupon immediately cancel the permit issued to such corporation, and make and enter on the stub thereof an order in substance: 'This permit is canceled for violation of the law under which issued, by the removal of a civil cause from a court of this state, to the federal court.' A certified copy of such stub and order thereon, under the seal of the office of the Secretary of State, shall be evidence of such fact, in any of the courts of this state; but no obligation then existing to the corporation nor any contracts of the corporation then existing shall be affected by such cancellation. After such permit shall be so canceled, any contract, agreement, or undertaking, with or by or to such corporation shall be null and void. After a cancellation of the permit of any corporation, it shall be unlawful for the Secretary of State to again issue a permit to such corporation to do business, until the said corporation shall pay to the Secretary of State, for the use of the state, a sum in cash equal to one-tenth of one per cent. of the capital stock of said corporation, and after such payment and the issue of such new permit such corporation shall be thereafter restored to the right to engage in and transact business in this state, but such new permit shall be subject to forfeiture as provided in this article."

The bill, after setting forth the citizenship of complainant and defendants, its compliance with the statutes before mentioned, the amount of property owned and used by complainant in this state, which is assessed for taxation at $900,000, the nature and extent of the business in which complainant is engaged, how it is carried on, that the matter in dispute exceeds the sum of $2.000, etc., and referring to certain provisions of the Constitution of the state, which are set out in the opinion, sets forth that complainant is engaged in the business of telegraphing in this state, and between the several states and with foreign countries. "Complainant further states that, in order to conduct its said business, it has been, and is, necessary for complainant to acquire, own, or control rights of way, or easements, over land in the state of Alabama, and to enter into contracts and make leases with reference to buildings in which to do business, and to have and maintain offices in said state for the transaction of its said business, and to have one or more agents at each of such offices; and that complainant has a large number of offices distributed over the state of Alabama, to wit, the number of over four hundred (400). Complainant has acquired rights of way and easements and franchises, and has made leases and contracts, and has acquired and established the properties above referred to, in reliance upon and under and by virtue of the laws of Alabama in force prior to the said act of March 4 [6], 1907 (Laws 1907, p. 377), and under and in pursuance of a well-established policy in Alabama, as indicated by its Constitution and statutes, encouraging corporations not organized under the laws of Alabama to come into said state and to do business, and acquire property rights in said state, under general laws applicable to complainant, said enactments not in terms or by implication in any wise limiting such privilege, contract, or franchise in point of time. That said lines of telegraph existing in said state of Alabama, and hereinbefore described, have been constructed by your orator, as aforesaid, with the consent and permission of said state and in accordance with its laws, and your orator has invested in the said lines of telegraph now in said state large sums of money, in excess of several hundred thousand dollars; and that continuously since the construction of said lines of telegraph, your orator has used the said lines for the transmission of telegraph messages for the government of the United States and the several departments thereof, and for the public, as an instrumentality of the Postal Department, and of commerce wholly within the state of Alabama, and also for interstate commerce, and commerce between points in said state and foreign countries, and thus said telegraph lines have been continuously employed in domestic, interstate, and foreign commerce since their construction."

Complainant also alleges that it has filed with the Postmaster General its written acceptance of all the restrictions and obligations of the act of Congress approved July 24, 1866, 14 Stat. 221, c. 230, and thereby become "a part of the postal equipment of the United States, and an instrumentality of the Postal Department of the United States, and carried upon its lines telegraph messages for the government of the United States, and for the several departments thereof, and the people of the United States and the people of Alabama, as prescribed and required in and by the provisions of the said act; that it is engaged in the transmission of the results of the observations at the signal service stations, and the reports of the Weather Bureau Department of the government." It also alleges that contracts had been in existence for years before the passage of the acts complained of, with various railroad companies in the state doing intrastate and interstate business, and under said contracts the said railroad companies have the right to use one or more of the wires of complainant, and by the terms of said contracts they are to be maintained and kept in order for the purpose of handling the trains of the said railroad companies, and directing the movements of the said trains, and the use of the wires by the railroad companies aforesaid, for the purpose, among other things, of directing the movement of trains within the state of Alabama on the tracks of the several railroad companies with which complainant has contracts, to wit, the Southern Railway Company, the Seaboard Air Line Railway Company, the Mobile & Ohio Railroad Company, and other railroad companies. It is also alleged that, if complainant's permit to do business in Alabama is revoked, it would result in the inability on the part of complainant to comply with its contracts with said railroad companies, and prevent the handling of the trains by means of the telegraph, thus subjecting complainant to grievous suits for nonperformance of its duties. That such use of the telegraph is absolutely essential to the railroad companies for the handling of their trains, and the performance of the duties imposed upon them by law, and necessary for the convenience of many localities which have no other telegraphic facilities. The bill asserts in various forms the revocation of complainant's license to do business in the state, impairs the obligation of its contracts, and will deprive complainant of its property without due process of law, etc., and will constitute a breach by the state of its own contract with the complainant upon the payment of the license fee, etc.

Against a rule to show cause why a preliminary injunction should not issue, respondents showed cause, in substance, that the bill is without equity; that the suit is in reality a suit against the state of Alabama, of which the court had no jurisdiction; and that the enforcement of the statute complained of did not violate any contract or invade any property right of the complainant, or deprive it of property without due process of law, or, by denial of the equal protection of the laws or in any way, prevent it from carrying out its contracts with the railroad companies, or its duty to the government in the transmission of government messages.

Campbell & Johnston, for complainant.

Alex. M. Garber, Atty. Gen., and Thos. W. Martin, Asst. Atty. Gen., for defendants.

JONES, District Judge (after stating the facts as above). If the statute under review be unconstitutional, plainly a suit seeking injunctive relief against the persons charged with its execution cannot be a suit against the state. The state is not a party to the record. No judgment which can be rendered in the suit can take any property of the state, or fasten liens upon it, or interfere with the disposition of funds in its treasury, or compel the state, indirectly, by controlling its officers, to affirmatively perform any contract, or to pay any debt, or direct the exercise of any discretion committed to its officers in the execution of any valid statute. Under these circumstances, the decisions of the Supreme Court, from the case of Osborn v. Bank, 9 Wheat. 738, 6 L. Ed.

204, down to Ex parte Young, 209 U. S. 152, 28 Sup. Ct. 441, 52 L. Ed. 714, are unbroken in holding that the suit against the officers is not a suit against the state. When the Legislature or Congress attempts by the enforcement of invalid statutes to destroy a right secured by the Constitution or laws, they overstep the limits of their power and their enactments are mere nullities. Such legislative excesses cannot be set up to shield those acting under them from personal responsibility for their acts, and whenever trespasses are threatened, and will result in irreparable injury to a property right, if not prevented, a court of equity will enjoin the execution of an invalid statute. If such suits against individuals are suits against the state, of which a court has no jurisdiction without the consent of the state, the power of the courts to enforce many sacred constitutional safeguards for the protection of liberty and property of the citizen, when illegally assaulted under the forms of law, would be entirely defeated. The doctrine is utterly at war with our system of constitutional government. Central of Ga. Ry. Co. v. Railroad Commission (C. C.) 161 Fed. 1000; Ex parte Young, 209 U. S. 152, 28 Sup. Ct. 441, 52 L. Ed. 714.

2. Section 240 of the Constitution of Alabama of 1901 ordains:

"All corporations shall have the right to sue, and shall be subject to be sued, in all courts in like cases, as natural persons."

This section is found in an article regulating "foreign corporations," and "corporations chartered under the laws of this state," which carefully discriminates between the two classes of corporations. It is evident from the dropping, in the close of the article, of all distinction in regard to the right to sue and be sued, and using the words "all corporations," that the framers of the Constitution intended to put corporations of every kind upon the same footing as to their right to resort to "all courts." It has been urged that this language could not have been intended to refer to the federal courts, since the framers of the state Constitution would, naturally, not attempt to make provision for suits in federal courts, the right to resort to which is conferred and governed solely by the Constitution and laws of the United States. True, the state could not give the right, but it could disable itself by its fundamental law from interfering with a foreign corporation because it exercised the right. In view of the history of the original section, and its sweeping words which imply no exceptions, we are not authorized to construe the section as though the words "of this state" were interpolated after the words "in all courts," and thus contract the right given to a mere right to sue and be sued "in all courts of this state." The framers of the Constitution were dealing with the broad subject of suits, by and against all kinds of corporations, in all courts which administer justice in this state. The property rights of corporations are litigated and settled quite as often in the federal courts as in the state courts. The section has a remedial purpose, and must be construed liberally, rather than narrowly. Moreover, words in a Constitution must be deemed to have been used in their popular sense, unless in some way the contrary can be fairly gathered from the whole instrument. To construe this section as though it read "in all courts of this state" would be to interpolate words which the framers of the Consti-

tution designedly omitted, and to make rather than interpret the Constitution. At common law, as well as under its statutes ever since the admission of the state into the Union, corporations had the right "to sue and be sued in all courts, in like cases as natural persons." If the section intended nothing more than to reaffirm this right, it would have been entirely unnecessary. Its incorporation in the fundamental law had a broader and deeper purpose. The traditional policy of the state, up to the time of the formation of the Constitution of 1875, had been to invite foreign corporations to do business in Alabama, and to put no restrictions upon their exercise of the right because of the forum in which they might wage their litigation. The contrary policy had been adopted in some states about that time, and its wisdom had been the subject of much discussion. The policy was deemed by many to be inimical to the true spirit of our institutions, and it was believed that it prevented the inflow of capital and immigration from other states. The capital invested by foreign corporations doing business here is the property of natural persons, generally citizens of other states, who very reasonably object to having to pay as the price for the privilege the surrender of a valuable constitutional right which all other citizens, natural as well as artificial, can freely enjoy. They are often loath to go into a state or put their money there, where they may become engaged in litigation, and yet have to forego the choice of the forum in which their property rights would be determined. The condition of our state at the time of the formation of the Constitution of 1875 was such that the people deemed it exceedingly desirable to encourage immigration and capital from abroad, and to refrain from legislation which might prevent or discourage such aids to the future progress of the state. The framers of the Constitution of 1875, therefore, desired to assure all who invested their capital in business here that the state would not attempt to confine them to litigation in its own courts, or to put any burdens or penalties upon their right to do business here if they resorted to the courts of the United States. They designed to put all corporations upon a plane of absolute equality in those respects with natural persons. As natural persons can sue and be sued in all proper cases in all courts, state or federal, the foreign corporations would have the same right; and, the right being given by the fundamental law, the state would be powerless to attach any conditions to its exercise by the foreign corporations which did not apply equally to natural persons, whose rights to do business can never be forfeited or descriminated against because they litigate their business affairs in one court rather than another. Hence the whole matter was thus taken out of the realm of legislative discretion, and the policy of the state fixed and announced to all whom it might concern, in its fundemental law.

This provision was construed by the Supreme Court of Alabama in Railroad Company v. Morris, 65 Ala. 199, and Smith v. L. & N. R. R. Co., 75 Ala. 451. In the latter case, the court, after quoting the words of Justice Field (County of San Mateo v. Southern Pac. R. Co. [C. C.] 8 Sawyer, 238, 13 Fed. 722), that section 1 of the fourteenth amendment applied to corporations as well as natural per-

sons, and implied not only the right to resort on the same terms as others to the courts of the country for the security of person and property, but also exemptions from all invidious burdens, etc., said:

"This question, however, would seem to be settled by our own state Constitution, art. 14, § 12 (now section 240), which ordains 'that all corporations shall have the right to sue, and shall be subject to be sued in all courts in like cases as natural persons.'"

The court further held:

"That the sum of these provisions is that no burden can be imposed upon one class of persons, natural or artificial, that is not in like conditions imposed upon all other classes."

When a constitutional provision has received a settled construction and is afterwards incorporated into a new or revised Constitution, it must be presumed to have been retained with a knowledge of that construction, and the courts will therefore feel bound to adhere to that construction. Ex parte Roundtree, 51 Ala. 42. The words of section 240 of the present Constitution must therefore receive the same construction given them under the prior Constitution of 1875, for they must be presumed to have been inserted in the present Constitution with that meaning. This construction of the section by the highest court of the state is binding upon every court, state or federal, even though the federal court, in the exercise of its own independent judgment, might reach a different conclusion.

Under the laws of Alabama, no domestic corporation, much less a natural person, is punished by the forfeiture of any right whatever if it bring a suit in the federal court, as it may when a federal question is involved, or remove a case to the federal court, as it may when sued in the state court by a citizen of another state. Directly the opposite rule is declared by the statute if the foreign corporation resorts to the federal court. The statute declares that although the Constitution gives all corporations, foreign and domestic, the right to sue and be sued on equal terms with natural persons in all courts, yet if the foreign corporation goes into a particular court it shall be subject to an invidious penalty, going to the extent of forfeiting its right to do business here, which penalty is not, and cannot be, visited upon domestic corporations and natural persons under these circumstances. The statutes are therefore a plain attempt to defeat the enjoyment of the perfect equality which the Constitution commands in this respect, and, being hostile to its commands, are mere nullities. They are also obnoxious to section 1 of the fourteenth amendment, in that they deny the equal protection of the laws by inflicting pains and penalties upon one person or class of persons for doing an act which, when done by any other person, under the same circumstances, subjects him to no burdens or pains whatever, and in no manner interferes with his right to do business in this state.

3. The same result is inevitable, if the court gives any effect to section 239 of the state Constitution, which reads as follows:

"Any association or corporation organized for the purpose, or any individual, shall have the right to construct and maintain lines of telegraph and telephone within this state, and connect the same with other lines; and the

Legislature, by general law of uniform operation, shall provide reasonable regulations to give full effect to this section."

This section gives any corporation, organized for the purpose, the right to construct and maintain telegraph lines in this state. This is the right to which the Legislature is commanded to give full effect. In compliance with the Constitution, foreign telegraph companies were invested with the power of eminent domain and otherwise regulated. The Constitution left no power in the Legislature save to "provide reasonable regulations" for conducting the business. The business to be regulated is that of constructing and maintaining telegraph lines. The corporation is not carrying on that business when it seeks justice in the courts. Forfeiture of a right to do business because the owner resorts to the courts is not "reasonable regulation" of the telegraph business. It is not regulation of the business in any sense. It is destruction of the right to do the business. The power to destroy a business never exists when the only grant of authority over the subject is to regulate the carrying on of the business.

It is an accepted canon of constitutional law that the exercise of a constitutional right in a lawful way can injure no one. Whenever and to whatever extent the Constitution speaks on a particular subject, to that extent the police power is displaced, and has no function thereafter, save as it may be useful in furthering the constitutional policy. The only reason for the existence of the police power, and which alone upholds its exercise in any case, is that it is necessary or proper for the promotion of the public welfare, and, where the Constitution has spoken, the police power must follow, and cannot antagonize its commands. The Constitution of the state gives the telegraph company the right to construct and maintain lines in Alabama, and the Constitution and laws of the United States give the telegraph companies the right to resort to the federal courts. Upon what theory, then, can the state, under its police power, or any other power, interfere, as the statutes here attempt to do, with the proper enjoyment of either right, or lawfully declare that the exercise of one constitutional right shall work the forfeiture of the other constitutional right? The destruction here attempted of these constitutional rights can be vindicated only on the theory that the operation of the Constitutions of the state and of the United States, and the exercise of rights thereunder, are so prejudicial to the well-being of the state, and such a menace to the public weal, that the police power, which can never come into existence except to save the state from harm or promote its welfare, must intervene and rescue the state from the effects of obedience to the fundamental law of the state and nation. It is a startling doctrine to proclaim that there is any power in the Legislature to confiscate one of a man's constitutional rights because he exercises another of his constitutional rights. The logic which would sustain such an exercise of power must be rejected, since its acceptance would enthrone Legislatures above Constitutions, and finally overthrow our constitutional institutions. The telegraph company being engaged in business here under a grant of authority from the Constitution of the State, the Legislature has no more power to con-

fiscate that right because it resorts to the federal courts, in the exercise of a right given by the Constitution and laws of the United States, than it would have to confiscate any other vested property right of any other person under the laws of the state, because he exercised the right, arising under the Constitution and laws, to resort to the mails of the United States in carrying on his business.

The bringing of a suit by a foreign corporation in a federal court to assert any right given it by the law of the land touches nothing of which the police power of the state is the guardian, and cannot give rise to legislative power, under any head, to hamper or forbid the resort to that court, or punish a person for so doing by destroying a business in which a person has a constitutional right to engage. Joseph v. Randolph, 71 Ala. 506, 46 Am. Rep. 347. The telegraph company having come into the state and acquired property and done business here, as it had the constitutional right to do, its business and property are secure against all hostile action of the state except for forfeiture for cause, for misuser, or nonuser, prescribed by the law of the land, and applicable alike to all persons and corporations similarly situated, pronounced by judgment of the courts after hearing, and not by statutory edict. A statute which attempts to forfeit a man's property or business because he exercises a constitutional right in a lawful way, in a resort to the courts of his country for justice, transcends all the bounds of legislative power, and is a mere edict of despotism. No court which sits to administer the fundamental law, alike of the state and of the United States, can recognize it as a legitimate exercise of power. In the language of section 35 of the Declaration of Rights:

"The sole object and only legitimate end of government is to protect the citizen in the enjoyment of life, liberty and property, and when the government assumes other functions, it is usurpation and oppression."

4. In the passage of this statute, and a similar one before this court in Seaboard Air Line Ry. Co. v. Railroad Commission (C. C.) 155 Fed. 792, the Legislature necessarily held there was no constitutional provision, state or federal, which prevented the state, under all circumstances, from arbitrarily expelling any foreign corporation from doing intrastate business if it remove a suit to the federal court, for no exception whatever is made in the operation of the statute as to any corporation doing intrastate business in any case or under any circumstances. It is a part of the history of the times that the Legislature supposed it had such power, under the doctrine declared by the Supreme Court of the United States in Prewett v. Life Insurance Co., 202 U. S. 252, 26 Sup. Ct. 619, 50 L. Ed. 1013. The pith of the Supreme Court's reason for refusing to interfere with the expulsion there is thus stated in its own words:

"This is justifiable, because complainant showed no constitutional right to do business in that state. * * * This is the whole point of the case, and, without reference to the injustice or prejudice or wrong alleged, must determine the question."

Clearly that decision is direct authority against the right of expulsion in this case, since complainant here has a constitutional right

to do the business—"to construct and maintain lines of telegraph within this state."

The Supreme Court was not attempting in that case to lay down any general rule as to when a state waived or parted with its absolute sovereign prerogative to expel a foreign corporation at will, as distinguished from its right to expel for cause, or to enunciate the doctrine that in some cases the Constitution of the United States would not forbid the exercise of the prerogative. In that case, there being no estoppel or waiver, nor any provision of the Constitution of the United States, which militated against the exercise of the absolute prerogative, the court held the fact that the state gave an invalid reason, offensive to public policy, such as the removal of a suit to the federal court, could not affect the legality of the expulsion, lawful in itself, whatever the motive. It did hold, however, that any statute exacting an agreement in advance to abstain from the federal court was a nullity, unless other provisions of the expulsion statute were separable, and intended to be enforced when standing alone. The Supreme Court in that case merely stated the general rule, which has always obtained in our jurisprudence, that a corporation, a mere artificial person, chartered under the laws of one state, could not migrate to another state and exercise its powers there without the consent of that state, save to carry on interstate commerce or the operations of the general government. As the foreign corporation had no right to come into the borders of another state to do a local business, the court held that the other state might deny it admission in the first instance, or not having prescribed conditions in advance, and merely permitted the foreign corporation to remain on pure sufferance, or by comity, might, nevertheless, afterwards arbitrarily expel it for removing a suit to the federal court, or for any other reason or motive which the state might deem sufficient. This is the sum and substance of the whole ruling in Prewett's Case. That case is far from deciding that a foreign corporation may be expelled, under any and all circumstances, at the mere pleasure of the state, and when taken in connection with prior and subsequent decisions of the Supreme Court, it is clear that case never intended to assert such a doctrine.

It has not been doubted since the great case of Fletcher v. Peck, 6 Cranch, 88, 3 L. Ed. 162, that a state, in the language of Chief Justice Marshall, is "restrained, either by principles which are common to our free institutions, or by the particular provisions of the Constitution of the United States," from arbitrarily withdrawing its own grant; and the reason of the doctrine applies as well to the arbitrary withdrawal of a grant of a right to do business, and to hold and use property acquired in the business, when investments have been made on the faith of the state's laws, and vested rights have arisen in the business, as where there has been a direct grant from the state of real property to a particular individual. It is equally well settled that the department of the government which represents the sovereignty of the state or of the United States in dealing with any particular matter may, by its conduct, estop the state or the United States, as the case may be, from arbitrarily withdrawing the grant of a right, and disappointing the just expectations which its laws and conduct raised,

to the prejudice of one who has relied and acted on its laws and the acts of its officers, when such action of the state will forfeit his property, rip up completed transactions, or prevent the future exercise of rights which vest in and flow from the original transaction. United States v. Walker (C. C.) 139 Fed. 412, and authorities there cited.

The right to expel foreigners is an attribute of sovereignty. An independent sovereign may exercise the power arbitrarily, if he chooses, being responsible solely to the power whose subject he expels, under the law of nations. An independent sovereign may also waive the right, or disable himself from exercising it, by treaty with another sovereign, or by particular concessions to the foreigner who might otherwise, lawfully, be arbitrarily expelled. The states of this Union are sovereign, except in so far as they have delegated their sovereignty. But for the Constitution of the United States, each of the states might impose what conditions it pleased upon the coming and remaining in their borders, of natural persons, citizens of other states. While the states of the Union do not stand to each other in the relation of independent sovereigns, and the Constitution of the United States is much more than a treaty between them, several of its provisions operate upon the power of the state to expel a foreign corporation as effectually as a treaty would between wholly independent sovereigns. The prohibitions the Constitution puts upon certain exercises of power by the states inevitably, in many situations, forbid the exercise of absolute sovereign prerogative to expel a foreign corporation at pleasure. The states are forbidden to pass laws impairing the obligation of contracts, or to deprive any one of life, liberty, or property without due process, or to deny to any one within their jurisdiction the equal protection, of the laws. A foreign corporation may acquire a vested right to do intrastate business, which is protected by the Constitution of the United States from destruction by the exercise of the arbitrary prerogative of expulsion, in other ways than by the direct grant, as in the instant case, in the Constitution of the state. It may acquire a vested right to do business by laws inviting foreign corporations to invest in property and do business here, giving it certain privileges if it does, if the corporation acts upon the faith of these laws and performs their conditions. The state may also confer a vested right to do business by authorizing the foreign corporation to purchase and succeed to the franchise and business of domestic corporations, if it purchase in reliance upon these laws. By these and other like acts, the state may abandon and waive its sovereign, arbitrary prerogative of expulsion, and be prevented by the operation of the Constitution of the United States from exercising it. No act of the state is lawful which will impair the obligation of contracts it has authorized, or deprive the foreign corporation of property without due process of law, or deny to it the equal protection of the laws. The prerogative must be exercised in subordination to the Constitution of the United States, and cannot be made the instrument of accomplishing results which the Constitution of the United States forbids a state to bring about.

Some other interesting questions are raised by the bill which it is unnecessary to decide at this time. Plainly, the statute under review

violates both the Constitutions of the state and of the United States, and it is evident that its enforcement would inflict irreparable injury upon the complainant, and work great harm to the public.

A preliminary injunction must issue as prayed.

UNITED STATES v. CONKLIN et al.

No. 14,547.

(Circuit Court, N. D. California. February 13, 1909.)

1. EQUITY (§ 153*)—BILL—CONSTRUCTION.

Whether a bill states a cause of action depends on the legal effect of its allegations.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 153.*]

2. DEEDS (§ 69*)—VALIDITY—FORGERY.

Where certain vendors under a contract for the sale of land to B. had no definite understanding as to the precise form of the documents they were to execute, except that they understood that they were to execute deeds to B. direct, but were willing to sign any papers which their attorney should advise, instruments prepared by such attorney, conveying the land to the United States and authorizing B. to select lieu land in the place thereof, signed by such vendors, were not forgeries, nor void.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 69.*]

3. VENDOR AND PURCHASER (§ 38*)—CONVEYANCES—FRAUD.

Certain vendors, having contracted to sell land to B., left it to their attorney to prepare the necessary papers. The attorney prepared a deed from the vendors to the United States, and certain powers of attorney authorizing B. to select certain lieu land in the place thereof, which the vendors signed without understanding their character. Neither B. nor the attorney intended to defraud the vendors, nor did it appear that any advantage was obtained, or that they were injured by the deception, if any. *Held*, that the transaction, as between the vendors and B., was not unobjectionable.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 38.*]

4. PUBLIC LANDS (§ 120*)—LIEU LAND—DEED—FORGED ACKNOWLEDGMENT—RESCISSION.

A deed of land to the United States had been in fact recorded, though it bore a false certificate of acknowledgment; the grantors never having acknowledged the same. The grantors had never refused to acknowledge the deed, nor had the government been deprived of the land, and there was no reason to fear that it would be. *Held*, that the grantors' failure to acknowledge was at most a breach of contract, and the false acknowledgment was not such deception as would entitle the United States to rescind a patent for lieu land granted in the place of the land conveyed.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 120.*]

5. PUBLIC LANDS (§ 120*)—LIEU LAND—CONVEYANCES—TITLE TO LAND RECEIVED IN EXCHANGE—"OWNERSHIP."

Where a full abstract of title to land tendered to the United States in exchange for lieu land was furnished, the fact that the grantors did not have an unincumbered title to the land offered in exchange, in the absence of fraud, did not entitle the government to rescind a patent granted for the lieu land, as "ownership" of land authorized to be conveyed in exchange does not imply a perfect title.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 120.*

For other definitions, see Words and Phrases, vol. 6, p. 5152.]

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

6. PUBLIC LANDS (§ 120*)—LIEU LAND—PATENT—CANCELLATION—FRAUD.
The government is not entitled to set aside a patent for lieu land for fraud in the conveyance of land exchanged therefor, where it is unable to show damage resulting from such fraud.
[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 120.*]

7. PUBLIC LANDS (§ 120*)—LIEU LAND—FRAUD.
Grantors of land to the United States in exchange for lieu land cannot take advantage of their own fraud, if any, in conveying the land exchanged, as against the United States.
[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 120.*]

In Equity. On demurrer to bill. Sustained, with leave to amend.

The Attorney General, Robt. T. Devlin, U. S. Atty., and George Clark, Asst. U. S. Atty.

A. E. Bolton, N. E. Conklin, and Campbell, Metson, Drew, Oatman & McKenzie, for defendants.

VAN FLEET, District Judge. This is a suit in equity by the United States to set aside and annul, on the ground of fraud in its procurement, a patent granted to Mollie Conklin and Emily M. Reddy, as executrix, and Edward A. Reddy, as executor, of the estate of Patrick Reddy, deceased, for a tract of 200 acres of land, under Act June 4, 1897, c. 2, 30 Stat. 36 (U. S. Comp. St. 1901, p. 1541), providing for an exchange with the government of lands held in private ownership in a public forest reserve for other vacant lands in lieu thereof. Certain of the defendants have demurred to the bill for want of facts to entitle complainant to relief in equity.

The material averments of the bill are, in substance: That in August, 1900, the defendant Mollie Conklin was the owner in fee of an undivided one-half interest in a tract of land, including the land covered by the patent, comprising some 9,500 acres, known as the "Monache Lands," situate in Tulare and Inyo counties, in this state, in what is known as the "Sierra Forest Reserve," and that Emily M. Reddy and Edward A. Reddy were each the owners of an undivided quarter of said tract; their title being subject, however, to administration in the estate of Patrick Reddy, deceased, then in course of probate, under whose will their title was derived, and of which will they were the executors. That on said date the said Mollie Conklin and Emily M. Reddy made and entered into an oral agreement with one John A. Benson, under the terms of which it was agreed that Benson should buy said entire tract of land at the rate of $3.80 per acre, and that title to the land might be taken in parcels as desired by the purchaser, but the whole tract to be taken within 90 days, deeds for different parcels to be executed by the grantors as desired by Benson and placed in escrow, and delivered upon payment of the agreed price per acre; the latter to furnish any necessary abstract of title at his own expense.

It is alleged: That at the making of this agreement the law firm of Campbell, Metson & Campbell, of which Joseph C. Campbell was the head, which firm had long acted as attorneys for the grantors, and in whom they had entire confidence, acted for and represented all the parties in negotiating the agreement; and it was understood that

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

said firm, or Mr. J. C. Campbell, would continue to act for all parties in the matter "in preparing and in directing the execution of all legal documents necessary to the carrying out of the said agreement, and in advising the said Mollie Conklin and the said Emily M. Reddy at all times in carrying out said agreement on their part," and upon whose advice they would solely rely, and "that whatever instruments were prepared by the said John A. Benson and presented to the said Mollie Conklin and the said Emily M. Reddy for execution in pursuance of said agreement would be in fact prepared by the said J. C. Campbell or the said firm of attorneys, and that the same would be so prepared strictly and solely in accordance with the terms of said oral agreement." That thereafter the said Benson procured to be sent to said Mollie Conklin and Emily M. Reddy, by the hand of a person to them unknown, a large number of written instruments, which were represented to them by such messenger to have been prepared in and brought from the office of said firm of attorneys, and that they were the writings which were to be executed by them in pursuance of their said agreement of sale, and which they were desired by said attorneys to sign and deliver to such messenger. That the grantors, being of advanced years and unversed in legal matters, and relying wholly upon the representations made by the agent of said Benson, they, without examination of said papers, or knowledge of their character or import, signed and delivered them to such messenger, by whom they were immediately carried and delivered to Benson. That the documents so executed by them "were in fact deeds purporting to convey and relinquish to the United States government said 'Monache Lands,' and were in fact powers of attorney in blank and undated, and without the name of any attorney mentioned therein, and the said written instruments were in part blank lieu selections; but that said selections were all in blank, in that there was no description therein of lands selected in lieu of lands relinquished or surrendered. That said selections, when so executed, were not dated." That these papers included the deed and lieu selection and power of attorney subsequently used by Benson as a basis for procuring the issuance of the patent herein involved; and that said instruments and each and all of them were executed by said grantors through the "mistake, inadvertence, and fraud hereinbefore alleged," and which was at all times known to said Benson. That the said last-mentioned deed and other documents were never acknowledged for record by either of the said grantors, but that upon the receipt of the same the said Benson "falsely, fraudulently, and without any right so to do, procured to be attached to said deed a false, forged, and fraudulent certificate of acknowledgment, falsely purporting to certify that the said deed had been executed" by the grantors in due form of law before an officer authorized to take the same, and such as to entitle the same to record; and that thereupon the said Benson procured said deed to be recorded in the office of the recorder of deeds in the county wherein the lands involved were situated, and filed said deed with the Department of the Interior of the United States under the requirements of said statute and the regulations of the Land Department in such cases, together

with an abstract of the title to the land described therein, and at the same time and in like manner, after filling the blanks in said lieu selection and power of attorney, filed the same with said department, which papers were received and acted upon by the officers of the department under the belief that the said instruments were in all respects genuine and that said Benson was authorized to act for said grantors. That thereafter in due course said department approved of the lieu selection made thereby and issued the patent in suit and delivered the same to said Benson. That all said acts by Benson were without right or authority from the grantors in said deed, and the action thereon by the officers of the government was had without knowledge on their part of said fraudulent acts, but in the belief that Benson was in all respects authorized to act in the premises and said deeds and other instruments were in all respects genuine and valid.

It is then alleged that the grantors in said deed "never at any time knew they were deeding, transferring, conveying, relinquishing, or disposing of any title or interest in and to said lands to the United States of America; that they never knew at any time that they were selecting or authorizing the selection of any land from the United States of America in lieu of the lands surrendered by them to the United States of America; that they never had at any time authorized such transfer, relinquishment, or selection," and further, that in signing the written instruments hereinbefore referred to they believed they were "in fact executing deeds to John A. Benson to be placed in escrow in pursuance to the oral agreement hereinbefore alleged; * * * that said Emily M. Reddy at no time had authority to transfer or convey the estate of Patrick Reddy, deceased, as such executrix, except under authority of the superior court of the state of California having jurisdiction of the administration of said estate; that the said superior court never at any time authorized the execution of any of the said written instruments so signed, executed, and delivered by the said Mollie Conklin and the said Emily M. Reddy." It is further alleged:

"That the name of Edward A. Reddy appears signed to all the written instruments executed in the manner hereinbefore alleged by the said Mollie Conklin and the said Emily M. Reddy; that the plaintiff is not advised and informed as to the understanding of the said Edward A. Reddy at the time he appears to have so executed the said written instruments, and is not advised whether the same were executed by the said Edward A. Reddy in fact, or whether the same were executed by him inadvertently, or by mistake, or under a misapprehension of fact, or at all; that the said Edward A. Reddy had no authority or right to convey the estate of Patrick Reddy, deceased, except upon granting of authority so to do by the superior court of the state of California having jurisdiction over the administration of the estate of Patrick Reddy, deceased; that said court never at any time, by any order or otherwise, authorized the execution of said written instruments or any of them."

It is also alleged:

"That the administration of the estate of said Patrick Reddy, deceased, has never been brought to a close, and that the expenses of the administration of the said estate have never been paid; that claims aggregating a large amount have been duly presented, allowed, and approved against said estate, and filed with the papers of said estate; and that the lands described in paragraph 1 hereof are subject to the payment of the expenses of the administration of the estate of Patrick Reddy, deceased, and of the payment of all claims and debts

owing by said estate, and that said debts, expenses, and claims have not been paid, and that said lands are incumbered by virtue of the administration of said estate, and that the creditors of said estate have never waived their claim to such lands; that the owners of said lands described in paragraph 1 hereof, within the meaning of the act of Congress hereinbefore mentioned, never at any time deeded, relinquished, or transferred the complete title of said lands to the United States; that the officers of the United States and of the Department of the Interior thereof, in approving the said selection of the said lands hereinbefore described, and in issuing the said patent for the lands hereinbefore described, acted inadvertently and through mistake in assuming that the said written instruments so presented to the said Department of the Interior, as hereinbefore alleged, transferred and conveyed to the United States a complete title to the said lands first hereinbefore described; that said approval and said patent were made without authority of law, in that the ownership of said lands hereinbefore described in paragraph 1 hereof was never surrendered or conveyed to the United States."

These are the essential features of the bill; the allegations as to the other defendants not being material for present consideration. The prayer, so far as material, is for a decree setting aside, canceling, and recalling unto the United States the patent in suit, and declaring that the title to the lands so attempted to be conveyed to the United States in exchange for the lands described in the patent has never vested, and that the title of the United States to the lands described in the patent be quieted.

The contentions of the defendants as to the alleged deficiencies of the bill, in the want of sufficient facts to entitle complainant to sue, are, generally stated: First, that the bill discloses no deception practiced by the grantors in procuring the deed of relinquishment constituting legal fraud; second, that under the facts alleged the deed, if in any wise subject to be assailed, is voidable merely, and not void, and the United States, having accepted and acted upon it in good faith and without notice of the fraud, if any, received a perfect title to the lands conveyed thereby, and was consequently in no wise injured; third, that the incumbrance of the title, if any, by reason of the unsettled condition of the estate of Patrick Reddy, deceased, was disclosed by the abstract, and the government's acceptance of the deed with knowledge of the state of the title estops it from complaining on that score; and, lastly, that the suit cannot be maintained, because it does not appear that the government has returned or offered to return the consideration passing to it as a basis for the patent.

1. In determining whether the bill states a cause of action, the first thing to be considered is the legal effect of its allegations. It might be supposed that the pleader meant to plead that the grantors never had in fact executed the deed of relinquishment or the instruments authorizing the selection of lieu lands. If this were so, then the deed would be void, and no title would pass to the government, and no selection was, in fact, ever made; and, the patent having therefore issued under a mistake of fact, the government would be entitled to set it aside. While the oft-repeated statement in complainant's brief that the documents were "forged" might lead to the conclusion that this is the construction put upon the transaction by the United States attorney, he explicitly disclaims this by the following language in his brief:

"On the face of the bill, therefore, the deeds executed by Mrs. Conklin and Mrs. Reddy were not void instruments, but merely voidable, unless the forgery of the certificate of acknowledgment defeated the grant."

This construction of the bill seems to me to be correct. It may be that when a person definitely intends to execute a certain document, and another is surreptitiously substituted in its place, and unwittingly on his part receives his signature, the latter document is not, in fact, executed, and therefore void. But here the grantors do not appear to have had any very definite understanding as to the precise form of the documents they were to execute except that it was understood in a more or less tentative way that they were to execute deeds to Benson direct; but it clearly appears that they were willing to sign any papers which their attorney, Mr. Campbell, or his firm, should advise were necessary or proper in order to carry out the purpose of the agreement, which was a sale by them of the land. It will be observed that there is no averment that the representation by the messenger of Benson that Mr. Campbell or his firm had prepared and sent the papers was in fact false; and, since fraud cannot be presumed, it must be taken as true that the papers were so prepared by Mr. Campbell or his firm, were considered in compliance with the contract, and sent for the purpose of being executed. The grantors did then sign, and did intend to sign, these particular instruments, and, therefore, they are not forgeries or void.

The government, therefore, can recover, if at all, only on the ground of fraud. In determining whether there was, in a legal sense, any fraud in the transaction, we should first inquire: Do the facts alleged constitute fraud against the grantors? We all know that it is a common practice for a purchaser to resell the property before the purchase is fully consummated, and he will often purchase with the view of making such a resale. It is also common for the deed in such case to be made to the second purchaser direct, at the request of the first. Such a method of consummating a transaction is not unusual, and, if understood by the parties, is entirely regular. In this case it was clearly satisfactory to Benson, for he sent the papers to be executed. It was satisfactory to the grantors, for they left it to Mr. Campbell, their duly authorized attorney in the matter, and he, as we have seen, presumptively prepared the papers and advised their execution. Under these circumstances the facts themselves do not show that either Benson or Campbell intended to in any way defraud the grantors. Moreover, the bill does not allege that they did any of these acts with the intent to defraud them, nor does it allege that they did, in fact, defraud them, or obtain any advantage from them, or that they were in any way injured by the deception, if any; for there is not an intimation in the bill that the grantors did not receive the price agreed upon for the land. Under these circumstances the transaction between the parties, it would seem, was entirely legal, and could not be the subject of any complaint by the grantors on the facts alleged.

Was the government defrauded? A deed was delivered to the government, which was in fact executed, and was sufficient to and did convey the title it purported to convey, and one which we have seen could not be set aside. This was, then, no fraud.

An application for lieu lands was likewise submitted, made under a power of attorney, which was executed by the parties and gave the authority which it purported to grant, and which, we have seen, was not obtained by fraud. This was, then, no fraud.

An abstract of title was submitted, which showed the actual state of the title of the parties and the recordation of the deed. The deed was, in fact, recorded; so this was no fraud.

The only false thing, then, in the whole transaction, as it is alleged, is the fact that the grantors never acknowledged the deed, and that the certificate of acknowledgment made by the notary was false, and that this was procured by and known to Benson. Of course, as is admitted, this did not affect the validity of the deed as a conveyance, nor did it in fact prevent its recordation. It is not alleged that any one had anything to gain by the deception, or that in fact the government was intended to be or was in any way affected or damaged thereby. As the matter is set forth in the bill, however, this constituted a misrepresentation to the government of a fact; and it is safe to assume that, if the government had known that the deed was not acknowledged, it would not have issued the patent. Is such a misrepresentation a legal fraud, or ground for rescinding the contract?

The question thus arises: Can one party to an exchange of lands rescind the contract because the deed of the other was falsely represented to be acknowledged? As suggested, it is not alleged that this was done with the intent to injure the plaintiff, or that, in fact, any injury has resulted. It is not alleged that the grantors have refused to acknowledge the paper, or that they have ever been requested so to do. The government has not been deprived of the land, and it does not appear that there is any reason to fear that it will be. The failure to acknowledge the deed seems to be a breach of contract at most, and not with any intention of defrauding the government of the land. The only allegation of the purpose of the deception is:

"That the said acts of said John A. Benson, last herein described, were committed for the purpose of falsely and fraudulently procuring the issuance of said patent."

But the procuring of the patent was a perfectly proper purpose, and it is not alleged that it was done with the intent to in any way injure the government, and, as stated, it is not alleged that the government was, in fact, injured. It seems to be well settled that no deceit will be available to set aside an exchange of land, if the party obtained exactly what he bargained for. 14 Encyclopedia of Law, p. 144.

2. The point made, that the grantors did not have a good unincumbered title, I hardly think is of any weight. Congress necessarily conferred authority on the Land Department to determine who were the owners of the land, and in the absence of fraud this determination must be conclusive. A full abstract was furnished, and, therefore, there was no fraud or deception in this particular. In Hyde v. Shine, 199 U. S. 62, 82, 25 Sup. Ct. 760, 763, 50 L. Ed. 90, the Supreme Court recognizes that "ownership may not imply a perfect title."

3. Nor do I think the latter case is authority for the proposition that it is not necessary to show damage flowing to the plaintiff from

the alleged fraud. There a conspiracy was alleged to obtain lands from the government by exchanging lands obtained from the state in the name of fictitious persons and conveyed by forged instruments. Such instruments would not pass a legal title to the government, and, therefore, a conspiracy was clearly made out, which would or could work injury. So the remark that the United States government might set aside the patent "procured by these fraudulent means" referred to the means alleged in the indictment there being considered, and not such means as are alleged in this bill. The two cases are essentially different in their circumstances.

Even if the allegations of the bill disclosed a fraud on the grantors, this could not be taken advantage of by them as against the United States, and, therefore, the United States was not injured thereby. Schultz v. McLean, 93 Cal. 356, 28 Pac. 1053. I know of no rule that makes fraud against the government any different from fraud against the individual; and I do not think the Hyde Case points to any such distinction. It is quite apparent, therefore, that the bill is lacking in equity; and in this view it is not material to determine whether it was necessary for the bill to allege that the government had offered to make restitution before bringing suit.

The demurrers will be sustained, with leave to the complainant to amend, if it shall be so advised.

UNITED STATES v. BARBER LUMBER CO. et al.

(Circuit Court, D. Idaho, C. D. October 3, 1908.)

1. COURTS (§ 85*)—RULES—EFFECT.
   The rules promulgated by the Supreme Court of the United States for the guidance of federal courts have the force and effect of law.
   [Ed. Note.—For other cases, see Courts, Cent. Dig. § 294; Dec. Dig. § 85.*]

2. EQUITY (§ 321*)—PLEADING—TIME—EQUITY RULES—COMPLIANCE BY UNITED STATES.
   Where the United States voluntarily comes into a federal court, seeking relief against an individual, her rights are those of an ordinary suitor, and not those of a sovereign, and hence she is equally bound to comply with general equity rule 66, regulating the time for the filing of pleadings.
   [Ed. Note.—For other cases, see Equity, Cent. Dig. § 629; Dec. Dig. § 321.*]

3. EQUITY (§ 210*)—PLEADING—FILING AFTER TIME.
   Where, in a suit by the United States to set aside certain patents to timber land, no replication was filed within the time required, owing to the mistake or inadvertence of a former district attorney, his successor would be permitted to file a replication nunc pro tunc, subject, however, to an order requiring him to speed the cause.
   [Ed. Note.—For other cases, see Equity, Cent. Dig. § 483; Dec. Dig. § 210.*]

In Equity. On motion to dismiss.

C. H. Lingenfelter, U. S. Dist. Atty.

C. T. Bundy, J. H. Hawley, and Alfred A. Fraser, for defendants.

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

DIETRICH, District Judge. By its bill complainant seeks to have vacated and set aside a large number of patents to timber lands, which it is averred were procured through the operation of a fraudulent conspiracy entered into by the defendants and others; the title to all the lands having, subsequent to patent, been conveyed to the defendant Barber Lumber Company. The bill was filed April 17, 1907. Subpœna issued December 4, 1907, and upon the same day service was made upon the Barber Lumber Company, and upon two of the other defendants. Apparently no effort has been made to procure further service, and, indeed, it seems to be conceded that the Barber Lumber Company is the only necessary party defendant. In due time the Barber Lumber Company appeared, and upon February 1, 1908, it filed and served its answer, denying the equities of the bill. No replication having been filed, the defendant, on September 16, 1908, filed a motion to dismiss the suit on account of complainant's default in that respect. Upon the presentation of the motion in open court on the following day, counsel for the government tendered for filing its replication, with the request that it be filed nunc pro tunc; that is, as of the next succeeding rule day after the filing of the bill, as provided in general equity rule No. 66. Thereupon it was stated upon behalf of the defendant that it desired only that the suit be finally submitted upon its merits as early as practicable, and that it would not press its motion for dismissal, provided complainant would file its replication and agree to speed the cause; no other terms being demanded. To this condition counsel for the government was unwilling to assent, and was unable to advise the court of any date when the taking of testimony could be commenced or concluded. The court having intimated that it was disposed to direct the filing of the replication, but that the government, as a litigant, is, in matters of procedure, required substantially to conform to the rules which have been promulgated for the guidance of the courts and litigants, the district attorney, explaining that the default had occurred prior to his appointment, and being surprised by the defendant's motion, asked leave to make a showing and furnish a brief, which was granted. In addition to filing an affidavit, in which certain conditions are set forth which it is thought appeal to the discretion of the court, and which will later be noticed, there is presented an elaborate brief, in which it is contended:

"That in the matter of practice and the rules of court * * * the government [using the precise language of counsel] not only does not stand before the court in the same light as an individual suitor, but that it has privileges and immunities which, of necessity, are prerogatives of government; that it is not bound by the acts of its agents' negligence, even if such acts are willful; that time does not run against it; and that laches cannot be imputed to it. This doctrine is derived from a principle of public policy, and comes down even in republican forms of government from a basic principle of monarchy that 'the king can do no wrong.'"

It must be noted that this is not a plea to the court to relieve complainant from a default into which it has fallen through the inadvertence or neglect of its former district attorney. Such relief is not resisted by defendant, and the court has already intimated that it would be granted. It is not an appeal to the court to exercise its discretion in granting to complainant such time, in excess of the 90

days prescribed by the rules for the taking of evidence, as may, under all the circumstances of the case, be reasonably necessary. Upon the other hand, it is a negation of the necessity for such application. The premise is that complainant is above and exempt from the rules of court; and it logically and necessarily follows that, not being subject to a rule, it cannot be held to be in default for any failure to conform thereto, and, not being amenable to the rule limiting the time for taking evidence, there is no necessity for its seeking an enlargement of the prescribed time. Nor is it suggested that, while generally bound to comply with the rules of the court, the government, for some specific reason, is relieved from the operation of the particular rule under consideration. The proposition is a declaration of the independence of the government from all rules.

To such a view I am unable to give my assent. It is utterly at variance with fundamental principles, and is impossible in practice. If the litigant is sovereign, the court is subject. It is the sworn duty of the judge "to administer justice without respect to persons." Rank cannot be recognized. How can rights be correctly weighed if one party is permitted to lay his hand upon the balance? It will not do to say that the government will act justly. If so, it should be left to adjudge its own controversies without the intervention of the courts. Nor is it material that the prerogatives of sovereignty are claimed only as to the rules of practice and procedure. Time and mode of the trial of a right are, not infrequently, of the substance of the right itself. Delay may mean disaster, especially to the weaker party. "To none will we sell, to none will we deny, or delay, right or justice." So reads the Great Charter. It is a mistake to assume that rules of procedure are mere formalities, adopted with the view only to the convenience and dignity of the courts. They are intended to promote the more perfect administration of justice, and experience demonstrates that the courts can best fulfill their functions by exacting substantial compliance therewith. An individual cannot maintain an action against the government; but this exemption may be waived. So the government may voluntarily come into court, seeking relief against an individual. It comes, however, not as a sovereign, but as a suitor. Within its own domain the court is supreme. The government, having a controversy, may invoke the assistance of the courts; but in entering their portals it voluntarily divests itself of sovereignty, submits itself to their jurisdiction, and consents to conform to their rules and abide by their decrees.

Looking at the question in another aspect, it is not doubted that Congress, by direct enactment, may subject the government to the process of the courts and prescribe the procedure to which it must conform as a party litigant. But by section 917 of the Revised Statutes (U. S. Comp. St. 1901, p. 684) Congress, doubtless appreciating the difficulty of devising direct legislation of sufficient elasticity and adaptability, conferred upon the Supreme Court of the United States the power "generally to regulate the whole practice to be used in suits in equity or admiralty by the Circuit and District Courts"; and by section 918 (page 685) a like power was conferred upon the Circuit and

District Courts "to regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in the proceedings," not inconsistent with any law of the United States, or any rule prescribed by the Supreme Court. From time to time the Supreme Court of the United States has, pursuant to the authority thus conferred upon it, promulgated rules for the guidance of the courts, one of which is equity rule No. 66. These rules have the force and effect of law. American Graphophone Company v. National Phonograph Company (C. C.) 127 Fed. 349.

"No District or Circuit Court of the United States has the power to adopt a practice inconsistent with those rules or to disregard their provisions." Northwestern Insurance Company v. Keith, 77 Fed. 374, 23 C. C. A. 196.

"Parties to suits in Louisiana (as in all other jurisdictions) have a right to the benefit of these rules; nor can they be denied by any rule or order, without causing delays, producing unnecessary and oppressive expenses, and, in the greater number of cases, an entire denial of equitable rights." Gaines v. Relf, 15 Pet. 9, 10 L. Ed. 642.

Counsel remark the absence from the Reports of any case directly in point, and cite only decisions affirming the proposition that generally, in the matter of substantive rights, statutes of limitation and the doctrine of laches cannot be invoked against the sovereign. These are familiar exceptions to general rules, and are based upon considerations wholly inapplicable to court procedure. In none of the numerous decisions cited is there any intimation that the exceptions are to be extended to embrace violations of the rules of practice and procedure in the courts. Indeed, the books do not seem to contain any case where a proposition like that here asserted has been put forward; and it is incredible that, if the government has such extraordinary prerogatives, it has heretofore apparently neglected to assert them. In no case which has come under my observation, where the government is a party, has any distinction been made in exacting compliance with the rules because of its sovereignty. Doubtless, where discretion is left to the court, it may properly take into consideration the conditions under which the government must act, the fact that it must employ agents in various degrees of subordination, and that in some matters it cannot proceed as expeditiously as may private individuals. Such considerations do not look to the suspension of the rules, but only to their reasonable enforcement. Distinctions of the same or similar character, and for like reasons, might properly be made, where all parties are either natural persons or private corporations.

In United States v. Fremont, 59 U. S. 30, 15 L. Ed. 302, the appeal of the government was dismissed by the Supreme Court because it had failed to file the record within the first six days of the term, as required by the rules of the court.

In United States v. Pacheco, 63 U. S. 225, 16 L. Ed. 336, the appeal of the United States was dismissed for failure to comply with the rules of the court. A like penalty for a similar default was imposed upon the government in United States v. Gomez, 64 U. S. 326, 16 L. Ed. 552.

In United States v. Atherton, 102 U. S. 372, 26 L. Ed. 213, impliedly it is held that the government is bound by the same rules of pleading as apply to private litigants. The court refused to interfere with the action of the trial court in denying the application of the government to be permitted to amend its bill. There is no suggestion that as a party in court the government occupies a favored position. See, also, United States v. Ames, 99 U. S. 35, 25 L. Ed. 295.

In United States v. Lee Yen Tai, 113 Fed. 465, 51 C. C. A. 299, the Circuit Court of Appeals declined to consider the errors assigned by the government, because the assignments did not comply with the rules of the court.

In United States v. Rossi, 133 Fed. 380, 66 C. C. A. 442, the Circuit Court of Appeals of this circuit enforced its rule No. 10 (150 Fed. xxvii, 79 C. C. A. xxvii) against the government, by refusing to consider its exceptions to the charge of the trial court, because they did not comply with the requirements of the rule.

In Mitchel v. United States, 9 Pet. 743, 9 L. Ed. 283, the Supreme Court refused the application of the government for further time in which to produce proofs.

In Mountain Copper Company v. United States (C. C. A., Ninth Circuit) 142 Fed. 625, 73 C. C. A. 621, it is said:

"It is the well-established law that, when the government comes into a court asserting a property right, it occupies the position of any and every other suitor. Its rights are precisely the same; no greater, no less."

It is true that this language was not used with specific reference to matters of practice or procedure; but it is thought to be a statement of the general rule, subject, only, to certain recognized exceptions.

In The Siren, 74 U. S. 152, 19 L. Ed. 129, it is said:

"But, although direct suits cannot be maintained against the United States, or against their property, yet when the United States institute a suit they waive their exemption, so far as to allow the presentation by the defendant of set-offs, legal and equitable, to the extent of the demand made or property claimed, and when they proceed in rem they open to consideration all claims and equities in regard to the property libeled. They then stand in such proceedings, with reference to the rights of defendants or claimants, precisely as private suitors, except that they are exempt from costs and from affirmative relief against them, beyond the demand or property in controversy."

In United States v. Stinson, 197 U. S. 200, 25 Sup. Ct. 429, 49 L. Ed. 724, the Supreme Court, in speaking of the only matters of practice under consideration, said:

"The government is subjected to the same rules respecting the burden of proof, the quantity and character of evidence, the presumptions of law and fact, that attend the prosecution of a like action by an individual."

See, also, Carr v. United States, 98 U. S. 433, 25 L. Ed. 209; United States v. Smith, 94 U. S. 214, 24 L. Ed. 115; United States v. Stinson, 125 Fed. 907, 60 C. C. A. 615; United States v. Beebee (C. C.) 17 Fed. 36; United States v. Ingate (C. C.) 48 Fed. 251.

Turning, now, to those features of the case which appeal to the court's discretion, what order should be entered? Upon behalf of complainant it is urged that the default occurred prior to the appointment

of the present district attorney; that he has not yet had time to familiarize himself with all the business pending in his district; that the issues involve numerous transactions, and the trial will necessitate the taking of much testimony from many witnesses; and that for a portion of the time prior to December 1st the district attorney must give his attention to the trial of criminal cases.

It is also suggested that, at the time the motion was made, some of the record evidence was not in the custody of the district attorney, but was being used by the government in proceedings pending in Wisconsin, looking to the removal of some of the officers of the defendant company to this jurisdiction for trial on criminal charges growing out of the transactions referred to in the bill; but manifestly this is but a temporary condition, and no difficulty should be experienced in procuring a return of the originals, or, if they are still unavailable, of securing certified copies thereof.

It is further suggested that the taking of testimony should await the final determination of the pending criminal proceedings; but whatever, if any, valid reasons there may, at one time, have been for taking such a course, they are no longer persuasive. Upon the trial of one of the criminal cases growing out of these transactions more than a year ago, the government, of necessity, in a large measure, disclosed its case against the other defendants, who have not yet been tried. Furthermore, the trial of still another defendant has been set for an early date, at which time it will doubtless be necessary for the government again to traverse the ground and make public the facts in its possession.

Upon the other hand, it is represented that the government has not used, and is not using, diligence in the prosecution of the suit; that nearly 18 months have elapsed since the suit was commenced, and nearly 8 months since answer was filed; that the pendency of the suit casts a cloud upon the defendant's title; that it has erected a lumber manufacturing plant, at an expense of several hundred thousand dollars, and that, for its successful operation, it is necessary to build a railroad into the timber lands; that the attack upon its title hopelessly impairs its credit and renders it impossible to procure funds for the construction of such a road; that it is paying taxes upon the lands; and that the standing timber is subject to, and must be protected against, the ravages of forest fires.

I have considered both the conveniences and the necessities of the parties, and it is my conclusion that the replication be filed nunc pro tunc; that the complainant be given until and including January 15, 1909, in which to take its evidence; that the defendant Barber Lumber Company be given 30 days thereafter in which to take its evidence; and that the complainant have 15 days thereafter in which to take evidence in rebuttal.

An order will be entered accordingly.

In re STODDARD BROS. LUMBER CO.

(District Court, D. Idaho, C. D. March 20, 1909.)

1. PARTNERSHIP (§ 241*)—RETIRING PARTNER—LIABILITY FOR FIRM DEBTS—ESTOPPEL.
The principle underlying the responsibility of a partner, who retires without publishing proper notice, to subsequent creditors of the firm, is that of estoppel, implying that the partner induced or knowingly permitted such subsequent creditors to extend credit to the firm on the assumption that the partner was a member thereof.
[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 479½, 480; Dec. Dig. § 241.*]

2. ESTOPPEL (§ 110*)—DEFENSES—PLEADING.
Estoppel is a defense, which must be affirmatively pleaded and proved by one seeking to avail himself thereof.
[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 300; Dec. Dig. § 110.*]

3. PARTNERSHIP (§ 241*)—DORMANT PARTNER—WITHDRAWAL—NOTICE.
An unknown or dormant partner need not give notice of his withdrawal from the firm.
[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 480; Dec. Dig. § 241.*]

4. PARTNERSHIP (§ 241*)—RETIRING PARTNER—NOTICE OF WITHDRAWAL—SUBSEQUENT CREDITORS.
Since one holding himself out as a partner, though he be not such, is only liable to those who deal with the firm in the belief that he is a partner, subsequent creditors of a firm were not entitled to assert the responsibility of a former partner, who retired without publishing notice of his withdrawal, unless such creditors knew that the partner represented himself to be a member of the firm and were misled by the fact that the formal notice of withdrawal had not been given.
[Ed. Note.—For other cases, see Partnership, Dec. Dig. § 241.*]

5. EVIDENCE (§ 459*)—PAROL EVIDENCE—WRITTEN CONTRACTS—NOTES OF FIRM.
Parol evidence is admissible to show that certain notes signed by the individual members of the firm evidenced a partnership obligation and that the form of the signature was mere inadvertence, so as to establish the notes as a firm debt.
[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1909, 2111; Dec. Dig. § 459.*]

6. PARTNERSHIP (§ 217*)—DEBTS—NATURE OF OBLIGATION—EVIDENCE.
The terms of a note signed by the individual members of a firm will control in determining the nature of the obligation as to whether it is a debt of the firm or of the partners signing it, unless the prima facie case made by the instrument is overcome by clear and convincing evidence.
[Ed. Note.—For other cases, see Partnership, Dec. Dig. § 217.*]

7. PARTNERSHIP (§ 146*)—DEBTS—NOTES FOR INTEREST OF RETIRING PARTNER.
Notes given by a remaining to a retiring partner in payment for the latter's interest, sold to the partner making the notes, and not to the firm, were not firm obligations.
[Ed. Note.—For other cases, see Partnership, Dec. Dig. § 146.*]

8. BANKRUPTCY (§ 326*)—LIENS—VOLUNTARY RELEASE—LIABILITY OF CREDITOR.
Where a creditor of a firm, holding a firm mortgage as security for $12,000, voluntarily released the same, that the bankrupt firm might sell the property and out of the proceeds pay firm debts on which the claimant was

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

liable as surety and such debts were paid to the amount of $11,625, the claimant was liable for $375, the amount lost to creditors by such voluntary release.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 326.*]

9. BANKRUPTCY (§ 477*)—CLAIMS—ATTORNEY'S FEES.

Claims for fees by attorneys for objecting creditors should be filed with the referee in the first instance, so that any party aggrieved by the referee's ruling thereon may have the same reviewed by appropriate proceedings.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 477.*]

C. H. Finn, Hawley, Puckett & Hawley, and Frank Estabrook, for George Stoddard.

L. F. Clinton, Neal & Kinyon, Griffiths & Griffiths, and Rice, Thompson & Buckner, for objecting creditors.

DIETRICH, District Judge. Upon the petition of certain creditors the Stoddard Bros. Lumber Company, a partnership, was, on August 19, 1908, adjudicated a bankrupt. It was alleged that the firm consists of A. K. Stoddard and Charles Moslander; but no adjudication of their insolvency as individuals was sought or obtained. Thereafter George Stoddard, a brother of A. K. Stoddard, presented for allowance several claims, evidenced chiefly by promissory notes, to the allowance of which objections were made by some of the creditors. A hearing was had, resulting in an order by the referee rejecting all of the claims. This ruling is now submitted for review.

1. A general objection running to all of the claims is that the claimant is in fact a member of the bankrupt firm. I do not find that this contention is supported by the evidence.

2. Another general objection argued is that George Stoddard, if not in reality a member of the firm, should be held responsible upon the theory that he held himself out as such. In support of this position, the objecting creditors rely mainly upon the fact that the claimant was at one time a member of the partnership, and that after withdrawing, in 1897, he failed to give notice of dissolution, and permitted the business to continue under the original name of Stoddard Bros. Lumber Company; also that he continued to render assistance to the firm in procuring loans, and failed to see that its obligations to him were fully disclosed by its books and records. Apparently, more for this than for any other reason, the referee rejected the claims.

The objection was not originally specified as one of the grounds relied upon, and it was not until the evidence was practically closed that the creditors evinced a purpose to assert it. But, upon the assumption that it was interposed in time, what effect should now be given to the objection? The principle underlying the responsibility of a partner, who retires without publishing proper notice, for the obligations of the firm subsequently incurred, is that of estoppel. He is held liable, not because he has in truth contracted, but because it would be inequitable and against good conscience to permit him to deny that he contracted. Thompson v. Bank, 111 U. S. 529, 4 Sup. Ct. 689, 28 L. Ed. 507.

This, of course, implies that he has induced or knowingly permitted the person who is charging him with responsibility to extend credit upon the assumption that he was a member of the firm receiving the credit. If, however, an objection of this kind, when raised by a single creditor, may avail to defeat the allowance against a bankrupt estate of the claim of a person sought to be estopped, the conduct of the claimant, amounting to estoppel as to one creditor, may operate vicariously as an estoppel in favor of all other creditors, regardless of the question whether or not they have been misled or deceived by any action or inaction on the part of the claimant, or whether they had any knowledge of the "holding out." In this particular case, if it be assumed that the evidence discloses that George Stoddard induced some one of these objecting creditors to extend to Stoddard Bros. Lumber Company credit, upon the belief that he was a responsible member of the firm, why should his claim be postponed to those of other creditors who were not so deceived? If claimant has misled any creditor, it does not follow that his mouth is closed to deny responsibility to some other creditor. But the absolute disallowance of his claim in effect charges him with responsibility to all creditors alike. It is thought that, as a general rule, this objection does not furnish sufficient ground for the rejection of a claim otherwise just and valid. At most, it can be asserted only by a creditor in whose favor the facts constitute an estoppel against the claimant.

It is true that, upon the withdrawal of George Stoddard in 1897, no formal or public notice was given of that fact, and no change was made in the firm name. The only notice which was given was to the Dun and the Bradstreet Mercantile Agencies. It is, however, not pretended that any of the present creditors had, prior to George Stoddard's withdrawal, ever transacted business with the firm, and, while there was no change in the business name, it is not contended that, either before or after the claimant's withdrawal, his name ever appeared upon the letter or bill heads or in other advertisements of the partnership business. Apparently it is conceded by the objecting creditors that the record is insufficient to establish estoppel against the claimant, unless, it being shown that the claimant was at one time a member of the firm and that notice of dissolution had not been given, the court will indulge the presumption that all creditors, in extending credit, acted upon the assumption that he was a member of the firm when the credits were given. But estoppel is a defense, to be affirmatively pleaded and proved by him who would avail himself of it. Upon behalf of the objecting creditors it is argued that Strecker v. Conn, 90 Ind. 469, lays down a contrary rule, and in effect holds that there is a presumption in favor of the creditor where the withdrawing member of the firm has not published notice of the dissolution. The question in that case was as to whether or not it was necessary for the creditor to show that he gave special credit to the "financial ability" of one holding himself out as a partner. In other words, it was contended by the party sought to be charged as a partner that the creditor asserting estoppel was bound to show that the credit would not have been extended, but for his reliance upon the financial ability of the person so holding himself out. From other parts of the opinion

it is made clear that it was not intended to hold that such a presumption in favor of the creditor as is here contended for could be indulged. It is expressly said that:

"If one knowingly permits himself to be held out to the world as a partner, he becomes liable to those who deal with the firm in the belief that he is a partner as fully as if he were in fact a partner."

In other words, one holding himself out as a partner, even though he be not such, is "liable to those who deal with the firm in the belief that he is a partner." It is true that in Thompson v. Bank, supra, and Sun Insurance Company v. Kountz Line, 122 U. S. 583, 7 Sup. Ct. 1278, 30 L. Ed. 1137, it was observed that the "holding out" may be so public and so long continued as to justify the inference that one dealing with the partnership knew of and relied upon it; but no presumption is thus implied. Whether the creditor knew that the person against whom he seeks to recover represented himself to be a member of the firm receiving credit, and whether, to his injury, he acted upon such knowledge, are questions of fact to be proved, not necessarily by direct testimony, but by evidence, either positive or circumstantial. Here the record discloses no evidence from which the court can reasonably infer that any one of the creditors, in dealing with the bankrupt firm, relied upon the responsibility of George Stoddard. It is not even shown that any one of them at any time knew that he ever was a member of the firm. That being the case, how could they be misled by the mere fact that he did not give formal notice in the newspapers that he had withdrawn from the firm? The case is thus brought within the general rule that an unknown or dormant partner need not give notice of his withdrawal. Shumaker on Partnership, p. 332.

Moreover, the failure to give notice by publication does not necessarily impose responsibility. "We think it is not an absolute, inflexible rule that there must be publication in a newspaper to protect a retiring partner." Lovejoy v. Spafford, 93 U. S. 430, 23 L. Ed. 851.

It is concluded that this objection should be overruled without prejudice to the right of any creditor, in a proper proceeding, to assert the responsibility of the claimant, George Stoddard, for any claim against the firm for which he may be liable by reason of the fact that he held himself out as a member of the firm, if in fact he did so hold himself out.

3. Two notes, dated April 5, 1904, each for $6,000, are signed, not in the firm name, but by the individual members of the firm, namely, Alexander K. Stoddard and Charles Moslander; and it is contended on behalf of the creditors that these notes are not valid claims against the bankrupt firm, but are only obligations of the individual members thereof, and that therefore they cannot be paid until the creditors of the firm, as such, are fully satisfied. Over objections, oral evidence was received to show that the consideration of the notes was a firm obligation; and it is argued that such evidence is inadmissible, in that it tends to contradict and vary the terms of a written contract. There is much to be said both for and against the view that oral evidence cannot be received for this purpose; but my conclusion is that, while the form of the contract makes a prima facie case of individual liability only, oral

evidence may be received to show the real transaction. And where it appears, free from doubt, that the consideration of the instrument passed not to the individuals, but to the firm, and that it was not given or received for the purpose of substituting an individual for a firm obligation, and that the form was purely accidental, the obligation is provable against the partnership estate. Here there is no evidence that either party intended to substitute an individual for a firm obligation, or that either party understood that by the form of the notes the existing obligation, which was strictly one of the firm, and not of the individual members of the firm, would in any wise be altered; nor does it appear that either party understood that the obligation of the individuals was in any respect to be increased or modified. There is no reason to believe that, if the legal effect of an instrument signed by the individuals severally had been called to the attention of the parties at the time, the notes would have been executed in their present form. There is no showing that the members of the firm had property of any considerable value other than their interests in the joint enterprise, and there is no apparent reason why the claimant should have preferred an individual obligation to a firm obligation. It is therefore thought that the referee correctly ruled in receiving such evidence; and it is concluded that the evidence shows, beyond doubt, that these notes were intended to, and do, represent partnership, and not individual, obligations.

No decision has been called to my attention, and I have found none, announcing the rule that oral testimony may not be received for the purpose for which it was offered. There is a diversity of opinion as to the effect to be given to such testimony, and when it should be held that the obligation is of the partnership, and when of the individual members thereof. This diversity is fairly exemplified by the opinions in the following cases: Davis v. Turner, 9 Am. Bankr. Rep. 704, 120 Fed. 605, 56 C. C. A. 669; Strause v. Hooper (D. C.) 105 Fed. 590; In re Warren, Fed. Cas. No. 17,191; In re Herrick Fed. Cas. No. 6,420; In re Bucyrus Machine Co., Fed. Cas. No. 2,100; In re Holbrook, Fed. Cas. No. 6,588; In re Thomas, Fed. Cas. No. 13,886.

Before passing this point, it may be observed that the terms of the written instrument should control, unless the prima facie case thus made is overcome by evidence both clear and convincing. Any other rule would open the door for fraud and double dealing.

4. The note, Exhibit 2, being No. 2 of the four $1,000 notes, dated March 1, 1902, is barred by the statute of limitations. The statutes of Idaho, and not those of Oregon, control. The other three $1,000 notes are not barred by the laws either of Oregon or of Idaho.

5. The four $1,000 notes, dated March 1, 1902, being Exhibits 1, 2, 3, and 4, are renewals of notes theretofore given by the maker, A. K. Stoddard, to the claimant, George Stoddard, as the consideration paid by the maker to the claimant for the latter's interest in Stoddard Bros. Lumber Company, the bankrupt. It is contended by the claimant that the notes were originally given for an indebtedness due from Stoddard Bros. Lumber Company to him for material purchased by the bankrupt; but, whatever may have been said or understood by the parties at the time, it is clear that the claimant, George Stoddard, who was

then a member of the firm, withdrew and alienated his interest therein in consideration of receiving the originals of these notes. In substance, the transaction was one of sale between him and his brother, A. K. Stoddard, and the notes were given for the purchase price. It was a transaction, not between the firm and George Stoddard, but between A. K. Stoddard and George Stoddard. In the course of his testimony, A. K. Stoddard said:

"George got out eight or nine years ago; about two years after Moslander came in."

Upon being asked whether there were any records showing the change in the partnership, he said:

"The record that I bought George Stoddard out and gave him notes for the amount due him."

On cross-examination he testified as follows:

"Q. Who bought George Stoddard's interest? A. I did. Q. How did you sign the notes? A. A. K. Stoddard. Q. George Stoddard did not sell his interest to the partnership? A. No; to me personally."

It is incredible that, if George Stoddard were selling out to the firm, he would not have taken an obligation of the firm, or at least an obligation signed by the individual members thereof. Moslander was entirely ignored. He knew nothing about the sale, and was not asked to sign the notes or assume any obligation. It is therefore thought that, so far as they are based upon the four notes referred to, the claims do not constitute a charge against the partnership estate.

6. The claimant held a mortgage upon real estate in Wyoming belonging to the bankrupt firm; the mortgage having been given as security to him to indemnify him against loss by reason of obligations upon which he had become surety for the partnership, and the amount of the mortgage security being $12,000. It is admitted that this mortgage was voluntarily released by the claimant in order that the bankrupt might sell and transfer the property. Out of the proceeds of the sale of this property obligations of the firm upon which the claimant was liable as a surety were paid to the aggregate amount of $11,625. To this extent the creditors were not injured by the release of the mortgage. The claimant is chargeable with the amount lost to the creditors by reason of the voluntary release, namely, $375, which amount should be deducted from his claims.

The whole matter is remanded to the referee, with directions to take such further proceedings as may be proper, consistent with the views herein stated. In one of the briefs it is suggested that attorney's fees should be allowed to counsel for the objecting creditors. I think it will be better for counsel who desire such allowance to be made to present a formal claim and have it passed upon by the referee in the first instance. If any party is aggrieved, the ruling of the referee may be reviewed by appropriate proceedings.

KEITH v. KELLERMANN.

(Circuit Court, S. D. New York. March 29, 1909.)

1. PARTNERSHIP (§ 9*)—CONTRACT—CONSTRUCTION.
A contract for acrobatic performances described plaintiff as the "manager" and defendant as the "performer"; defendant agreeing to perform special acts on such days and at such times as plaintiff should direct. Defendant agreed not to perform except with plaintiff's consent; plaintiff agreeing in the summer season to meet all expenses necessary for the production of defendant's exhibition with the option to renew for succeeding summer seasons and pay defendant one-half of the proceeds after running expenses had been deducted. *Held*, a contract of employment, and not a partnership.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 23, 24; Dec. Dig. § 9.*]

2. PARTNERSHIP (§ 1*)—WHAT CONSTITUTES—AUTHORITY OF PARTNERS.
The test of "partnership" is whether the parties are jointly interested as principals and may bind each other by their acts or engagements within the scope of the enterprise.

[Ed. Note.—For other cases, see Partnership, Dec. Dig. § 1.*

For other definitions, see Words and Phrases, vol. 6, pp. 5191–5202; vol. 8, pp. 7746–7747.]

3. MASTER AND SERVANT (§ 3*)—CONTRACT OF EMPLOYMENT—CONSTRUCTION.
Two contracts were made between plaintiff and defendant on the same day; the first employing defendant to perform certain acrobatic feats at plaintiff's places of amusement during the winter seasons of 1908 and 1909 at $300 per week, with plaintiff's right to renew the same on giving a specified notice, and defendant binding herself not to perform except in accordance with plaintiff's directions. The other contract covered the summer season of 1909, with the right to renew for subsequent summer seasons; defendant to receive one-half of the net profits. *Held*, that the two agreements should be construed as constituting one contract.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 3.*]

4. MASTER AND SERVANT (§ 3*)—CONTRACT OF EMPLOYMENT—CONSTRUCTION—EQUITABLE MUTUALITY.
A contract for acrobatic performances required defendant to perform in such theaters and other places and on such days as might be designated by plaintiff, and required that plaintiff pay defendant $300 at the end of each week after the last performance on Saturday for services rendered or produced by defendant as previously provided. *Held*, that the contract should not be construed as imposing no obligation on plaintiff to designate and provide places and days for defendant's performances, nor as relieving plaintiff from the obligation to pay plaintiff in case he should refuse or omit to designate such times and places, and did not therefore lack equitable mutuality.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 3.*]

5. INJUNCTION (§ 60*)—SUBJECTS OF RELIEF—EMPLOYMENT CONTRACT.
Defendant, an acrobatic performer, whose performances in diving and swimming were unique, and who could not be replaced, contracted to perform for plaintiff at such places as he should designate during the winter seasons of 1908 and 1909 for $300 per week; plaintiff at his option being entitled to renew the contract by giving notice for the seasons of 1910 and 1911, and defendant agreeing not to present any act or specialty in any place other than those designated by plaintiff, or for any other person than plaintiff, without his consent during the term of the contract

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

or of any renewal. *Held*, that defendant having refused to continue to perform, and having made a new contract with plaintiff's principal competitor for a term beginning March 22, 1909, plaintiff was entitled to an injunction restraining her from performing for any one other than plaintiff during the remainder of the seasons of 1908 and 1909, and the seasons of 1909 and 1910; plaintiff having exercised his option to renew the agreement for the latter season.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 118; Dec. Dig. § 60.*]

6. MASTER AND SERVANT (§ 3*)—CONTRACT OF EMPLOYMENT—ENFORCEMENT—MUTUALITY OF OBLIGATION.

Where a contract for the employment of defendant to perform certain acrobatic feats, under plaintiff's management and at such places as he should designate during the summer season, neither expressly nor by necessary implication fixed any periods when such performances should be given, and plaintiff for any reason satisfactory to him might omit exhibitions during any part of the season during which defendant would be without compensation, though bound not to work for any one else, such agreement was unenforceable against defendant for want of mutuality of obligation.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 3.*]

7. SUNDAY (§ 17*) — EMPLOYMENT CONTRACT — CONSTRUCTION — "DAYS" — "WEEK."

An acrobatic performer's contract provided that she should receive $300 at the end of each "week" after the last performance on Saturday for services rendered, to be performed at such theaters and such other places and on such "days" as might be determined by plaintiff. *Held*, that it was no objection to the enforcement of such contract by injunction that it provided for exhibitions on Sunday, in violation of statute, since, if such exhibitions were prohibited, the words "days" and "week" as used in the contract would be construed to mean week days only.

[Ed. Note.—For other cases, see Sunday, Cent. Dig. §§ 48, 49; Dec. Dig. § 17.*

For other definitions, see Words and Phrases, vol. 2, pp. 1832–1837; vol. 8, pp. 7427, 7428, 7626.]

Maurice Goodman (Henry W. Taft, of counsel), for complainant.

George M. Leventritt (William D. Guthrie and Benjamin N. Cardozo, of counsel), for defendant.

WARD, Circuit Judge. October 17, 1908 at Boston, Mass., the parties executed the following agreements:

"Agreement made this 17th day of October, 1908, between Benjamin F. Keith of Brookline in the county of Norfolk and commonwealth of Massachusetts, hereinafter called the first party, and Annette Kellermann at present of Boston in the county of Suffolk and said commonwealth, hereinafter called the second party, witnesseth that in consideration of the promises of each of the parties herein set forth it is agreed as follows:

"First. The second party agrees to render professional services for the first party from the 19th day of October, 1908, to the 3d day of May, 1909, in performing the following acts, to wit, trick and fancy diving, toe dancing, Diabolo, as many times, in such theaters and other places and on such days as may be determined by said first party.

"Second. Said second party agrees not to present either privately or publicly during the term thereof, or any renewal hereof as hereinafter provided, any act or specialty in any place other than those designated by the first party or for any person other than the first party without the consent of said first

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

party in writing, and a violation hereof shall entitle the first party to cancel this agreement.

"Third. The second party agrees to eliminate any portion of her acts or performances whenever so requested by said first party or his representatives and agrees to abide and be bound by rules and regulations now or hereafter adopted by said first party in his various theaters.

"Fourth. The first party agrees to pay the second party three hundred dollars ($300.00) at the end of each week after the last performance on Saturday for services rendered or produced by said second party as hereinbefore provided, provided, however, that said second party complies with each and every agreement and condition by her to be kept and performed as above set forth.

"Fifth. If the first party is prevented by fire or by public authority, city, state or federal, from operating any theater wherein the second party is to perform or produce hereunder, the first party may cancel this agreement for the time that he is prevented from so operating.

"Sixth. This contract shall be renewed with all its conditions and agreements on the part of both parties to be kept and performed for any one or all of three theatrical seasons each of thirty weeks and beginning on the 4th day of October, in the year 1909, on the 3d day of October, in the year 1910, and on the 2d day of October, in the year 1911, if the first party desires to renew said contract and notifies the second party that he intends so to renew on or before the 15th day of August in each of said years. Such notice shall be sufficient if sent by the first party by mail to the last and usual place of abode of said second party known to said first party.

"In witness whereof said parties have hereunto set their hands and seals this 17th day of October, 1908."

"Agreement made this 17th day of October, 1908, between Benjamin F. Keith of Brookline in the county of Norfolk and commonwealth of Massachusetts, hereinafter called the manager, and Annette Kellermann now of Boston in the county of Suffolk and said commonwealth, hereinafter called the performer, witnesseth that in consideration of the promises of each of the parties herein set forth it is agreed as follows:

"First. The performer agrees that during the summer season of the year 1909 she will solely under the management and direction of the manager render her professional services as a performer in the open air and elsewhere in such acts, in such places, on such days, and at such times, as the manager directs. Said season is to begin as soon after the 1st day of June, 1909, as the weather conditions permit and suitable fittings and other necessary preparations have been made for the production of said services, but in no case later than the 1st day of July, and is to terminate on such date in the month of September in said year as the manager shall determine.

"Second. Said performer further agrees that during said summer season and during the period between the close of her engagement with said manager for the season of 1908-09, as provided in another agreement between the same parties dated the 17th day of October, 1908, and the opening of said summer season, she will perform or exhibit in no places other than those determined by the manager without his consent in writing, nor will she accept any engagement or make any contract so to operate without said consent in writing.

"Third. Said manager agrees to assume all expense necessary or incidental to the fitting up and getting ready for the production of the performer's acts and exhibitions as herein provided.

"Fourth. It is further agreed by both parties that the proceeds of the enterprises herein provided for, after all running expenses have been deducted, shall be equally divided between said parties, but no salary or living expenses for either party is to be included in said running expenses.

"Fifth. It is further agreed that this contract with all its agreements and conditions on the part of both parties to be performed shall be renewed for any or all of the summer seasons, and for the periods between the winter and summer seasons so far as applicable thereto, in the years 1910, 1911 and 1912 if the manager desires so to renew and gives notice of his intention so to renew to the performer on or before the 15th day of May in each of said years, and said seasons are to begin and terminate as is provided in this con-

tract for the summer season for the year 1909. A notice to the performer will be sufficient if sent to the last and usual place of abode of the performer known to the manager."

It will be seen that together the documents cover public performances to be given by the defendant from October 19th to May 3d, called the winter season, and from June 1st or as soon thereafter as the weather should permit and the necessary preparations could be made, but not later than July 1st, to such date in September as the plaintiff should determine, being the summer season. Between the two seasons the defendant agreed not to perform anywhere except with the plaintiff's consent.

The defendant, admitting that the first agreement is one for employment, contends that the second is a partnership; but I think that it is also a contract for employment. The plaintiff is described as the "manager," the defendant as the "performer." The defendant agrees to perform in such acts on such days and at such times as the plaintiff shall direct. Between the winter and summer seasons the defendant agrees not to perform at all except with the plaintiff's consent. The plaintiff is to meet all expenses necessary for the production of the defendant's exhibitions and has the option to be declared on or before May 15th, in each year to renew the contract on the same conditions for the summer seasons of 1910, 1911, 1912, or either of them.

While it is true that the sharing of profits is a most distinctive feature of partnerships, such sharing in the case of contracts for the loan of money or for personal services is generally a method of measuring compensation. The real test of partnership is whether the parties are jointly interested as principals and may bind each other by their acts or engagements within the scope of the enterprise. Cassidy v. Hall, 97 N. Y. 159, 168; Berthold v. Goldsmith, 24 How. 536, 16 L. Ed. 762. I think it impossible to say that the defendant can be regarded as authorized to bind the plaintiff by her acts or promises. At all events, this suggestion is relevant only upon the objection that the bill is multifarious because including two contracts of a different nature, an objection apparently abandoned by the defendant on this motion, and to be properly raised upon plea, answer, or demurrer.

March 4, 1909, the plaintiff exercised his option of renewing the agreement upon the same conditions for the winter season of 30 weeks from October 4, 1909. The bill treats the two agreements as constituting one contract, and the defendant throughout her printed brief acquiesces in this construction, which seems to me the right one. Joy v. St. Louis, 138 U. S. 1, 38, 11 Sup. Ct. 243, 34 L. Ed. 843. The defendant refused to continue to perform her contract with the plaintiff and made a new agreement for 51 consecutive weeks beginning March 22, 1909, for higher compensation, with his principal business competitor. Thereupon the plaintiff filed this bill, obtained an order to show cause why a preliminary injunction restraining the defendant from performing for any one but himself down to the 1st of May, 1910, with a restraining order in the meantime upon giving security in the sum of $5,000 to respond in damages in case it should be found to have been improperly granted. Without going into the details, the affidavits

make it entirely clear: That the defendant's performances in diving and swimming are unique; that she cannot be replaced; that the plaintiff, if deprived of her services, will be subjected to great loss, impossible of satisfactory measurement; that the plaintiff is and always has been ready and willing to perform his part of the contract fully; but that the defendant has abandoned the contract solely for the purpose of making a more profitable engagement with the plaintiff's principal business competitor.

The defendant contends that no injunction should issue because the contracts either construed separately or together lack equitable mutuality. It is said that article 1, regulating the winter season, which requires the defendant to perform "in such theaters and other places and on such days as may be designated" by the plaintiff, does not bind him to designate any theaters, places, or days at all. It is further said that article 4, which requires the plaintiff to pay the defendant "$300 at the end of each week after the last performance on Saturday for services rendered or produced by said second party as hereinbefore provided," does not require the plaintiff to pay anything if he has not designated any theater or place in or day on which the defendant is to perform. Such a construction is wholly unreasonable, and also unnecessary, because the contract admits of a reasonable one. If the action were by the defendant to recover damages at the rate of $300 a week for any week or weeks during the winter season in which the plaintiff refused or omitted to designate any time or place for her to perform, I think it perfectly clear that she could recover. The agreement, being capable of a construction consistent with fairness and common sense, should be given that construction in preference to one that is unreasonable, to the point of dishonesty. Coghlan v. Stetson (C. C.) 19 Fed. 727. If the contract should be so construed at law, a fortiori it should be so construed in equity. It presents every element to justify the issuance of an injunction in aid of its performance, viz., the uniqueness of the defendant's acts, the definiteness of the time of her employment, the certainty of the plaintiff's loss, and the difficulty of measuring it; the combination of a positive covenant to perform for the plaintiff, with the negative covenant to perform for no one else. McCaull v. Braham (C. C.) 16 Fed. 37.

On the other hand, the second part of the contract, regulating the summer season, seems to me to be open to the objection that it does lack equitable mutuality. Neither expressly nor by necessary implication does it fix the periods when performances shall be given. For business or other reasons satisfactory to him, the plaintiff might omit exhibitions during any part of the summer season. During such period there would be no proceeds to divide, and the defendant would be without compensation and at the same time under a covenant not to perform for any one else. The contract lacks in this respect the kind of mutuality which moves a court of equity to aid its performance by injunction. Shubert Theatrical Company v. Coyne (Sup.) 115 N. Y. Supp. 968. As in the cause cited, the defendant would receive compensation, if any, only for actual performances; whereas, under the

contract for the winter season she would be entitled to compensation for readiness to perform.

It is also objected that no injunction should be granted because the contract provides for exhibitions on Sunday, in violation of statute. It is true that exhibitions have been given on Sunday; the defendant claiming extra compensation on the ground that the contract does not cover, and the plaintiff refusing said compensation on the ground that it does cover, Sundays. The contract does not expressly so provide, and if such exhibitions on Sunday are in violation of the statute, which I do not decide, the parties should be taken not to have intended to violate the law, and to that end the words "days" and "week," wherever used, should be construed as not including Sundays.

The contract being divided into two entirely separable parts, one for the winter and the other for the summer season, I see no reason why the court should refuse the plaintiff equitable aid as to that part which admits of it, leaving the parties to their rights and remedies at law in respect to that part, the performance of which for the reasons stated should not be aided by equity.

I will sign an order restraining the defendant from performing for any one else than the plaintiff without his written consent during the remainder of the winter season of 1908–09, and during the winter season of 1909–10.

UNITED STATES v. ANDERSEN.

(District Court, D. Idaho, C. D. April 1, 1909.)

No. 20.

1. COURTS (§ 424*) — FEDERAL COURTS — JURISDICTION—PROCEEDINGS OF STATE COURT—REVIEW.

Where, in proceedings for the naturalization of an alien in a state court, that court deliberately reached a conclusion favorable to its jurisdiction and adverse to the government's contention, and no steps were taken for a review by the Supreme Court of the state, which alone could give an authoritative construction of the local law on which the jurisdiction depended, a federal District Court would not take jurisdiction of an application by the government to set aside the certificate of naturalization granted in the state court proceedings, having only concurrent and not revisory jurisdiction.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 424.*]

2. COURTS (§ 366*)—CONCURRENT JURISDICTION—COMITY.

Since the construction of state laws is primarily within the authority of the state courts, a court of the state having held that it had jurisdiction under a state statute of a naturalization petition, and having granted a certificate of citizenship, a federal District Court of concurrent jurisdiction, in a proceeding by the government to cancel the certificate for alleged want of jurisdiction of the state court on considerations of comity, would reach a conclusion as to the construction of the state law in conformity with that of the state court.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 366.*]

3. ALIENS (§ 69*)—NATURALIZATION—CERTIFICATES—PROCEEDINGS TO CANCEL—DUTY TO PROSECUTE.

Naturalization Act June 29, 1906, c. 3592, § 15, 34 Stat. 601 (U. S. Comp. St. Supp. 1907, p. 427), makes it the duty of the United States district at-

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

torney, and not of the Bureau of Immigration and Naturalization, or its representatives, to prosecute proceedings for the cancellation of certificates of naturalization.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 69.*]

On Demurrer to Petition by the United States to Cancel a Naturalization Certificate.

C. H. Lingenfelter and Andrew J. Balliet, for the United States.

Jens Peder Andersen, in Pro. Per.

DIETRICH, District Judge. At some date prior to June 9, 1908, the respondent, Jens Peder Andersen, filed in the district court of the Third judicial district of Idaho, in and for Ada county, his petition for naturalization, praying that he be admitted as a citizen of the United States, and, after hearing, his petition was, on the 9th day of June, 1908, granted, and a certificate of citizenship issued to him. The United States now brings this proceeding, under section 15, Naturalization Act June 29, 1906 (chapter 3592, 34 Stat. 601 [U. S. Comp. St. Supp. 1907, p. 427]), to cancel the certificate, upon the ground that, the respondent being a resident of Boise county, and not of Ada county, the court, in granting the certificate, acted without jurisdiction. Proper service was made upon the respondent, who, appearing in person, has filed a demurrer questioning the sufficiency of the petition to entitle the government to any relief. At the hearing of the demurrer the government was represented by Mr. Andrew J. Balliet, of the Bureau of Immigration and Naturalization; no argument, either oral or written, being submitted upon behalf of the respondent.

Section 3 of the naturalization act referred to provides that exclusive jurisdiction to naturalize aliens as citizens of the United States shall be exercised by United States Circuit and District Courts, by certain territorial courts, and by "all courts of record in any state or territory now existing, or which may hereafter be created, having a seal, a clerk, and jurisdiction in actions at law or equity, or law and equity, in which the amount in controversy is unlimited." It is further provided that the jurisdiction of all courts specified "shall extend only to aliens resident within the respective judicial districts of such courts."

By section 15 of the act, it is made the "duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of setting aside and canceling the certificate of citizenship, on the ground of fraud, or on the ground that such certificate of citizenship was illegally procured." It is further prescribed that:

"Whenever any certificate of citizenship shall be set aside or canceled, as herein provided, the court in which such judgment or decree is rendered shall make an order canceling such certificate of citizenship, and shall send a certified copy of such order to the Bureau of Immigration and Naturalization; and in case such certificate was not originally issued by the court making such order, it shall direct the clerk of the court to transmit a copy of such order and judgment to the court out of which such certificate of citizenship shall have been previously issued. And it shall thereupon be the duty of the clerk of the court receiving such certified copy of the order and judgment of the

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

court to enter the same of record, and to cancel such original certificate of citizenship upon the records, and to notify the Bureau of Immigration and Naturalization of such cancellation."

Section 11 of article 5 of the Constitution of Idaho provides that:

"The state shall be divided into five judicial districts, for each of which a judge shall be chosen by the qualified electors thereof, whose term of office shall be four years. And there shall be held a district court in each county at least twice in each year, to continue for such time in each county as may be prescribed by law, but the Legislature may reduce or increase the number of districts. * * *"

At the time the naturalization proceedings herein referred to were had, Ada county and Boise county constituted the Third judicial district, of which Hon. Fremont Wood was the qualified and acting district judge. It is not doubted that the state district courts have naturalization jurisdiction; but the question presented is whether or not the district court of any district can, while sitting in one county, entertain a petition for naturalization presented by a resident of another county of such district. It is contended, upon behalf of the government: That, for the purposes of territorial jurisdiction, the county is to be regarded as the unit, and that the "judicial district" of the Constitution has reference only to the territory from which the judge is elected or appointed, and in which he performs his official functions; that the district court of Ada county is an entity distinct from the district court of Boise county; and that therefore, when the federal statute limits the naturalization jurisdiction of the court to the judicial district of such court, it limits the jurisdiction of the district court in and for Ada county to the applications of aliens resident within that county.

In support of this view, attention is called to the fact that officers of the court, other than the judge, are elected from the county, and not from the district, and are looked upon as county officers. Jurors are chosen from residents of the county, and not of the judicial district. In the main, the criminal jurisdiction of the court is confined to offenses committed within the county, and, generally, civil actions are to be brought and tried in the county where the property is situate or the defendant resides. Moreover, in making application of the naturalization act to the judicial system prevailing in Idaho, the fact that the term "district" is used both in that act and in the Constitution and statutes of the state is without significance. If in Idaho, as in some states, the judicial subdivisions were designated as "circuits" instead of "districts," and the courts were called "circuit courts" instead of "district courts," the problem would be precisely the same. The conclusion reached in the United States v. Schurr (D. C.) 163 Fed. 648, favors the petitioner's contention.

Upon the other hand, it may be urged that, when the Constitution was adopted, provision was made not only for a district judge, but for a district attorney, whose territorial jurisdiction corresponded to that of the judge. The official court stenographer is appointed for the district, and not for the county. Section 6 of article 18 of the Constitution, relating to county organization, provides for county officers whose term of office is two years, but no reference is there made to the clerk

of the district court. Upon the other hand section 16 of article 5, which has to do with the judicial department of the government, provides that:

"The clerk of the district court for each county shall be elected by the qualified electors thereof at the time and in the manner prescribed by law for the election of members of the Legislature, and shall hold his office for the term of four years,"

—which is the term provided for the district judge and the district attorney. Among other things, section 4140 of the Revised Codes of Idaho, prescribing the contents of the summons to be issued in civil actions, provides that it shall direct the defendant to "appear and answer the complaint within twenty days, if the summons is served within the district within which the action is brought, and within forty days if served elsewhere"; the term "district" being used to designate, not a county, but a judicial district. By section 3890 of the Revised Codes, extensive power is conferred upon the district judge sitting at chambers "anywhere within his district." He may even go so far as to receive a plea of guilty in a criminal case and impose sentence. Sections 3831 and 3832 of the Revised Codes apparently negative the idea that in the same district, district court can be in session in two counties at the same time, thus perhaps militating against the view that the court in each county is a distinct entity, and favoring the view that each district has one court, which, however, convenes or sits in each county.

From this statement of the case it must be apparent that the question submitted is not free from doubt, and that, primarily, it involves a construction of the Constitution and statutes of the state. Incidentally, to be sure, the naturalization act must be interpreted; but, given an authoritative construction of the state laws, it is not thought that the application of the federal act would be attended with any grave doubt or difficulty. Although not expressly alleged, it may be presumed that the record in the matter of the naturalization of respondent at the time of the hearing of his application disclosed the fact of his residence in Boise county. From statements made by counsel for the government at the oral argument, it may also be fairly inferred that the precise question now under consideration had the court's attention, and that it deliberately reached a conclusion adverse to the government and favorable to its jurisdiction. Notwithstanding this adverse decision upon a point of law clearly disclosed upon the face of the record, no steps were taken for a review by the Supreme Court of the state, where alone may be had an authoritative construction of the local law, which, as has been observed, is the controlling feature of the issue here submitted. Moreover, the respondent is still a resident of the Third judicial district of Idaho, and, under the provisions of section 15 of the naturalization act, this proceeding might have been commenced in the state district court in Boise county, if not in Ada county, thus respectfully giving to that tribunal an opportunity to review its own records, and to the government, in case of an adverse ruling, the right of an appeal to the Supreme Court of the state. In matters of naturalization the United States District Court for Idaho and the state district court for the Third judicial district of Idaho are

courts of co-ordinate power, exercising concurrent jurisdiction. Inferior courts of a common origin, and having equal authority, while proceeding independently to adjudicate distinct and independent controversies, not infrequently accept as precedents, and follow, each other's decisions upon doubtful questions of general law, to the end that there may not be a babel of judicial expression, in the absence of an authoritative ruling by appellate tribunals. Mast, Foos & Co. v. Stover Mfg. Co., 177 U. S. 485, 20 Sup. Ct. 708, 44 L. Ed. 856; New York Filler Co. v. Jackson (C. C.) 112 Fed. 678. Even superior courts of co-ordinate jurisdiction are inclined to a similar practice. Gill v. Austin, 157 Fed. 234, 84 C. C. A. 677. But if, under such circumstances, considerations of comity are sufficient to warrant uniformity of decision until a higher court can settle the law, like considerations under the conditions here existing are little less than mandatory. This court is not urged merely to reach a conclusion out of accord with that of the state court upon a question raised in an action entirely independent of the proceeding in the state tribunal. This is not an application for relief against a judgment of another court, procured by fraud or by a representation of facts now known to be untrue. By the petition here this court is asked to review merely a legal conclusion, deliberately adopted by a court of co-ordinate jurisdiction, upon a question arising upon the same facts as are here presented, and virtually to send its process into that court requiring it to vacate and set aside its own judgment. Such a function is in its nature revisory, and necessarily implies superiority, which, under the general provisions of the law, this court does not possess. Little Rock Junction Ry. v. Burke, 66 Fed. 83, 13 C. C. A. 341; Blythe v. Hinckley, 173 U. S. 501, 19 Sup. Ct. 497, 43 L. Ed. 783.

But assuming that the court cannot decline to entertain the petition, every consideration of comity, if not of judicial courtesy, requires that a conclusion be reached in harmony with that of the state court. Any other policy would be intolerable, resulting in confusion of judicial decision and the consequent bewilderment of suitors, and also engendering antagonisms between the courts. If in this matter this court can to-day set aside the judgment of the state district court, there is no reason why that court may not to-morrow send its process here, directing the vacation of an order of this court in some other naturalization matter, should the government feel aggrieved and apply to it for relief. With the growing complexity of state and national relations, and in view of the ever-increasing conflict of jurisdiction between the state and the federal courts, it is of the highest importance that in exercising their powers the courts of one class shall proceed with scrupulous regard and due deference to the dignity and rights of the courts of the other class.

Not insensible of the embarrassment which the court must necessarily experience in entertaining the petition, counsel for the government explained that the proceeding was brought here rather than in the state court because, having supervision of matters of naturalization in several states, he found it physically impossible to attend upon the state courts, on account both of the great number of their terms and the fact that in many instances they sit in remote places, difficult

of access. Some force might be accorded to this explanation if we were considering only the convenience and personal preferences of the courts, but public interests are involved. As was said in Mast, Foos & Co. v. Stover Mfg. Co., supra, comity "is something more than mere courtesy, which implies only deference to the opinion of others, since it has a substantial value in securing uniformity of decision and discouraging repeated litigation of the same question." Moreover, it may be remarked that it is not one of the functions of the Bureau of Immigration and Naturalization, or of its representatives, to prosecute proceedings of this character. That duty is, by the plain provisions of the act, imposed upon the United States district attorney, where it properly belongs, and there is no reason for presuming that the department of justice will fail to provide him with adequate assistance for the proper performance of his official duties.

Under the circumstances, an expression of opinion as to the correctness of the state court's ruling, even if proper, would be without advantage. It is sufficient to say that the question is not free from doubt.

In that view, and for reasons already given, considerations of comity require that the demurrer be sustained, and the petition dismissed, and it is so ordered.

COLBY v. CLEAVER et al.

C. H. COLBY & CO. v. McBIRNEY et al.

(Circuit Court, D. Idaho, C. D. December 21, 1908.)

Nos. 282, 283.

1. CORPORATIONS (§ 656*)—FOREIGN CORPORATIONS—STATE LAW—FAILURE TO COMPLY—CONTRACTS—VALIDITY—STATUTES.

Rev. St. Idaho 1887, § 2653, as amended by Act March 10, 1903 (Laws 1903, p. 49), requires foreign corporations doing business in the state to comply with certain conditions, and declares that no contract or agreement made in the name of, or for the use or benefit of, a foreign corporation, failing to perform such conditions, can be sued on or enforced in any court of the state by such corporation, nor can such corporation take or hold title to any realty within the state, and that any pretended deed or conveyance of real estate to such corporation shall be absolutely null and void, etc. *Held*, that such section did not make void a mortgage to a foreign corporation not having complied with such conditions, on land in Idaho.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 656.*]

2. CORPORATIONS (§ 661*)—FOREIGN CORPORATIONS—BUSINESS WITHIN STATE—CONTRACTS—ENFORCEMENT—STATUTES—FEDERAL COURTS—"ANY COURT OF THIS STATE."

Rev. St. Idaho 1887, § 2653, requiring foreign corporations to comply with certain conditions before doing business within the state, and declaring that no contract made in the name or for the use or benefit of a foreign corporation, not having performed such conditions, can be sued on or enforced in "any court of this state" by such corporation, did not preclude a foreign corporation, not having complied with the prescribed

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

conditions, from resorting to the federal courts in Idaho to enforce a mortgage to it on land in that state.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 661.*

Foreign corporations doing business in state, see notes to Wagner v. J. & G. Meakin, 33 C. C. A. 585; Ammons v. Brunswick-Balke-Collender Co., 72 C. C. A. 622.]

In Equity.

Hawley, Puckett & Hawley, for complainants.

Morrison & Pence, Hugh E. McElroy, and William B. Davidson, for defendants.

DIETRICH, District Judge. Each of these suits was brought for the purpose of foreclosing a real estate mortgage. Both cases involve the same question, and they have been argued and submitted together. The answers allege that the mortgages were given to the Des Moines Life Insurance Company, a corporation organized under the laws of the state of Iowa, which corporation, at the date of the execution and delivery of the mortgage, was doing business in the state of Idaho without having complied with the provisions of the laws of the state relating to foreign corporations. The complainants present exceptions to those portions of the answers setting forth as a defense the default of the mortgagee in that respect; it being alleged that the complainants are not the actual holders or the owners in good faith of the instruments sued upon, and that the mortgages are subject to all of the defenses which would be available to the defendants as against the mortgagee were it the complainant. The provisions of law relied upon by the defendants is found in section 2653 of the Revised Statutes of Idaho of 1887, as amended by an act of the Legislature of Idaho approved March 10, 1903 (Laws 1903, p. 49). The section, as amended, provides that every corporation not created under the laws of the state of Idaho must, before doing business in the state, file in certain offices a copy of its articles of incorporation, and also a designation of an agent upon whom process, running against the corporation, may be served, and in case of resignation or death of such agent the corporation is required to designate his successor. Then follows this provision:

"No contract or agreement made in the name of, or for the use or benefit of, such corporation, prior to the making of such filings as first herein provided, can be sued upon or be enforced in any court of this state by such corporation, and such corporation cannot take or hold title to any realty within this state prior to making such filings, and any pretended deed or conveyance of real estate to such corporation prior to such filings shall be absolutely null and void; and any and all officers, agents and representatives, of said corporation, or persons claiming to be officers or agents of the same, who shall make or attempt to make any contract or agreement or contract any indebtedness in the name of such corporation or for its use and benefit, before such original filings are made, or while such corporation is in default upon filing a reappointment as hereby provided, shall be jointly and severally, personally liable upon and for all such contracts and agreements as principal contractors."

It is further provided that the statute of limitations shall not run in favor of such corporation while it is in default. The purpose of the

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

statute is remedial; the clear intention being to require foreign corporations doing business within the state to place within the reach of persons contemplating or having business relations with them certain information with regard to their organization, and also to make them amenable to the process of the state courts in case of any controversy growing out of their business transactions in the state. Certain penalties are imposed for failure to comply with the law. Such corporation is denied the benefit of the statute of limitations while it remains in default. Any of its officers or agents, transacting business for it before it complies with the law, are made personally liable upon its contracts as principals. Conveyances of real estate to it are declared to be absolutely void. As to executory contracts or agreements entered into with such corporation while it is in default, it is declared that they cannot "be sued upon or be enforced in any court of this state by such corporation"; and this is the particular clause of the law which we are now called upon to construe.

It is clear that the Legislature did not intend that such contracts or agreements should be absolutely void; otherwise, they would have been placed in the same category with conveyances of realty. That they are not void is the settled doctrine of the Supreme Court of the state. Valley Lumber & Mfg. Co. v. Nickerson et al., 13 Idaho, 682, 93 Pac. 24; Valley Lumber & Mfg. Co. v. Driessel, 13 Idaho, 662, 93 Pac. 765, 15 L. R. A. (N. S.) 299. Moreover, it is equally clear that it was not the intention of the Legislature to declare them unenforceable against the corporation. The real question is whether such a contract is ever or at all enforceable by or upon behalf of such corporation. The Supreme Court of the state has, in effect, held that it is not a lifeless thing, that the provisions thereof in favor of the corporation are not void, but that, when such contract is sued upon in a state court by the corporation, it shall be just as available to the corporation as it would be had the corporation not been in default at the time of the execution of the contract, unless the defendant, seasonably and in an appropriate manner, makes objection upon the statutory ground. See Valley Lumber & Mfg. Co. v. Nickerson and Valley Lumber & Mfg. Co. v. Driessel, cited supra.

If this view be correct, then such a contract or agreement is a subsisting and binding obligation, not only of the corporation, but of both parties thereto; for, if the undertaking of the one party were lifeless, his failure to raise objection could not operate to breathe life into that which was never animate. The point of pleading and practice thus settled in the state courts is not in question here, for the defendant has raised timely objection; but I have directed attention to this view of the Idaho court for the purpose of more clearly fixing and defining the status of such a contract. If the Legislature had declared such contract, or the portions thereof in favor of the defaulting corporation, to be void, or if it were provided that such contract is not enforceable by or on behalf of such corporation or its assignee, there would be no room for doubt as to the legislative intent; but the provision is that such a contract cannot "be enforced in any court of this state." In interpreting a statute, it is generally the duty of the court to give to each of its

several clauses and phrases some meaning. The exceptions to the rule are rare. The phrase "of this state" does not inject into the enactment either conflict or ambiguity; nor, if retained, is it materially at variance with the remedial purpose of the legislation, and I am unable to discern any valid reason for rejecting it. What significance did the Legislature attach to it? If it is to be given any meaning at all, it must be one of limitation. If it was the intention of the Legislature to provide that such a contract should not be enforceable in any court, why was not the phrase "of this state" omitted? Apt phraseology to express the idea of absolute nonenforceability readily suggests itself, and it is impossible to avoid the conclusion that it was not the intention to declare such a contract wholly unenforceable, but only to deny to the delinquent corporation certain means of enforcement. In other words, the state Legislature intended that the doors of the state tribunals should be closed against a foreign corporation which had transacted business in the state in violation of the state laws. If this view be correct, the clause does not, by its terms, embrace federal courts.

Such seems to be the natural and obvious meaning of the language used by the Legislature. Is such a construction subject to any valid objection? Will it tend to vitiate the statute, or to render it ineffectual in remedying the evil to which it was directed? Is there any inherent probability that the phrase was unadvisedly or inadvertently incorporated and retained in the act? The questions must, I think, be answered in the negative. In speaking of a similar provision of the laws of the state of Kansas, the Circuit Court of Appeals for the Eighth Circuit, in the case of Blodgett et al. v. Lanyon Zinc Company, 120 Fed. 893, 58 C. C. A. 79, decided a few days before the approval of the act under consideration, says:

"The statutes under consideration require foreign corporations seeking to do business in the state of Kansas to comply with the requirements there set forth. For a failure to comply with some of them, they prohibit the company from maintaining actions in the courts of the state of Kansas; but a prohibition of the commencement or of the maintenance of suits is not an inhibition of defending them, and the appellee is the defendant in the suit in hand. Moreover, the inhibition by a state of the maintenance of actions in its courts does not affect the right of a citizen or of a corporation to maintain them in the national courts. The jurisdiction of the federal courts was not conferred, and it cannot be withdrawn or limited, by the legislation of the states. It was granted by the people, through the Constitution and the acts of Congress, and an amendment of the Constitution or an act of Congress is requisite to destroy or diminish it."

Upon the authority of this decision, it was argued at the hearing that it would be incompetent for the state Legislature to enact a law purporting to deprive a foreign corporation of the right to have its controversies tried out in the federal courts, and that, if the act be construed as a prohibition against suing upon or enforcing such contracts in the federal courts, it is to that extent invalid. Without intimating any opinion as to the merits of this contention, or whether it is supported by the language of the Circuit Court of Appeals above quoted, it is sufficient to say that the decisions are somewhat variant upon the point, and that a doubt has more or less commonly prevailed as to just how far a state Legislature may go in limiting the rights of par-

ties when they seek to bring their controversies into the federal courts. It is not improbable, therefore, that in view of this uncertainty the Legislature thought it best to exercise the precaution of limiting the operation of the law to the tribunals over which and concerning the procedure in which it exercised undoubted control. I do not intimate that the Legislature could not have made such contracts nonenforceable in the federal courts. Upon that question I express no opinion. I refer to the prevailing doubt on the subject only for the purpose of illuminating, if possible, the motive and intent of the Legislature in using the phrase under consideration. It may reasonably have been concluded that it would be better to err upon the side of caution, and to enact legislation which, while not as broad as possibly it might be, would be of undoubted validity, and would still be sufficient to effect the object in view; and upon reflection it will appear that limiting the operation of this clause to the state courts does not materially diminish the penalties prescribed for a violation of the law, and still leaves them amply sufficient to compel compliance. It is a matter of familiar knowledge that the federal courts can acquire jurisdiction of comparatively few controversies. The great bulk of litigation must, of necessity, go into and stay in the state courts. It is hardly conceivable that, merely because of the possibility that of its rights of action a few may be of such character and magnitude as to give it access to a federal court, a foreign corporation will, by knowingly failing to comply with the comparatively simple and inexpensive requirements of the state statutes, willfully place itself in a position where it will, in the main, be without any tribunal to which it can resort to enforce its rights against parties with whom it transacts business. Moreover, the corporation is still deprived of the benefit of the statutes of limitations, its agents are liable upon its contracts as principals, and deeds to it are void. Therefore, by giving to the phrase "the courts of this state" its natural and apparent meaning, the penalties to which the defaulting corporation subjects itself are not materially diminished and the efficiency of the act will remain substantially unimpaired. The Legislature having prescribed certain penalties, it is not for the courts to add thereto.

Complainants' exceptions to paragraph 2 of the joint and several answer of Herbert R. Cleaver and F. W. Compton, No. 282, and to paragraph 2 of the joint and several answer of William S. McBirney and F. W. Compton, No. 283, and exceptions 1, 5, and 6 to answer of S. De Cloedt in No. 282, will therefore be allowed. The other exceptions will be denied, and the demurrers to the answers will be overruled.

TINKER & SCOTT v. UNITED STATES FIDELITY & GUARANTY CO.

(Circuit Court, D. Oregon. March 29, 1909.)

No. 3,148.

1. UNITED STATES (§ 70*)—PUBLIC IMPROVEMENT CONTRACT—TERMINATION—STIPULATIONS.

A provision in United States improvement contract that the United States might treat any assignment or transfer of the contract or subletting of the work as an annulment thereof, or might recognize the acts of the contractors as valid, as it should feel disposed, was for the sole benefit of the government, the observance of which could not be insisted on by other parties in interest.

[Ed. Note.—For other cases, see United States, Dec. Dig. § 70.*]

2. UNITED STATES (§ 70*)—IMPROVEMENT CONTRACT—SPECIFICATIONS—TERMINATION—USE OF APPLIANCES—"EMPLOYED ON ANY OF THE WORKS"—"MATERIALS BELONGING TO CONTRACTOR DELIVERED ON GROUND."

One of the specifications of United States improvement contract provided that if the contractor should fail to prosecute the work, or begin the delivery of material in such manner as to insure a full compliance within the time limit, or if any question should arise as to whether the contractor was properly carrying out the contract in its true intent and meaning, and on his neglect or refusal after notice to provide means for a more energetic compliance with the contract, the Secretary of the Interior might suspend the work and take possession of all machinery, tools, appliances, and animals "employed on any of the works," and all "materials belonging to the contractor delivered on the ground," and use the same to complete the work, etc. *Held*, that on the termination of the contract, under such specification, the Secretary of the Interior's right to take possession of machinery, tools, appliances, and animals was not limited to those employed by the contractor, but included all that were "employed on any of the works," by any one, whether contractor or subcontractor, but that the government's right to materials was limited to those on the ground and owned by the contractor.

[Ed. Note.—For other cases, see United States, Dec. Dig. § 70.*]

3. TROVER AND CONVERSION (§ 23*)—PERSONAL PROPERTY—RIGHTS OF POSSESSION.

Where the United States had taken possession of a crusher and a power plant under lawful authority, on termination of the contract for a public improvement, because of the contractor's default, and the government turned over such plants to defendant for use in the completion of the work as the contractor's surety, defendant's possession of the plants was lawful, and it was not therefore chargeable for conversion thereof.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 163–166; Dec. Dig. § 23.*]

4. UNITED STATES (§ 70*)—CONTRACT—TERMINATION—RIGHT TO MATERIAL—"DELIVERY."

Where a public improvement contract provided for termination at the election of the United States on the contractor's default, in which event the Secretary of the Interior might take possession of all materials belonging to the contractor delivered on the ground, and might use the same to complete the work, rock excavated by certain subcontractors and placed in position convenient to a crusher plant to be crushed, though material placed or "delivered" within the contract, was nevertheless not the property of the contractor, and hence was not subject to appropriation by the government on terminating the contract.

[Ed. Note.—For other cases, see United States, Dec. Dig. § 70.*

For other definitions, see Words and Phrases, vol. 2, pp. 1958–1970; vol. 8, p. 7632.]

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

Hogue & Wilbur and F. S. Senn, for plaintiffs.
M. L. Pipes and Beach & Simon, for defendant.

WOLVERTON, District Judge. This is an action in trover, and was submitted for trial by the court without the intervention of a jury.

On the 23d day of September, 1905, the United States let to Prendergast & Clarkson, a corporation, a contract for the construction and completion of the Shoshone dam and auxiliary works, Shoshone Project, Wyo., in accordance with the proposal and specifications attached to the contract and made part thereof. By the fourth article of the contract, it is stipulated that, in conformity with the requirements of section 3737 of the Revised Statutes (U. S. Comp. St. 1901, p. 2507):

"Neither this contract nor any interest therein shall be transferred to any other party or parties, and that any such transfer shall cause the annulment of the contract so far as the United States is concerned."

By section 22 of the specifications, under the head of "General Conditions," it is further provided as follows:

"Suspension of Contract. Should the contractor fail to begin the work within the time required, or fail to begin the delivery of material as provided in the contract, or fail to prosecute the work or delivery in such manner as to insure a full compliance with the contract within the time limit, or should any question arise as to whether or not the contractor is properly carrying out the provisions of his contract in their true intent and meaning, at any time during the progress of the work, notice thereof in writing shall be served upon him, and upon his neglect or refusal to provide means for a more energetic and satisfactory compliance with the contract within the time specified in such notice, then and in either case the Secretary of the Interior shall have the power to suspend the operation of the contract, and he may take possession of all machinery, tools, appliances, and animals employed on any of the works to be constructed under the contract and of all materials belonging to the contractor delivered on the ground, and may use the same to complete the work, or he may employ other parties to carry the contract to completion, substitute other machinery or materials, purchase the material contracted for in such manner as he may deem proper, or hire such force and buy such machinery, tools, appliances, materials, and animals at the contractor's expense as may be necessary for the proper conduct of the work and for finishing it in the time agreed upon. Any excess of cost arising therefrom over and above the contract price will be charged against the contractor and his sureties, who shall be liable therefor. The failure to order improvement of methods or increase of force, plant, or efficiencies will not relieve the contractor from his obligation to perform good work or finish in the time agreed upon."

The defendant, the United States Fidelity & Guaranty Company, executed its bond to the United States in the sum of $100,000 for the faithful performance of the contract on the part of Prendergast & Clarkson, and for the payment of the demands of all persons supplying labor and materials for the prosecution of the work provided for therein.

On February 26, 1906, Prendergast & Clarkson entered into a contract with Tinker & Scott, the plaintiffs, whereby Tinker & Scott agreed to furnish Prendergast & Clarkson the entire quantity of crushed stone and sand to be used for concrete in the construction of the "base of dam," "portion of the dam above the base," and "crest of

weir"; also, to excavate the "spillway" both "open cut and tunnel excavation"; also the "road tunnel"—and to utilize the excavated material, or such portion thereof as should be acceptable to the engineer for concrete material, the crushed stone and sand to be delivered in separate bins, to be furnished and maintained by them. Tinker & Scott further agreed to furnish and maintain adequate plant, consisting of power plant, crushing, screen and conveying plant, drilling plant, and all other necessary equipment and appliances that from time to time might become necessary to keep the organized forces of Prendergast & Clarkson furnished with concrete material; but that, in case of failure from any cause whatever on their part to carry out the agreement, all of said plant, equipment, and appliances were to remain on the works for the use of Prendergast & Clarkson, free of cost, until their contract should be finished. It was further agreed that Tinker & Scott should have all their accounts affecting the agreement carried by and in the name of Prendergast & Clarkson, and that they should furnish from time to time such money as was necessary from the books and accounts to meet and defray their expenditures; and, further, that they should be bound by the plans, specifications, and instructions furnished by the United States government to Prendergast & Clarkson in their entirety, and with no exception whatever, such plans and specifications being attached thereto. In consideration of which agreement on the part of Tinker & Scott, Prendergast & Clarkson agreed to pay them $1.60 per cubic yard for all crushed rock furnished in bins, except such as should be taken from tunnel and road excavation, approximating 7,600 cubic yards, for which Prendergast & Clarkson were to pay $4 per cubic yard. By an addendum it was further agreed that one central power plant should be constructed jointly by the contracting parties, and that when the work was completed the plant should be owned by them jointly. By another addendum it was further agreed that the rock excavated from the cliffs known as the "keys" should be on the parties' joint account, and that they, as to this, should divide the profits and losses equally.

Tinker & Scott entered upon the discharge of their agreement, and so continued from the date thereof until some time in August following. During the time there was accumulated for their use a considerable amount of goods, wares, and chattels, consisting of tools, implements, and materials for use in carrying out the work agreed to be performed by them. There was also provided for their use a crusher and a power plant, including all appliances and instrumentalities entering into the construction of either. The crusher was for crushing rock for use in the concrete work, and was located near the spillway, and the power plant was designed to furnish power for use in running the crusher, and in running certain machinery under the control and management of Prendergast & Clarkson. During the time there was also excavated from the spillway 3,000 yards of rock, and from what is known as the "keys" 5,000 yards. The rock from the spillway was conveyed to a locality near the crusher, or within about 100 feet therefrom, with a view to crushing the same later, and placing it in bins for use. All this property, including the rock, subsequently came into the

possession of the defendant; and plaintiffs, claiming that the same was tortiously taken from them, sue the defendant for a conversion thereof.

Preliminarily, it should be stated that the stipulation contained in article 4 of the government's contract with Prendergast & Clarkson was inserted for the benefit and protection of the government alone. It may treat any assignment or transfer of the contract or subletting of the contract work as annulling the same, or it may recognize the acts of the contractors in that respect as valid, as it may feel disposed. All other parties interested, or who may become interested in the contract, save the government, may not insist upon the observance of the stipulation. Goodman v. Niblack, 102 U. S. 560, 26 L. Ed. 229; Hobbs v. McLean, 117 U. S. 567, 6 Sup. Ct. 870, 29 L. Ed. 940; Dulaney v. Scudder, 94 Fed. 6, 36 C. C. A. 52.

From the weight of the testimony, it appears that the small tools and implements used by Tinker & Scott in their work of putting the crusher and power plant in place, and for excavation, and the materials designed for use by them, were purchased of Prendergast & Clarkson, and became and were at the time of the alleged conversion the property of Tinker & Scott. That firm was also in possession of the same. The crusher and appurtenances were purchased by Prendergast & Clarkson for use by Tinker & Scott, with the view and purpose that the latter should eventually own the same; but they had, at the time of the alleged conversion, paid no part of the purchase price. Such was also the case as it respects certain boilers, and a compressor designed for use in connection with the power plant. Tinker & Scott were in possession of the crusher and such other instrumentalities as were not connected with the power plant. The power plant and its appurtenances were designed for the joint use of plaintiffs and Prendergast & Clarkson. They were purchased by Prendergast & Clarkson; no part of the purchase price thereof having been paid by the plaintiffs. This plant and its appliances were jointly used by the contracting parties, and they were probably in the joint possession thereof at the time of the alleged conversion. The rock excavated from the spillway was in the possession of Tinker & Scott, and that from the keys, dropped into the bed of the stream, was in the joint possession of Prendergast & Clarkson and Tinker & Scott, so far as it could be said to be in the possession of any one other than the owners of the land upon which the improvements were to be constructed. I speak of the time of the alleged conversion. To be more exact, the time should be fixed as that when the government interfered to take possession of the works installed for carrying on the project under the government's contract with Prendergast & Clarkson.

I do not attempt to resolve exactly the ownership and the possession of this property at the time, as, under the view I take of the controversy, I do not deem it essential that I should do so. As I construe paragraph 22 of the specifications of Prendergast & Clarkson's agreement to construct the dam and auxiliary works, Shoshone Project, the Secretary of the Interior was authorized, upon a failure by Prendergast & Clarkson to carry forward the work with reasonable dispatch, to take possession of all machinery, tools, appliances, and animals em-

ployed on any part of the works to be constructed under the contract. The contract does not read "employed by the contractor," but all machinery, etc., "employed on any of the works," comprehending, by fair and unmistakable intendment, employment by any one, whether by the contractor or any subcontractor, so that they were employed upon the works. This rendition becomes more apparent by a further reading of the clause as follows: "And of all materials belonging to the contractor delivered on the ground"—thus limiting the materials that might be taken to such as were owned by the contractor and then upon the ground. But as to the machinery, tools, and appliances, there is no restriction except that they should be employed upon the work. The Secretary of the Interior is further authorized to use the same—that is, such machinery, appliances, tools, and materials as he is empowered to take possession of—to complete the work, or he may employ other parties to carry the contract to completion. Tinker & Scott are, by their specific agreement with Prendergast & Clarkson, as much bound by this condition as the latter, for it is made a part of their contract; but, if it were otherwise, having taken a subcontract to do a portion of the work, Tinker & Scott would be bound by a condition so general in its application.

There can be but little contention relative to the government taking possession of all the property described in the complaint. The fact is established by the testimony of H. M. Savage, John McGregor, T. J. Prendergast, and James F. Clarkson. It is unnecessary to extend comment upon the testimony showing its bearing and relation and what it tends to prove. It is sufficient that the conclusion of fact is as stated. The government took possession on August 14, 1906, and turned the entire property over to the defendant about the middle of September, so that the latter might complete the project as surety for Prendergast & Clarkson.

I may now determine the legal conclusions attending the controversy. The defendant's counsel say in their brief:

"There is a list of the small tool bill, the price of which were charged to Tinker & Scott and delivered to them, as to which the defendant is willing to yield."

This settles the dispute as to the list of tools and materials, for there are materials contained in the list which cannot be denominated tools. The value thereof has been shown to be $2,064.35, and the plaintiffs are entitled to recover for that item. As it relates to the crusher plant, which was in the possession of Tinker & Scott at the time, the government had the right and authority to take it into its possession, under the terms of the contract with Prendergast & Clarkson, upon their failure to proceed with the construction work, as stipulated in paragraph 22. The government having taken possession of this plant under lawful authority, and having turned the same over to the defendant for use in the completion of the work in pursuance of the purpose of Prendergast & Clarkson's contract, the defendant is therefore in lawful possession, and is not chargeable with a conversion of the plant. The power plant was taken by the government, and turned over to the defendant in the same way, so there is also no liability

on the part of defendant in trover by the real owners, whoever they may be.

A different question arises as respects the rock taken from the spillway. The excavation was made and the rock produced by the work and labor furnished by the plaintiffs, and at their own expense. The plaintiffs may have overdrawn their account with Prendergast & Clarkson in payment for the labor, but that only bears upon the relation between these two contracting parties of debtor and creditor. Prendergast & Clarkson had no right to the rock excavated, nor was any lien reserved thereon for their benefit. The rock constituted material on the ground, which was designed to be manufactured into crushed rock and placed in bins for use by Prendergast & Clarkson for their concrete work. It was material, but not delivered on the ground by the contractor, nor can it be said to have belonged to the contractor. The labor of Tinker & Scott, as is apparent, produced it, and they were intending to manufacture it into crushed rock, and they had placed it in position convenient to the crusher for so manufacturing it, so that it was material placed or "delivered," using the language of the government's contract, on the ground by Tinker & Scott, not the government's contractor, and it was still in their possession for further reduction into crushed rock. That the rock in its unfinished state was taken from the spillway does not differentiate it from rock that might have been brought from beyond the confines of the government's project and delivered thereon as material for use in construction. In either case it must be treated as material delivered on the ground, not by the contractor, but by the subcontractor. This being the case, the government was without authority, under its contract with Prendergast & Clarkson, to take the rock into possession or to deliver the same over to the defendant. Therefore the defendant's possession thereof is wrongful as against the plaintiffs, and the latter are entitled to recover its value.

The only testimony given upon the value of this rock is that of Tinker. He says there is a swell in the bulk of crushed rock above its mass in the ledge of about 75 per cent., so that a cubic yard from the ledge will make 1¾ yards of the crushed material. He further states that it is worth 40 cents per cubic yard to crush the rock. Three thousand yards in the ledge would make 5,250 cubic yards of crushed material. At $1.60 per cubic yard the product would be $8,400. By deducting 40 cents per cubic yard for crushing, the balance would constitute the aggregate value, namely, $6,300. The value claimed, however, is but $6,000—$2 per ton as measured in the ledge—which amount plaintiffs are entitled to recover.

Another item claimed is for 5,000 yards of rock. This rock was excavated from the keys and thrown into the bed of the river. By reason of its position, it was worthless for use for manufacturing crushed rock unless at a much larger expense than Tinker & Scott were to get for the material in the bin. It was of no value therefore as material on the ground.

As to the further item of 200 yards of rock taken from the tunnel, there is no proof concerning it. I conclude therefore that plain-

tiffs are entitled to recover for the small tools, etc., $2,064.35, and for the rock taken from the spillway and placed in proximity to the crusher for crushing purposes, $6,000, amounting in the aggregate to $8,064.35.

THE CHRISTIANA BAIRD.

(District Court, E. D. New York. April 2, 1909.)

TOWAGE (§ 11*)—INJURY TO TOW—COLLISION BETWEEN TOWS—FAULT OF TUG.

A tug proceeding down the Passaic river with a scow on one side and a schooner in tow on a hawser was compelled to wait the passing of trains before the opening of the draw in a railroad bridge, and while doing so kept to the east side of the river because the ebb tide was setting toward the southwest. The draw, which was on the east side, was opened in time to permit the tug to pass, but in doing so the master miscalculated and went so near the east side that the scow struck the trestle, and the schooner came into collision with it and was injured. *Held*, that the fault was that of the master, which rendered the tug liable for negligent towage.

[Ed. Note.—For other cases, see Towage, Cent. Dig. §§ 11, 19; Dec. Dig. § 11.*]

In Admiralty.

Alexander & Ash, for libelant.
Martin A. Ryan, for claimant.

CHATFIELD, District Judge. On the 14th of January, 1907, the tug Christiana Baird was proceeding down the Passaic river, with a scow, the Brimstone, fastened alongside on the port, and a schooner, the Annie E. Webb (owned by the libelant), on a hawser not more than 125 feet in length. When a short distance above the drawbridge operated by the New Jersey Central Railroad, the tug signaled the bridge. According to the custom of the railroad company under those conditions of tide, a signal was in position, indicating to the boat coming down the river that the draw would be opened upon the east side of the pier, in midchannel. The bridge tender did not respond to the tug's signal, and two trains, one from the east and the other from the west, crossed the bridge while the tug was drifting under the influence of her own headway and the tide. After these trains had passed over the draw, the tug gave a second signal to the bridge tender, which was not answered, nor was the draw opened, but another train, appearing some mile or more to the west, was allowed to pass over the draw before the eastern wing of the draw was raised. The tugboat, when the draw was started in motion, went ahead at full speed, and as the tow passed through the draw the forward port corner of the scow struck the northwest corner of the trestle, upon the east side of the draw, whereupon the scow swung around, and the schooner Annie E. Webb came ahead and into collision with the scow. Injuries resulted to the schooner from this collision, and she

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

was further damaged by being carried against the abutments of the bridge, while the tug and scow floated through the draw and were not seriously damaged. The ebb tide at this point sets to the southwest through the draw, and through all portions of the trestle, which is built upon rows of piles, assuming that the bridge runs approximately in an east and west direction.

The testimony in the case shows that the tug, at all times prior to going ahead at full speed when the draw was open, had been working to the eastward, maneuvering to maintain a position from which she could go straight through the draw when the eastern half was lifted. The testimony shows, also, that, at the time the tug started ahead at full speed, she was some 150 feet to the north of the bridge, and at the same time somewhat over to the east of the point where the scow struck the bridge.

Assuming, as the testimony shows without dispute, that the set of the tide was toward the bridge and to the west, it would have been a physical impossibility for the tug to hold the tow to the eastward of the draw, without an effort on the part of the captain to counteract the western drift of the tide. The entire testimony shows that the captain of the tug, as well as the bridge tender, realized that the bridge was not to be opened until the last train from the west had passed over the draw. It would appear that, when this train came in sight, the distance between the tug and the bridge was such that it would have been difficult, and perhaps more dangerous, to attempt to turn around than to wait, but throughout the entire period it is apparent that the bridge tender estimated and expected to be able to open the draw in time to allow the tug and its tow to go through. The captain of the tug at all times anticipated that the draw would be opened in time to allow his boat to go through, inasmuch as he did nothing at all to avoid accident, except to maintain his position against the tide.

It is unnecessary to consider who would have been responsible if the draw had not been opened in time to allow the passage of the boats; nor does the effect of the statute making it the duty of the railroad company to operate the draw, and to give timely signals when the draw cannot be opened, alter the responsibility in the present case. The bridge was opened in time. The tug would have experienced no difficulty in going through, and no accident of any kind would have happened, if the captain of the tug had not failed to estimate correctly the space by which he could clear the end of the trestle on the easterly side of the draw. In his efforts to maintain his position against the tide, he miscalculated, and his mistake was such that it must be deemed negligent towage, for which the towboat was responsible.

The claimant has cited two cases which must be referred to. In Clement v. Metropolitan West Side El. Ry., 123 Fed. 271, 59 C. C. A. 289, the court held that the approaching boat was not bound to heave to until the bridge was raised, nor to critically examine the situation, but carefully proceed at slow speed, upon the assumption that the bridge would open. But in that particular case the bridge was not opened, and the tug was exonerated from fault, on the ground

that the master of the tug did all that he could, under the circumstances, to avoid a collision brought about through the failure of the railroad company to perform its duty.

In the case of Pennsylvania R. Co. v. Central Railroad of New Jersey (D. C.) 59 Fed. 190, affirmed 59 Fed. 192, 8 C. C. A. 86, an accident occurred at the same bridge and draw opening as in the case at bar. The draw was held closed for the passage of a freight train from the west, exactly as in the present case, and, after the train had passed, the draw was seen to be opening, when the tug went ahead, but struck the bridge, and the Central Railroad of New Jersey, operating the bridge, was held responsible, and the tug exonerated.

The principle difference shown by the opinion between that case and the present is that, in the case mentioned, the tow, going up the river, was compelled to choose between the sides of the draw, and tried to pass through the westerly channel, but in so doing struck the starboard corner of the tow against the center pier; while in the case at bar the passage was to be made through the easterly side, and the tow struck its port corner against the bridge itself (the corner from which the tide would carry a floating object). In that case the court found, as a fact, that the bridge was not opened in time to let the tug "get her tow properly into shape for going into the passage," and in that case the railroad company put in a defense denying the libelant's statement of the occurrence. On the issue of fact the court found for the libelant. Here the facts are not greatly in dispute.

Because of these differences, it does not seem that the case at bar is on all fours; but, whether it be or no, it must be held in the present case that, upon the facts shown, the accident was due to a mistake on the part of the captain of the tug, for which the tug must be held responsible. If he attempted to make the passage, he was bound to use a proper degree of care in doing what, under the circumstances, he was compelled to do. A failure to estimate the space in which such a tow could go through the drawbridge, under the influence of the tide as it was then running, is something for which the captain of the tug, with his familiarity with the conditions and location, must be held responsible.

The libelant may have a decree.

THE ALBANI.

(District Court, E. D. Pennsylvania. April 1, 1909.)

No. 17.

1. SEAMEN (§ 23*)—VALIDITY OF CONTRACT FOR SERVICE—ADVANCEMENTS.
The fact that the master of a vessel took possession of notes given by seamen to a boarding house keeper after the signing of shipping articles, and held the same with the intention of paying them on the discharge of the seamen, if on inquiry it was found to be legal, did not constitute a violation of Act Dec. 21, 1898, c. 28, § 24, 30 Stat. 763 (U. S. Comp. St. 1901, p. 3079), prohibiting advancements to seamen, nor render the shipment void so as to entitle the seamen to quit the service before the expiration of the term of service under Rev. St. § 4523 (U. S. Comp. St. 1901, p. 3075), where the amount was not charged to the seamen nor any agreement made to pay the notes.
[Ed. Note.—For other cases, see Seamen, Dec. Dig. § 23.*]

2. ADMIRALTY (§ 13*) — JURISDICTION — SUITS FOR WAGES BETWEEN FOREIGN SEAMEN AND FOREIGN VESSELS.
Where the aid of an American court of admiralty is invoked in a settlement for wages between foreign seamen and a foreign vessel, in the absence of treaty stipulations it rests in the discretion of the court whether it will take jurisdiction, and the courts are inclined to take jurisdiction when, but only when, it is necessary to prevent a failure of justice.
[Ed. Note.—For other cases, see Admiralty, Dec. Dig. § 13.*
Jurisdiction of suits between foreigners, see note to Fairgrieve v. Marine Ins. Co. of London, 37 C. C. A. 193.]

In Admiralty. Suit by seamen for wages.

J. Lawrence Wetherill, for libelants.
Howard M. Long, for respondent.

HOLLAND, District Judge. These three libelants are Norwegians, and they have instituted this suit against the Albani, a British schooner, to recover wages due each in the sum of $44.75. They were engaged and signed shipping articles before the British consul at Savannah, Ga., on March 24, 1908, for a voyage—

"from * * * Savannah to Porto Rico, or any ports or places between the limits of 65° north and 65° south latitude, trading to and fro as required for a trip not to exceed twelve months, the final port of discharge to be in the Dominion of Canada. The ship has liberty to call for orders when and where required, no cash or liberty granted the members of the crew other than at the pleasure of the master."

The three libelants were secured through a boarding house keeper at Savannah, and the captain paid him $10, but this sum was not to be and was not deducted from the wages of the men. Next day, after the shipping articles had been signed, the boarding house keeper appeared with the men on board the Albani and handed three notes to the master. Each one of the three libelants had executed one of these notes in the sum of $22.50, and in the following form:

"$22.50 Savannah, Ga. March 25, 1908.

"Captain Sch. 'Albani' will please pay Harry Olsen twenty-two and $^{50}/_{100}$ dollars for board. To be paid when due me for services on board said schooner

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

and to be charged to my account at the end of the voyage or when duly discharged from said vessel. Witness."

They were not charged against the libelants on the shipping articles in evidence, in the column headed, "Amount of wages advanced upon or at the time of engagement," although these articles show that as to many of the other men engaged there are amounts charged against them as advances. The absence of these amounts as charges against the libelants in the shipping articles is some evidence to corroborate the master's testimony that it was not his intention to pay these notes until he had arrived in Canada, the port of discharge, and had submitted the matter to the consul there, and then, in case he found from this officer that it would be lawful to pay them, he would have done so, otherwise he would not have withheld this amount from the wages due the claimants.

The vessel sailed from Savannah, Ga., to San Diego, Cuba, and thence to San Andreas, in the West Indies, and thence to Philadelphia, where she arrived on May 23, 1908. Upon arriving in Philadelphia, the libelants immediately proceeded to the office of the British consul in the latter city, and claimed a right to be discharged, (1) because they had understood that their discharge was to be in an American port, and (2) because their shipment had been illegal on account of the notes. The case was heard by the British consul in this city, and their discharge refused by him. This libel was then filed by libelants. They claim that they did not understand the port of discharge to be in the Dominion of Canada, but the testimony shows that the shipping articles had been read to them by the British consul at the time they were executed, and explained by him and George Olsen, one of the claimants, to the other two, who did not understand or speak the English language so well. Their contract, which was explained to them, is in writing, and oral evidence offered to vary its terms has failed to convince me that this alleged misunderstanding as to the port of discharge was not a mere pretense to enable them to quit the schooner at Philadelphia.

Under the circumstances, the possession of these notes by the master was not a violation of the act of December 21, 1898, c. 28, § 24, 30 Stat. 763 (U. S. Comp. St. 1901, p. 3079), nor is it in contravention of the provisions of the Revised Statutes, § 4523 (U. S. Comp. St. 1901, p. 3075). They were executed the day after the signing of the shipping articles, and no part of the consideration of this contract, so that their execution would not render the shipping articles void, as was held in The Boundbrook (D. C.) 146 Fed. 160. But aside from this decision, the notes were in fact no advancement or allotment; they were notes secured from these libelants by a boarding house keeper with whom the libelants had stopped a few days prior to signing the shipping articles for the voyage on the schooner. There is nothing to prevent seamen from executing as many notes as they may see fit in favor of persons on shore, but they are only violative of the law protecting seamen when the master or parties in authority on a vessel employing such seamen agree to use the wages of the men in payment of such notes. In this case, the captain was simply asked

to take possession of the notes, which he did, without having charged them against the libelants, either in the shipping articles or in any other account, and this is corroborative of his testimony to the effect that he did not intend to pay them until he arrived at the port of discharge, when he intended to ascertain whether or not it was legal for him to do so. So that there was nothing in connection with these notes to invalidate the shipping articles.

There is no complaint that the ship's officers either neglected or ill treated the men. The evidence shows simply a desire on the part of the libelants to be discharged in this port, and they set up the reasons stated above for their claim. As we have said, the case was heard by the British consul and decided against them.

The respondent urges, under the circumstances, that this court should not take jurisdiction, as the claimants are foreigners and the respondent a foreign vessel, but that they should be remitted to the British courts, which have jurisdiction of the vessel and the contract. It has been held that, where the British consul or vice consul had passed upon the question of wages claimed by foreign seamen shipping on a British vessel, the courts would refuse to take jurisdiction. The New City (D. C.) 47 Fed. 328; The Belvidere (D. C.) 90 Fed. 106. An examination of the many cases which have been before the courts of the United States shows that the courts are inclined to take jurisdiction, in the absence of treaty stipulations to the contrary, where it is ascertained that it is necessary to do so to prevent a failure of justice (note, admiralty jurisdiction between foreigners, Fairgrieve v. Marine Ins. Co., 37 C. C. A. 193; The Falls of Keltie [D. C.] 114 Fed. 357; The Alnwick [D. C.] 132 Fed. 117; The Troop [D. C.] 117 Fed. 557), but that it rests in the discretion of the court of admiralty whose aid is invoked in the settlement between foreign seamen claiming wages against foreign vessels.

There is nothing in the evidence in this case to indicate that there would be an injustice done these claimants by a refusal of this court to take jurisdiction. They have received proper treatment while on board, and their proofs have failed to show any violation of the maritime laws of the United States.

The libel should, therefore, be dismissed; and it is so ordered.

THE MANHATTAN.

(District Court, E. D. New York. April 2, 1909.)

1. WHARVES (§ 20*)—INJURY TO VESSELS—OBSTRUCTIONS IN BERTH.

Where a wharf used for hire is so located as to have a very small amount of water in a berth at low tide, so that boats lying there necessarily rest on the bottom, the owner must be held responsible for injuries resulting from anything in the nature of permanent obstructions in the bottom.

[Ed. Note.—For other cases, see Wharves, Cent. Dig. §§ 36, 37; Dec. Dig. § 20.*]

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

2. WHARVES (§ 20*)—INJURY TO VESSELS—CONTRIBUTORY NEGLIGENCE.

Where those in charge of a scow, in a berth where she was injured by an obstruction on the bottom at each succeeding low tide, allowed her to remain after knowledge of the obstruction and when the boats' position could have been changed, the owner is entitled to recover from the wharf owner only for the injury received before they had such knowledge.

[Ed. Note.—For other cases, see Wharves, Cent. Dig. § 40; Dec. Dig. § 20.*]

In Admiralty.

Foley & Martin, for libelant.
John J. Trapp, for respondent.

CHATFIELD, District Judge. The libelant is the owner of a scow, the Manhattan, upon which stone for paving was being taken to a company doing work at Great Neck, L. I., and which scow was, upon the 28th day of June, 1905, brought alongside of a dock upon property belonging to the respondent. Some correspondence had been had with the husband of the respondent, as her agent, and payments for the use of the dock were made to the respondent, through her agent. The respondent attempts to show that the dock was maintained and used by the husband of said respondent in connection with a coal business, and that she was not responsible therefor. It also appears from the testimony that the bottom along the face of the dock consisted of sand, with more or less mud, but principally a sandy bottom, and that boulders were scattered throughout the sand, but that in years previous all boulders had been removed, especially at the time of the construction of the dock.

Some differences of testimony as to the various occurrences appeared in the course of the trial, but most of these were cleared up, and the fact seems to be that the boat in question was brought into the berth, and as the tide went out rested upon the bottom, where she apparently, as had every other boat using the berth worked or settled, under the influence of swells from passing steamers, and of the tide itself. In this way, a stone which was afterwards removed, and about which several of the witnesses testify, punctured or broke part of the planking of the bottom of the scow, and at each low tide thereafter the vessel continued to be damaged, until she was taken away. The testimony showed that another scow in the same location was held away from the stones which did the damage to the Manhattan, and her cargo removed while she was thus held in a position free from danger. The evidence shows plainly that the Manhattan could have been likewise saved from considerable injury if she had not been allowed to remain in the position in which she was first injured, and it was not shown that she was so impaled upon rocks, or sunk alongside of the dock in such a manner, that she could not have been moved by the force available at the time. The testimony shows satisfactorily to the court that the respondent knew, or should have known, of the presence of rocks which created a constant source of danger along the front of the dock. The libelant's boat was there

under contract, and was entitled to a safe berth. This it did not receive, and the defect lay in the presence of the stone subsequently removed, which must have gradually worked to the surface before the Manhattan was placed in the berth.

In a berth used in the way in which this one was continually used, with a very small amount of water at low tide, so that each boat lying at the wharf must necessarily become imbedded in the mud at each low tide, the owner must be held responsible for anything in the nature of permanent obstructions. An object by chance floating in or becoming imbedded and causing injury before its presence is noticed, may not be ground for holding the owner responsible if that injury results before reasonable time to discover the presence of the obstruction can be had, but the removal of such dangers as those causing the injury to the Manhattan would seem to be within the reasonable notice and control of the person owning the dock.

It is evident, however, that the Manhattan suffered much greater injury because those in charge of her allowed her to remain in the dangerous situation. Inasmuch as she was not sunk at the first injury, but floated with the tide and with each subsequent tide, it would seem that the libelant is only entitled to recover for the injuries which he could not prevent.

The libelant may have a decree for the damage which he incurred from the injury to the boat prior to the time when she floated clear of the obstruction, the day after her arrival.

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

(Circuit Court of Appeals, Sixth Circuit. March 16, 1909.)

No. 1,810.

ASSOCIATIONS (§ 18*)—CONTRACT BY VOLUNTARY ASSOCIATION—AUTHORITY OF OFFICERS.

The so-called contract between the International Printing Pressmen and Assistants' Union and the United Typothetæ of America, signed by the directors of each of such associations on January 8, 1907, for the purpose of governing the relations between the members of the two as employers and employés, is invalid and not binding for want of authority on the part of the directors of the Union to execute the same. It was designed to take the place of a prior agreement between the parties which was to expire by limitation May 1, 1907, but contained certain provisions differing therefrom. Such prior contract had been similarly negotiated, subject to ratification by each association, and had been so ratified. The new agreement was also ratified by the Typothetæ, but the directors of the Union assumed to have authority to conclude the contract. The minutes of the last preceding convention of the association at which their authority was given show, however, that their negotiations as to some of the matters covered by the agreement were to be reported to the next annual convention for its action, and such convention, which met in June following, voted to ratify the contract only subject to certain changes, which were never made.

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

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

For opinion below, see 157 Fed. 883.

Henry Spalding and Dudley Taylor, for appellants.

E. G. Kinkead, for appellees.

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

COCHRAN, District Judge. This case has to do with a controversy between certain employers on the one hand and certain employés on the other. The employers are master printers engaged in business in the principal cities of the United States and Canada. They are either corporations, firms, or individual natural persons. Those in each city are organized into local associations. Each local association has its own distinct name, consisting of the word "Typothetæ" preceded by the name of the city where located, as, e. g., the "St. Louis Typothetæ." These several local associations are organized into an international association, which has the name of the "United Typothetæ of America." The local associations are made up of the individual master printers of the city where located, and the international association is made up of the individual local associations. The local associations send delegates to an annual meeting of the international association, and these delegates at those meetings, amongst other business transacted thereat, elect the officers thereof to represent the association during the ensuing year. All the master printers of the two countries are not in the organization. Many are not.

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

The employés are pressmen and feeders and other assistants of the pressmen. They are all individual natural persons. They are located and organized as are the master printers. The pressmen and the feeders and other assistants of the pressmen, however, are separately organized so far as the local associations are concerned; the local associations of both being organized into one and the same international association. The local associations of each have their own distinct names; that in the case of the pressmen consisting of the words "Printing Pressmen's Union," preceded by the name of the city where located and followed by its particular number, as, e. g., "St. Louis Printing Pressmen's Union, No. 6," and in the case of the feeders and assistants of the words "Feeders' & Assistants' Union," preceded and followed as in the case of the pressmen, as, e. g., "St. Louis Feeders' & Assistants' Union, No. 43." The name of the international association is the "International Printing Pressmen and Assistants' Union." The local associations of both send delegates to an annual meeting of the international association, who elect officers to represent it during the succeeding year. All the pressmen and feeders and other assistants are not in this organization. Many are not. It seems that all union employés of this kind are not in it.

All the master printers belonging to the Typothetæ do not have in their employ pressmen and feeders and other assistants of the Printing Pressmen & Feeders' Union. Nor are all such employés in the employ of the master printers of the Typothetæ. Many such employers have no such employés in their employ, and many of such employés are not in the employ of any such employers. But to a large extent such employers have such employés in their employ. The officers of each international association are five in number, a president, three vice presidents, first, second, and third, and a secretary and treasurer, and these five constitute the board of directors of the association. At least this is the case with the Union, and we will treat it as so in the case of the Typothetæ.

All of the members of the Union do not approve of the controversy with which this suit has to do. A large number of them, though less than a majority, it would seem, do not approve of it. The suit was brought by 11 master printers belonging to the Typothetæ located in the cities of Chicago, St. Louis, New York, and Boston, on behalf of themselves and all the other members of the Typothetæ not citizens of Ohio, appellants here, against the president and the secretary and treasurer of the Union, citizens of Ohio and resident in the city of Cincinnati, appellees here. Those officials were sued, not in their official capacity, but in their individual. They were sued, however, because of their official position. The relief sought was an injunction against action on their part calculated to bring about a breach of a written contract alleged to have been entered into by the two international associations January 8, 1907. According to appellants' counsel, the nature of the relief sought was an injunction against the threatened violation of a negative covenant therein. The controversy which occasioned the suit involved two matters. One was as to whether there was any such contract between the two international associations.

The other was whether, if there was such a contract, the appellants were entitled to the relief they sought. The lower court held against the appellants as to both particulars and dismissed the bill.

Preliminary to setting forth the terms of the alleged contract certain other matters should be stated. The local associations of each organization alone had jurisdiction of the scale of wages to be paid by the employer to the employé. Neither international association had anything to do with either. The latter have jurisdiction of disputes between the local associations, of the hours of labor, and of lockouts, strikes, and boycotts. It is not entirely clear which has jurisdiction of shop practices. Neither of the international nor any of the local associations have anything to do with the fact or length of employment of the employé by the employer. That is a matter between each individual employer and each individual employé.

The contract referred to covered matters within the jurisdiction of the two international associations. It is not necessary to set it forth verbatim. Three pages of the printed record are taken to set it forth. It covered three main matters. It provided that disputes between local associations should be settled first by a local conference committee and then on appeal by a committee of the international associations; that the Union "shall not engage in any strike, sympathetic or otherwise, or boycott, unless the employer shall fail to live up to this contract," and "no employer shall engage in any lockout unless the Union or members thereof fail to live up to this contract"; and "that until January 1, 1909, 54 hours shall constitute a week's work, and that thereafter during the life of this contract 48 hours, of 8 hours a day, shall constitute a week's work." The contract went into effect May 1, 1907, and by its terms was to continue in force for 5 years; i. e., until May 1, 1912. There were a number of minor provisions which had relation to these main provisions. Amongst others was a provision as to what would constitute a fulfillment by the employer of his contract, dependent upon which was the question as to whether there would be a strike. It was that "paying the scale of wages and living up to the shop practices as settled by the committee, regardless of his employés' union affiliations," would be such a fulfillment. The clause "regardless of his employés' union affiliations" was considered by both parties to the contract as permitting an open shop as distinguished from a closed shop.

The provision in this contract, action calculated to bring about a breach of which on the part of the appellees was sought to be enjoined, was that by which the Union was not to engage in any strike unless the employers should fail to live up thereto. The action on the part of the appellee Berry which was sought to be enjoined was announcing the result of a referendum on the subject and inciting the members of the Union to strike, and that on the part of the appellee McMullen was the paying out of strike benefits. The action sought to be enjoined, therefore, was not the threatened violation of a negative covenant, as maintained by the appellants' counsel, but action on the part of the appellees calculated to bring about a violation of such a covenant. This, possibly, is a more favorable view of the matter for appellants;

and it may be questioned whether the payment of strike benefits alone can properly be said to be action calculated to bring about a breach of that provision of the contract, inasmuch as it would follow such a breach.

Now, as stated, there is a controversy as to whether the appellants were entitled to the relief they sought, or any part of it, even though it be conceded that there was the contract as claimed by appellants. This phase of the case presents very interesting and possibly novel questions for decision. In order to dispose of them it would have to be settled just who the contract was really between. Nominally it was between the two international associations. But really it could not have been so, because each of said associations lacked juristic personality. So far as there was any real contract at all, it must have been between the individual members of the different local associations. If so, this gives rise to the question whether it was a contract between all the members of the Typothetæ, whether they have any members of the Union in their employ or not, on the one side, and all the members of the Union, whether they are in the employ of the members of the Typothetæ or not, on the other, opening and letting in individuals as they become members of either organization and also opening and letting out such members thereof as might withdraw or be expelled therefrom; or was the contract limited to members of the Typothetæ who might have members of the Union in their employ on the one side, and members of the Union who might be in the employ of members of the Typothetæ on the other? If it were either, it would seem to be a joint contract on each side. The theory of appellants' case would seem to be that it is neither; for, if it was such, then the right of the members of the Typothetæ who were parties to the contract being joint, it might be thought that to a suit brought to protect the contract from invasion all of them were indispensable parties plaintiff, and, though some might sue for all, as the suit was limited to those who were not citizens of Ohio, the lower court was without jurisdiction, and the bill should have been dismissed for want of it, and not on the merits. To meet this view it would seem that the theory of appellants' case must be otherwise, to wit, that, though formally the contract was between the two international associations, it was really a separate contract between each member of the Typothetæ who had members of the Union in his employ on the one side and the members of the Union in his employ on the other; or rather, that the provisions of the contract, upon its being entered into, became terms of the separate contracts of employment between each member of the Typothetæ and the members of the Union in his employ. So taking the contract really to have been, there can be said to be no question as to the jurisdiction of the lower court. All members of the Typothetæ who had members of the Union in their employ were not indispensable parties plaintiff to the suit, and if any question can be made as to the right of some to sue for all of a limited number thereof—i. e., all not citizens of Ohio—or as to their suing for members of the Typothetæ who had no members of the Union in their employ, it is not a question affecting jurisdiction. On such theory of

the case an authority in support of the jurisdiction of the lower court and the right of a portion of the Typothetæ who had members of the Union in their employ may be found in the case of Bacon v. Robertson, 18 How. 480, 15 L. Ed. 499. This theory of the real nature of the alleged contract and of appellants' case is a reasonable one, and without more we accept it as correct and dispose of the appeal on that basis.

As to whether otherwise appellants were entitled to the relief they sought, assuming that such contract was entered into by the two associations, which has been much discussed by counsel, we do not find it necessary to consider, as we are constrained to hold with the lower court that no such contract was entered into, and hence pass it by. The alleged contract, as stated, was executed on January 8, 1907. It was signed on that date in the name of each association by its board of directors; the third vice president of the Union not signing. It was understood at the time of the signing that the board of directors of the Typothetæ had no authority to make a binding contract on its behalf, and the signing so far as it was concerned was expressly made subject to ratification by that association. A meeting thereof was held thereafter on February 2, 1907, at Pittsburg, for the purpose of ratifying the action of its board of directors, and at that meeting that action was ratified. The board of directors of the Union, at the time of the signing of the contract, claimed to have authority to make a binding contract on its behalf, and by their action attempted to do so. The third vice president refused to sign it because of the open shop clause therein heretofore referred to. Otherwise he sanctioned the contract, and it must be held that he was willing to its execution, and so far as he had power he authorized its execution. He was simply unwilling to attach his name thereto. There is no question that the board of directors of each association sincerely believed that the board of directors of the Union had full authority to make a binding contract on its behalf. In this, however, we believe they were mistaken, and it is for this reason that the lower court and we likewise hold that there was no such contract entered into between the two associations. Their authority, like that of the board of directors of the Typothetæ, was simply to negotiate a contract on behalf of the Union with the Typothetæ, and such contract had to be ratified by the Union association before it was binding upon it. The sole authority which the board of directors of the Union had to act on behalf thereof was because of action taken by it at its annual meeting held in June, 1906, preceding the date of the execution of the contract at Pittsburg, Pa.; and the sole evidence of that action upon which our conclusion can be based is the minutes of the proceedings of that meeting published in the American Pressman, the official organ of the Union, in its issue of September, 1906. This case here hangs upon a true construction of that action as thus evidenced.

A transaction or expression of a thought whose true nature or meaning is in question and sought to be determined is, like a jewel, seen at its best in its setting; and a part of the setting of a transaction or expression of a thought is the history that lies behind it and out of which

it has come. Before stating, therefore, what that action of that meeting of the Union was, and attempting to construe it, the steps leading up to it should be presented, and that chronologically. To do so will lengthen somewhat this opinion and tend to make it tedious; but the matter we have in hand is to demonstrate that the board of directors of the Union were in error in their construction of their authority. They and the members of the Typothetæ, who also sincerely believe that they had authority to make a binding contract, are intelligent men and capable of appreciating the reasonableness of the position taken here, and it will serve the ends of justice to so present the matter that they may do so.

The contract in question is not the first contract entered into between the two associations. At the time it was signed, as heretofore stated, there was a binding contract in existence between them which would expire May 1, 1907, when it was to begin to operate. That contract had been executed March 25, 1903. It had been executed on behalf of both associations by its board of directors. Before that execution, to wit, in July, 1902, under authority of both, it had been negotiated by the two boards. After this, to wit, at its annual meeting in September, 1902, this contract so negotiated was ratified by the Typothetæ and its final execution was then authorized; and subsequent to such ratification it was submitted to a referendum of the Union, by which it was ratified and its final execution authorized. On each side, then, no binding contract was executed until the action of its board of directors was ratified. The Typothetæ as to the contract in question gave its board of directors no greater authority than it had given them in the first instance, to wit, to negotiate it, and it did not become binding until ratified. If, then, the Union gave its board authority to make a contract binding without being reported back and ratified, it did more than it had done in the first instance, and that in the face of the fact that the Typothetæ had not given such authority to its board or without conditioning their authority so to act on similar authority being conferred by the Typothetæ. The contract so negotiated and executed, which was the first contract entered into by the two associations, contained exactly the same provision as the one in question as to strikes, boycotts, and lockouts. It contained substantially the same provisions in relation to disputes between local associations. The contract in question made some additions and changes in the subordinate provision relating to this main provision. The provision in relation to hours of work contained therein was as follows, to wit:

"It is expressly agreed that during the life of this contract 54 hours shall constitute a week's work."

The only material difference between the two contracts, then, was in relation to the hours of work; the first contract providing for 9 hours a day or 54 hours a week, and the one in question for the same hours until January 1, 1909, and thereafter during its life for 8 hours a day or 48 hours a week. So much, then, as to the first contract, the manner of its execution, and its provisions.

Long before its expiration agitation began within the Union for an 8-hour day. At the annual meeting of the Union at San Francisco in

June, 1905, a resolution was adopted instructing its board of directors to secure a conference with a committee of the Typothetæ "with a view of arranging, if possible, a workday of 8 hours." It further provided as follows:

"Failing to make a satisfactory agreement, we recommend the board to be constituted a shorter workday committee to begin a campaign with a view of demanding the eight-hour day at the expiration of our agreement on May 1, 1907, and being instructed to report to the next convention."

This action had no relation whatever to the execution of a new contract at the expiration of the existing one. It related solely to arranging with the Typothetæ for an eight-hour day, which, if agreeable to the Typothetæ, might begin before the expiration thereof, or might begin at the expiration thereof, or at some later date, and to a campaign amongst the members of the Union to demand such a day at the expiration of the contract in case of failure to so arrange. The board of the Union had no authority to make a binding arrangement in regard thereto. They had simply power to negotiate an arrangement to be reported back for consideration by the Union at its next annual meeting. The matter of an eight-hour day was treated on this occasion separate and apart from the matter of a new contract at the expiration of the old from this time on.

September 1, 1905, this resolution was communicated by the president of the Union to the secretary of the Typothetæ to be presented at its annual meeting that same month at Niagara Falls for its consideration. The hope was expressed that it would be considered by them "in a spirit that will evade any possibility of a demand from us at any time on a question so dear to our desires of having the working day of our membership brought to a workday of eight hours." In response to this, the board of the Union was invited to attend that annual meeting of the Typothetæ. This they did. It seems that, some time prior to this, if not prior to the San Francisco convention, the San Francisco Typothetæ had conceded to the members of the Union in that city the eight-hour day, and against this action the Typothetæ protested. The ground of the protest does not clearly appear. It may be that it was because it had been wrung from the San Francisco Typothetæ when by the contract between the international associations the nine-hour day was to last until May 1, 1907. When at Niagara Falls on this occasion the board of the Union met the board of the Typothetæ, the former pressed the desire for an eight-hour day, and the latter the San Francisco matter. Neither succeeded in gaining its point. The board of the Typothetæ, in reply to the arguments of the board of the Union to agree on a day for the eight-hour day, replied "that it was an inopportune time to present it, on account of the conditions existing that they were not able to have changed." They separated with a promise on the part of the board of the Typothetæ to send the board of the Union an answer to the eight-hour resolution, setting forth the exact position of the Typothetæ on the subject. Nothing more transpired on the subject until the following spring. April 11, 1906, the president of the Union wrote a letter to the secretary of the Typothetæ calling attention to the promise as to an answer to the reso

lution "bearing on the eight-hour day," and requesting that the matter be taken up soon by their board, and that he let him hear from him "as to their action thereon." On April 28th the secretary of the Typothetæ wrote the president of the Union stating that the board thereof "declined to take up the consideration of an eight-hour day, but will be pleased to appoint a committee to confer with a similar committee from the Pressmen's Union to consider the renewal at its expiration of the agreement which now exists between our respective organizations." To this the president of the Union replied May 1, 1906. He expressed regret that the board of the Typothetæ failed to leave the matter of the eight-hour day resolution "within the scope of the labors of the committee that they suggest be appointed to confer and consider the renewal of the agreement existing between our respective organizations," and said further:

"Had the eight-hour day resolution come within such a committee's consideration while in conference, it might have made it possible for me to have such a committee appointed prior to our convention which meets in Pittsburg, Pa., in June. The appointing of such a committee at this time would leave them without power of any kind in considering a renewal of the existing agreement until our convention expresses itself on the future of that document. I will place your letter before our convention, and you will no doubt be informed as to the future course of our organization on the question of the committee's appointment and the power given them in the consideration of the agreement's renewal with your organization, as well as other things that such a committee may be delegated to discharge in conference with your committee."

This is all that transpired between the two associations in relation to the matter in hand prior to the June convention, 1906, of the Union at Pittsburg, at which the action was taken which it is claimed by appellants amounted to conferring on its board power to make a binding agreement with the Typothetæ in renewal of the then existing contract. That contract had first been negotiated and then ratified before finally executed. The Union had taken up the matter of arranging for an eight-hour day without reference to a renewal of that contract, and the resolution adopted in relation thereto provided that whatever arrangement was made should be reported to the succeeding convention. The Typothetæ had refused to consider the eight-hour day. Nothing had been said or done in its behalf, indicating that at any time it would agree thereto. The matter of renewal of the contract was brought up by the Typothetæ, and not by the Union, and its only suggestion in regard thereto was that a committee be appointed on both sides "to consider the renewal." It was not contemplated by it that the committee appointed in relation thereto on either side should have authority to execute a binding agreement in renewal of the existing contract. So far as it was concerned, it was not contemplated that any course should be pursued different from what had been followed in connection with that contract.

The convention of the Union met at Pittsburg in June, 1906, that being the time of the year for all its annual conventions; the annual conventions of the Typothetæ being held in September of each year. Each of the five officers of the Union, as usual, made a report to the convention. We have to do only with the report of the president. In

this report he treated the renewal of the agreement with the Typothetæ and the eight-hour day subject as separate and distinct matters. The one was considered under the title "The U. T. A. Agreement," and the other under the title "Eight-Hour Day." Concerning the former subject, this is what he had to say, and all he had to say:

"This agreement also expires May 1, 1907. In a letter received from Secretary John MacIntyre, appearing in another part of this report, that organization requests that we appoint a committee to meet with a like committee from the U. T. A. for the purpose of effecting a continuance of the agreement at its expiration. I am heartily in favor of such a committee being appointed. The agreement has worked well during its past years of utility, we having made splendid strides under its provisions. While this agreement has come in for considerable abuse, and we have received considerable condemnation in certain quarters for what is called its 'open shop' provision, we have had but little complaint of any advantage being taken of us by the U. T. A. employers, and in the spirit of equity and fairness that both sides should have towards each other I am firmly of the opinion that it has been a success, and trust, when our committee meets with a like committee from the U. T. A. to discuss its renewal and other matters of interest to us, that they will, beyond question, come closer to each other in the mutuality of interest which fair dealing and equity towards each other's organization requires, in the full independence of each in carrying on the business for which both organizations are created."

The letter referred to by the president in this portion of his report is that of date April 28, 1906, hereinbefore referred to and quoted from by us. That portion of his report in which it appears is under the "Eight-Hour Day" title in the course of his narration of what had taken place in regard thereto. It will thus be noted that all the committee to be appointed in relation to the renewal of the agreement was to have to do, according to the suggestion of the secretary of the Typothetæ, was "to consider the renewal thereof," and, according to the recommendation of the president of the Union to his convention, which had the appointing power on its behalf, was "to discuss its renewal."

In dealing with the subject of the "Eight-Hour Day" in his report the president narrated what had taken place in regard thereto, beginning with the San Francisco resolution as we have hereinbefore set it forth, and followed the narration up with a recommendation. He put this forward, however, not as his recommendation, but as that of the board of directors. It was to them that the matter of arranging for an eight-hour day had been committed by the preceding annual convention at San Francisco, and it was fitting that the recommendation should come from them. The matter of renewing the agreement with the Typothetæ had not theretofore been committed to the board, and hence the recommendation in regard thereto came from the president alone. The recommendation in regard thereto is in these words:

"As the last convention delegated the question of the shorter workday to the board of directors, and with the correspondence as above, and their knowledge of affairs before them, they beg leave to report to the convention the following plan whereby some tangible method or course may be arrived at that will result in the adoption of the eight-hour day by the I. P. P. and A. U.:

"(1) That this convention instruct the incoming board of directors to meet as a committee with a like committee on the part of the United Typothetæ of America, as explained in the letter to Mr. MacIntyre under date of April

28th, herein mentioned—the committee on our part to strive with all power possible to have some concessions made by the Typothetæ towards having the eight-hour day established within reasonable time, in a manner that will warrant its adoption on mutual grounds as a finality; the committee on our part having power to sign up an agreement if the eight-hour day can be brought within a reasonable time of attainment; if not, the committee to report back to our next convention, as provided in section 6 of this report.

"(2) That an assessment of 50 cents per month be levied upon all pressmen members monthly from July 1, 1906, until July 1, 1907.

"(3) That an assessment of 25 cents per month be levied upon all feeder or assistant members monthly during the same period.

"(4) That this fund be sent to the International secretary-treasurer monthly by the secretary of each local union, the same to be deposited in a different bank from that in which we deposit our regular funds, and the same to be known as the 'Shorter Workday Fund.'

"(5) The question of what year and date the eight-hour day shall be adopted shall remain within the keeping of the incoming board of directors, they to report to the next convention in full their observations and judgments as to what our future course should be in setting a date for the adoption of the eight-hour day.

"(6) In view of the fact that our agreement with the United Typothetæ of America will not expire until May 1, 1907, the board of directors feel that the provisions of section 4 of this report would be the wisest course to follow, until at least another convention had followed the carrying out of the first three sections of this report, in order that an opportunity may be given the membership to understand our financial strength, as well as hearing from the incoming board of directors a report of the work done by them during the year towards an amicable adjustment of the shorter workday, or eight-hour day, with the United Typothetæ of America.

"(7) The wisdom of the above course is, in the estimation of the board of directors, the safest and best way for us to proceed, that we may feel our way carefully towards accomplishing the greatest amount of progress along the eight-hour day program, of not only trying to place our membership upon an eight-hour basis, but by the entire printing industry as well, in all sections where it is an industry of any importance, the same as was the nine-hour day in 1898.

"(8) In connection with our own efforts along the above lines, we should also court the aid and assistance of the other branches of the printing trade, in so far as trying to have a unity of purpose in placing the printing industry on an eight-hour basis as well as our membership in it.

"(9) While we would like to see our membership on an eight-hour basis, we should try with every means within our power of agitation and co-operation to bring the whole printing industry on an eight-hour basis, not forgetting the fact that this was accomplished when the nine-hour day was established in the printing industry.

"(10) The success achieved in our nine-hour day effort is possible in the adoption of the eight-hour day, and while recent events in the printing industry have mooted this possibility, it is still within our right and efforts to try at least along the lines adopted in bringing the printing industry to a nine-hour basis in 1898.

"(11) The foregoing report is made in outline of what should be done by the membership towards acquiring the eight-hour day, and while we all would like to see it come as soon as possible, we should not attempt to enforce it with a strike until all other means had failed to secure it, and our finances and organization are made such that, in the event of failure to accomplish our desire along the lines of easy approach, we can leave the date of enforcing it within the keeping of those whom we elect to administer our affairs, and then, when they inform us of what course we should pursue, we will know that the time has been carefully considered and our duty and finances will have to aid us in doing the rest."

It will be noted that in the recommendation as to the renewal of the contract no suggestion is made as to who shall constitute the com-

mittee to consider and discuss the matter. The recommendation here simply follows the suggestion of the Typothetæ's secretary as to the matter. On the other hand, in the recommendation as to the eight-hour day, it is specifically recommended that the board of directors have charge of that matter. Of course, under other circumstances, it would have to be held that the president contemplated that the committee having in charge the matter of renewal of the existing contract would have to do with the matter of the workday, as that matter was covered by the existing contract. But in view of the fact that the matter of the workday had been treated by the Union as a matter separate from that of a renewal of the contract, and was so treated by the president himself in his report, and different recommendations were made in regard thereto, there is hardly any room to hold that the president contemplated that the committee appointed in response to his recommendation as to the renewal of the contract would necessarily have anything to do with the matter of a workday.

It will be noted, further, that in the recommendation of the board of directors, through the president, in relation to the eight-hour day, they were to be given power to conclude a binding contract with the Typothetæ; i. e., one not subject to subsequent ratification by the Union. This contract, however, was not a renewal of the existing contract between the two associations, but a contract in relation solely to the eight-hour day. The board were given power to make such a contract with the Typothetæ, provided the eight-hour day could be brought within a reasonable time, and the board were to have the power of determining what was a reasonable time.

The items of this recommendation of the board of directors, through the president, other than the first one, have to do with raising a fund preparatory to a strike in the event of a refusal on the part of the Typothetæ to agree with the board of the Union on the subject, leaving the consideration of the time when, in that event, an eight-hour day should be demanded by the Union and a strike made to enforce it to the board, postponing that time until after the next annual convention, and to general expressions covering the desirability of an eight-hour day and what should be done to bring it about.

This is all the president's report to the Pittsburg convention of 1906 contained on either subject. This report, along with the reports of each of the other officers of the Union, was referred to a committee styled "Committee on Officers' Reports." That committee afterwards reported back to the convention. In relation to the president's report it made three recommendations, one general and two specific. One of the specific recommendations related to the matter of renewing the contract with the Typothetæ. The other related to the matter of an eight-hour day. The general recommendation was in these words:

"The committee have carefully gone over the many sections comprising the president's very voluminous and comprehensive report, and we find them very ably edited and throughout a very instructive instrument in the hands of every person interested in the I. P. P. and A. U. movement, and a thoroughly concise statement of the condition at present obtaining in the pressmen's craft. Your committee recommends the acceptance of the report as a whole and desire this convention to concur therein."

The specific recommendation as to the renewal of the contract with the Typothetæ was in these words:

"We, the committee, recommend that the board of directors be instructed to meet with like committee on the part of the U. T. A., with instructions to secure a renewal of the agreement with a declaration as to whether the eight-hour day will be agreed to."

The specific recommendation as to the eight-hour day was in these words:

"The committee are pleased to coincide with the recommendations of the board of directors, inasmuch as they are of such a nature that the committee have seen fit to indorse the plan of assessment as formulated by the board, to wit:

" '(2) That an assessment of 50 cents per month be levied upon all pressmen members monthly from July 1, 1906, until July 1, 1907.

" '(3) That an assessment of 25 cents per month be levied upon all feeder or assistant members monthly during the same period.

" '(4) That this fund be sent to the International secretary-treasurer monthly by the secretary of each local union, the same to be deposited in a different bank from that in which we deposit our regular fund, and the same to be known as the "Shorter Workday Fund." '

"And that we recommend that this convention declare in favor of the eight-hour day immediately after the expiration of the agreement now existing between the U. T. A. and the I. P. P. and A. U., provided it is not within the scope of the possibilities of having same arranged amicably and equitably between the U. T. A. and the I. P. P. & A. U. within a reasonable time after the expiration of the agreement now existing between these two respective organizations."

Counsel for appellants seem to think that, at this convention, in addition to there being a committee on officers' reports, to whom the president's and other officers' reports were referred, there was another committee, styled "Committee on U. T. A. Agreement," to whom the matter of renewing that contract was referred, and still another one, styled "Committee on Eight-Hour Day," to whom this subject was referred, and that the first specific recommendation above quoted came from the first of these two additional committees, and the second recommendation above quoted came from the second one. But such was not the case. There were no such two additional committees. Both of these two specific recommendations, as well as the general recommendation, came from one and the same committee, to wit, the committee on officers' reports. This being so, these two specific recommendations qualify the general recommendation. In so far as they depart from the recommendations in the president's report, the committee did not intend, by recommending generally that that report be accepted and concurred in, to recommend that that portion of the president's report should be accepted and concurred in. In recommending specifically something different therefrom, they showed that it could have had no such intent; and it is to be noted that the general recommendation is that the president's report be accepted and concurred in "as a whole."

Such, then, is the historical setting of that action of the Union at Pittsburg which is relied on as conferring authority on its board of directors to make the contract of January 8, 1907. That action was an adoption of the two specific recommendations of the committee on

officers' reports. In the course of the reading of the report of that committee, as each specific recommendation was read, a motion was made that it be adopted, and was at once put before the convention and carried. It is urged on behalf of the appellants that the question of adopting the general recommendation of the committee was put to the convention and carried. If such was the case, the convention could not have intended thereby to do anything more than the committee intended in making the recommendation, and that was to cover all the president's report except those portions thereof covered by the two specific recommendations. The claim is that this question was put and carried at the close of the reading of the committee's report. That portion of the record in the American Pressman relied on as showing this follows immediately upon the statement that a motion was made to adopt the second specific recommendation above and was then put and carried. It begins with these words:

"At this point Secretary-Treasurer Webb relieved Mr. Lyons in the reading of the reports of the committee. Mr. Webb then read to the convention the discussion of the eight-hour day question as it appears in the president's report. Delegate McDonald moved that the recommendation of the committee on officers' reports be adopted."

Then follows an introduction by the chairman of the convention of President Glocklin, of the International Bookbinders, in these words:

"The president of the International Bookbinders and the secretary of the same are present. They held a convention last week, and went on record on the eight-hour day proposition pretty much on the same lines we have. I will present to you President Glocklin of the International Bookbinders."

This is followed by a speech from that official setting forth the action of his organization in relation to the eight-hour day, which was, substantially, that a committee of the bookbinders be appointed to act in conjunction with the officers of the Union in taking steps towards securing an eight-hour day. Then comes a statement by the chairman of the Union convention in these words:

"The question comes on the recommendation of the committee. As you will notice in the committee's report, they instruct your executive board to meet in conjunction with a committee of the bookbinders and allied trades with a view of seeing whether we can mutually agree, if we are successful in trying to map out a mutual agreement as to when we will enforce an eight-hour day on the lines laid down by the executive committee of the past year. Are you ready for the question?"

This is followed by the statement:

"The question was then put and carried."

There is nothing whatever indicating that McDonald's motion and the question then put to the convention and carried had relation to the general recommendation of the committee on officers' reports at the beginning of its report. It must be taken to have had relation solely to that committee's recommendation as to acting in conjunction with a committee of the bookbinders in relation to the eight-hour day.

It follows, from this extended consideration of what the American Pressman shows as to action of the Union, that the recommendations contained in the president's report were never put to the convention.

In the natural order of things it is not to be thought that it was. That report was referred to the committee on officers' reports and came before the convention solely through that committee; and its recommendations in regard to the matters covered by the president's report, and not his, were put before the convention and adopted.

The authority of the board of directors of the Union in relation to the contract of January 8, 1907, depends entirely, then, on the two specific recommendations of the committee on officers' reports which were adopted by the convention. If such authority is not to be found there, it did not exist. According to appellant's counsel, the first one is "not altogether clear," the meaning of the other is "somewhat ambiguous and doubtful," and both are "awkwardly expressed." It is from resolutions which they so characterize that the authority in question has to be deduced.

Clearly no such authority is to be found in the adoption of the second specific recommendation in relation to the eight-hour day. The fact that the board of directors had recommended that it be given power to sign up an agreement in relation to the eight-hour day, if it could be brought within a reasonable time, and to this end to determine what was a reasonable time, and that this recommendation was not concurred in by the committee on officers' reports, but another recommendation was made in regard thereto in substitution therefor, and that this recommendation, and not the board's recommendation, was adopted, has a tendency to show that no such authority was within the meaning of the substituted recommendation so made and adopted. It is true that this recommendation of the committee here starts out with the words:

"The committee are pleased to coincide with the recommendations of the board of directors."

But these words are immediately followed by the following ones:

"Inasmuch as they are of such a nature that this committee have seen fit to indorse the plan of assessment as formulated by the board, to wit."

Then are set forth items 2, 3, and 4 of the board's recommendation in relation to the plan of assessment. These succeeding words qualify the preceding general words, and show that the only portion of the board's recommendation which the committee coincided with was the provision for and plan of assessment. What follows is simply a recommendation that the convention set forth its position in relation to the eight-hour day by declaring in favor of its inauguration immediately after the expiration of the existing contract with the Typothetæ, provided it was not within the scope of the possibilities of having it arranged amicably and equitably between the two associations within a reasonable time after the expiration thereof. The board recommended that it be empowered to conclude a binding agreement as to inauguration of eight-hour day within a reasonable time, leaving it to it to determine what was a reasonable time. The committee recommended that the convention simply declare its position in regard to the eight-hour day, which was that it should be inaugurated after the

expiration of the existing contract, provided it could not be amicably arranged to begin within a reasonable time thereafter.

This brings us to the first specific recommendation. This is the only one of the two that can be said to have conferred any power whatever on the board of directors. The second, as we have seen, simply indorsed the board's recommendation as to an assessment and the manner thereof, and declared the Union's position in regard to the eight-hour day. In this recommendation the committee brought together again the two subjects of a renewal of the existing contract and of the length of the workday, which had become separated as hereinbefore indicated. It is short and to the point. It instructs the board of directors to meet a like committee of the Typothetæ and secure from it two things—"a renewal of the agreement," and "a declaration as to whether the eight-hour day will be agreed to." Though the existing contract covered the length of the workday, making it nine hours, it could not have been intended that the board was to secure a renewal of the agreement in that particular. What was meant was that it should secure a renewal thereof except in that particular. The length of the workday was to be covered by the second thing which the board was authorized to secure. Then as to the meaning of the instruction to secure a renewal of so much of the existing contract. It was not to execute anything. It was to secure—i. e., obtain or get—something from a like committee of the Typothetæ, and, of course, something which it was within its power to give. The only thing which it was within its power to give was an expression of willingness to renew so much of the existing contract, a tentative agreement on the part of the Typothetæ to renew that portion thereof. The second thing which the board was directed to secure was a declaration, and the first was to be of like character. At any rate, if it were at all possible to hold that the first part of the instruction which it was recommended should be given to the board was to execute a binding contract on behalf of the Union, it is not possible to hold that it was intended that such contract should cover the matter of the length of the workday. This is negatived by the second part of the instruction, which was simply that a declaration on the part of the Typothetæ as to whether the eight-hour day would be agreed to should be secured.

The action of the Pittsburg convention of June, 1906, of the Union amounted, therefore, to this and nothing more. It thereby declared itself in relation to the eight-hour day and made provision for a fund to pay strike benefits in case it should thereafter determine to strike to secure such a day; and it instructed its board of directors to secure from a like committee of the Typothetæ a declaration of its position as to the eight-hour day in connection with an agreement to renew the existing contract between the two associations in so far as it did not cover the length of the workday. If such is the extent of its action, it follows that the Union's board had no authority to execute the contract in question on behalf of the Union. Of course, the board was to report back to the next convention what it so obtained for its consideration. This followed as a matter of course, without anything being said expressly on the subject.

It is true that it further follows from this that no provision was made to govern the relations between the two associations after May 1, 1907, when the existing contract would expire, and none could be made unless a convention of the Union, as well as of the Typothetæ, were called in advance of their regular time of meeting; that of one being in June and the other in September. But the Union had its heart set on the eight-hour day. It is plain that it was unwilling to continue amicable relations with the Typothetæ, except under an agreement that the eight-hour day should begin within what it considered to be a reasonable time. So far as it was concerned, the parting of their ways had come, except on these terms. The Typothetæ had not up to this time indicated in any way its willingness to come to an eight-hour day. So far as it had expressed itself, it had been against coming thereto. There was, therefore, not much occasion for the Union being desirous or even willing to make provision for a new contract between the two associations to begin at the expiration of the old. All that was to be expected of it from its standpoint was an indication of its willingness to enter into a new contract with the Typothetæ if it would first declare that it would agree to an eight-hour day; and that is practically what it did, and all it did.

Such we understand to be the true construction of the action of that convention in relation to the matter as shown by the record of what took place printed in the official organ of the Union. As to what took place, of course, that record must be accepted as controlling. But our views of what it shows is substantially borne out by the testimony of witnesses who were delegates to the convention from the Chicago and New York Unions. They testified that, according to their understanding and that of the delegates to the convention with whom they came in contact at that time, the board was not empowered to bind the Union, but had to report what took place between them and the Typothetæ committee to the next convention of the Union for its consideration and ratification; and immediately after the contract in question was entered into both of those Unions protested against it on the ground that the Union board had exceeded its authority.

As a matter of fact, the provision in the contract as to the time when the eight-hour day should go into effect was acceptable to the members of the Union. But by this time a movement in favor of a closed shop had arisen in the Union. It was because of the open shop provision therein that the Union's third vice president refused to sign the contract on its behalf. At its next convention, held at Brighton Beach, New York, in June, 1907, the delegates in favor of eliminating that provision from the contract were in the majority. They selected a new set of officers with one exception, the appellees being two of the new ones selected; and in relation to the contract in question they took the following action, to wit:

"Whereas, our board of directors has renewed the agreement with the United Typothetæ of America: Now, therefore, be it

"Resolved, that said agreement is ratified and approved, provided the 'open shop' clause is stricken out and the amendment is inserted providing for nine hours' pay for the eight-hour day. And it is further

"Resolved, that, in the event the U. T. A. rejects these amendments, our board of directors are instructed to submit the question of the immediate

inauguration of the eight-hour day to referendum, said referendum to be taken thirty days after such rejection."

So far as the amendment providing for nine hours' pay for the eight-hour day was concerned, there would probably have been no trouble in its being adopted by the Typothetæ; for evidently what was in mind in the agitation for an eight-hour day was, not simply securing such a workday, but nine hours' pay therefor. It was the elimination of the provision as to the open shop that was unacceptable to the Typothetæ. The board of directors of the Union and the executive committee of the Typothetæ met at Niagara Falls in September, 1907, during the latter's annual convention at that place, and conferred concerning their differences. They were unable to agree. The board of the Union urged the acceptance of the two amendments. The executive committee of the Typothetæ refused to accept either, claiming that a binding contract existed between the two associations, and demanded that it be lived up to. They parted, each adhering to its position. Thereafter the immediate inauguration of an eight-hour day was submitted to a referendum of the Union by its board of directors, pursuant to the June, 1907, resolution. If carried, it meant a strike if that day was not immediately acceded to by the Typothetæ; and before its result was known the union members of Chicago and New York did strike. This submission and these strikes were at once followed by the suit we have here.

It is urged on behalf of appellants that at no time after the execution of the contract on January 8, 1907, and before the suit was brought, did the Union, or any one on its behalf, ever take the position in express terms that its board of directors were without authority to make a binding contract on its behalf; that it is not so stated in the resolution adopted in June, 1907, nor was it stated by any member of the board of directors of the Union at the conference in September, 1907. This may be conceded; but it was presupposed by and necessarily involved in the position that the Union had taken. It took the position that the contract was not binding upon it, was subject to its ratification, and that it had a right to propose amendments thereto. The only possible ground for this position was that the board was without such authority. This being so, it is of no consequence that lack of authority was not claimed in express terms.

It is urged on behalf of appellees that the contract was not binding on the Union for the further reason that it was not an exact renewal of the existing contract, in that it made changes in and additions to the subordinate provisions relating to the main provisions as to the settlement of disputes between local unions, and the third vice president did not sign the contract. It is unnecessary to determine either of these questions, as we hold that the board of directors was without authority to execute the contract on the Union's behalf.

The decree appealed from is affirmed.

MORGAN v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. April 2, 1909.)

No. 2,844.

1. PUBLIC LANDS (§ 13*)—RIGHT TO CUT TIMBER FROM MINERAL LANDS—CONSTRUCTION OF STATUTE.

Under Act June 3, 1878, c. 150, § 1, 20 Stat. 88 (U. S. Comp. St. 1901, p. 1528), providing that all citizens and bona fide residents of certain states and territories "shall be and are hereby authorized and permitted to fell and remove for building, agricultural, mining, or other domestic purposes any timber or trees growing or being on the public lands, said lands being mineral and not subject to entry under existing laws of the United States except for mineral entry," the right to cut timber is not restricted to the particular spot or minor tract of land on which mining is being actually done, but extends to adjacent lands, they being mineral, although no mining development work has been done thereon; and whether or not a tract in question not so developed is mineral within the meaning of the statute is a question of fact, in an action to recover for timber cut, to be inferred by the jury from its surroundings and appearance, and applying to the facts their own common sense and observation.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 16–18; Dec. Dig. § 13.*]

2. PUBLIC LANDS (§ 13*)—RIGHT TO CUT TIMBER FROM MINERAL LANDS—EVIDENCE OF CHARACTER OF LAND.

To justify the cutting of timber under such act, it is not essential to prove that the tract from which it was cut, if not developed as mining ground, presents such indications of mineral as would justify a prudent person experienced in such matters in the belief that it could be worked for mineral at a profit.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 16–18; Dec. Dig. § 13.*]

3. PUBLIC LANDS (§ 13*)—ACTION FOR CONVERSION OF TIMBER—MEASURE OF DAMAGES.

A person who cut and removed timber from public land in good faith, in the belief that he had a lawful right to do so under Act June 3, 1878, c. 150, § 1, 20 Stat. 88 (U. S. Comp. St. 1901, p. 1528), permitting the cutting of timber from mineral lands for certain purposes, if not so justified, is liable in damages for the stumpage value of the timber only, and not for the manufactured value.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 17; Dec. Dig. § 13.*]

4. TRIAL (§ 281*)—EXCEPTIONS—REFUSAL OF INSTRUCTIONS.

A general exception to the refusal of instructions in mass is bad if any one of the number was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 694; Dec. Dig. § 281.*]

5. TRIAL (§ 83*)—RECEPTION OF EVIDENCE—SUFFICIENCY OF OBJECTION.

A general objection to a question asked a witness as "immaterial" is insufficient to warrant the exclusion of the testimony sought to be elicited unless its immateriality is clearly manifest.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 199; Dec. Dig. § 83.*]

6. EVIDENCE (§ 263*)—ADMISSIONS BY PARTY—RIGHT TO EXPLAIN.

Where, in an action to recover damages for the alleged unlawful cutting of timber from public land, the United States introduced in evi-

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

dence an affidavit made by defendant before an inspector of the Land Department as an admission of the value of the timber taken, it was error to refuse to permit him as a witness to explain the circumstances under which, and the purpose for which, the affidavit was made.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1022-1027; Dec. Dig. § 263.*]

7. TRIAL (§ 46*)—OFFER OF EVIDENCE—SHOWING PURPOSE OF ADMISSION.

Where the materiality of evidence is not apparent on objection thereto, the party offering it should advise the court of its purpose.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 115-117; Dec. Dig. § 46.*]

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

J. E. Simonson, Henry Howard, Jr., and W. G. Simonson, for plaintiff in error.

Ralph Hartzell, Asst. U. S. Atty. (Thomas Ward, U. S. Atty., on the brief), for defendant in error.

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

PHILIPS, District Judge. This is a suit instituted by the United States against James C. Morgan (hereinafter designated the defendant) and Louisa B., his wife, for cutting and removing timber from certain public lands situate in Grand county, Colo. The first count of the petition charges that between April, 1902, and April, 1903, the defendant wrongfully and unlawfully entered upon the land and cut and removed therefrom large amounts of timber, of the value of $4,200. The second count charges that between the dates aforesaid the plaintiff was entitled to the possession of certain lumber located in Colorado, cut from the lands aforesaid, of the value of $4,200; that the defendants wrongfully and unlawfully took possession thereof and converted the same to their own use. There was a verdict for the plaintiff in the sum of $2,250 against the defendant James C. Morgan, and of acquittal of Louisa B., the wife.

The answer, after tendering the general issue, alleged that the defendants are citizens of the United States, over 21 years of age, and bona fide residents of the state of Colorado; that while said James C. Morgan was such citizen and resident he entered upon an unsurveyed portion of the public mineral lands not subject to entry under the laws of the United States except for mineral entry, and cut and removed therefrom, in accordance with the law, a small number of trees, for building, agricultural, mining, and other domestic purposes; that the defendant was authorized so to do by Act Cong. June 3, 1878, c. 150, 20 Stat. p. 88 (U. S. Comp. St. 1901, p. 1528).

The said act of Congress authorizes any citizen of the United States and other persons bona fide residents of the state of Colorado to fell and remove, for building, agricultural, mining, or other domestic purposes, any timber or other trees growing or being on the public lands, said lands being mineral, and not subject to entry under existing laws of the United States except for mineral. The evidence

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

showed that the defendant possessed the requisite citizenship and residence to entitle him to take timber as provided by the statute. His evidence further tended to show that what is known as "scrip" was laid upon a part of the land in question by an incorporated company, from which said Louisa B. Morgan purchased. The defendant undertook himself, with the assistance of an engineer, to survey said lots of ground, and, as he supposed, correctly surveyed them. But as the survey placed the tracts in an oblong shape, instead of in contiguous squares, as prescribed by the United States survey, his surveys were not recognized by the Department of the Interior.

That the land from which the timber was taken was not adaptable to agricultural use is beyond question. It lies on a mountain range about 10,000 feet high, sterile and rocky, exceedingly rugged and difficult of access, without soil to support and a season too short to admit of cultivation for purposes of husbandry. If it was mineral land, the statute authorized the defendant to cut and remove therefrom any and all timber and trees growing thereon for either building, agricultural, mining, or other domestic purposes. The only limitation upon this right was that the timber should not be taken for exportation from the state.

The testimony of the defendant, without contradiction, was that he sold a large portion of the timber cut from the south center tract to mines in that locality, and some was shipped to lumber yards in the city of Denver. In answer to the question for what purpose was the lumber used manufactured from the logs, he replied that it was principally for mining at mines near Georgetown, Central City, and Black Hawk, and the rest was used for building, and none of it was shipped out of the state by him. He further testified that the south 40 was along the face of a very steep hillside, at an angle of 33½ degrees; that two years ago (before giving his testimony) there were only seven days in which there was no frost there; that, on account of the inaccessibility of this timber and the difficulties in the way of getting it out, the enterprise was without any profit and was financially disastrous.

On behalf of the defendant it was shown that what is known "as Yankee Hill Mine," a series of a dozen mines, was about four or five miles from the lands in question; that they were valuable mines; that the Vacquez mining camp was about 2½ miles southwest from the mill at the second cutting, which were valuable mines, and were worked the summer before and the summer of the trial of this case; that the Bressler mines, consisting of eight 20-acre tracts or claims in the neighborhood, had "quite a little bit of work done on them, and placer locations have been made all over this ground;" that the placer lands referred to by one of the witnesses joined the middle cutting in question, and the location post thereof was set one-half foot south of his north line; that they had operated about four years; that the side hill directly east of this claim had been located as placer land; that there was a copper lode location in the vicinity being developed and operated; that what is known as "Caldwell's placer locations" were about two miles north of where his mill was.

Near the land in question was a place called "Spruce Lodge." A witness on behalf of the defendant testified that he had lived for a number of years in the community where the lands are situate; that he had prospected that mountain range for 12 miles as a miner, and also the lands in question; that he had located a mine about 1¼ miles from Spruce Lodge, and several other claims in that locality, the nearest of which was one-half to three-quarters of a mile from where the defendant's sawmill was set the second time; that he had assays made of the mineral taken from his mines, showing 28 per cent. copper, 11 oz. gold, and 9 oz. silver, and considered the mine valuable; that there were leads on the land where the defendant cut the timber, but he made no location there because the difficulty of transportation would consume the profits. There was other evidence by the defendant tending to show the close proximity to the lands in question of mines opened and worked.

The witness called on behalf of the government, an engineer and assayer, testified that he had surveyed and prospected over the mountain region in question to the east and west of the tracts on which the defendant did the cutting; that while he found float indications he found none of such grade as to justify him, in his judgment, in making locations. On cross-examination he said:

"I found mineral-bearing quartz on the top of the ground—that is indicative of mineral land—but I never prospected this particular tract."

The issue, therefore, to have been submitted to the jury, first, was whether or not the lands from which the defendant cut the timber were within the purview of the statute. Does the statute imply that before the citizen can enter upon the land, and cut and remove timber, there must have been actual discovery and development work showing the presence all over it of valuable mineral deposits, workable at a profit? The courts exercising jurisdiction over the region where the statute is operative have given construction and application to it broader, more practical and consonant with its purpose and spirit, than an affirmative answer to the foregoing inquiry would indicate. Judge Hallett, who presided in the District of Colorado, had occasion, early after its enactment, to apply this statute, shown by his ruling made in 1889 in United States v. Edwards (D. C.) 38 Fed. 812. There no mines had been actually discovered and developed on the tract of land from which the timber had been cut, but valuable mines had been opened within a few miles of the locus. After adverting to the fact that the region was mountainous, rugged, and unfitted for cultivation or pasturage, he said of the statute:

"It will be observed that the lands referred to from which timber may be taken are such as are subject to entry as mineral lands, as distinguished from those which may be occupied under the pre-emption, homestead, and other acts relating to agricultural lands."

Further on he said:

"It is not altogether a question of finding valuable ore or metal in the ground from which the timber is taken. Obviously the act of Congress is not limited to land which is or may be actually occupied for mining purposes. After location made, the timber on a mining claim belongs to the claimant,

and it cannot be supposed that Congress intended to give it to another. Furthermore, the grant is of timber on lands subject to mineral entry, and not subject to entry as agricultural lands, which means such as may be taken for mining purposes, as distinguished from such as have been taken in that way. Without attempting to describe mineral lands in a way which may be sufficient for all cases arising under the act of 1878, it seems clear that the lands mentioned in the complaint and in the statement of facts are of that character. They are in a mountainous region, in the vicinity of valuable mines, and have some indications of valuable metals in them. They are unfit for cultivation and for pasturage, and are not subject to entry under the pre-emption or other laws relating to agricultural lands."

Presumably it was not intended by Judge Hallett, by the last clause quoted, to imply that merely because the tract of land may be unsuited for agricultural purposes it is to be regarded as mineral land; but apparently the separate statement was intended to be linked up with what preceded; that is to say, as the land was unfit for cultivation or pasturage, being in a mountainous region, in the vicinity of valuable mines, etc., of like characteristics, it might be treated as "being mineral."

Hon. Henry M. Teller, who was United States Senator from Colorado at the time of the enactment of this statute, afterwards in 1882, when Secretary of the Interior, gave expression to his view of the intent and construction of the statute in instructions, as follows:

"Where the lands are situated in districts of country that are mountainous, interspersed with gulches and narrow valleys, and minerals are known to exist at different points therein, such lands, in the absence of proof to the contrary, will be held to be mineral in character; but when there are extensive valleys, plains, or mountain ranges, and no known mineral exists, the land may be considered and treated as nonmineral."

The construction of this statute has been before the Court of Appeals of the Ninth Circuit, within whose jurisdiction this act is operative. See United States v. Basic Company, 121 Fed. 504, 57 C. C. A. 624, and United States v. Rossi, 133 Fed. 380, 66 C. C. A. 442. Without repetitious extracts from the opinions, the following summary, in our judgment, expresses the proper construction of the statute: The conception of Congress in its enactment was to encourage the development of mines in the public lands of that region. As mineral-bearing lands were usually situate in mountainous, barren regions, unadapted to agriculture and the founding of homes, and the timber thereon may be essential not only for direct use in and about the mines to be opened or operated, but for building homes and fences for the use of the people desiring to occupy and develop such communities, license is given to any citizen, resident of the state or territory, to enter upon such public lands and remove the timber "for building, agricultural, mining, or other domestic purposes, said lands being mineral, and not subject to entry under existing laws of the United States except for mineral." The term "other domestic purposes" was not employed in the narrow sense of household purposes, but in the broader sense of other industries in the locality, including the right of persons cutting and removing the timber to sell it for domestic consumption, as contradistinguished from exportation from the state. United States v. United Verde Copper Co., 196 U. S. 207, 25 Sup. Ct. 222, 49 L. Ed. 449.

In furtherance of this legislative policy, the right to cut timber should not be restricted to the particular spot, or minor tract of land, on which mining is being actually done, as there may be an absence of timber thereon sufficient for the miners' use or other domestic purpose. It follows, as a logical sequence, that the citizen may enter upon and take timber from adjacent lands, they being mineral, although no mining development work has been done thereon. In such conjuncture the question arises, how, in the absence of such actual discovery and development, is it to be determined whether or not it be mineral land? The courts apply to the situation the rule of noscitur a sociis, as one of practical sense and necessity. If contiguous or near thereto, in the sense of neighborhood—"vicinity, adjoining district"—there be lands on which mineral has been actually discovered by development work, and the land in question be of like topography, or delineation, with the same surface indications of what is known as a lead or float in a placer mining region, it would warrant the inference that such tract is also mineral land within the meaning and intent of the statute.

From the premises it follows that it is not essential that on the particular piece of land from which the defendant removed timber any mine should have been opened, disclosing mineral in paying quality or quantity. It was sufficient if, by reason of the presence of valuable mineral in the neighboring lands of like surface characteristics, a reasonable, prudent person likely would have been led to expect to find mineral in the adjacent tract. The citizen of average intelligence, in taking timber from public land claimed to be mineral, when charged with trespass thereon should be judged by surrounding appearances, such as whether or not there had been discovery and development of such mineral on contiguous or nearby land of like physical characteristics and surface indications. In recognition of this view of the statute, it has been held that surveys made by the government of mountainous regions, indicating the lands as mineral in character, are competent evidence in favor of the person who has cut timber therefrom. United States v. Van Winkle, 113 Fed. 903, 51 C. C. A. 533.

The paragraph of the charge of the court complained of, which directed the jury on this important issue, is as follows:

"Now before you can find that this defense, to the effect that the defendant had a right to take the timber because it was on mineral lands, has been sustained, you must find that those lands were valuable for minerals. That, however, does not mean, gentlemen of the jury, that there must be positive proof that they have been worked or can be worked at a profit for the mineral they contain. If the mineral indications are such on these lands as would justify a reasonable and prudent person who has had some experience and has knowledge in that sort of thing to spend his money and labor on these lands for the purpose, and in the hope, and in the honest belief that he could work them at a profit, that would be sufficient evidence to justify you in finding that these were valuable mineral lands. In that connection, also, it is proper for you to take into consideration any evidence of lands adjoining or near that contain valuable minerals and are valuable for their minerals. It does not, however, conclusively follow that because there may be a claim near by that is valuable for its mineral, that, therefore, necessarily, these lands are likewise valuable, but these are facts for you to take into consideration in determining whether or not these lands are valuable for mineral; but before you can sustain this defense you must arrive at the conclusion, from the evidence, that the lands from which this timber was cut was valuable for its

minerals. A mere finding of some value in the mountainous section of this state in a particular piece of land does not indicate that that piece of land is valuable for its mineral deposits; that, I take it, is common knowledge to almost every citizen of the state of Colorado."

As further evidence of the mind of the trial court, it refused the following declarations of law requested by the defendant:

"I charge you that lands of a rocky, broken character, lying reasonably near lands in which mineral has actually been discovered, and which is so like it in general appearance that miners would be justified in prospecting it in the expectation of discovering mineral, should be classified as mineral lands under this act.

"It is not altogether a question of finding valuable ore, or metal, in the ground from which the timber is taken. The act of Congress is not limited to land which is or may be actually occupied for mining purposes."

While it may be conceded that some parts of the foregoing pronouncement of the court, independently viewed, contain some legal truths, yet they were so linked up with and fastened to other incorrect statements of the law as to vitiate the whole. Too much stress was placed upon the thought that the jury must find that the locus in quo should show valuable mineral. While advising the jury that it is not essential that the tract in question should have been worked for the mineral contained, yet this was coupled with the requirement that the land must present such indications as would justify a reasonable and prudent person experienced in such matters in spending his money in working for mineral development, in the honest belief that he could do so at a profit. So, although the person entering upon the land and cutting the timber may have been a reasonable and prudent person, unless he was also experienced in such matters, he would not be justified from the surrounding circumstances hereinbefore indicated in believing that the land on which he entered contained valuable mineral. The language of the statute is "said lands being mineral." It is not even confined to any species of mineral, and it is not necessarily synonymous with "metalliferous." Northern Pacific Railway Company v. Soderberg, 188 U. S. 526, 23 Sup. Ct. 365, 47 L. Ed. 575. It does not follow that to establish its mineral character the person removing timber from the land should be required to prove that its apparent character was such as to inspire in an experienced miner the belief that he could work it as a mine at a profit. This might be quite impracticable in making proof. In this, as in other respects, the law is intended to be a sensible thing, and in applying such a statute as this, unless otherwise restrained by its positive terms, the court should so construe it as to make it reasonably practicable within the intendment of the act. Whether or not the land in question was mineral, within the meaning of the statute as hereinbefore outlined, is a question of fact to be inferred from its surroundings and appearances, by the jury of 12, who apply to the facts their own common sense and observation. The land might be so inaccessible, or removed from water, and the like, as to forbid an attempt to work it in the reasonable hope of realizing a profit.

Again, while the charge of the court authorized the jury to take into consideration the fact of any "claim near by that is valuable for

its mineral," it immediately followed this up, as if to impair the force of such evidence, with the warning that it would not follow that—

"necessarily these lands are likewise valuable; but before you can sustain this defense you must arrive at the conclusion, from the evidence, that the land from which this timber was cut was valuable for its minerals. A mere finding of some value in the mountainous section of this state in a particular piece of land does not indicate that that piece of land is valuable for its mineral deposits."

This was certainly most confusing. It carried with it the suggestion that, although on one part of a tract of adjoining land there was valuable mineral, it might not only fail to indicate "that that piece of land is valuable for its mineral deposits," much less could its contiguous, neighboring land, however much like it in topography and surface indications, be inferred to be mineral land. If this be a proper construction of the statute, it would result that to justify removing from the land any timber for the purposes stated in the statute, the defendant would be required to show that on every "particular piece" of a given tract valuable mineral had been found, or could, in the judgment of experienced miners, be worked as a mine at a profit. The perplexing dilemma in which the court's charge left the jury is indicated by the inquiry of the juror when the jury returned into court for further instruction, who said: "The entire evidence was that it was mineral land except one gentleman, who said that he did not see any mineral there." The only enlightenment the jury received from the court was this: "As I heretofore instructed you, in effect, it must be valuable for that purpose."

The said paragraph of the charge, as a whole, was misleading and confusing, and is not in harmony with the proper construction of the statute heretofore outlined.

If the evidence had warranted a verdict for the government, the defendant was entitled to have the jury properly advised as to the basis for the assessment of damages. The only evidence for this ascertainment was the statement contained in an affidavit given by the defendant, taken by an inspector of the Land Office Department sent out to investigate the facts respecting the alleged trespass, in which the defendant stated that the stumpage value of the timber taken was $300, and the market value in the manufactured article was $4,200. In the same affidavit, which the government put in evidence, the defendant stated that:

"As he understood the law, he had a right to cut timber to be sold to ranchmen and settlers in the vicinity; that nearly all of the timber so cut by him on the government land was sold and disposed of at his sawmill to residents in that vicinity, etc. That the cutting of the timber was not a willful act on his part, but was done with the honest belief that he had a perfect right to so do, as he understood the law."

If the defendant went upon the land and cut and removed the timber in good faith, believing that he had a right thereto, he was only answerable in damages for the stumpage value thereof, and not for the manufactured value. This is the universally recognized rule of law, and has been so applied to alleged trespasses under this statute. Gentry v. United States, 101 Fed. 51, 41 C. C. A. 185; United States

v. Gentry, 119 Fed. 70, 55 C. C. A. 658; United States v. Van Winkle, 113 Fed. 903, 51 C. C. A. 533; United States v. Homestake Mining Co., 117 Fed. 481, 54 C. C. A. 303.

The trial court had in mind a conception of this rule of law, but it fell into error, in the final concrete summing up on this matter, by saying to the jury:

"If you should find that the defendants, or either of them, went upon the government land and cut timber at the time believing that they had the right to it as their own property, and not knowing that it was off the 40 acres on which they had a right to take the timber, they are not to be charged with the value of that lumber in its manufactured state, * * * and in that event the value of the trees as they stood in the forest would be the measure of damages."

This required the jury to find, before the defendant could be accorded the benefit of the stumpage value, that the land was the defendant's "own property"; whereas, notwithstanding the title to the land may have been in the government, if in good faith, as above indicated, the defendant did the act, the government could only recover the stumpage value.

Among the requests for instructions made on behalf of the defendant touching this question is the following:

"If you find that the lands from which the timber was cut are not mineral lands, then the question arises, how much, if any, the defendants cut on government lands, and the measure of damages. I charge you that, if the defendants had good reason to believe, and in good faith did believe, that they had a right to cut and appropriate the lumber manufactured and the timber referred to and described in the complaint, and if you find that under the law I give you and the evidence, that they had no such right, then the plaintiff is entitled to recover, not the value of the lumber manufactured from the logs, but only the value of the timber in the trees as it stood on the lands before being cut; that is, the stumpage value."

But defendant's counsel made the not uncommon mistake, where a large number of instructions are asked and refused, instead of saving an exception to the refusal of each one, the bill of exceptions shows that they made one general exception to the refusal in mass. So that, if any one of the number be properly refused, the objection saved is unavailing. Moulor v. American Life Ins. Co., 111 U. S., loc. cit. 337, 4 Sup. Ct. 466, 28 L. Ed. 447; Holloway v. Dunham, 170 U. S., loc. cit. 619, 620, 18 Sup. Ct. 784, 42 L. Ed. 1165; Baggs v. Martin, 108 Fed., loc. cit. 34, 47 C. C. A. 175; Empire State Cattle Co. v. A., T. & S. F. Ry. Co., 147 Fed., loc. cit. 461, 77 C. C. A. 601. Some of the requests made by the defendant were bad, and, therefore, the exception is bad. As the case must be remanded, we have thus pointed out the law as it should be applied to the facts if retried.

Error is assigned of the action of the trial court in sustaining objections to certain questions asked of the defendant when on the witness stand. As heretofore indicated, the inspector from the Land Office Department, in investigating the facts respecting the alleged trespass, took the affidavit of the defendant made before him, in which the defendant admitted cutting and removing the timber, stating the stumpage and market value in the manufactured form thereof, admitted by him to have been cut outside of the line of the deeded land

to his wife, and expressing a willingness to settle with the government for the timber so taken at its stumpage value of $300. It also contained other statements not necessary to mention. After the government introduced this affidavit, the defendant was called, when the following occurred:

"Q. How came you to make that affidavit? (Plaintiff objects to question as immaterial. Objection sustained. Defendants except.) Q. For what purpose did you make the affidavit? (Plaintiff objects to question as immaterial. Objection sustained. Defendants except.) Q. Would you, or would you not, have made that affidavit had it not been for the promise of compromise and settlement with the agent of the United States? (Plaintiff objects to question as immaterial. Objection sustained. Defendants except.)"

The only ground of objection interposed to these questions was that they were immaterial. This was insufficient to reject the testimony sought to be elicited by the questions, unless its immateriality was clearly manifest or such as to exclude the possible circumstances making it relevant, material, or competent. Sparf et al. v. United States, 156 U. S., loc. cit. 57, 15 Sup. Ct. 273, 39 L. Ed. 343; Shandrew v. Chicago, St. P., M. & O. Ry. Co., 142 Fed. 320, 73 C. C. A. 430; Sparks v. Territory of Oklahoma, 146 Fed., loc. cit. 374, 76 C. C. A. 594. The affidavit could be employed by the prosecution only as a statement made in pais by the defendant. It had no greater force than a verbal or written admission, which is by no means conclusive on the party. He may explain the circumstances under which it was made, if for its impeachment or explanation, and as to whether the party who reduced his statement to writing embraced therein all he said. He may give in evidence all he said, as a part of the res gestæ, if it be pertinent and explanatory. Greenleaf on Evidence (16th Ed.) vol. 1, par. 201a, p. 336, states the rule as follows:

"The party against whom the admission is offered may also explain it away, so far as possible, in any other way—as, by showing that it was said with a different intent or meaning, or without personal knowledge, or the like."

See, also, Adkins v. Hershy, 14 Ark. 442; Stone v. Cook, 79 Ill. 424–429. The fact that the admission is in the form of an affidavit does not conclude the party from explaining or contradicting it. C., B. & Q. R. Co. v. Bartlett, 20 Ill. App. 96, 104; Yale v. Edgerton, 14 Minn. 194, 204 (Gil. 144); Pelton v. Schmidt, 104 Mich. 345, 62 N. W. 552, 53 Am. St. Rep. 462; Solomon R. Co. v. Jones, 30 Kan. 601, 2 Pac. 657; Sharp v. Swayn (Del.) 40 Atl. 113, 115. However, if the questions propounded were intended to develop the circumstances and all the material facts connected with the making of the affidavit, for the purpose of explanation or impairment, counsel, when the objection was made, should have advised the court what he proposed to develop, so that the court could see its competency and materiality. Origet v. Hedden, 155 U. S., loc. cit. 235, 15 Sup. Ct. 92, 39 L. Ed. 130; Guarantee Co. v. Phenix Ins. Co., 124 Fed. 170–175, 59 C. C. A. 376; Aull Savings Bank v. Aull, 80 Mo. 199; Jackson v. Hardin, 83 Mo., loc. cit. 187. This feature of the case, and its discussion, could have been obviated had the court charged, or the defendant requested it to instruct, and saved proper exception if refused, to the effect that, as the government, in order to sustain its case, had put in

evidence the statement of the defendant, which contained the sworn assertion that in taking the timber he had acted in good faith, in the honest belief that he was authorized thereto by the law, and there being no countervailing proof, the jury, if they should find for the plaintiff, could not assess the damage at a sum in excess of $300, the admitted stumpage value.

For the errors hereinbefore stated, properly preserved, the judgment of the Circuit Court must be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

In re WATERTOWN PAPER CO.

(Circuit Court of Appeals, Second Circuit. March 16, 1909. On Rehearing, April 13, 1909.)

Nos. 165, 166.

1. BANKRUPTCY (§ 332*)—CLAIMS—PRESENTATION—FORM.

Where the whole account between claimant and the bankrupt corporation was fully inquired into before a special master, and if the claim, which was irregular in form, had been amended so as to conform to the proof the inquiry would not have been changed, and the amount was correctly stated, the fact that the consideration for the debt was stated as "wood pulp sold and delivered," when in fact the claim was for a balance of a running account, a large part of which represented an indebtedness for wood pulp sold and delivered, did not justify a rejection of the claim.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 332.*]

2. BANKRUPTCY (§ 340*)—CLAIMS—REJECTION.

Evidence *held* insufficient to justify the rejection of a claim by a corporation against the bankrupt corporation, on the ground that the two corporations were so closely owned and identified as to constitute in fact but one corporation.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 340.*]

3. CORPORATIONS (§ 378*) — SEPARATE CORPORATIONS—OWNERSHIP OF STOCK—MERGER.

Under the rule that a corporation is an entity, separate and distinct from its stockholders and from corporations with which it may be connected, the facts that the stockholders of two separately chartered corporations are identical, that one owns shares in the other, and that they have mutual dealings, will not in general merge them into one corporation, or prevent the enforcement by one of an otherwise valid claim against the other.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 378.*]

4. CORPORATIONS (§ 378*)—SEPARATE EXISTENCE—OWNERSHIP OF STOCK.

After the organization of a paper company, its stockholders caused the organization of a pulp company, with funds advanced by the paper company, but for the account of its stockholders, to whom the advancements were charged. The paper company owned no stock of the pulp company, and, while the two corporations mingled their affairs, the paper company purchasing its pulp, etc., from the pulp company, and the controlling stockholders regarded the two corporations generally as different departments of their business, the separate corporate organizations were kept up, each corporation keeping its own books, having its own creditors, owning its own assets, and conducting its own business in its own name, nor were the stockholders of the two entirely the same. *Held*, that

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

the separate existence of such corporations was not fraudulent, nor were their affairs so conducted as to make one a mere instrumentality or adjunct of the other, so as to prevent the enforcement of claims of the pulp company against the paper company.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 378.*]

5. BANKRUPTCY (§ 355*)—CLAIMS—SECURED CLAIMS—PLEDGES.

After a corporation which became bankrupt had been in existence for a considerable period, its controlling stockholders organized another corporation known as "The Pulp Company." Thereafter the latter's officers pledged certain of its bonds to secure notes and accounts of the bankrupt, and T., having subsequently purchased the stock of both corporations, took assignments of these debts of the bankrupt in his own name and acquired the collateral bonds so pledged. *Held*, that T., though the owner of all the shares of the Pulp Company, was neither the corporation nor the accommodation pledgor for the benefit of the bankrupt, and hence could not have such notes and accounts of the bankrupt allowed as unsecured claims against its estate.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 355.*]

Appeals from the District Court of the United States for the Northern District of New York.

In the first appeal, the H. Remington & Son Pulp & Paper Company (designated in the opinion following as the "Pulp Company") appeals from an order disallowing a claim of $72,775.45 presented by it against the bankrupt estate of the Watertown Paper Company (designated in the opinion as the "Paper Company"). In the second appeal, John B. Taylor appeals from an order disallowing a claim of $28,498.33 presented by him against said bankrupt estate. Although the claims are distinct and have been the subject of separate orders, the appeals have been argued together and present enough facts in common to render their consideration in one opinion expedient.

Elon R. Brown and Geo. S. McCartin, for appellants.

Frederick M. Boyer, for appellees.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

1. The Claim of the Pulp Company.

NOYES, Circuit Judge. The statement of the Pulp Company's claim as presented embraced items of "merchandise" furnished at various times from September 30, 1904, to November 16, 1905, amounting to $72,775.45. The affidavit to which the statement was annexed stated that the consideration of the debt was "wood pulp sold and delivered." It appears from the books of the corporations, however, that said amount was really the balance of the running accounts between said corporations extending over a long period. It also appears that the accountant, in preparing the claim, took this balance from the books and sufficient of the late sales to amount thereto, and stated the one as the consideration of the other.

It is urged at the outset that the claim should be rejected because it was improperly presented. It was presented in irregular form. Other items than merchandise entered into the account. Payments had been made and should have been shown. When the proof came in, showing that the claim was for a balance of account, instead of for merchandise sold, it should properly have been amended. Still the whole matter of the account between the two corporations was

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

fully inquired into before the special master, and, if the claim had been amended so as to conform to the proof, the inquiry would have been in no way changed. The amount was correctly stated. Wood pulp sold did in fact constitute the consideration of a large part of the indebtedness. The District Court apparently rejected the claim upon other grounds than those of form. Under all the circumstances, we think that the technical objection of defective presentation should not be sustained.

In considering the claim of the Pulp Company upon its merits, we must start with the assumption that, if the Paper Company were not a bankrupt, the claim would be valid and enforceable in the courts. The books of the corporations show that the balance in favor of the Pulp Company is the amount stated in the claim as presented. Indeed, the appellees say in their brief:

"No question is made in the proofs by contestants that the pulp mill did manufacture and deliver to the paper mill pulp to the extent and amount of vastly more than $72,775.45. Nor is any question made but that said last-mentioned sum represented the balance of the running account kept between the two mills and included all items from the organization of the Pulp Company in 1887 to the date of adjudication, whether of money, credits, or pulp."

The contention of appellees, however, is that the claim is unenforceable against the bankrupt estate of the Paper Company because —as they allege—the Pulp Company and the Paper Company are not two separate corporations, but one. "There is no such claim"—they say—"unless, indeed, the bankrupt can be said to have a claim against itself." In other words, they claim that the Pulp Company was merely an adjunct or branch of the Paper Company. It is necessary, therefore, before considering the legal questions, to examine the facts appearing in the record with respect to the organization, existence, and relations of the two corporations.

The bankrupt—the Paper Company—was organized in 1864 with a capital stock of $14,000, which was afterwards increased to $20,000. Prior to 1886 its entire capital stock was owned by Hiram Remington and Edward W. Remington. At that time Hiram Remington gave 20 shares to each of his three daughters, and the ownership remained the same down to the time of his death in 1905. The Pulp Company was organized in 1887 with a capital stock of $20,000, of which $10,000 was taken by Hiram Remington, $9,500 by Edward Remington and $500 by Nellie Remington, wife of Edward Remington. The stock of the Pulp Company was paid for by Hiram Remington and Edward Remington in the following manner: They both had credits of considerable sums upon the books of the Paper Company, which by their direction advanced the necessary funds to the Pulp Company and charged the advancements to their accounts. In 1902 the stock of this company was increased by a stock dividend to $128,000, all of which was held by the same stockholders. In March, 1905, Hiram Remington died, and his shares in the two corporations were distributed among his children. Prior to that time there had also been some changes in the holdings of Edward Remington and his wife in the Pulp Company. It may be broadly stated, however, that during the entire existence of the Pulp Company prior to November, 1905, when

John B. Taylor acquired the shares of the two corporations, the ownership of their stock had been in Hiram Remington and Edward Remington and their families. But it also appears that the several stockholders had different interests in the two corporations and that some owned stock only in one corporation.

The affairs of the two corporations were closely intermingled. For some years after the organization of the Pulp Company the Paper Company manufactured its own pulp; but in 1891 and thereafter it procured its supply from the Pulp Company and took substantially all that it produced. This it made into paper and sold it in the market. The corporations gave each other commercial paper and indorsed for each other. Separate books of account were kept for the two corporations; but the business was conducted from the office of the Paper Company. The Pulp Company had no bank account; all its bills being paid by the Paper Company and charged to its account. All credits of the Pulp Company were collected by the Paper Company and credited to it. A certain proportion of the office expenses was charged to the Pulp Company.

The case thus presented is one in which the stockholders of two corporations are largely the same, in which both corporations have been under the same management, and in which their affairs have for years been involved and intermingled; and the legal question is whether these relations prevent the one corporation from enforcing against the bankrupt estate of the other a claim which, in case the latter corporation had remained solvent, would have been both valid and enforceable. It must be clearly borne in mind that this is not a case in which a creditor is suing a corporation upon the ground that it has so held itself out in connection with another corporation as, upon principles of estoppel, to render it responsible for a particular debt of the latter. Any legal principle which would prevent the Pulp Company from collecting its claim from the estate of the Paper Company would permit all the creditors of the Paper Company to look to the Pulp Company for the payment of their demands—would, in effect, extend the jurisdiction of the bankruptcy court over the Pulp Company's property.

Now, it is an elementary and fundamental principle of corporation law that a corporation is an entity separate and distinct from its stockholders and from other corporations with which it may be connected. The fact that the stockholders of two separately chartered corporations are identical, that one owns shares in another, and that they have mutual dealings, will not, as a general rule, merge them into one corporation, or prevent the enforcement against the insolvent estate of the one of an otherwise valid claim of the other. As said by the Supreme Court of Arkansas in Lange v. Burke, 69 Ark. 85, 88, 61 S. W. 165, in holding, in a case where two corporations were practically controlled by the same stockholders and had had intimate business relations, including the employment of the same bookkeeper, that a claim of one corporation would be enforced against the insolvent estate of the other:

"A corporation is an artificial being, separate and distinct from its agents, officers, and stockholders. Its dealings with another corporation, although

it may be composed in part of persons who own the majority of the stock in each company, and may be managed by the same officers, if they be in good faith and free from fraud, stand upon the same basis, and affect it and the other corporation in the same manner and to the same extent, that they would if each had been composed of different stockholders and controlled by different officers."

And as said by the Circuit Court of Appeals for the Sixth Circuit in Richmond, etc., Const. Co. v. Richmond, etc., R. Co., 68 Fed. 105, 108, 15 C. C. A. 289, 34 L. R. A. 625:

"The contract company was a legal corporation, wholly distinct and separate from the railroad company. The fact that the stockholders in each may have been the same persons does not operate to destroy the legal identity of either corporation. Neither does the fact that the one corporation exercised a controlling influence over the other, through the ownership of its stock or through the identity of stockholders, operate to make either the agent of the other, or to merge the two corporations into one."

See, also, Waycross, etc., R. Co. v. Offerman R. Co., 109 Ga. 827, 35 S. E. 275; Crane v. Fry, 126 Fed. 278, 61 C. C. A. 260; Watson v. Bonfils, 116 Fed. 157, 53 C. C. A. 535; Fitzgerald v. Missouri Pac. R. Co. (C. C.) 45 Fed. 812; Goodwin v. Bodcaw Lumber Co., 109 La. 1050, 34 South. 74; Ex parte Fisher, 20 S. C. 179; White v. Pecos, etc., Co., 18 Tex. Civ. App. 634, 45 S. W. 207.

Unless, therefore, it can be shown that some exception to the general rule of separate corporate existence and liability applies in this case, it must follow that the claim of the Pulp Company should have been allowed. The only exceptions to that rule possibly applicable here are: (1) The legal fiction of distinct corporate existence will be disregarded, when necessary to circumvent fraud. (2) It may also be disregarded in a case where a corporation is so organized and controlled, and its affairs are so conducted, as to make it merely an instrumentality or adjunct of another corporation.

Under the first exception the cases are numerous which hold that a person cannot transfer his property to a corporation to defraud its creditors, nor employ a separate corporate existence to evade his liabilities. But there is nothing in the record showing any fraud in the organization of the Pulp Company or in its operation or management. It does not appear that the Pulp Company absorbed the assets of the Paper Company. In fact, the balance presented as its claim by the Pulp Company is reached by deducting all the Paper Company's credits. It does not appear that creditors of the Paper Company gave it credit in the belief that it owned the property of the Pulp Company. Indeed, the record is barren of any facts from which fraud can be found or inferred. So the question is whether the case presented comes within the second exception to the rule—whether the Pulp Company was merely an adjunct of the business of the Paper Company, an agency or instrumentality through which it acted.

There is, as the appellees point out, a line of cases holding that, when one corporation creates another corporation for a particular purpose and holds all its stock, the latter will be treated as the agent of the former or as an instrumentality for carrying out its purposes. In these cases the controlling corporation has been held liable for the debts of the subordinate company. Interstate Telegraph Co. v. Balti-

more, etc., Telegraph Co. (C. C.) 51 Fed. 49, Id., 54 Fed. 50, 4 C. C. A. 184, in which a railroad company organized a telegraph company with small capital—all of which it held—as a department of its business and was held liable for its debts, is an illustrative case along this line. But the principles of those cases are only indirectly applicable here. Neither the Paper Company nor the Pulp Company own any of the other's shares, and in no sense can it be said that the Paper Company organized the Pulp Company as a department of its business.

Probably the strength of the appellees' contention can best be tested by applying the principles of that which is probably the most favorable case for them which they cite—Re Muncie Pulp Co., 139 Fed. 546, 71 C. C. A. 530, decided by this court. In that case a New York corporation, the stock of which was owned by two officers, engaged in a manufacturing business in Indiana and acquired certain gas and oil well properties there. It being desirable that a local corporation should be formed to acquire rights of way, such a corporation was organized, with the same stockholders as the first corporation, to which the latter transferred, without consideration, its gas and oil well properties. The local company kept no separate books, and its affairs were managed by the first corporation. The latter corporation went into bankruptcy, and it was held that the local company was merely the agent of the bankrupt corporation, and that its shares in the names of the officers, as well as its property, belonged in law to the bankrupt. In his opinion Judge Coxe said:

"The Great Western Company was undoubtedly a mere creature of the pulp company, having no independent business existence, and organized solely for the purpose of facilitating the business of the latter. The Great Western Company has no shadow of claim to the property in controversy, and to permit it, or its president, or shareholders, to dispose of such property, is to sanction a fraud upon the creditors of the pulp company."

But the present case is not at all like the Muncie Case, nor like any of the other cases cited by the appellees. As already shown, no element of fraud is present. The Paper Company did not in any legal sense furnish the money to build the Pulp Company's plant. It is true that it actually advanced the funds; but it did so for the account of the Remingtons. It was merely the conduit through which the Remingtons' money passed to meet their obligations. It does not appear that the Paper Company ever had the slightest claim—legal or equitable—to any of the stock of the Pulp Company. It is true that the two corporations mingled their affairs. A creditor of the one company might perhaps have a claim, based upon principles of estoppel, against the other. Lax business methods are clearly shown. Undoubtedly the controlling stockholders regarded the two corporations as being, in a general way, different departments of their business. But the separate corporate organizations were apparently kept up. Each corporation had its own creditors, its own assets, and conducted its business in its own name. Books of account were kept, showing their financial relations. The stockholders were not entirely the same. We cannot, upon these facts, hold that the corporations were identical, nor that the Pulp Company was merely an adjunct or

instrumentality of the Paper Company. Instead of coming under the exceptions, this case seems clearly to come within the general rule that the distinct corporate existence of two separate although associated corporations will be regarded by the courts.

For these reasons, we think that the claim of the Pulp Company should have been allowed against the bankrupt estate of the Paper Company.

2. The Claim of John B. Taylor.

The claim of John B. Taylor, as presented against the bankrupt estate, was for $28,498.33 upon certain notes and accounts which the Paper Company owed to various corporations and individuals, and which were assigned by them before the bankruptcy to the claimant. As already indicated, John B. Taylor acquired a majority of the shares of the Pulp Company in November, 1905, and later the remaining shares. He also acquired the shares of the Paper Company, which at that time was practically insolvent. Upon his purchase of these stock interests, Taylor found that notes and accounts of the Paper Company, to the amount of his claim as presented, were held by various banks and individuals, who held as collateral therefor bonds of the Pulp Company secured by a mortgage of its plant. Taylor purchased these secured debts of the Paper Company, took assignments thereof to himself in his own name, and acquired the collateral therefor.

Taylor now claims the right to present these assigned claims against the bankrupt estate as unsecured claims and to have them allowed as such. He admits that the value of the collateral which he acquired in purchasing the claims exceeds the amount thereof, and he concedes that, unless such claims can be allowed as unsecured, they should be rejected. The position of the claimant is thus stated in his brief:

"Taylor was no more a secured creditor after he took an assignment of these claims than he was before. In each instance he, as the owner of the H. Remington & Son Pulp & Paper Company, was the accommodation pledgor for the benefit of the Watertown Paper Company, and was compelled to take up and pay the obligations secured by the bonds to protect his own property."

Even assuming that the Pulp Company was the accommodation pledgor for the benefit of the Paper Company—which with respect to all the notes is not clear—and assuming that the legal position of the Pulp Company, in case it had paid the claims, would have been as stated by the claimant, his contention regarding his own position is wholly untenable. If any one thing is certain from the examination which we have already made, it is that a corporation is an entity distinct and separate from its stockholders. The fact that Taylor legally and equitably owned all the shares of the Pulp Company did not make him the corporation. He, as the owner of such stock, was not the accommodation pledgor for the benefit of the Paper Company. The Pulp Company itself was such pledgor. Taylor was under no legal obligation in the matter whatever. He was merely a person interested in the properties, who chose to buy secured claims against the Paper Company. By virtue of the assignments to him, he stood precisely in the position of his assignors, and became a secured creditor of the Paper Company. His claim was properly rejected.

The order of the District Court disallowing the claim of the Pulp Company is reversed, with costs.

The order of the District Court disallowing the claim of John B. Taylor is affirmed, with costs.

On Rehearing.

PER CURIAM. In the opinion in this case the contention of the claimant Taylor that he stood in the position of an accommodation indorser and took up the obligations and collateral in question to protect his own property was negatived, and it was shown that he acquired the rights, and only the rights, of his assignors. Upon this petition the claimant insists that his assignors themselves were unsecured creditors of the bankrupt estate, and this contention has lead us to a further examination of the record.

If it were true that the Pulp Company had itself pledged its own bonds as security for its accommodation indorsements of the Paper Company's obligations, there would be force in the claimant's contention. It might well be said that the banks and individuals receiving the collateral had no security as against the bankrupt—that their security was the property of the indorser and was upon the contracts of indorsement. But we think this was not the situation. We are satisfied that most of the bonds were delivered by the Pulp Company to the Paper Company to be used by the latter as collateral for its debts. The record shows instances where the Paper Company itself pledged the bonds as security for its own debts, and authorized their sale in case of default. Indeed, the Paper Company pledged the bonds as security for indebtedness toward which the Pulp Company bore no relation, as indorser or otherwise. In our opinion the Paper Company acquired from the Pulp Company such special property in the bonds as warranted their pledge for the Paper Company's debts, and that upon such pledge they became in the hands of the pledgees "security upon the property of the bankrupt," and rendered such pledgees secured creditors.

It is possible that some of the items of the claim in question do not stand in precisely the situation just stated; but the evidence was insufficient to enable us to separate the items or apportion the collateral, and we were not asked to do so.

The petition for a rehearing is denied.

NATIONAL FIREPROOFING CO. v. MASON BUILDERS' ASS'N et al.

(Circuit Court of Appeals, Second Circuit. March 26, 1909.)

No. 187.

1. CONTRACTS (§ 136*)—INJUNCTION (§ 61*)—AGREEMENTS IN RESTRAINT OF TRADE—REMEDIES.

Agreements creating a monopoly in restraint of trade and against public policy, though invalid and unenforceable, are not illegal in the sense of

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

giving a right of action to third persons for an injury sustained, nor as affording ground for an injunction against threatened injury.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 136;* Injunction, Dec. Dig. § 61.*]

Monopolistic Contracts—validity as affected by public policy, see note to Cravens v. Carter-Crume Co., 34 C. C. A. 486.]

2. MONOPOLIES (§§ 24, 28*) — FEDERAL ANTI-TRUST ACT—INJUNCTIVE REMEDY—RIGHTS OF INDIVIDUALS.

A person injured by a violation of the federal anti-trust act cannot sue for an injunction thereunder; his sole remedy being a suit to recover treble damages, and the injunctive remedy being available to the government only.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. §§ 17, 18; Dec. Dig. §§ 24, 28.*]

3. MONOPOLIES (§ 8*)—DEFINITION.

A "monopoly" is the concentration of business in the hands of a few.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 8.*

For other definitions, see Words and Phrases, vol. 5, pp. 4570–4573.]

4. MONOPOLIES (§ 12*)—STATUTES—AGREEMENTS.

An agreement between a mason builders' association and bricklayers' unions in the city of New York that the builders' association should include in their contracts for building all cutting of masonry, interior brickwork, fireproofing, etc., and should not lump or sublet the installation thereof if the labor in connection therewith is bricklayers' work, as recognized by the trade, but that the men employed on the walls should be given preference, and that no members of the bricklayers' union should work for any one not complying therewith, did not constitute a monopoly, within the New York statute providing that every contract or combination whereby a monopoly in the manufacture, production, or sale in the state of any article, or commodity of common use is or may be created, established, or maintained, etc., is against public policy, illegal, and void.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 12.*]

5. CONSPIRACY (§ 1*)—DEFINITION—"CIVIL CONSPIRACY."

A "conspiracy" is a combination to effect an illegal object as an end or means, and a "civil conspiracy" is a combination of two or more persons to accomplish by concerted action an unlawful or oppressive object, or a lawful object by unlawful or oppressive means.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 1; Dec. Dig. § 1.*

For other definitions, see Words and Phrases, vol. 2, pp. 1193, 1454–1461; vol. 8, p. 7613.]

6. CONSPIRACY (§ 6*)—ACTION—ELEMENTS.

To warrant an action for conspiracy, damage must have resulted from the combination.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 5; Dec. Dig. § 6.*]

7. INJUNCTION (§ 101*)—CONSPIRACY—DAMAGE.

To justify an injunction against a conspiracy, damage must have been threatened.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 101.*]

8. CONSPIRACY (§ 3*)—OBJECT—ILLEGALITY.

The direct object or purpose of a combination furnishes the primary test of its illegality; it being insufficient to show that it works harm to others incidentally, unless it was entered into for the primary purpose of injuring another, in which case it is not rendered valid by the fact that it may incidentally benefit the parties thereto.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 3; Dec. Dig. § 3.*]

9. CONSPIRACY (§ 3*)—COMBINATION OF LABORERS—MOTIVE—OBJECT—MEANS.
Several laborers may combine for mutual advantage, and so long as the motive is not malicious, the object not unlawful or oppressive, and the means neither deceitful nor fraudulent, the result is not a conspiracy, although it may necessarily work injury to others.
[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 3; Dec. Dig. § 3.*]

10. CONSPIRACY (§ 3*)—COMBINATION OF LABORERS AND BUILDERS—VALIDITY.
An agreement between a master mason builders' association and bricklayers' unions in the city of New York prohibited the association from subletting interior brickwork, fireproofing, etc., but requiring that such work be included in the building contracts, and that the men employed on the construction of the walls should be given a preference in performance thereof, and that no members of the bricklayers' unions should work for any one not complying with the rules and regulations of the agreement. *Held*, that such agreement was for the special benefit of the bricklayers, and was not intended to injure complainant, a nonresident corporation authorized to do fireproofing alone, and hence, though the agreement operated to complainant's prejudice, it was not a conspiracy against which complainant had any remedy.
[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 3; Dec. Dig. § 3.*]

11. CONSPIRACY (§ 3*)—STATUTES—OBJECT.
An agreement between a mason builders' association and bricklayers' unions in the city of New York, prohibiting the subletting of interior brickwork, fireproofing, etc., and requiring that the men employed on the outside walls of a building be given preference in the performance of such inside work, did not constitute a conspiracy prohibited by Pen. Code N. Y. § 168, subds. 5, 6; the test of the application of the statute being the purpose of the combination, which, if lawful and carried out by lawful means, shows absence of conspiracy, though a third person may be incidentally injured.
[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 3; Dec. Dig. § 3.*]

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

See, also, 145 Fed. 260.

This is an appeal from a decree of the Circuit Court for the Southern District of New York dismissing a bill of complaint in a suit in equity.

The complainant is a corporation under the laws of the state of Pensylvania and is authorized by its charter to manufacture and install fireproofing. Since its organization it has been engaged almost exclusively in the manufacture and installation of what is known as hollow tile fireproofing and produces over 50 per cent. of the entire output of that article in the United States.

The defendant Mason Builders' Association is a corporation under the laws of the state of New York, composed of master mason builders doing business in the city of New York, but comprising less than a majority of the mason builders of that city.

The defendants the various Bricklayers' Unions, with four exceptions which are chartered, are unincorporated associations. Practically every bricklayer in the city of New York and Long Island is a member of one of these unions.

The object of this suit is to restrain the enforcement of, and to have declared void, an agreement entered into between the Mason Builders' Association and the Bricklayers' Unions, upon the ground that it unlawfully interferes with the business and property of the complainant.

The agreement in question between the Mason Builders' Association and the Bricklayers' Unions is a biennial trade agreement covering the years

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

1906 and 1907 and relating to rates of wages, hours of labor, the settlement of differences by arbitration, and many other matters in the building trade affecting the interests of the parties. The particular clauses to which the complainant objects are the following:

"(5) The members of the Mason Builders' Association must include in their contracts for building all cutting of masonry, interior brickwork, the paving of brick floors, the installing of concrete blocks, the brickwork of the damp-proofing system and all fireproofing-floor arches, slabs, partitions, furring and roof blocks—and they shall not lump or sublet the installation, if the labor in connection therewith is bricklayers' work as recognized by the trade, the men employed upon the construction of the walls to be given the preference."

"(10) No members of these Bricklayers' Unions shall work for any one not complying with all the rules and regulations herein agreed to."

The first agreement between the Builders' Association and the unions was entered into in 1885 and provided only for rates of wages, hours of labor, and arbitration of differences. The agreements since that time have embraced the provisions of the original agreement and also a gradually increasing number of other important stipulations. Clause 5 in substance was inserted in the agreement of 1893 at the request of the unions and has been retained in subsequent agreements. Clause 10 was inserted in the agreement at the request of the association. The precise time when this was done does not appear, but the clause was in force before the complainant started business in the city of New York.

The work of installing tile fireproofing is considered to be bricklayers' work by the trade, and it would be impracticable for the complainant to undertake such work in the city of New York without employing members of the Bricklayers' Unions. Clause 10, however, provides that members of the unions shall only work for persons complying with all the rules and regulations of the agreement. Among them is clause 5, which provides that the work of installing fireproofing shall not be sublet by a contractor, but must be included in the contract for the building. It follows therefore that these two clauses operate to prevent the complainant from installing its fireproofing in New York City unless it takes the entire contract for erecting a building, which it is not authorized by its charter to do.

In actual operation, too, the clauses in question have prevented the complainant from carrying out contracts for the installation of fireproofing. Thus in 1903 the complainant had a contract with the George A. Fuller Company—a general contractor not a member of the Builders' Association—for installing fireproofing in a building which it was erecting under contract in New York City. The association notified the complainant that its agreement with the unions forbade building contractors subletting the installation of fireproofing, and subsequently all the bricklayers employed upon the building—including those engaged upon the fireproofing—struck. Consequently the complainant was obliged to cancel its contract. Other similar instances are shown in the testimony.

It is evident therefore that these clauses affect owners and general contractors as well as a person who, like the complainant, desires to take separate fireproofing contracts. An owner is practically unable to make a contract for fireproofing alone because if he does the bricklayers will not only refuse to do that work, but will decline to do the other work upon the building. A general contractor, whether a member of the association or not, practically cannot sublet the fireproofing because if he does he will violate clause 5, and the bricklayers will refuse to work for him.

The defendants claim that the object of clause 5 is to benefit the bricklayers by giving them inside as well as outside work and by preventing specialization in their trade. This subject is fully considered in the opinion.

The object of clause 10 is, obviously, to make the trade agreement effective by extending its operation to third persons requiring the labor of bricklayers. While members of the unions may work for others than members of the association, they can only work for such employers as follow the rules and regulations of the agreement. Should the complainant obtain the power to make general building contracts and enter into such con-

tracts, it could then obtain the services of members of the unions in setting the fireproofing required. The complainant, however, does not wish to do business in this manner. It desires to take separate contracts for fireproofing installation and is prevented from so doing business by the operation of the clauses in question.

The allegations of the amended complaint with respect to a combination to injure the complainant, accompanied by threats and intimidation—except as they relate to the enforcement against it of these clauses—are not supported by the evidence. Whatever the defendants have done has been for the enforcement of such clauses, and if they are valid, and their execution and enforcement in the manner shown lawful, no independent cause of action is established.

James W. Osborne (Henry E. Lineaweaver, of counsel), for appellant.

Eidlitz & Hulse (Frederick Hulse, of counsel), for appellees Mason Builders' Ass'n and others.

Arthur Ofner and Joseph Forrester, for appellees Bricklayers' Union No. 1 and others.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

NOYES, Circuit Judge (after stating the facts as above). In considering the legal questions arising in this case, it must be borne in mind at the outset that it is not sufficient to show that the agreement in question may create a monopoly, may be in restraint of trade, or may be opposed to public policy. Agreements of that nature are invalid and unenforceable. The law takes them as it finds them, and as it finds them leaves them; but they are not illegal in the sense of giving a right of action to third persons for injury sustained. Brown v. Jacobs' Pharmacy Co., 115 Ga. 433, 41 S. E. 553, 57 L. R. A. 547, 90 Am. St. Rep. 126. And upon similar principles it seems equally clear that they afford such persons no ground for seeking an injunction against injury threatened.

But the complainant asserts that the agreement in this case is positively unlawful and not merely negatively invalid—that it contravenes both national and state statutes against combinations, and thus does give rights of action to injured persons. With respect to the federal statute, it is not obvious in what way a trade agreement between builders and bricklayers, relating to their work in the state of New York, can be said to directly affect interstate commerce; but the consideration of this question is not necessary because a person injured by a violation of the federal act cannot sue for an injunction under it. The injunctive remedy is available to the government only. An individual can only sue for threefold damages. Greer v. Stoller (C. C.) 77 Fed. 2; Southern Indiana Exp. Co. v. United States Exp. Co. (C. C.) 88 Fed. 663. See, also, Bement v. National Harrow Co., 186 U. S. 87, 22 Sup. Ct. 747, 46 L. Ed. 1058; Post v. Southern R. Co., 103 Tenn. 184, 52 S. W. 301, 55 L. R. A. 481; Metcalf v. American School-Furniture Co. (C. C.) 108 Fed. 909; Block v. Standard Distilling, etc., Co. (C. C.) 95 Fed. 978; Gulf, etc., R. Co. v. Miami Steamship Co., 86 Fed. 407, 30 C. C. A. 142; Pidcock v. Harrington (C. C.) 64 Fed. 821; Hagan v. Blindell, 56 Fed. 696, 6 C. C. A. 86, affirming Blindell v. Hagan (C. C.) 54 Fed. 40.

The statute of New York which it is claimed that the defendants violate provides in its first section as follows:

"Every contract, agreement, arrangement or combination, whereby a monopoly in the manufacture, production or sale in this state of any article or commodity of common use is or may be created, established or maintained, or whereby competition in this state in the supply or price of any such article or commodity is or may be restrained or prevented, or whereby, for the purpose of creating, establishing or maintaining a monopoly within this state of the manufacture, production or sale of any such article or commodity, the free pursuit in this state of any lawful business, trade or occupation, is or may be restricted or prevented, is hereby declared to be against public policy, illegal and void." Laws 1899, p. 1514, c. 690.

The complainant says that the agreement in question violates this statute because it tends to create a monopoly in the hands of members of the association and other general contractors who comply with its provisions. It may well be doubted, however, whether a combination of employers and employés in the building trade could ever be for the purpose of creating a monopoly "in the manufacture, production or sale in this state of any article or commodity of common use." Be that as it may, the thing which is essential to the existence of a monopoly—the concentration of business in the hands of a few—is not present here. The business of installing fireproofing in the city of New York is open to all who choose to engage in it under existing economic conditions. General contractors cannot be said to have a monopoly when any person can be a general contractor. Members of the unions cannot be said to be monopolists when any qualified bricklayer can join a union. Moreover, while it is probable under the New York decisions (Rourke v. Elk Drug Co., 75 App. Div. 145, 77 N. Y. Supp. 373) that a person specially injured by a violation of this anti-monopoly statute would have a right of action for damages, it seems, upon the principle of the cases cited with respect to the federal statute, that only the Attorney General can sue for an injunction; such a suit being authorized by a section of the statute.

The complainant, thus failing to show any right to an injunction upon the ground that the agreement is contrary to public policy or in contravention of any state or national anti-trust statute, can only establish that it is entitled to such relief by showing that the execution of the agreement amounted to a conspiracy, and that its enforcement threatens injury; and to ascertain whether the complainant has established this requires the examination of a most important phase of the law of conspiracies as affecting combinations of labor and combinations between labor and capital.

A "conspiracy" may be broadly defined as a combination to effect an illegal object as an end or means. And a "civil conspiracy," which we are considering, may be defined as a combination of two or more persons to accomplish by concerted action an unlawful or oppressive object; or a lawful object by unlawful or oppressive means. To sustain an action, damage must have resulted from the combination; to warrant an injunction, damage must be threatened.

And so the inquiry is: (1) Was the object of the agreement unlawful or oppressive? (2) If the object were lawful and free from oppression, were the means unlawful or oppressive?

The direct object or purpose of a combination furnishes the primary test of its legality. It is not every injury inflicted upon third persons in its operation that renders a combination unlawful. It is not enough to establish illegality in an agreement between certain persons to show that it works harm to others. An agreement entered into for the primary purpose of promoting the interests of the parties is not rendered illegal by the fact that it may incidentally injure third persons. Conversely, an agreement entered into for the primary purpose of injuring another is not rendered legal by the fact that it may incidentally benefit the parties. As a general rule it may be stated that, when the chief object of a combination is to injure or oppress third persons, it is a conspiracy; but that when such injury or oppression is merely incidental to the carrying out of a lawful purpose, it is not a conspiracy. Stated in another way: A combination entered into for the real malicious purpose of injuring a third person in his business or property may amount to a conspiracy and furnish a ground of action for the damages sustained, or call for an injunction, even though formed for the ostensible purpose of benefiting its members and actually operating to some extent to their advantage; but a combination without such ulterior oppressive object, entered into merely for the purpose of promoting by lawful means the common interests of its members, is not a conspiracy. A laborer, as well as a builder, trader, or manufacturer, has the right to conduct his affairs in any lawful manner, even though he may thereby injure others. So several laborers and builders may combine for mutual advantage, and, so long as the motive is not malicious, the object not unlawful, nor oppressive and the means neither deceitful nor fraudulent, the result is not a conspiracy, although it may necessarily work injury to other persons. The damage to such persons may be serious—it may even extend to their ruin—but if it is inflicted by a combination in the legitimate pursuit of its own affairs, it is damnum absque injuria. The damage is present, but the unlawful object is absent. And so the essential question must always be whether the object of a combination is to do harm to others or to exercise the rights of the parties for their own benefit.

These principles are well settled by the leading cases upon conspiracies. Thus in the celebrated case of Mogul Steamship Co. v. McGregor, L. R. 21 Q. B. 552, Lord Chief Justice Coleridge said:

"I do not doubt the acts done by the defendants here, if done wrongfully and maliciously, or if done in furtherance of a wrongful and malicious combination, would be ground for an action on the case at the suit of one who has suffered injury from them. The question comes at last to this: What was the character of those acts, and what was the motive of the defendants in doing them?"

And when the Mogul Steamship Case came to the House of Lords (L. R. [1892] App. Cas. 25, 58), Lord Hannen said:

"The question, however, raised for our consideration in this case is whether a person who has suffered loss in his business by the joint action of those who have entered into such an agreement can recover damages from them for the injury so sustained. In considering this question, it is necessary to determine upon the evidence what was the object of the agreement between the defendants and what were the means by which they sought to attain that object. It appears to me that their object was to secure to themselves the benefit of the carrying trade from certain points. * * * I consider that a differ-

ent case would have arisen if the evidence had shown that the object of the defendants was a malicious one, namely, to injure the plaintiff whether they (the defendants) should be benefited or not."

The cases relating particularly to combinations of labor also state the same doctrine. Thus in National Protective Ass'n v. Cumming, 170 N. Y. 315, 328, 63 N. E. 369, 372, 58 L. R. A. 135, 88 Am. St. Rep. 648, Chief Judge Parker said:

"It is only where the sole purpose is to do injury to another, or the act is promoted by malice, that it is insisted that the act becomes illegal. No such motive is alleged in that finding. It is not hinted at. On the contrary, the motive which always underlies competition is asserted to have been the animating one."

And in the concurring opinion in the same case, Judge Gray said:

"The struggle on the part of individuals to prefer themselves, and to prevent the work which they are fitted to do from being given to others, may be keen and may have unhappy results in individual cases; but the law is not concerned with such results, when not caused by illegal means or acts."

In Jacobs v. Cohen, 183 N. Y. 207, 211, 76 N. E. 5, 7, 2 L. R. A. (N. S.) 292, 111 Am. St. Rep. 730, Judge Gray also said:

"Nor does the answer aver that it was intended thereby to injure other workmen; or that it was made with a malicious motive to coerce any to their injury, through their threatened deprivation of all opportunity of pursuing their lawful avocation."

In the same case the judge further said regarding the agreement there in question:

"That, incidentally, it might result in the discharge of some of those employed, for failure to come into affiliation with their fellow workmen's organization, or that it might prevent others from being engaged upon the work, is neither something of which the employers may complain, nor something with which public policy is concerned."

In Mills v. United States Printing Co., 99 App. Div. 605, 612, 91 N. Y. Supp. 185, 190, another New York case, the court said:

"There is a manifest distinction, well recognized, between a combination of workmen to secure the exclusive employment of its members by a refusal to work with none other, and a combination whose primary object is to procure the discharge of an outsider and his deprivation of all employment. In the first case, the action of the combination is primarily for the betterment of its fellow members. In the second case, such action is primarily 'to impoverish and to crush another' by making it impossible for him to work there, or, so far as may be possible, anywhere. The difference is between combination for welfare of self and that for the persecution of another. The primary purpose of one may necessarily but incidentally require the discharge of an outsider; the primary purpose of the other is such discharge and, so far as possible, an exclusion from all labor in his calling. Self-protection may cause incidental injury to another. Self-protection does not aim at malevolent injury to another."

In Vegelahn v. Guntner, 167 Mass. 92, 98, 44 N. E. 1077, 35 L. R. A. 722, 57 Am. St. Rep. 443, Justice Allen said:

"A combination among persons merely to regulate their own conduct is within allowable competition and is lawful, although others may be indirectly affected thereby; but a combination to do injurious acts, expressly directed to another, by way of intimidation or restraint either of himself or of other persons employed or seeking to be employed by him, is outside of allowable competition and is unlawful."

In Allis-Chalmers Co. v. Iron Moulders' Union (C. C.) 150 Fed. 155, Judge Sanborn said:

"The conclusion to be drawn from the cases, as applicable to this controversy, is, I think, that the combination of the defendant unions, their members and the defendant O'Leary, to strike, and further to enforce the strike and if possible to bring the employers to terms by preventing them from obtaining other workmen to replace the strikers, was not unlawful, because grounded on just cause or excuse, being the economic advancement of the union moulders, and the competition of labor against capital."

In Allen v. Flood, L. R. (1898) App. Cas. 1, 164, Lord Shand said:

"Their object was to benefit themselves in their own business as working boiler makers, and to prevent a recurrence in the future of what they considered an improper invasion on their special department of work. How this could possibly be regarded as 'malicious,' even in any secondary sense that can reasonably be attributed to that term, I cannot see."

In Quinn v. Leathem, L. R. (1901) App. Cas. 495, Lord Shand, in speaking of Allen v. Flood, supra, said:

"In that case I expressed my opinion that while combination of different persons in pursuit of a trade object was lawful, although resulting in such injury to others as may be caused by legitimate competition in labour, yet that combination for no such object, but in pursuit merely of a malicious purpose to injure another, would be clearly unlawful; and having considered the arguments in this case, my opinion has only been confirmed."

The principal case relied upon by the complainant (Curran v. Galen, 152 N. Y. 33, 46 N. E. 297, 37 L. R. A. 802, 57 Am. St. Rep. 496) when analyzed will not be found to conflict with the principles just stated. It was held in that case, in substance, that if the prime purpose of a combination of workingmen is to restrict the citizen in pursuing his lawful calling and through contracts with employers to coerce other workingmen to become members of the combination, such purpose is against public policy and renders the combination unlawful, notwithstanding it may possess other features of advantage to its members. As said by the court in its opinion:

"Public policy and the interests of society favor the utmost freedom in the citizen to pursue his lawful trade or calling, and if the purpose of an organization or combination of workingmen be to hamper, or to restrict, that freedom, and, through contracts or arrangements with employers, to coerce other workingmen to become members of the organization and to come under its rules and conditions, under the penalty of the loss of their position, and of deprivation of employment, then that purpose seems clearly unlawful and militates against the spirit of our government and the nature of our institutions."

But the court went on to say that if the organization were for the purpose of promoting the general good of its members, it would not be invalid, and quoted with approval the instructions given to a jury in an English case (Regina v. Rowlands, 17 Ad. & Ellis [N. S.] 671):

"A combination for the purpose of injuring another is a combination of a different nature, directed personally against the party to be injured, and the law allowing them to combine for the purpose of obtaining a lawful benefit to themselves gives no sanction to combinations which have for their immediate purpose the hurt of another. The rights of workmen are conceded; but the exercise of free will and freedom of action, within the limits of the law, is also secured equally to the masters. The intention of the law is, at present, to allow either of them to follow the dictates of their own will, with respect to their own actions, and their own property, and either, I believe, has a right to

study to promote his own advantage, or to combine with others to promote their own mutual advantage."

It is evident therefore that the combination in Curran v. Galen was condemned because its primary purpose was to coerce workingmen to join it; any other objects being merely incidental. As said by Judge Martin in his dissenting opinion in the later case of Park & Sons Co. v. National Druggists' Ass'n, 175 N. Y. 40, 67 N. E. 150, 62 L. R. A. 632, 96 Am. St. Rep. 578:

"As we have already seen, this court in Curran v. Galen unanimously held that a combination or association of workingmen *whose purpose was to hamper or restrict the freedom of the citizen in pursuing his lawful trade or calling*, through contracts or arrangements with employers to coerce workingmen to become members of the organization and to come under its rules and conditions under penalty of loss of their positions and of deprivation of employment, was against public policy and unlawful." (Italics ours.)

And in National Protective Ass'n v. Cumming, 170 N. Y. 334, 63 N. E. 374, 58 L. R. A. 135, 88 Am. St. Rep. 648, already referred to, Judge Gray said:

"The case is not within the principle of Curran v. Galen, 152 N. Y. 33, 46 N. E. 297, 37 L. R. A. 802, 57 Am. St. Rep. 496. Upon the facts of that case, as they were admitted by the demurrer to the complaint, the plaintiff was threatened, if he did not join a certain labor organization, and so long as he refused to do so, with such action as would result in his discharge from the employment and in an impossibility for him to obtain other employment anywhere, and, in consequence of continuing his refusal to join the organization, his discharge was procured through false and malicious reports, affecting his reputation with members of his trade and with employers. There is no such compulsion, or motive, manifest here. There is no malice found. There is no threat of a resort to illegal methods."

Applying the principles which we have thus far ascertained to the facts of the present case, do we find that the object of the defendants in entering into the agreement embracing the clauses in question was to injure the complainant or to benefit themselves?

The object of clause 10 manifestly was to make the stipulations of the agreement generally effective. The mason builders joining in the agreement being bound by its stipulations, it was necessary for their protection that competing outside builders should only employ bricklayers upon the same conditions. So it was for the advantage of the bricklayers themselves to have means for enforcing uniformity in terms of employment.

It also seems clear from the testimony that the object of clause 5 was to benefit the bricklayers. Certainly from their point of view substantial benefits accrue from preventing the installation of fireproofing by separate contractors. Through the operation of this clause the men who do the exposed work secure the easier and safer inside work and more continuous employment than would otherwise be the case. The specialization of the bricklayers' trade through the growth of a class of workmen who would devote themselves to setting fire brick and would, in the end, take all that work from the ordinary bricklayer, is prevented.

It is true that the complainant contends that these advantages are fanciful rather than real, and points out that much of the fireproofing

is laid before the walls. Still it appears that a very large amount of fireproofing is done after the walls are completed, and the contention of the bricklayers that they obtain advantages through the operation of clause 5 in securing different kinds of work and steady employment seems well founded. The complainant also contends that there would be no danger of specialization in the bricklayers' trade should it take separate contracts for installing fireproofing, but the evidence does not support this contention. On the contrary, it indicates that the apprehensions of the bricklayers, as shown upon the record, are not without foundation.

Considering all the testimony, we are satisfied that the direct object of the adoption of the clauses in question was to benefit the parties and not to injure the complainant or other persons in a similar situation. Any particular or special intention to injure the complainant is, of course, negatived by the fact that the clauses in question were inserted in the trade agreement between the parties long before the complainant undertook to do any business in the city of New York.

The object of the agreement being neither unlawful nor oppressive, the next inquiry is whether the means adopted to make it effective were unlawful or oppressive.

As indicated in the statement of facts, no threats or acts of intimidation except in connection with the enforcement of clause 5 are shown. Instances do appear, however, in which bricklayers struck and ceased to work because they claimed that work was being done in violation of this clause. So, statements were made by members of the Builders' Association and of the unions that the complainant would not be permitted to take separate contracts for the installation of fireproofing. It is unnecessary to review the acts of the defendants in detail. We are not satisfied that if the defendants or their representatives made threats, they threatened to do anything which they had no right to do. The object of the agreement was not unlawful. The defendants had the right to strike to secure its enforcement. They also had the right to notify the complainant and persons with whom it had dealings that it could not take contracts for the installation of fireproofing contrary to the terms of the agreement without incurring its penalties. But a threat to do that which a person has the right to do is not unlawful. In National Protective Ass'n v. Cumming, 170 N. Y. 315, 330, 63 N. E. 369, 373, 58 L. R. A. 135, 88 Am. St. Rep. 648, already referred to, the court said:

"They did not threaten to employ any illegal method to accomplish that result. They notified them of the purpose of the defendants to secure this work for themselves and to prevent McQueed and his associates from getting it, and in doing that they but informed them of their intention to do what they had a right to do, and when a man purposes to do something which he has a legal right to do, there is no law which prevents him from telling another who will be affected by his act of his intention."

And in Park & Sons v. National Druggists' Ass'n, 175 N. Y. 1, 20, 67 N. E. 136, 143, 62 L. R. A. 632, 96 Am. St. Rep. 578, it was also said:

"There are no threats alleged in this complaint on the part of defendants to do anything except that which they have a right to do, if the views so far ex-

pressed be sound, and as we said in that case, and it is proper to repeat here, that a man may threaten to do that which the law says he may do, provided that, within the rule laid down in certain cases therein cited, his motive is to help himself."

It therefore follows that the defendants have not entered into a combination to accomplish an unlawful or oppressive object, or a lawful object by unlawful or oppressive means, and are not guilty of a common-law conspiracy.

Finally, the complainant contends that the agreement amounts to a conspiracy under the Penal Code of the state of New York (section 168, subds. 5 and 6). But the principles applicable to conspiracies at common law, which we have considered, apply to conspiracies under the statute. The test of the application of the statute is the purpose of the combination, and if the object and means be lawful, there is no conspiracy, even though a third person may be incidentally injured.

And so the conclusion must be that the Circuit Court was right in dismissing the complaint. Nevertheless it cannot be denied that the complainant has ground for complaining. It desires to engage in a lawful and legitimate business in a lawful and legitimate way and is practically prevented from so doing by the acts of the defendants. Its right to do business in the manner it desires is interfered with, and the law affords it no remedy because such interference is only incidental to the exercise by the defendants of their own right to contract for their own benefit. The complainant is injured, but has no remedy. The law could only make it possible for the complainant to do business in the way it chooses by compelling the defendants to do business in the way they do not choose. But, when equal rights clash, the law cannot interfere.

Decree affirmed, with costs.

WALTHER v. WILLIAMS MERCANTILE CO.

WILLIAMS MERCANTILE CO. v. WALTHER.

(Circuit Court of Appeals, Sixth Circuit. April 15, 1909.)

Nos. 1,860, 1,874.

1. SALES (§ 4*)—DISTINGUISHED FROM BAILMENT.

A contract between a mercantile company and the bankrupts provided that the company should place its stock of merchandise and business in the hands of the bankrupts to be operated by them for a year as a general retail store on conditions agreed on, viz., that the bankrupt should take the stock as per inventory, conduct the business, paying all expenses, including rent, insurance, taxes, clerk hire, and sell the goods for cash only or to responsible parties, and that they would replenish the stock so that it should be at no time less than $500 below the inventory amount, and at the close of the term, if the value should be less than when taken by the bankrupts, they should pay the mercantile company the deficiency, and, if greater, the mercantile company would pay for the excess to $500. It was agreed that the title to the stock and the additions should remain in the mercantile company, and the bankrupts, for the use of the stock, should pay 12 per cent. on all sales to $30,000, 10 per cent. on sales above

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

$30,000 and up to $40,000, and 9 per cent. above $40,000, during the year, and should have the balance of the profits for their services and operating expenses. *Held*, that the contract was one of bailment, and not a sale, and was valid under the Michigan law.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 7–11; Dec. Dig. § 4.*]

2. BAILMENT (§ 3*)—CONTRACTS—REGISTRATION OR FILING.

A contract of bailment, by which possession of a mercantile stock and business was transferred to the bankrupts, who were to operate the same for a year in consideration of payment of certain percentages on sales, was not required by any law of Michigan to be recorded or filed.

[Ed. Note.—For other cases, see Bailment, Dec. Dig. § 3.*]

3. BANKRUPTCY (§ 326*)—SET-OFF—"MUTUAL DEBITS AND CREDITS."

A bailment contract transferring the possession of a mercantile business to the bankrupts to operate the same for a year provided that, for the use of the property, the bankrupts should pay to the bailor certain percentages on sales, and rent and insurance, that the bankrupts should keep the stock up to within $500 of the original inventory value, that on termination of the contract the bailor should pay any inventory excess up to $500, and that the bankrupts should be liable for any deficiency. On the termination of the contract, the inventory excess amounted to $1,323.42, but the bankrupts were indebted to the bailor on account of unpaid insurance and percentages on sales, etc., $679.73. *Held*, that such items were "mutual debits and credits" as defined by Bankr. Act July 1, 1898, c. 541, § 68, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3450), providing that such claims shall be set off in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 514; Dec. Dig. § 326.*]

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

Jacob Kleinhaus, for Fred E. Walther.

Jas. H. Campbell and Isaac C. Wheeler, for Williams Mercantile Co.

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

TAYLER, District Judge. On the 30th of December, 1905, the Williams Mercantile Company, a corporation of the state of Michigan, then and for some years prior thereto doing a general mercantile business at Manton, Mich., entered into a contract with William J. Walker and Walter C. Williams, whereby the Mercantile Company agreed to place its stock of merchandise and business in the hands and control of Walker & Williams, to be operated by them for a period of one year as a general retail store upon the terms and conditions set out in the contract.

It was agreed that Walker & Williams should take the stock of merchandise as per an inventory to be taken during the second week of January, 1906, and immediately take possession, operate, and conduct the business in a thorough, efficient, and businesslike manner, employing sufficient help for the purpose, paying all expenses, including rent, insurance, taxes, clerk hire, etc., and sell goods for cash only or to responsible parties. Walker & Williams further agreed that they would replenish the stock as rapidly as goods should be sold therefrom as nearly as might be, so that the stock on hand should

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

at no time be less than $500 below the amount as shown by the inventory, if inventoried at cost price. If, at the close of the term, the value of the stock of goods should be less than when taken over by Walker & Williams, as shown by inventories, then Walker & Williams were to pay to the Mercantile Company in cash the amount of such deficiency; and if, at the close of the term, the value of the stock of goods should be greater than when taken over by Walker & Williams, the Mercantile Company was to pay for such excess to the extent of $500 only. Walker & Williams agreed to keep the stock insured during the life of the agreement to the extent of 80 per cent. of the inventory value for the benefit of the Mercantile Company, and in default of their procuring and keeping up such insurance the Mercantile Company had a right to effect the same, and Walker & Williams agreed to repay the premiums so paid for insurance. It was agreed that the title to the stock of goods and merchandise, with the additions thereto, should become, be, and remain in the Mercantile Company. Walker & Williams agreed to pay, and the Mercantile Company agreed to accept, "for the use of said stock of goods," 12 per cent. on all sales up to $30,000, 10 per cent. on all sales above $30,000 and up to $40,000, and 9 per cent. on all sales above $40,000, during the year 1906. Walker & Williams were to have the balance of the profits on the sale of goods as pay for their services and to cover the expenses of operating and carrying on the business. The other provisions of the contract relate to the manner in which accounts should be rendered and the parties be protected in their rights.

Thereupon the Mercantile Company, on the 11th day of January, 1906, turned its stock of goods and business over to Walker & Williams, who continued to operate the store for the year following and sold during that period goods to the amount of $43,250.59, on which they paid, prior to the day when the stock was turned back to the Mercantile Company, all of the percentages provided for accruing up to the 1st of December, 1906. Early in January, 1907, the Mercantile Company repossessed itself of the entire stock of goods then on hand. The invoice value of the goods when turned over in January, 1906, was $14,053.31. On the day they were returned to the Mercantile Company the inventory value was $15,375.73. In the year during which Walker & Williams were in possession of the store they bought and added to the stock goods to the amount of $41,649.85. Of the goods which were turned back to the Mercantile Company when they assumed possession of the stock about one-half of it was made up of goods which were in stock when originally turned over to Walker & Williams. In 1907, when Walker & Williams gave up possession of the goods, they were indebted, on account of the business, about $10,000, and there was due them on accounts between $5,000 and $6,000. Individually, they were people of small means; each of them being the head of a family and owning a homestead worth about $1,200.

At the time when the Mercantile Company took possession of the stock of goods, it did not insist upon the enforcement of that provision of the contract which required it to pay to Walker & Williams only to the extent of $500 for such excess as the value of the goods

then turned over had over the inventory value when originally turned over, but settled as if it was required to pay the full amount, $1,323.42, the actual excess in the later value over the first value. During the year the Mercantile Company had paid on account of insurance on the property $362. There was due to it on account of percentages for sales about $360, and for rent during December and 10 days in January between $40 and $50, making the entire amount of the indebtedness of Walker & Williams to the Mercantile Company, growing out of the contract, $769.73. Deducting this indebtedness from the sum of $1,323.42, representing the excess of the last over the first inventory, the Mercantile Company paid to Walker & Williams $553.60.

On the 6th day of March, 1907, a petition in involuntary bankruptcy was filed against Walker & Williams in the District Court, and thereafter they were adjudged bankrupts, and Frederick E. Walther was elected trustee. Later the trustee brought this action, seeking to recover from the Williams Mercantile Company the stock of goods so turned over to them by Walker & Williams and for damages. On the trial the District Court ruled against the trustee as to his claim to title to the stock of goods turned over by the bankrupts, but directed the jury to return a verdict for the plaintiff for $769.73, with interest, making in all $801.80, being the difference between the amount of cash which the Mercantile Company paid to the bankrupts and the excess value of the goods as turned over at the time above the inventory value the year before, on the ground that there was a preference given to the Mercantile Company to that extent. Both sides prosecute error; the trustee to the decision of the court that the Mercantile Company was entitled to receive back the stock of goods from the bankrupts, and the Mercantile Company from the direction of the court to return a verdict against it for $801.80.

As to the first of these questions: The theory of the trustee, on which he prosecuted his original case and now prosecutes error, is that the transaction between the Mercantile Company and Walker & Williams was a sale, and therefore the turning back of the property in January, 1907, was the payment of a debt, and, if so, a preference. The court below denied the validity of this claim. We are of opinion that the District Court was right in holding that no sale was made by the terms of the contract whereby the bankrupts went into the possession of the stock of goods January 11, 1906, and that therefore the relation of debtor and creditor, as to the stock of goods, did not arise between them. If that be true, it necessarily follows that no preference could be given by permitting the Mercantile Company to repossess itself of the stock at the termination of the agreement. Whether such a transaction could on behalf of the creditors, in any other way than that resorted to here, be avoided, is not before us. It is enough to say that the contract itself was one in the nature of a bailment, and was not made invalid or impossible of execution because the stock was to be sold in the usual course of trade and that such of the goods purchased from time to time to replenish stock as remained in stock at the termination of the agreement should belong to the Mercantile Company.

The contract related not only to a stock of goods, but to a business. The stock is treated as a unit. It is to be kept up to a certain standard. It is to be returned to the owner, according to that standard, in one year. The necessities of the situation, as well as the specific terms of the contract, contemplated sales and replenishment of the stock, while the title to all should be and remain in the Mercantile Company, subject only to its obligation to pay for the surplus up to $500 over the original inventory value. A contract of this character, whereby possession is given to another than the owner with the right to sell in the usual course of trade, and the title thereof together with the results of replenishment of the stock for the purpose of maintaining the stock and business as a unit to remain in the owner, is not in violation of the settled law of the state of Michigan. No law of that state required that such an agreement should be recorded or filed. The rule of law in force in Michigan is declared in Erwin v. Clark, 13 Mich. 10, and Ledyard v. Hibbard, 48 Mich. 421, 12 N. W. 637, 42 Am. Rep. 474. To the same effect is Richardson v. Shaw, 209 U. S. 365, 28 Sup. Ct. 512, 52 L. Ed. 835. There was no error therefore in the ruling of the court respecting this branch of the case.

We come now to the second question, arising out of error proceeding No. 1,874, prosecuted by the Mercantile Company. As we have seen, when the goods were appraised at the termination of the period, their value was $1,323.42 in excess of the inventory of 1906; and that, while the contract bound the Mercantile Company to pay no more than $500 for any such surplus, this point seems to have been waived, and the transaction was dealt with on the basis of an obligation by the Mercantile Company to pay the full amount of the surplus. Meantime these several items already referred to of indebtedness growing out of the contract accrued in favor of the Mercantile Company; that is to say, the insurance, percentages on the sales, and the rent. The state of the case when the Mercantile Company took over the stock of goods on January 10, 1907, was this: That, growing out of the contract, the Mercantile Company was to pay to Walker & Williams $1,323.42, and Walker & Williams, on account of the same contract and incidental to it, owed the Mercantile Company $769.73.

We are unable to see why these items do not constitute "mutual debits and credits" as defined by section 68 of the Bankruptcy Law (Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3450]), wherein it is provided that:

> "In all cases of mutual debits or mutual credits between the estate of a bankrupt and a creditor, the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid."

In this case, the balance was against the Mercantile Company and was paid by it to Walker & Williams. The theory upon which the decision of the court below must have rested was that on the state of facts which existed the Mercantile Company was bound to pay $1,323.42 for the surplus stock and look to the bankrupts' estate for their indebtedness to it. This theory seems to us unsound. We think that under the undisputed facts one claim might be set off against the other.

The contract may be said to have had two phases; one, requiring Walker & Williams to turn back to the Mercantile Company the stock of goods. This was the bailment part of the contract. Naturally and incidentally, certain other obligations arose between the parties in connection with this contract: On the one hand, an indebtedness of the Mercantile Company to Walker & Williams for any surplus stock which might be turned over to it, and, on the other hand, an indebtedness of Walker & Williams to the Mercantile Company for insurance, for percentages on sales, and for rent. These were all parts of the same contract, and existing, as they did, at the time when the stock of goods was turned back to the Mercantile Company, must be considered as mutual debits and credits, the one to be offset against an equal amount of the other.

It follows from this that the decision of the court below as to this point must be reversed, and the general order would be to affirm the court in case No. 1,860 and to reverse in case No. 1,874.

CLYDE COMMERCIAL S. S. CO., Ltd., v. WEST INDIA S. S. CO.

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

No. 169.

1. SHIPPING (§ 39*)—CHARTERS—CONSTRUCTION—DEMISE OF VESSEL.

A time charter of a steamer to be officered, manned, provisioned, maintained, and navigated by the owner, and to be placed at the disposal of the charterer to the extent of her cargo space, is not a demise of the vessel, although the charter party speaks of her "delivery" to the charterer.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 39.*]

2. SHIPPING (§ 39*)—CHARTERS—CONSTRUCTION OF CHARTER PARTY.

A provision in a charter party, which contains independent covenants to be performed by each party, that acts of God, enemies, perils of the seas, errors of navigation, etc., are mutually excepted, operates merely to relieve either party from liability to the other on account of the breach of any of such covenants on his part, where it results from any one of the excepted causes. Such exceptions do not apply, however, to a special provision for the suspension of charter hire for delay, resulting from any one of certain enumerated causes, many of which are the same as those specified in the exceptions.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 39.*]

3. SHIPPING (§ 49*) — CHARTER — DEDUCTION OF CHARTER HIRE—DETENTION OF VESSEL IN QUARANTINE—"DEFICIENCY OF MEN"—"RESTRAINT OF PRINCES OR PEOPLE."

The detention of a vessel under a time charter at an intermediate port on her voyage under a general quarantine regulation of the state because she came from a port which under such regulations was presumptively infected was not caused by a "deficiency of men" constructively or otherwise, within a clause of the charter party relieving the charterer from the payment of hire in case of delay from such deficiency, but was through "restraint of princes or people" within a provision mutually excepting such cause, and the charterer is entitled to no deduction therefor.

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

For other definitions, see Words and Phrases, vol. 7, p. 6186.

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

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

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

Convers & Kirlin (J. Parker Kirlin and John M. Woolsey, of counsel), for appellant.

Wheeler, Cortis & Haight (Charles Haight and Clarence Bishop Smith, of counsel), for appellee.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

WARD, Circuit Judge. This is a libel by the owner of the steamship Santona to recover deductions made by the charterer from the charter hire. The charter party contains the following provisions material to be considered:

"The said owners agree to let and the said charterers agree to hire the said steamship from the time of delivery for six calendar months. Steamer to be placed at the disposal of the charterers at a safe U. S. Atlantic port. * * * It is understood that steamer is to come out in ballast * * * being on her delivery ready to receive cargo and tight, staunch, strong and in every way fitted for the service * * * (and with full complement of officers, seamen, engineers and firemen for a vessel of her tonnage) and to be so maintained during the continuation of this charter party.

"(1) That the owner shall provide and pay for all provisions, wages, and consular shipping and discharging fees of the captain, officers, engineers, firemen and crew * * * also for all the cabin, deck, engineroom and other necessary stores and maintain her in a thoroughly efficient state in hull and machinery for and during the service.

"(2) That the charterers shall provide and pay for all the coals, fuel, port charges, pilotages, agencies, commissions, consular charges (except those pertaining to the captain, officers or crew) and all other charges whatsoever except those before stated."

"(4) That the charterer shall pay for the use and hire of said vessel 962 pounds ten shillings per calendar month commencing on and from the date of her delivery," etc.

"(6) Payment of said hire to be made in cash semimonthly in advance at New York * * * and in default of such payment or payments as herein specified the owner shall have the faculty of withdrawing said steamer from the service of the charterers without prejudice to any claim that the owners may otherwise have on the charterers in pursuance of this charter."

"(9) That the whole reach of the vessel's holds, decks, and usual places of loading and accommodation in the ship (not more than she can reasonably stow and carry) shall be at the charterers' disposal reserving only proper and sufficient space for ship's officers, crew, tackle, apparel, furniture, provisions, stores, and fuel.

"(10) That the captain shall prosecute his voyages with the utmost dispatch. * * *"

"(14) That the master shall use all diligence in caring for the ventilation of the cargo.

"(15) That in the event of the loss of time from deficiency of men or stores, breakdown of machinery, stranding, fire or damage preventing the working of the vessel for more than twenty-four running hours the payment of hire shall cease until she be again in an efficient state to resume her service. * * *"

"(17) The act of God, enemies, fire, restraint of princes, rulers and people and all dangers and accidents of the seas, rivers, machinery, boilers and steam navigation and errors of navigation throughout this charter party always mutually excepted."

"(21) Steamer is to be docked, bottom cleaned when an opportunity occurs in U. S. north of Hatteras or in Europe and payment of the hire to be suspended until she is again in proper state for the service. * * *"

It will thus be seen that the owner officered, manned, and provisioned the vessel, was in entire control of her navigation, and bound to maintain her during the charter party in good condition. The expression "delivery" of the vessel to the charterer and "delivery" by it at the end of the term to the owner is to be construed in connection with these provisions and with the further provision that she was to be "placed at the disposal of the charterers" to the extent of the space agreed upon. We entertain no doubt that the charter did not amount to a demise of the vessel. Reed v. United States, 78 U. S. 591, 20 L. Ed. 220; United States v. Shea, 152 U. S. 178, 14 Sup. Ct. 519, 38 L. Ed. 403. If she had been at fault for a collision during the term, it would scarcely be contended that the charterer would be personally responsible.

Irrespective of the special provisions and exceptions, there can be no doubt that, if the owner failed to perform any of its covenants, it would be responsible in damages to the charterer which might be measured in some cases by the charter hire and which in other cases might be more or less than the charter hire. If the charterer failed to perform its covenants, it would likewise be liable to the owner in damages, measured if the failure were in payment of the charter hire by the amount of hire unpaid with interest, or, if it were a failure to provide coals or pilots or pay port charges, measured by the amount of the damages so caused to the owner. The parties, however, did provide a series of exceptions in article 17 which are described as "mutual." We think this word cannot be construed in the sense of reciprocal in respect to the same broken engagement because the charter party contains no such reciprocal or interdependent covenants. The charterer makes no special covenant in consideration of the owner's undertaking to maintain the hull and machinery in good condition (1); to put the agreed space at the disposal of the charterer (9); to prosecute the voyage with dispatch (10); to ventilate the cargo (14); and to clean the ship's bottom (21). Its covenant to pay charter hire (4 and 6) is in consideration of the performance by the owner of all its covenants. Similarly the owner covenants nothing in special consideration of the charterer's undertaking to provide coals and pilotages and pay for port charges, etc. (2); all its covenants together being made in consideration of the charterer's single covenant to pay hire. By mutual we understand that the parties intended the exceptions to protect each from liability to the other whenever performance of any covenant was prevented or delayed by any exception. If the owner were prevented from maintaining the vessel in an efficient state or from giving the whole space contracted for or from prosecuting the voyage with dispatch or from properly ventilating the cargo or cleaning the ship's bottom by any of these exceptions, he would not be responsible to the charterer. On the other hand, if the charterer were so prevented from furnishing coals, paying port charges or furnishing pilots or from paying hire on the date fixed, it would be relieved from liability therefor to the owner, and, in the case of charter hire, the owner could not withdraw the steamer as provided in article 6.

If the causes enumerated in article 15 for which payment of hire is suspended were wholly different from the exceptions in article 17,

it might be fairly contended that those exceptions applied to them, but they include many categories exactly alike. If hire is to be suspended for delay over 24 hours caused by breakdown of machinery, that delay is immediately excused by the exception of accidents to machinery in article 17. Suspension in case of stranding is immediately excused, whether the owner is at fault or not, by the exception of accidents of the sea or errors in navigation; suspension in case of fire by the exception of fire. This leads us to the conclusion that article 15 must be understood to state absolute categories in which the parties intended the hire to be suspended whether the owner was at fault or not, and therefore that article 17 does not apply to them at all.

Hard cases may be imagined, but the question is what does the contract, as written, mean, and by it the parties must abide whether the results are hard or not. The vessel was detained at Colon after she had discharged her cargo, and before she proceeded on her voyage, one day 18½ hours. The master wrote to the charterer at the time that he had to remain because the second and third engineers, having developed fever, were too weak to attend to their duties; "so I had to remain, but hope to get away to-morrow morning." The master having lost the time because he had not, or thought he had not, a sufficient crew to proceed with (though subsequent events showed he was wrong in this particular), the delay was due to a deficiency of men under article 15, and the charterer was entitled to deduct charter hire for that time. The vessel was subsequently delayed 10 days and 20 hours at Sabine because of the quarantine laws of the state of Texas. The proclamation of the Governor by authority vested in him by the laws of that state declared every vessel coming from a port south of 25 degrees north latitude to "be considered infected unless proof to the contrary be submitted to the state health officer and special exemption be granted to said places. * * *" The Santona came from such a port, viz., Colon, and, as she was detained as infected, it is fair to assume that no such exemption had been granted to Colon. The proclamation further provided:

"Vessels from an infected place having had sickness or deaths en route, but having no sickness at the time of arrival, will be disinfected and held seven full days after disinfection under observation before being released and a longer time if considered necessary by the said health officer."

The Santona fell within this description, and her detention was prolonged after the first seven days because some new cases of fever appeared. The delay was not caused by a deficiency of men constructive or otherwise, as in the case of Tweedie Trading Co. v. Emery, 154 Fed. 472, 84 C. C. A. 253. In that case the crew were constructively deficient, just as the vessel in this case was constructively infected. There was, therefore, no deficiency of men within article 15.

Detention by quarantine authority is a restraint of princes or people. The Progresso (D. C.) 42 Fed. 229; Id., 50 Fed. 835, 2 C. C. A. 45; The Santona (C. C.) 152 Fed. 516; Carver on Carriage of Goods by Sea, § 82. Accordingly this exception which prevented the owner from prosecuting his voyage with dispatch relieves him from liability to the charterer for the delay so caused. The case is to be treated as if no

delay had occurred. On the other hand, the charterer is not protected by the exception from paying hire because it was not thereby prevented from paying hire and because it had the use of the vessel for which it was to pay notwithstanding the interruption. The case is not at all like that of Northern Pacific Railway Co. v. American Trading Co., 195 U. S. 439, 25 Sup. Ct. 84, 49 L. Ed. 269, in which a deputy collector, through his mistaken understanding of the law, refused a clearance to a steamer unless a shipment of lead which was contraband of war during the Chinese-Japanese War were first discharged. In that case there was no statute of the United States nor any proclamation of the President requiring clearance to be refused to a vessel having on board articles contraband of war. Mr. Justice Peckham said:

"Here there was no intervention of the government of the United States. The exportation of lead was never prohibited by the Treasury Department during the war between China and Japan. There was no change in the law or the policy of this government subsequently to the making of the contract by which its performance was excused. The exportation of the lead was legal when the contract was made and continued to be so after the execution of such contract, although the deputy collector mistakenly refused to grant the clearance unless the lead was taken off the vessel. Such mistaken decision did not render the original loading of the lead on the ship unlawful, nor would it have been unlawful for the ship to proceed with the lead on board provided the clearance had been had. It was not an act of the state, therefore, which prevented the sailing of the vessel within the true meaning of such a term, but a mistaken act of a subordinate official not justified by law, and not sufficient as an excuse for the nonperformance of the contract in question under the circumstances already detailed. If the bill of lading were regarded as applicable for this purpose, the refusal of the clearance did not constitute a 'restraint of princes, rulers or people,' within that clause of the bill."

The decree is reversed, and the court below directed to enter a decree for the libelant for the amount deducted from charter hire for delay at Sabine, with interest and one-half the costs of both courts.

MORIMURA BROS. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. April 13, 1909.)

No. 212 (4,986).

1. CUSTOMS DUTIES (§ 37*) — CLASSIFICATION—RICE PASTE CURTAINS—EJUSDEM GENERIS—"ARTICLES IN PART OF BEADS."

Curtains in chief value of rice paste formed into regular-shaped particles are dutiable under Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 408, 30 Stat. 189 (U. S. Comp. St. 1901, p. 1673), relating to "articles * * * in part of beads," not being excluded by the doctrine of ejusdem generis, though the paragraph also enumerates laces, wearing apparel, ornaments, etc.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. § 122; Dec. Dig. § 37.*]

2. CUSTOMS DUTIES (§ 25*)—CLASSIFICATION—"PASTE."

The provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 112, 30 Stat. 158 (U. S. Comp. St. 1901, p. 1635), for manufactures of "paste,"

Includes only the form of paste which is a variety of glass, and does not embrace articles made from rice paste.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 25.*]

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 affirming a decision by the Board of United States General Appraisers, G. A. 6,628 (T. D. 28,257), which had affirmed the assessment of duty by the collector of customs at the port of New York. The board held that by virtue of the similitude clause in Tariff Act July 24, 1897, c. 11, § 7, 30 Stat. 205 (U. S. Comp. St. 1901, p. 1693), the articles in question were dutiable as "articles * * * in part of beads," under section 1, Schedule N, par. 408, 30 Stat. 189 (U. S. Comp. St. 1901, p. 1673), even if they were not in fact composed of beads.

The paragraph referred to reads in part as follows:

"408. * * * Laces, embroideries, galloons, wearing apparel, ornaments, trimmings and other articles not specially provided for in this act, composed wholly or in part of beads or spangles made of glass or paste, gelatin, metal, or other material, but not composed in part of wool, sixty per centum ad valorem."

In the oral argument and in their brief the importers' counsel urged especially that the goods in controversy (curtains) were excluded from said paragraph under the doctrine of ejusdem generis, and contended for assessment either under Schedule B, par. 112, 30 Stat. 158 (U. S. Comp. St. 1901, p. 1635), relating to manufactures of "paste," or under section 6, 30 Stat. 205 (U. S. Comp. St. 1901, p. 1693), relating to unenumerated manufactures.

The board's opinion reads as follows:

SHARRETTS, General Appraiser. The merchandise in question consists of curtains made of wood, cotton cord, and rice paste. It is stipulated in the record that rice paste is the component material of chief value in the completed articles, which are dealt in under the generic name of "rice curtains." * * * The only provision in the act for manufactures of "paste" is in the schedules dealing with "glass and glassware," and in both the jewelry and glassware schedules in the several paragraphs relating to "paste" the latter word is always coupled with glass. Hence we have no difficulty in reaching the conclusion that rice dough, although probably paste, within the dictionary definition of the word, is not the substance provided for in paragraph 112, which includes only the variety of glass known as "paste." U. S. v. Popper et al., 66 Fed. 51, 13 C. C. A. 325. In consonance with this conclusion we hold the disputed articles are either dutiable at 20 per cent. ad valorem, as claimed, under section 6, or at 60 per cent. ad valorem, as assessed, either directly or by similitude, under paragraph 408.

It requires merely an inspection of the exhibits in this case to show that rice curtains bear a very close resemblance to beaded curtains, if, indeed, they are not such in fact. The same conditions obtain as to numerous other articles, such as glass bead fan chains, necklaces, ornaments, etc., exact counterparts thereof now being made of rice dough, as may be seen by an inspection of the exhibits in Re Cattus, protest 250,770, decided concurrently with this case, Ab. 15,858 (T. D. 28,278). There is some evidence tending to show that the small particles, when removed from the strings—which may readily be done without destroying them—would be known as beads; but upon this point commercial designation cannot be invoked, the testimony being conflicting.

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

We are not much impressed with the argument of importers' counsel that beads must be made of some durable substance, nor that the particles, if separated from the strings, would be discarded as waste. Rice dough, if baked to extreme hardness, is equally as durable as gelatin, which is enumerated among the materials of which beads or spangles are made; nor would any attempt be made to recover glass beads of a similar size to those in question, were they to be separated from the string. Unquestionably both descriptions, if so separated, would be swept out as worthless. There is much force in the argument of the attorney for the government that witnesses who do not deal in rice curtains were not qualified to pass upon the commercial description of such articles. We do not, however, feel that it is incumbent upon us to determine whether or not the articles are composed wholly or in part of beads.

Section 7 provides that articles not enumerated in the tariff act, which are similar either in material, quality, texture, or the use to which they may be applied, to any article enumerated therein as chargeable with duty, shall pay the same rate of duty which is levied upon the enumerated article which it most resembles in any of the particulars mentioned. Curtains composed in chief value of beads are enumerated as articles composed wholly or in part of beads. Rice curtains are so similar to beaded curtains as to leave a doubt in our minds if they are not such in fact. They take their place among the latter in trade and commerce; and this fact alone, in our opinion, is sufficient to defeat the importers' claim. Even were all of the requirements of material, quality, texture, and intended purpose of use, etc., instead of any one, we do not think there is a sufficient difference between beads composed of gelatin or wax and baked rice dough, nor in either of the other respects mentioned, to eliminate them from the similitude provision.

In accordance with the views herein expressed, and following decisions of this board (see G. A. 6.150, T. D. 26.707, and G. A. 4.189, T. D. 19.495), we overrule the protests and affirm the decision of the collector in each case.

Kammerlohr & Duffy (John G. Duffy, of counsel), for appellants.
J. Osgood Nichols, Asst. U. S. Atty.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. Decision of the Circuit Court affirmed.

PYMAN S. S. CO., Limited, v. MEXICAN CENT. RY. CO.

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

No. 200.

SHIPPING (§ 175*)—DEMURRAGE—CONSTRUCTION OF CHARTER PARTY—LOADING.

Under a charter party providing for the payment of demurrage by the charterer for delay in loading or discharging beyond the lay days specified, "except in case of strikes or any other accidents or causes beyond the control of the charterer," the charterer is not liable for delay in loading caused by the refusal of the owner of the coal dock at which the vessel was directed to load, and which was the only one at which the charterer could reasonably load, to give her proper dispatch, which was a cause "beyond the control of the charterer," within the meaning of the exception.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 572; Dec. Dig. § 175.*

Demurrage, see notes to Harrison v. Smith, 14 C. C. A. 657; Randall v. Sprague, 21 C. C. A. 337; Hagerman v. Norton, 46 C. C. A. 4.]

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

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 awarding to the libelant, the owner of the steamship Dunholme, demurrage by reason of her detention in the port of Philadelphia from December 24, 1906, to January 4, 1907. The opinion of the District Judge will be found in 164 Fed. 441.

Frederick R. Swift (George L. Kobbe and Joseph H. Choate, Jr., of counsel), for appellant.

J. Parker Kirlin and Russell T. Mount, for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. The relevant clauses of the charter party are as follows:

"* * * That the said steamer * * * shall * * * proceed to the port of Philadelphia and after discharge of her inward cargo there load in the customary manner from the agents of the freighters, at such dock or wharf as she may be ordered to by charterers' agents on arrival, full and complete cargo, consisting of about 5,000 tons of coal. * * *

"It is agreed that the days for loading and discharging shall be as follows: Commencing at 6 o'clock a. m. on the day after vessel reports and is ready to receive or discharge cargo. Cargo to be loaded at customary dispatch. * * *

"Demurrage, if incurred, to be paid by the charterers or their agents at the rate of 10 cents United States currency per net registered ton per day (except in case of strikes or any other accidents or causes beyond the control of the charterers which may prevent or delay the loading and or discharging). Detention by frost or quarantine not to be reckoned in lay days."

Several points have been discussed in the briefs, but it will be necessary for us only to consider the exception in the last of the above-quoted paragraphs.

The findings of the District Judge, which are here summarized, are supported by the testimony and sufficiently set forth the facts. After arrival at the port of Philadelphia the vessel discharged, put herself in condition to receive cargo, and gave written notice of the fact. The cargo provided was ready at the piers of the Pennsylvania Railroad Company at Greenwich Point, in that port. In Philadelphia coal as cargo is never loaded in any other way than through chutes, from which coal contained in railroad cars is dumped directly into the holds of vessels. There are only three places at which coal in cargo quantities can be thus loaded. These are the piers of the Pennsylvania Railroad at Greenwich Point, those of the Baltimore & Ohio Railroad Company at Jackson street, and those of the Philadelphia & Reading Company at Port Richmond. Vessels of the size of the Dunholme cannot be loaded at the Baltimore & Ohio piers at Jackson street, and there are but four berths at which she could be loaded at Greenwich, and but one at Port Richmond. These various piers were entirely under the control of the railroad companies, which owned them, and no shipper had any power to control the order in which vessels should be admitted to them, nor to procure a berth for any vessels, except as the owners of the piers might permit. Before the steamer finished discharging, charterer's agent communicated with the officer in charge

of the Pennsylvania Railroad piers, who had the power to determine the order in which vessels should receive their berths, notifying him that the Dunholme would require a berth on or about December 17th. Thereafter he made repeated and persistent applications to the proper officers of the railroad to secure a berth, and, as the District Court finds, "respondent did all it could to expedite the loading."

It was suggested on the argument that the coal provided for her cargo might have been sent through the city by rail from Greenwich Point to Port Richmond; but the evidence indicates that it was not within the power of the shipper to compel the connecting railroads so to convey. The vessel was delayed two weeks by the arbitrary action of the Pennsylvania Railroad, which, instead of giving her proper dispatch, postponed her admission to a berth until after other vessels, which came later, but which happened to belong to shippers whom the railroad favored, had been admitted and loaded. The cause of this delay in loading was evidently "beyond the control of the charterers," in the ordinary use of that phrase, and we are not persuaded to the conclusion that it means anything else because it is included in the same sentence with "strikes or any other accidents." She was deprived of her turn because a third person, who controlled the situation, refused to let her have it, and such deprivation was the proximate cause of the delay.

The decree is reversed, with costs of this appeal, and cause remanded, with instructions to decree in conformity with this opinion.

KUTTROFF, PICKHARDT & CO. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. April 13, 1909.)

No. 154 (5,024).

CUSTOMS DUTIES (§ 38*)—FREE LIST—CHROME ALUM—"CRUDE STATE."

The provision for articles in a "crude state," in Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 482, 30 Stat. 195 (U. S. Comp. St. 1901, p. 1680), does not include chrome alum, which is removed from its crude state of a paste by a crystallizing process, in which it is freed from incidental impurities.

[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. 6,647, T. D. 28,346), which affirmed the collector at the port of New York. The importation is commercially known as "chrome alum," and was classified under Act July 24, 1897, c. 11, § 1, Schedule A, par. 3, 30 Stat. 151 (U. S. Comp. St. 1901, p. 1627), as a "chemical salt." It is concededly a chemical salt; but the importers contend that it is entitled to free entry under paragraph 482:

"Articles in a crude state, used in dyeing or tanning, not specially provided for."

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

The opinion filed in the Circuit Court reads as follows:

HAZEL, District Judge. The Board of Appraisers in this case affirmed the decision of the collector, who assessed the merchandise herein as a chemical salt dutiable at 25 per centum ad valorem under paragraph 3 of the act of 1897. The chief question involved herein is whether the merchandise, described as chrome alum, in its imported state was crude within the meaning of law. The witnesses agree that when the importation was received in this country it was in the crudest form known to commerce. It is sold to tanners, dyers, and manufacturers of mordants for dyers. The Board of General Appraisers gave careful consideration to the question submitted, and reached the conclusion that to crystallize the article—that is, to make it commercially salable—it required refining or purifying by chemical process and treatment, and on account thereof it was held not to be in a crude state. The importers, however, contend that under the doctrine of United States v. Merck, 66 Fed. 251, 13 C. C. A. 432, United States v. Godwin (C. C.) 91 Fed. 753, and Roessler & Hasslacher Chemical Co. v. United States (C. C.) 94 Fed. 822, the merchandise was in fact in a crude condition, entitling it to free entry under paragraph 482 of the tariff act of 1897, which reads: "Articles in a crude state used in dyeing and tanning not specially provided for in this act."

The contention is without merit. In the Merck Case the court had before it a drug known as "elaterium," which the government contended was a medicinal preparation, but the court was of opinion that it was a drug in its crudest form. The evidence showed that to put the juice of the fruit from which the drug was produced in the condition of importation simply required its subjection to a process of evaporation and drying, which, however, did not advance the article from its crude state. In the Godwin Case, Judge Wheeler held that to dry the powder of the pawpaw melon in the sun and sift the same to remove deleterious substances was not a process of refining or of manufacture, and the article retained its crude condition. In the Roessler Case the controversy related to zinc dust, and, in the judgment of the court, partially oxidized atoms of zinc, which is obtained as a by-product in the refining of zinc, was an article in a crude state. These cases are not precedents for such a determination in the case at bar, in view of the fact, which is clearly established by the evidence, that chrome alum, the by-product obtained from oxidizing anthracene, after reduction, contains impurities which necessitate careful and extensive refining to render it commercially salable, and hence can hardly be said not to have been materially advanced in manufacture. As stated in the opinion of the board: "The evidence conclusively shows that the article (when imported) is refined, is prepared by artificial process, and is in a complete form needing no other preparation for its use."

Moreover, it is held that, when an article has been assessed at a rate of duty which is acquiesced in for a long period of time, such classification is entitled to consideration. The undisputed evidence shows that the merchandise of the character under consideration as a rule has without protest been returned for duty as a chemical salt. This rule is not inaptly invoked here. Hills Bros. Co. v. United States (C. C.) 143 Fed. 695, affirmed (Dec. 4, 1906) 151 Fed. 476, 81 C. C. A. 14.

The decision of the Board of General Appraisers is affirmed.

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

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

Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. The only question in the case is whether the article is "in a crude state." It is derived as a by-product of the process of manufacturing certain coal-tar colors. In such process chromium sulphate and potassium sulphate are formed, and these two products, combined with water, constitute chrome alum; but, as the evidence shows, it remains at the close of the process "as a grayish, greenish

paste." This seems to be its crude state; but the paste is thereafter treated with sulphuric acid, and from the solution the chrome alum of importation crystallizes out, being thereby freed from incidental impurities. We concur with the board and the Circuit Court that chrome alum thus crystallized is not in a crude state.

Decision affirmed.

JAMES SHEWAN & SONS v. NEW ENGLAND NAVIGATION CO.

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

No. 172.

SHIPPING (§ 79*)—LIABILITY OF VESSELS FOR TORTS—INJURY TO FLOATING DRY DOCK FROM SWELL—CONTRIBUTORY FAULT.

The owners of a floating dry dock, permanently stationed alongside a pier, where it was held by means of wooden collars passing over heavy spuds driven in the bottom, having room to move up and down with the rising and falling of the tide, which was injured by the excessive swell caused by a passing steamer, *held* not chargeable with contributory fault because of the manner of fastening the dock, where it had been the same for five years, during which time the dock had received no serious injury from passing vessels; and the steamer *held* liable for the entire damages.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 79.*

Liability of vessel for injuries caused by creation of swell, see note to The Asbury Park, 78 C. C. A. 3.]

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

For opinion below, see 155 Fed. 860.

Foley & Martin, for libelants.

James T. Kilbreth, for respondent.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

WARD, Circuit Judge. The libelants are the owners of a floating dry dock attached to the north side of the pier at the foot of Fourth street, East River. It consists of a pontoon, with bulkheads extending 200 feet on each side; the one on the pier side having four wooden collars or saddles, about 50 feet apart, which run up and down on four 20x20 oak spuds driven 16 feet into the bottom, their upper ends being clamped to the pier. This system allows the dock to slide up and down on the spuds with the tide, or as it is pumped out or filled with water.

On the morning of July 11, 1905, the dock, containing about 3,400 tons of water, was caused to surge to and from the pier, as well as forward and backward, to such an extent that the innermost and outermost spuds were strained, so that they were cracked lengthwise, their saddles parted, and the saddles of the middle spuds loosened. The District Judge rightly found that this extraordinary motion was caused by the displacement waves of the respondent's steamer, William G. Payne, coming down the river on a flood tide at an excessive rate of

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

speed. But he also found the libelants at fault as to the construction of the dock, in that they should have given the saddles on the innermost and outermost spuds more play; the movement of the dock being greater there than at the middle spuds. Inasmuch as the dock had been used at this same place continuously for five years without sustaining damage of any consequence from passing steamers, we think the libelants cannot be fairly charged with lack of care or skill in its construction.

The decree is reversed, and the court below directed to enter a decree for the libelants for the full amount of the damage sustained, with interest and costs of both courts.

NORFOLK & WASHINGTON (D. C.) STEAMBOAT CO. v. RAGLAND.

(Circuit Court of Appeals, Fourth Circuit. March 8, 1909.)

No. 856.

SHIPPING (§ 166*)—MISTREATMENT OF SHIP PASSENGER—EXCESSIVE DAMAGES.

An award of $1,000 to a passenger as damages for his imprisonment and mistreatment by the officers of a vessel *held* excessive, and reduced to $500, where his own conduct was not without blame.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 166.*]

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

For opinion below, see 163 Fed. 376.

William H. White, Jr., and Walter H. Taylor (Loyall, Taylor & White, on the brief), for appellant.

R. T. Thorp (Thorp & Bowden, on the brief), for appellee.

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

PER CURIAM. This case here on appeal is a libel in personam; damages being claimed because of the arrest and imprisonment of the libelant. The court below allowed him the sum of $1,000 as compensation for the maltreatment to which he had been subjected. The only contention before us relates to the amount so allowed; the other assignments of error having been abandoned.

The right of the libelant to recover is plain—in fact, is conceded. That he was mistreated as a passenger by the representative of the appellant was fully proven, and that his conduct in connection with the matter which resulted in said mistreatment was not what it should have been, he not being without blame, is also without question. Under all the circumstances we are of opinion that an allowance of $500 will be ample compensation. Let the decree appealed from be so modified.

Modified and affirmed.

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

CHICAGO-TEXAS LAND & LUMBER CO. v. ROBERTSON et al.

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

No. 1,840.

CANCELLATION OF INSTRUMENTS (§ 37*)—RIGHT TO CANCELLATION.

A bill for the cancellation of a deed to lands sold to an innocent purchaser to pay debts which were a legal charge upon them, where the complainant does not offer to pay the debt, is without equity.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. § 73; Dec. Dig. § 37.*]

Appeal from the Circuit Court of the United States for the Western District of Louisiana.

Hubert M. Ansley, for appellant.

A. P. Pujo, C. D. Moss, Geo. W. Wall, M. W. Greeson, and David G. Robertson, for appellees.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The bill in this case is one to cancel deeds of real estate sold to pay debts of complainant which were an admitted charge upon the lands conveyed, and it is without equity, in that complainant does not even offer to restore the large sums of money paid out for its benefit in satisfaction of such admitted legal charges. Under the evidence, Matthews is an innocent purchaser, and is entitled to protection in a court of equity. Greeson, although fully acquainted with the trust relations of Robertson, was a creditor of the complainant, and in all his dealings with the complainant and Trustee Robertson appears to have acted at arm's length.

The charges in the bill against Robertson for violation of trust, conspiracy for the purpose of making money, and bad faith are wholly unsustained by the evidence, which, on the contrary, shows that Robertson, as trustee, dealt with his trust fairly and honestly.

The decree of the Circuit Court is affirmed.

HENNIBIQUE CONST. CO. v. ARMORED CONCRETE CONST. CO. OF BALTIMORE et al.

(Circuit Court of Appeals, Fourth Circuit. March 11, 1909.)

No. 861.

PATENTS (§ 328*)—INFRINGEMENT—REINFORCED CONCRETE GIRDER.

The Hennebique patent, No. 611,907, for a reinforced concrete beam or girder, 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 District of Maryland.

For opinion below see 163 Fed. 300.

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

William B. Whitney, for appellant.

Arthur Steuart (Steuart & Steuart, on the brief), for appellees.

Before GOFF and PRITCHARD, Circuit Judges, and BOYD, District Judge.

GOFF, Circuit Judge. The record presented by this appeal is both interesting and important, and, while it is voluminous, the real questions involved are few, and, we think, readily solved. The suit was based on the United States patent No. 611,907, for a reinforced concrete beam or girder, issued to Francois Hennebique. The many assignments of error, considered in connection with the facts to which they refer, may be stated concisely as follows:

It was error to hold that the words "bay," "span," and "compartment," as used in the patent owned by complainant, referred to the open space between the faces of the adjoining supporting columns, and that it required the bent rods, used in combination with the straight rods and stirrups, to be extended completely over the columns into the next span of the girders; that it was error to hold, as the court below did, that the rods used by defendants in the building erected by them, and specially complained of in the bill, extended no further than the center of the supporting columns, and that if in a few instances they in fact did extend a few inches further it was not so intended; and that they did not extend into the next bay, so as to obtain any of the benefits claimed by the patentee for his construction.

The defense was the invalidity of the patent sued on, because of abandonment of invention before patent; noninvention, in view of the art; noninfringement. The court below, considering the matters presented by the bill, exhibits, answer, and evidence, sustained the defense of noninfringement, and did not, therefore, find it necessary to dispose of other questions presented by the record and discussed by counsel. We find ourselves impelled to the conclusion reached by the court below, and, as no questions are involved other than the proper application of the facts, we do not deem it essential to discuss in detail the testimony from which that result was indicated. We are in full accord with the opinion of Judge Morris, found in 163 Fed. 300.

Affirmed.

LOVELL v. SEYBOLD MACH. CO.

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

No. 149.

1. PATENTS (§ 234*)—INFRINGEMENT—IDENTITY OF MACHINES.

The claims of a patent should cover only what the patentee has in fact invented, and not what he imagines he has invented; and the inventor of a practical working machine will not be held to have infringed a prior patent for an unsuccessful machine, which added nothing of substantial value to the art, merely because the language of its claims is broad enough to include the successful structure.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 234.*]

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

2. PATENTS (§ 328*)—INFRINGEMENT—BOOK-TRIMMING MACHINES.
The Lovell and Bredenberg patent, No. 490,877, and the Lovell and Williamson patent, No. 734,907, each for a book-trimming machine, 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 Southern District of New York.

For opinion below, see 159 Fed. 736.

Complainant appeals from a decree dismissing the bill in an action of infringement founded upon two letters patent numbered, respectively, 490,877 and 734,907, for book-trimming machines. The Circuit Court held that the claims involved were not infringed.

A. G. N. Vermilya, for appellant.

Grafton McGill (Alfred M. Allen and Melville Church, of counsel), for appellee.

Before COXE, WARD, and NOYES, Circuit Judges.

COXE, Circuit Judge. The principal controversy relates to claims 3, 4, 5 and 9 of the patent to Lovell and Bredenberg granted January 31, 1893, for a book-trimming machine. The specification describes an automatic feeder consisting of an endless chain or ladder carrying successive crossbars or pushers for engaging the books singly and feeding them one by one to the cutters. This is the method which the patentees regard as the distinguishing feature of their invention. What they considered to be a distinct disadvantage and wished to avoid was the old method of placing the books or pamphlets in a deep pile and subjecting the pile to the action of the cutters. They say in the specification:

"This method of trimming is defective in that the books at the top of the pile are cut to a smaller size than those at the bottom by reason of the effect of the clamp, which holds the pile, and which in coming down invariably draws the upper portion of the pile away from the gauge. The operation is also unduly expensive by reason of the numerous manipulations necessary, whereby the labor cost is rendered considerable."

It is this defective method, which the complainants abandoned, that Charles Seybold, president of the defendant, undertook to improve with the result that he has produced an ingenious, complicated and highly efficient machine which cuts deep piles of books with neatness and accuracy and marks an important advance in the art. Although it is probable that this machine would trim the pamphlets and single books described in the Lovell method it is absolutely certain that the Lovell machine could not trim the pile of books of the Seybold machine.

Seybold discarded the old endless feed machines, of which the Lovell and Bredenberg machine is a type, and proceeded to improve upon that class of machines of which the mechanism shown in the Withey patent of June 15, 1880, is a type. Here the pile of books or signatures is clamped on the cutting base, when a table rotates a quarter of a turn to a position where the ends of the pile are trimmed

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

by two parallel knives; while making this cut the operator places a second pile on the table as before and after a second turn the first pile will come on the third parallel knife which completes it, and so on with the succeeding piles.

But one machine was made under the complainant's 1893 patent, it was never a commercial success and was abandoned. The patent has added nothing of practical value to the art whereas the defendant's machine has been an unquestioned success. The claims must be construed in the light of the contribution which the patentees made to the art. They should hold whatever of value they have added provided it involved invention to make the addition. It would, however, be grossly unfair to compel the builder of a practical working machine to pay tribute to one who has added nothing of substantial value to the art, simply because the language of his claims is broad enough to include the successful structure. Claims should cover what the patentee has invented and not what he imagines he has invented.

But one claim, the eleventh, of letters patent No. 734,907 is involved. It is as follows:

"In a cutting machine, a plate carrier mounted to move laterally and in turn supporting a clamping bar, and a knife carrier, together with means for holding said plate carrier in different lateral positions."

We agree with the defendant's expert in thinking that this claim is not infringed. He says:

"I do not find in the defendant's machine any part which answers at all to the term 'plate carrier' as used in the claim, nor do I find in the defendant's machine any parts which correspond to the clamping bar and knife carrier as called for by said claim. The adjustable brackets, the lower portions of which carry the cutting edges, are in no sense the plate carriers of the Lovell & Williamson patent, as the plate carrier of said patent is designed as a part having ways in which the clamping frame and knife carriers are mounted to reciprocate vertically. The claim obviously does not refer to a structure consisting simply of a strong base to which a cutting edge or knife is rigidly clamped or secured, and a pressure bar which moves in unison with the knife until the work is engaged, and always moves in the same direction as the knife, but the claim must be read in view of the specification and disclosure in the patent, and by referring to the latter we find that all of the elements set forth in the claim are of a specific character, each having characteristics which warrant the use of the rather unusual descriptive terms of the claim."

The decree is affirmed with costs.

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

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

No. 241.

PATENTS (§ 328*)—VALIDITY AND INVENTION—RAILWAY BLOCK SIGNALING APPARATUS.

The Wilson patent, No. 470,813, for an electric railway signal, was not anticipated and discloses invention. It covers the first successful automatic block signaling apparatus of the normal danger system, affording full protection to the train in front and rear for every inch of track, and

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

is entitled to a construction sufficiently broad to protect the actual invention. Claim 1, as so construed, *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 New York.

On appeal from an interlocutory decree entered December 28, 1908, holding valid and infringed letters patent No. 470,813, granted to Adoniram J. Wilson for an electric railway signal. The cause was before this court in April, 1907, upon an appeal from an order granting a preliminary injunction restraining the infringement of the patent in suit and four other patents granted to Wilson for similar improvements. The bill alleged the infringement of 53 claims, but the discussion on the former appeal was limited to 6 claims only. The opinion reversing the order granting a preliminary injunction is reported in 153 Fed. 907, 82 C. C. A. 653. The controversy has now been narrowed to the consideration of the first claim of No. 470,813.

For opinion below, see 168 Fed. 62.

Macomber & Ellis (Edmund Wetmore and J. William Ellis, of counsel), for appellant.

William Houston Kenyon and Henry D. Williams, for appellees.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

COXE, Circuit Judge. This is an equity action for the infringement of letters patent No. 470,813 granted March 15, 1892, to Adoniram J. Wilson, assignor to the complainant, for an improvement in automatic electric block signals for railways. The application was filed November 9, 1891, which must be regarded as the date of the invention.

The drawings represent, diagrammatically, the invention applied to a series of seven blocks on a line of railway, the sections varying in length to meet the requirements of different railways. The intermediate blocks—those between the first and the seventh as shown—may be duplicated indefinitely. The specification describes, by reference to the drawings, the successive operation of a train upon the signal devices in passing over the track sections represented. In the preferred arrangement shown in the drawings it is intended that each alternate signal shall be merely a cautionary signal which the engineer may pass but he does this with notice to look out sharply for the next signal. The intervening signals are absolute signals, which he should never pass except when they stand at safety, and if they do not clear before him he must stop until they do. In the broad invention the rail circuits are normally closed and the signaling circuits are normally open at a circuit closer which is constructed to be closed by the action of the train upon one of the rail circuits. The signaling circuit is also capable of being broken by one or more normally closed circuit breakers which are constructed to be opened by the action of the train on one or more of the next succeeding rail circuits of the line.

The claim involved is as follows:

"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,

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

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."

It is a combination claim for a block signaling apparatus, having the following elements:

(1) A series of normally closed rail circuits.

(2) A series of normally open signaling circuits.

(3) Each signaling circuit including (1) a normally open circuit closer, constructed to be closed by the action of the train upon one of the rail circuits and also including (2) a normally closed circuit breaker constructed to be opened by the action of the train upon the next succeeding rail circuit of the line.

The defense is that the claim, if broadly construed, is invalid in view of the prior art, and, if limited to the device shown and described, is not infringed.

The patent relates to the so-called normal danger system as distinguished from the normal safety system, it being contended that the patentee was the first to make the former a safe, reliable, simple and workable system—having marked advantages over the systems of the prior art.

The record presents such a wilderness of irrelevant matter that it is not easy to deduce therefrom a perfectly clear understanding of the respective advantages and defects of these rival systems. We understand, however, that the normal danger system is equipped with normally open signaling circuits so arranged that the force which sets the signal at safety never operates except when a train is approaching. The signal is held by gravity in the position indicating danger so long as no trains are present and is sent to safety by the on-coming train.

Under the normal safety system, when the engine driver approaches a block the semaphore at the entrance is in an inclined position by day and shows a green light by night indicating that the track ahead is clear and that he may safely proceed unless the signal rises to a horizontal position, or shows a red light. In other words he is to assume that the track ahead is clear and safe until the contrary appears by the appearance of a danger signal.

The normal danger system, on the contrary, always shows a red light at night and a horizontal semaphore by day, indicating danger; the safety signal appearing only on the approach of a train and when the block to be protected is clear. In the first system the assumption is that all is safe ahead till "danger" appears, and, in the second, that all is unsafe ahead until "safety" appears.

In the one, if there be no movement of the signals, the engine driver keeps on, in the other, unless there be movement of the signals, he stops. To quote from the pamphlet said to have been written by the president of the defendant:

"Consistency argues that all the signals shall indicate danger, except where they are cleared for the passage of a train."

From the viewpoint of safety it seems to us that the preponderance of evidence is clearly in favor of the complainants' system. If, through

climatic or other influences, the signals cease to operate it seems obvious that it is much safer that they should clog in the danger rather than in the safety position. In the one case the failure of the signal to operate might result in the unnecessary stopping of a train, in the other it might result in a rear-end collision. It is not at all improbable that laymen may give greater weight to this feature of the system than practical railroad men, but it seems to us that an improvement which reduces, in any degree, the chances of derailment and collision, and thus safeguards life and property, is entitled to greater consideration than one which deals only with economics.

We do not intend to intimate that the Wilson system does not, from a practical point of view, compare favorably with the normal safety plan. Quite the contrary appears. As the electric current is in operation during the comparatively short time that the signal stands at clear it is obvious that there is very much less consumption of battery material. As one of the witnesses points out, the expense of maintenance increases only in proportion to the amount of use, whereas in the normally clear system the expense is greatest when apparatus is least used. Scientific men, versed in the art of railway signaling had early recognized that the logic of the situation was all with the normal danger theory. Thus, in 1842, Sir William Cooke writes:

"I think it highly desirable that the ordinary or quiescent condition of the station signal should be a state of danger, and not a state of safety, so that a train should never run into a station without special guaranty that it was prepared to receive it."

This was before the days of automatically controlled block signaling but it shows that early in the art of railroading it was recognized that the ideal position of the signal was one indicating normal danger. The difficulty was not with the theory but with the means to make the theory practicable. This was an easy task when applied to a manually operated system but the record shows that its practical application to an automatic system was obstructed by impediments which it was found impossible wholly to remove, although many skillful and scientific men were at work on the problem. At the date of Wilson's invention, in 1891, the art of railway signaling was in an embryonic condition. Men of genius and skill, cognizant of the advantages of the normal danger plan, were endeavoring to produce a practical system, but none, prior to Wilson, succeeded in perfecting a plan to which hard headed railroad men were willing to intrust the lives and property committed to their care.

The defendants rely upon patents granted to five inventors—Robinson, Spang, Pope, Gassett and Westinghouse—to defeat or fatally limit the claim in suit. William Robinson, in 1872, received a patent, relating to a normal safety system and in 1879 he received a British patent for a normal danger system. It is not pretended that either of these patents anticipates but, if we comprehend the defendant's contention, it is that Robinson possessed the knowledge, as demonstrated by the description and drawings of his patents, to convert the plan of the earlier patent into a successful normal danger system. A sufficient answer is that patents are not defeated by what prior inventors might

have done. They, like other men, must be known by their works, and no one pretends that the plan described by Robinson in the British patent 3,479, in 1879, was operative. At least no one ever attempted to operate it. No reliable protection is shown and it is doubtful whether it could be operated in connection with a block system.

Robinson is conceded by all to have been one of the most accomplished signal engineers of his time. The fact that he failed to convert his 1872 system into a normal danger system is mute but persuasive testimony that it was not an obvious thing to do. The defendant's argument would be more specious if the 1879 patent were not here to confute it. If this distinguished engineer had not made the attempt it might be said with considerable force that had he done so he certainly would have succeeded. But what is left of the contention in view of the fact that he did attempt it and failed? Would the court be justified in assuming that a skilled mechanic could do what Robinson could not do?

Four patents, Nos. 164,227, 164,228, 168,059 and 208,995, were issued to Henry W. Spang, from 1874 to 1878, describing with great particularity eight normal danger plans which never went into use. Being radically wrong in theory they could never be made practically useful. The initial errors in Spang's system were insufficient length of the clearing section and lack of efficient protection for the train while on that section. The defendant's counsel deny this but we are not convinced by their argument. We agree with the judge of the Circuit Court in holding that the protection afforded by the Spang patent, 164,227, was insufficient "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." In other words the danger signal was not held in position by gravity but by electric energy which if withdrawn by breakage or for any other reason was liable to cause disaster by producing the misleading impression that the track was clear.

Frank L. Pope in 1873 was granted a patent, No. 143,529, covering a normal danger system or, more accurately, two such systems. Here too we have the fatal defect of clearing sections but 50 feet in length and wholly unprotected. The plan was never put into actual use and is admitted to be wrong in principle.

Oscar Gassett, in 1882, was granted a patent, No. 251,867, for a normal danger system, which like all the others which preceded it was never a practical success. The language of the description is somewhat indeterminate upon the question of duplication if the entire track is to be protected, and this has led to sharp differences of opinion among the experts which the court cannot undertake to decide. It is enough that a patent which was respected by competitors for 13 years and which covers a system which has been in successful operation during its entire life cannot be invalidated by the ambiguous language of a patent which has added nothing of value to the art. In such circumstances, unusually clear and perspicuous language is necessary. Success cannot be anticipated by failure. When the problem of aerial navigation is finally solved by the construction of a secure dirigible air-ship, it is safe to predict that the inventor's patent will not be in-

validated by a prior structure, no matter how perfect it may be, which was never known to fly. The difficulty with Gassett's plan is the same as with his predecessors, viz., short and insufficient protection for the clearing sections. When he attempts to afford entire protection he has recourse to track instruments.

George Westinghouse, Jr., in 1887 was granted a patent (No. 360,638) for a signaling apparatus. Like the Robinson patent, Westinghouse shows normally closed track circuit, but in a normal safety system. Like defendants he mounts both his home and distant signal on the same post but in other respects he adds nothing to the prior art. The judge of the Circuit Court has considered the Robinson, Spang and Gassett patents more in detail and we do not deem it necessary to repeat his observations regarding them. We have endeavored to understand the combinations of the patent, of the defendant and of the various patents which have a direct relation to the controversy; but to describe them in detail, without recourse to diagrams and reference letters, is impossible. Such descriptions even though the material were at hand would be of no general interest and would serve no useful purpose. We must content ourselves by giving our conclusions without entering into minute details.

We have, then, a situation where a problem is taken up by a number of skilled specialists, all working for its solution, each contributing something of value but failing to produce a safe, workable plan. If we may judge the prior systems from the fact that none of them, except in one or two tentative instances, went into actual use, the inference is plain that railroad men were unwilling to take the risk of installing them. When Wilson took up the work it had virtually been abandoned by the others, they had tried and failed and there was no reliable normal danger plan then in existence. That Wilson solved the problem we have no doubt, the systems installed under his patent are successful and are rapidly growing in popularity. We do not consider him a pioneer in the sense that he discovered a new art. The idea of a normal danger system was old but he was the first to harness it and set it to work. So much he has contributed and to this extent he is entitled to protection.

The subject is so abstruse and complicated and the opinions of those who are skilled in the art are so diametrically opposed upon almost every mooted question that we are forced to bring to our aid presumptions drawn from facts about which there is no dispute. The normal danger system is a meritorious one and, concededly, has some advantages over the rival system. Theoretically it is the ideal system and was the one employed when signals were manually operated. Repeated efforts had been made to secure a perfect electrically controlled normal danger system but always without success. When, therefore, the question is whether a prior system described and diagrammatically illustrated is practically operative, any doubt which arises should be resolved in favor of the working plan and against the paper plan. It matters not that all the elements of the claim were old when segregated. Undoubtedly they were old, but they were never combined before to accomplish the result which Wilson accomplished.

In approaching the question of infringement it must be remembered that the controversy is confined to the first claim which covers the broad invention and has no connection with the second claim which relates to the specific means described and diagrammatically shown. Having found that Wilson was the first to devise a successful normal danger system affording full protection to the train in front and rear for every inch of track, it is manifest that a construction should be placed upon the claim as broad as the invention and that he who uses the invention without license should be held to infringe no matter what else he may use. It must also be borne in mind that the combination of the claim is expressly related to "a block signaling apparatus" as understood by those skilled in the art. In other words the claim cannot be construed to refer to "a succession of unrelated units" but to "a series of consecutive blocks" which are necessary in a block signaling apparatus.

Even were we able to do so, we find it unnecessary to follow the discussion, found in the record and briefs, of the differences between the plan of the patent and the defendant's plan for the reason that infringement does not, in our judgment, depend upon the use of the precise apparatus shown by the patentee in illustrating his system. The installation by the defendant on the Illinois Central Railroad is certainly "a block signaling apparatus" on the normal danger plan. It would seem that when this system was installed the defendant was aware of the fact that it would infringe the claim of the Wilson patent if liberally construed. After an examination, the expert of the defendant reported that in his judgment, the claims "would be held to be invalid or so limited in their scope that the circuits which we proposed to use would not infringe." The president of the defendant assented to this view. The inference is plain that they concluded to take the risk, knowing that they would be held to infringe unless a limited construction was given to the first claim.

The defendant's system is an embodiment of the Wilson system. It has all the elements of the claim operating in substantially the same way to produce a like result. In the defendant's apparatus there is a series (nine) of normally closed rail circuits and a series of normally open or broken, signaling circuits. Each signaling circuit has a normally open circuit closer and a normally closed circuit breaker operating as described in the claim. The approaching train, if the track be clear, produces a "clear" indication of a signal ahead, while a signal in the rear stands at "danger" thus affording complete protection.

The defendant locates its home and distant signals on the same post, but this, though quite likely an improvement, is a matter of detail in no way changing the operation of the combination which produces the same result upon the series of distant and home signals respectively, as in Wilson's system. Such inconsequential changes do not go to the essence of the invention and do not avoid the claim. The defendant has moved the distant signals as shown in the drawings of the patent and has located them on the posts of the home signals in the rear. The differences between its system and that of the patent upon which the

defendant bases its contention of non-infringement are stated by complainants' expert, Mr. Wagner, as follows:

"Defendant does not infringe:
"(1) Because it uses subsections.
"(2) Because it clears distant signals too late.
"(3) Because it clears home signals too soon.
"(4) Because it clears distant signal through home signal on ahead.
"(5) Because it does not clear home signal by a circuit closer 'a' on the block to the rear, but only holds home signals to clear by this circuit closer 'a.'
"(6) Because it puts distant signal to danger by closing a shunt through circuit closer 'a.'"

His answers may be briefly paraphrased, in the same order, as follows:

First. Defendant's blocks were divided into subsections because they were too long to be safely and economically operated each as a single rail section.

Second. The distant signal in defendant's system is cleared at a point 2,000 to 3,000 feet to the rear and remains in the clear position while the train traverses this distance which is amply sufficient to clear the signal.

Third. The defendant's home signal is cleared throughout the entire block to the rear as shown in the patent by a normally open circuit closer.

Fourth. The circuit of the distant signal is closed as described in the patent independently of the home signal on ahead. The actual clearing of the distant signal is merely arrested until the home signal has moved to the clear position and by doing so has closed a shunt.

Fifth. Defendant's contention numbered 5, supra, requires the diagram to which it refers to explain it satisfactorily. But without the diagram it is plain that it is based upon a somewhat technical construction, the fact being that the system would be practically useless were it not for the circuit closer "a," which closes and holds the signaling circuit closed until the train reaches and enters the block protected by the signal.

Sixth. The distant signal is not sent to danger by a shunt closed by the circuit closer "a" but by opening the normally closed circuit breaker "f."

We think it unnecessary to dwell further upon the question of infringement. The subject is fully discussed in the opinion of the Circuit Court and is illustrated and elaborated by means of a diagram showing the defendant's system.

The defendant argues that, in any event, the costs of the rebutting testimony should be borne by the complainants. When it is remembered that the issue is confined to a single claim of a patent having but one drawing and three pages of description, we are convinced that at least half of the record of 2,400 pages is irrelevant and immaterial. As, however, the judge of the Circuit Court has considered and decided this question and has awarded this complainant but two-thirds of the amount expended in printing and taking testimony, we do not feel disposed, assuming the question to be properly before us, to interfere with his adjustment of the costs, which is certainly not unreasonable.

The patent having expired, the paragraph of the decree providing for an injunction should be modified by the Circuit Court.

The decree is affirmed with two-thirds of the costs of this court.

DRAPER CO. v. AMERICAN LOOM CO. et al.

(Circuit Court, D. Massachusetts. March 24, 1909.)

No. 492.

PATENTS (§ 325*)—SUITS FOR INFRINGEMENT—COSTS.

Where, in a suit in equity on several patents, the complainant succeeds as to some and is defeated as to others, the costs are in the discretion of the court, and will be awarded according to the circumstances of the particular case.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 607; Dec. Dig. § 325.*]

In Equity.

Wm. K. Richardson, for complainant.

Wetmore & Jenner, for defendants.

LOWELL, Circuit Judge. The complainant brought a bill in equity to restrain the infringement of three letters patent. Testimony was taken concerning all three of them. At the argument before the Circuit Court, the complainant expressly withdrew the first patent from consideration, and pressed only the second and third. The Circuit Court dismissed the bill generally, with costs for the defendant. An appeal was taken by the complainant to the Circuit Court of Appeals. At the argument before that court the complainant expressly withdrew from the court's consideration the second patent, and argued altogether concerning the third. The Circuit Court of Appeals held the third patent valid and infringed, and reversed the decree of the Circuit Court, with costs against the defendant in the Circuit Court of Appeals. Pursuant to the mandate of the latter court, the Circuit Court now enters a final decree in favor of the complainant in respect of the third patent; but there is controversy concerning the allowance of costs in the Circuit Court.

An examination of the cases cited by the complainant, such as Draper v. Wattles (C. C.) 81 Fed. 374, and of those cited by the defendant, such as Saddle Co. v. Sager Gear Co. (C. C.) 122 Fed. 645, confirms me in the opinion that the Circuit Court is not bound by any hard and fast rule to award or to deny costs to one party or to the other in a case where several patents are in suit, and the complainant has failed as to all but one of them, while succeeding as to that one. As in other cases, so in the case supposed, costs are in the discretion of a court of equity, and here they will be awarded according to the circumstances of the particular case. Having examined the calculations made by complainant and defendant, I am of opinion that justice will most nearly be done in the case at bar if the complainant is allowed half the full costs ordinarily taxable against a defeated defendant in an infringement suit. No costs are allowed the defendant.

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

MALIGNANI et al. v. GERMANIA ELECTRIC LAMP CO.

(Circuit Court, D. New Jersey. April 5, 1909.)

1. PATENTS (§ 229*)—PROCESS—INFRINGEMENT.
The mere transposition of some of the steps in a patented process does not avoid infringement, where neither the principle, mode of operation, nor result is changed.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 365-369; Dec. Dig. § 229.*]

2. PATENTS (§ 328*)—INFRINGEMENT—PROCESS OF EVACUATING INCANDESCENT LAMPS.
The Malignani patent, No. 537,693, for a process of evacuating incandescent lamps, *held* infringed.
[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

In Equity. On final hearing.

Richard N. Dyer, and John Robert Taylor, for complainants.
W. M. Brown, for defendant.

CROSS, District Judge. A number of defenses were set up in the answer filed in this case, which, however, with the exception of that of noninfringement, were all abandoned at the hearing. Indeed, save as to the excepted defense, there was no testimony worthy of the name offered in support of any of them. The bill of complaint is founded upon letters patent No. 537,693, issued April 16, 1895, to one Arturo Malignani, for a "process of evacuating incandescent lamps." The General Electric Company is a licensee of the patentee. Infringement of the first claim only is alleged. It is as follows:

"A process for producing a vacuum in the bulbs of incandescent lamps consisting in first introducing into a tubular elongation of said bulb suitable substances capable of being gasified by heat and combining with the gases generated by the filament when brought to incandescence to form solid or liquid precipitations, then exhausting the said bulb by means of a pump and sealing the said tubular elongation up, then bringing the filament to intensive incandescence and simultaneously heating the substance in the elongation aforesaid, and finally sealing off the said elongation, in the manner and for the purpose substantially as described."

A high vacuum is a necessary feature of the process of lamp manufacture. Prior to the process disclosed by the patent in suit, there had not been known in the art any practical method of exhausting the gases from incandescent lamps other than by continuous and protracted pumping, which at the time when the patent in suit was granted, occupied about 25 minutes, in order to produce a satisfactory vacuum. The Malignani process reduced the period of time necessary for like exhaustion to a minute or less. Speaking of this process the complainants' expert says:

"After some considerable investigation during the past seven months I have been able to demonstrate that the Malignani process of incandescent lamp exhaustion, briefly stated, is due to a purely physical combination between the residual gases of the lamp bulb and the condensed vapors of suitable volatile substances, of which phosphorus is one, which are set out and broadly covered by claim 1 of the patent here in suit. This physical combination precipitates all the gases and vapors of the lamp bulb almost simul-

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

taneously, so that an almost perfect vacuum is obtained. It is impossible of attainment without the electrical condition of ionization of the lamp bulb, which results from the intensive incandescence of the filament. * * * As I have already stated, a rapid electro-physical absorption of gases, started in a relatively high vacuum and yielding an almost perfect vacuum, was unknown to the prior patent art and unreferred to in scientific and technical literature until Malignani had discovered this phenomenon and applied it in such a useful manner."

The uncontradicted testimony in behalf of the complainants shows that the patented process is in general use and of the greatest utility; but with this we need not be greatly concerned, since the validity of the patent is not in controversy. Testimony was offered in behalf of the defendant intended to show that between April and October, 1905, it adopted and used in its factory one process in exhausting lamps, and that after that date it adopted and used another, and that the use of the latter was continued up to the time when the testimony herein was taken. Complainants' counsel, in their brief, have in the first of three parallel columns set forth the six successive steps of claim 1 of the patent in suit, and in the second of said columns the steps in the process employed by the defendant between April and October, 1905, and lastly, in the third column, the steps in the process employed by the defendant after October, 1905. These statements are so clear, and furthermore so entirely in accord with the undisputed testimony in the case, that they are reproduced below in the order above stated, and designated as (a), (b), and (c), respectively:

(a) "(1) Introducing into the glass tubulature of the bulb a suitable substance (arsenic, sulphur, or iodine, or the like); (2) exhausting the lamp bulb by means of a pump; (3) sealing the tubulature (as by soldering the end of the tube by fusing the glass, to close off communication between the lamp and the pump); (4) bringing the filament of the lamp to intensive incandescence; (5) heating the substance in the tubulature; and (6) sealing off the tubulature from the lamp, close to the bulb, by fusing the glass."

(b) "(1) Introducing into the glass tubulature of the bulb a suitable substance (amorphous phosphorous); (2) exhausting the lamp bulb by means of a pump or pumps; (4) bringing the filament of the lamp to a high incandescence, until a blue haze appears in the bulb (intensive incandescence); (3) sealing the tubulature (as by compressing a pinch cock upon a piece of rubber tubing, into which the lamp tubulature had been inserted, to close off communication between the lamp and the pump); (5) heating the substance in the tubulature; and (6) sealing off the tubulature from the lamp, close to the bulb, by fusing the glass."

(c) "(1) Introducing into the glass tubulature of the bulb a suitable substance (red or amorphous phosphorous); (2) exhausting the lamp by means of a pump or pumps; (4) raising the filament of the lamp until a blue halo appears in the bulb (intensive incandescence); (5) heating the substance in the tubulature; (3) sealing the tubulature (as by compressing a pinch cock upon a piece of rubber tubing, into which the lamp tubulature had been inserted, to close off communication between the lamp and the pump; and (6) sealing off the tubulature from the lamp, close to the bulb, by fusing the glass."

By a comparison of the defendant's methods as thus shown with that of the patent, it appears that the process of the defendant, designated (b), followed the process of the patent, except that steps 3 and 4 of the patent were reversed, and that process (c) of the defendant, while it likewise adopted the steps of the patent, nevertheless transposed steps 3, 4, and 5 thereof, and made them 4, 5, and 3, respectively. The

testimony clearly shows that the essential feature of the patented process is the raising of the filament of the lamp to intensive incandescence in an attenuated atmosphere, at a time when the vapor of a suitable solid substance has been introduced into the bulb to effect the precipitation of its gaseous contents in order to obtain the desired vacuum. This feature is followed in both of the processes of the defendant. There is, moreover, uncontradicted expert testimony to the effect that both of its processes are substantially like the process of the patent, since they are the same in principle, mode of operation, and result.

Accepting this, then, as proven in the case, the defendant does not avoid infringement by merely transposing the steps of the process. Transposition of the various steps is, under such circumstances, mere evasion. Moreover, the testimony proves that some of the transposed steps were performed well-nigh simultaneously. Then, too, it will be noticed that no step was omitted, nor was any new one introduced; but each was used substantially as the patent intended it should be to accomplish the desired result. Cases holding infringement under circumstances like those above disclosed, are numerous; for instance, in Mowry v. Whitney, 14 Wall. 620, 20 L. Ed. 860, in considering a process patent, the court at page 648 of 14 Wall. (20 L. Ed. 860) said:

"It hardly seems necessary to resort to the opinions of experts in order to reach the conclusion that the process of the defendant is only formally different from that of Whitney, while the essential element of the two processes is the same. But the testimony of the experts examined, taken as a whole, clearly supports such a conclusion. It is true some of the witnesses testify that in their opinion the processes are different; but when they attempt to describe the difference they point out only matters which are merely formal, only variances in the mode of using the same process."

So, too, in Cochrane v. Deener, 94 U. S. 780, 787, 24 L. Ed. 139, where a patented process for bolting flour was considered, the court said:

"The forcing of the air currents upward through the screen and film of meal carried on it and against the downward fall of the meal, instead of forcing them through the bolting cloth in the same direction with the meal, is also a mere matter of form, and does not belong to the substance of the process. The substantial operation of the currents of air in both cases is to take up the light impurities and bear them away on the aggregate current through the open flue, and thus to separate them from the middlings. This, too, may be an improvement on Cochrane's method; but it is only an improvement."

Again, in Celluloid Manufacturing Co. v. American Zylonite Company et al. (C. C.) 31 Fed. 904, Mr. Justice Gray, with whom was sitting Judge Colt, considered a patent involving a process of making celluloid sheets and other plastic composition, and in delivering the opinion of the court, at page 911, said:

"The facts that the defendants apply the heat first from above and afterwards from below, while the plaintiff applies the heat first from below and afterwards from above, and that the sides of the defendants' chase or mold are not, like those of the plaintiff, made hollow for the purpose of containing steam, do not constitute any substantial difference in the process used by both parties. The case in this respect falls within the principle of the decisions

of the Supreme Court in Tilghman v. Proctor, 102 U. S. 707, 730, 26 L. Ed. 279, and of this court in Machine Co. v. Teague (C. C.) 15 Fed. 390."

See, also, in Hammerschlag Co. v. Bancroft (C. C.) 32 Fed. 585, where a process patent for waxing paper was before the court, and in the course of his opinion Judge Gresham, at page 589, said:

"One of the reasons urged against the identity of the two processes, and against infringement of the fifth claim, is that the defendant passes the paper under a roller submerged in a bath of paraffine, thus applying the wax to both surfaces of the paper, and then passing it through two squeeze rollers located over the vat. The defendant may not observe the same order in the various steps of the process that we find described in the reissued patent; but it does not follow that the processes are different because the various steps do not succeed each other in precisely the same order. The invention being for a process or an art, the inventor was not restricted to the particular means described in his patent for carrying out his process."

To the same effect are Burdon Wire & Supply Co. v. Williams (C. C.) 128 Fed. 927; Warren Featherbone Co. v. American Featherbone Co. et al. (C. C.) 133 Fed. 304; United States Mitis Co. v. Carnegie Co. (C. C.) 89 Fed. 343; Universal Brush Co. v. Sonn et al. (C. C.) 146 Fed. 517; Tilghman v. Proctor, 102 U. S. 707, 730, 26 L. Ed. 279.

The same rule has been followed in mechanical patents, where parts have been reversed or transposed. See Devlin et al. v. Paynter et al., 64 Fed. 398, 12 C. C. A. 188; Columbia Wire Co. v. Kokomo Steel & Wire Co., 143 Fed. 116, 74 C. C. A. 310; Ives et al. v. Hamilton, Executor, 92 U. S. 426, 23 L. Ed. 494; Hoyt v. Horne, 145 U. S. 302, 308, 12 Sup. Ct. 922, 36 L. Ed. 713.

It is unnecessary to add further citations. The foregoing sufficiently justify my conclusion that the defendant in this case, notwithstanding the transposition of certain steps in the patented process, as above indicated, has infringed the patent in suit.

A decree to this effect will be entered in favor of the complainants, with costs.

UNITED STATES v. McLAUGHLIN et al.

(District Court, D. Minnesota, Fourth Division. January 17, 1908.)

1. CONSPIRACY (§ 27*)—"OVERT ACT"—REQUISITES.

To constitute an indictable conspiracy there must be by one or more of the conspirators some overt act, which must be an act tending to carry out the object of the conspiracy or in some way tending to make it effectual, and if the conspiracy ceases without an overt act it would not constitute an offense, though when consummated it is the conspiracy rather than the overt act which constitutes the crime.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 38; Dec. Dig. § 27.*

For other definitions, see Words and Phrases, vol. 6, p. 5128; vol. 8, p. 7743.]

2. CONSPIRACY (§ 27*)—OVERT ACT—FRAUD.

Where defendants were charged with having formed a conspiracy to defraud several corporations engaged in selling merchandise, lumber, building material, etc., by mail, by means of catalogues, and it was al-

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

leged that the scheme or artifice to defraud was to be effected by the use of the post office establishment of the United States by soliciting and obtaining from such corporations catalogues and samples requesting price lists and estimates on spurious bills of lumber by falsely representing that defendants were desirous of purchasing such materials, etc., letters and postal cards sent through the mails by which defendants requested catalogues, prices, samples, and estimates, but in none of which was there any representation that the signer or any of the defendants intended to purchase such materials from the addressees, were insufficient to constitute an overt act required to make out a criminal conspiracy.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 38; Dec. Dig. § 27.*]

On Demurrer to Indictment.

The following is a copy of the charging part of the indictment, and the letters, postal cards, etc., claimed to constitute the overt acts:

The grand jurors of the United States of America within and for said district and division, in the name and by the authority of the said United States of America, upon their oaths, present, that on or about the 16th day of March, 1907, and prior to all the days and dates hereinafter mentioned, at the city of Minneapolis, in the county of Hennepin, in the state and District of Minnesota, in the Fourth division thereof, and within the jurisdiction of this court, Theodore S. McLaughlin, Leonard R. Welles, George P. Thompson, Elijah Hudson, James C. Melville, I. Nesbit Tate, Rufus B. Clark, R. B. French, whose true Christian name is unknown, Ralph Burnside, William J. Bruce, Willard G. Hollis, Stanley Moore, George C. Ingram, N. S. Darling, whose true Christian name is unknown, C. E. Greef, whose true Christian name is unknown, J. W. Lucas, whose true Christian name is unknown, O. M. Botsford, whose true Christian name is unknown, George H. Rogers, Arthur R. Rogers, and other persons to the grand jurors unknown, did, then and there unlawfully, wrongfully, and knowingly, conspire, combine, confederate, and agree together to commit the act made an offense and crime against the United States by section 5480 of the Revised Statutes of the United States and acts amendatory thereof, as follows, to wit, by then and there devising and intending to devise a scheme and artifice to defraud Gordon Van Tine Company, a corporation duly organized, created, and existing under and by virtue of the laws of the state of Iowa, the Waterman-Hunter Company, and the T. M. Roberts Co-operative Supply Company, corporations duly created, organized, and existing under and by virtue of the laws of the state of Minnesota, and certain other corporations created and existing under and by virtue of the laws of the state of Illinois, doing business at Chicago, Illinois, as follows, to wit: Chicago Mill Work & Supply Co., Sears, Roebuck & Co., Montgomery Ward & Co., Schaller-Hoerr & Co., South Side Lumber Co., Geo. Green Lumber Co., John Spry Lumber Co., Chandler Lumber Co., Street, Chatfield & Co., White River Lumber Co., Chicago & Riverdale Lumber Co., Chicago House Wrecking Co., to be effected by opening correspondence and communication with the said above-named corporations through and by means of the post office establishment of the United States, which said use and misuse of the said post office establishment of the United States was then and there a part of the said conspiracy; which said scheme was in substance and effect as follows, to wit:

"That the aforementioned corporations were then and there engaged in the business of selling lumber, millwork, and builders' supplies by means of what is commonly known and designated as the 'catalogue and mail order' plan and system; that the said mentioned merchandise, and the prices at which the same was being sold by the said aforementioned corporations, were described and set forth in certain catalogues and price lists then and there published by said corporations respectively; that said catalogues were then and there of the approximate value of one dollar, and the selling of the said merchandise so offered for sale by said corporations was effected by orders from the public transmitted by mail; that the said above-named Theodore S. McLaughlin,

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

Leonard R. Welles, George P. Thompson, Elijah Hudson, James C. Melville, I. Nesbit Tate, Rufus B. Clark, R. B. French, Ralph Burnside, William J. Bruce, Willard G. Hollis, Stanley Moore, George C. Ingram, N. S. Darling, C. E. Greef, J. W. Lucas, O. M. Botsford, George H. Rogers, and Arthur R. Rogers, and other persons to the grand jurors unknown, well knowing the said plan and system under and by which the said above-mentioned corporations were then and there selling their merchandise and conducting their business as aforesaid, should fraudulently solicit and obtain from said corporations, through and by means of the post office establishment of the United States, said catalogues and samples of the merchandise therein described, and in like manner request from said corporations estimates and prices on fictitious and spurious bills of lumber and building material by in each instance representing and pretending to said corporations that they the said persons aforesaid were desirous of and intended to make purchases of the said corporations, whereas in truth and in fact the said persons did not intend to make purchases of the said corporations and did not honestly and in good faith intend to enter into any business relations with the said corporations, but then and there by said means intended to defraud the said corporations out of the possession and value of their said catalogues and samples, together with the postage and stationery used in said correspondence, and the value of the time necessarily consumed by said corporations and their clerks in making estimates and prices upon the said bills of lumber and material, and so fraudulently induce the said aforementioned corporations to part with their said money and property without in any wise returning to them any equivalent; which said scheme and artifice to defraud as aforesaid, pursuant to said conspiracy, was to be effected by opening correspondence with said corporations by said persons aforesaid by means of the post office establishment of the United States."

The indictment then set out seratim a series of letters and postal cards, alleging over each one that the writer, in the city of Minneapolis, District of Minnesota, and in the Fourth division thereof, etc., did unlawfully, wrongfully, and knowingly deposit and cause the same to be deposited in the post office of the United States on the date it was mailed, for mailing and delivery through and by means of the post office establishment of the United States, on which the postage was prepaid, and addressed to the various addressees, as follows:

"Apr. 22—07.

"Gordon Van Tine Co., Davenport, Iowa.

"Gentlemen: Please send me samples and best prices on your prepared roofing. Also a paint catalogue and color card of paint for residence. Do you guarantee your paint? Our local dealers do.

"Very truly, I. N. Tate.

"1700 Portland Ave., Minneapolis."

"Minneapolis, Minn. Apr. 26th, 1907.

"Waterman-Hunter Co., City.

"Dear Sirs: I wrote you sometime ago asking for a catalogue and as yet I have not received any. Will you please let me have one as soon as possible and oblige, George Peake,

"Minneapolis, Minn."

"Minneapolis, Apr. 25th.

"Gordon Van Tine & Co., Davenport, Iowa.

"Dear Sirs: Please send me some of your samples of roofing, also your paint color card.

"Yours, Chas. K. Stephens,

"17 North 10th St., Mpls., Minn.

"I sent for your catalogue but never heard from you."

"Minneapolis, Minn. 4—23—07.

"Messrs. Gordon & Van Tine & Co., Davenport, Iowa.

"Dear Sirs: As I am preparing to build, will you please forward to my address at your earliest convenience 1 sash and door catalogue, also samples of your paint and roofing.

"Thanking you in advance for these, I am,

"Yours truly,

W. C. Moult,
"603 South 10th St., Minneapolis."

"Minneapolis, Apr. 26, 07.

"Waterman-Hunter Co., City.

"Dear Sirs: Received your catalog and would like to know how much one of your Homesteaders Cabins would cost, size about 12x20 feet. Are these cabins warm enough to live in in winter.

"Yours,

Chas. K. Stephens,
"17 North 10th St."

"Minneapolis, 4—30—07.

"Waterman Hunter Co., City.

"Gentlemen: Please send me one of your mill work catalogues.

"T. S. McLaughlin,
"41 Groveland Terrace."

"Minneapolis, Minn., 4—30—07.

"Gordon Van Tine Co., Davenport, Ia.

"Gentlemen: Will you please send me a catalogue of sash and doors, etc.

"A. S. McLaughlin,
"2417 Aldrich Ave. South, Minneapolis, Minn."

"Minneapolis, Minn., 4-22-07.

"Gordon Van Tine Co., Davenport, Ia.

"Gentlemen: Can I get one of your sash and door moulding books. I buy quite a lot of them.

"Yours respt.,

A. S. McLaughlin,
"2417 Aldrich Ave. South, Minneapolis, Minn."

"1024 Hawthorne Ave., Minneapolis, Minn.

"Gordon Van Tine Co., Davenport, Ia.

"Dear Sirs: Would you kindly send me one of your mill work catalogues by return mail, and oblige,

"Yours truly,

Will J. Morrow."

"Minneapolis, Minn. May 8th, 07.

"Gordon Van Tine Co., Davenport, Ia.

"Gentlemen: I would like very much to have one of your complete catalogues, as I am thinking of building this summer.

"Yours truly,

R. I. Scheldrup,
"Address: 622 E. 16th St. Mpls., Minn."

"Toronto, S. D. May 2nd, '07.

"Gordon Van Tine & Co., Davenport, Iowa.

"Gentlemen: Please send me samples of 1, 2 & 3 ply roofing.

"Yours truly,

Lars Hetland."

"Courtenay, N. D. Apr. 30th, '07.

"Waterman-Hunter Co., Mpls., Minn.

"Gentlemen: Please send me at your earliest convenience one of the 1907 catalogues No. 1 and oblige,

"Yours truly,

E. A. Hubbell."

To which indictment defendants severally demurred on the following grounds:

(1) That the said indictment does not state sufficient facts or grounds to constitute against the said defendants, or either of them, an offense against the United States, or an offense against any law of the United States, nor any offense.

(2) That as against the said defendants, or either of them, the said indictment is not direct or certain as regards the offense therein attempted to be charged.

(3) That as against the said defendants, or either of them, the said indictment is not direct or certain, as regards the particular circumstances of the offense therein attempted to be charged which are necessary to constitute a complete offense.

Charles C. Houpt, U. S. Dist. Atty., and Paul Ewert, Asst. U. S. Atty.

M. D. Koon, W. A. Lancaster, John Lind, W. E. Hale, Rome G. Brown, C. W. Somerby, L. L. Brown, Louis K. Hull, and C. J. Traxler, for defendants.

LOCHREN, District Judge (orally). I think that my mind is pretty well made up regarding this indictment. The defendants are charged with having formed a conspiracy to defraud several corporations of Iowa, Minnesota, and Illinois, and it is alleged that this scheme and artifice to defraud these corporations was to be effected by the use of the post office establishment of the United States. The circumstances under which this conspiracy was entered into between these defendants are stated. That is that these several corporations are engaged in what is known as the "catalogue and mail order business," in selling merchandise, including lumber, millwork, and other building material under the catalogue and mail order system, and that these defendants, well knowing the business in which these corporations were engaged, devised this scheme to defraud by soliciting and obtaining from said corporations catalogues and samples, and requesting price lists and estimates on spurious bills of lumber, and alleges the means that were adopted to perpetrate this alleged fraud; that is, by in each instance representing and pretending that they, the said defendants, were desirous of purchasing materials of these several corporations; and the indictment traverses these pretensions and representations, alleging that these defendants had no purpose of purchasing material of these corporations or of entering into any business relations with them. Then the indictment states the overt acts which are set forth in the indictment—several of them—one of them being a postal card signed by I. Nesbit Tate asking for samples, and another communication is signed by Theodore S. McLaughlin; both of these parties being defendants. There are other communications which are alleged to have been mailed by certain other defendants, although their names are not attached to the communications. I think that the indictment contains allegations that all of the communications were placed in the mails by one or more of the defendants.

I think that, when the indictment rests upon conspiring, confederating, and agreeing together, it is necessary that there should be by one

or more of the conspirators some overt act, and that if the conspiracy ceases without an overt act it does not constitute a crime, although when it is consummated it is the conspiracy rather than the overt act which is the crime. It seems to me that an overt act must be an act which has a tendency at any rate to carry out the object of the conspiracy, or in some way tends to make it effectual. It may not be sufficient of itself to complete the offense, but it should have a tendency to do so. I do not imagine that any letter which could have no tendency to mislead the corporations which are the alleged victims could be claimed to be an overt act at all. It must be an act having a tendency to effectuate the object of the conspiracy.

I have looked over all these letters, and it seems to me that there is none of them which embraces the fraud alleged. That is, there is none of these letters which contains anything that could be tortured or construed into a representation of any kind that the signer of the letter, or any of the defendants, represented that he intended to purchase any materials from the corporations or any one else. Some letters ask for catalogues which, according to the indictment, contained a description of the merchandise, with prices; others ask for samples. I think these are the two characters of these letters. But there is none of them that contains any statement whatever which, under any rule of construction, can be claimed to be a representation that the party writing intended to purchase from the corporations. Of course, it is well known that any party desiring to purchase goods would be interested in ascertaining where they could be got and the prices at which they could be obtained, and the mere fact that inquiries were made which would bring that information will not raise any presumption that there was an intention on the part of the party desiring the material to purchase from any particular person. It would be natural that there should be inquiry by the one desiring to purchase as to the character of the material and the prices, and that the intending purchaser should make such inquiries from many persons, so that he could be advised as to where to purchase and what character of material to purchase. And the mere fact that such persons should ask for catalogues or samples does not embrace any representation, in my opinion, that they desired or had made up their minds to purchase from any particular person or corporation. It seems to me that the overt acts alleged do not support the charges of fraud which are the subject of the alleged conspiracy, and that they are immaterial; that there is not in the overt acts charged in the indictment anything germane to the subject of the alleged fraud.

I think the demurrer should be sustained.

CENTRAL TRUST CO. OF NEW YORK v. MUNICIPAL TRACTION CO. et al.

(Circuit Court, N. D. Ohio, E. D. February 26, 1909.)

1. FRANCHISES (§ 3*)—GRANTS OF FRANCHISES—CONSTRUCTION OF GRANT.
   Legislative or municipal grants of property, franchises, or privileges in which the government or public has an interest are to be construed strictly in favor of the public, and nothing passes by implication which is not granted in clear and explicit terms.
   [Ed. Note.—For other cases, see Franchises, Dec. Dig. § 3.*]

2. STREET RAILROADS (§ 28*)—FRANCHISE—RENEWAL OR EXTENSION OF GRANT BY IMPLICATION.
   A municipal ordinance, consenting to the consolidation of street railroad companies operating a number of lines, the franchises for which expired at different dates, although by the consolidation passengers acquired the right to free transfers from one line to another, did not, in the absence of express provision therefor, have the effect of extending the franchise of any line beyond the term of the original grant to that line.
   [Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 28.*]

3. STREET RAILROADS (§ 28*)—FRANCHISE—EXTENSION BY IMPLICATION.
   The grant by a city council to a consolidated street railway company operating a number of lines of road, which were built under separate franchises expiring at different times, of the right to build extensions and connecting lines and to operate the same in connection with its other lines until a given date, did not operate to extend the franchises of such other lines or any of them until such date, where some of them by their terms expired earlier, and where no such intention was expressed.
   [Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 28.*]

In Equity.

The receivers appointed by this court are operating the lines of the Cleveland Railway Company. This company is a consolidated company, embracing, among other lines, those of the so-called "Woodland Avenue & West Side Street Railroad Company." The present controversy arises over the question whether the franchises under which the lines of the old Woodland Avenue & West Side Street Railroad Company are operated have expired; the city contending that the franchises in question terminated February 10, 1908; and the railway company and its bondholders insisting that the grants will not expire until July 1, 1914, and, in any event, not before January 26, 1910. Upon the determination of this question depends the question whether the receivers shall be directed (as asked by the railway company and its creditors and bondholders) to charge a fare of 5 cents (or 11 tickets for 50 cents) over the Woodland Avenue and West Side lines (as permitted by the franchises for those lines), or whether a fare of 3 cents is properly chargeable, as provided by the ordinance granted to the Forest City Railway Company on April 16, 1908, under the contention that the franchises of the Woodland Avenue and West Side lines have previously expired.

Pending the decision of the question here submitted, the lines in question are now being operated upon a three-cent basis. The facts necessary to a determination of the question presented are these:

In the year 1885 the Woodland Avenue Street Railway Company was being operated under a franchise granted in 1879 to the Kinsman Street Railroad Company, which by its terms would expire September 20, 1904. The West Side Street Railroad Company was then being operated under a franchise limited by its terms to expire February 10, 1908. The lines of these two companies ran on opposite sides of the Cuyahoga river, meeting at the public square. These two lines were in 1885 consolidated into a system known as the Woodland Avenue & West Side Street Railroad Company. This consolida-

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

tion continued until May 11, 1893, at which time the lines of the Woodland Avenue & West Side Street Railroad Company were consolidated with those of the Cleveland City Cable Railway Company; the latter consisting of three lines known as the St. Clair Street line, whose franchise would expire by its terms January 5, 1910, the Superior Street line, and the Payne Avenue line; the franchises of the two latter expiring January 26, 1910. These cable lines, which operated only on the east side of the river, met at the public square the lines of the consolidated Woodland Avenue & West Side Street Railroad Company. The lines thus consolidated (under the name of the Cleveland City Railway Company) embraced 62½ miles of railway.

In 1903 the lines composing the Cleveland City Railway Company were united with those of the Cleveland Electric Railway Company (a consolidated company formed in 1893, and known as the "Big Consolidated"); the consolidation being now called the Cleveland Railway Company, which is a defendant in this suit.

In the year 1906 the Supreme Court decided that, by virtue of ordinances passed subsequent to the consolidation of 1885, the common council of the city of Cleveland had clearly expressed an intention to extend the franchises of the Woodland Avenue lines until the termination of the grants to the West Side lines, viz., until February 10, 1908. See Cleveland v. Cleveland Electric Ry. Co., 201 U. S. 529, 26 Sup. Ct. 513, 50 L. Ed. 854. It is now the contention of the Cleveland Railway Company, and those claiming under it, that by the consolidation of 1893 and the subsequent extension and subsidiary grants the franchises of the entire Cleveland City Railway Company's system (thus embracing the Woodland Avenue and West Side lines) were extended at least until January 26, 1910, which was the date fixed by ordinance for the expiration of the Superior Street and Payne Avenue lines formerly a part of the cable company's lines. The acts which are thought to evidence the intention of the common council to extend the franchises in question to January 26, 1910, are these:

1. The consolidation agreement of 1893 and the resolution of the common council thereon: On May 13, 1893, the Woodland Avenue & West Side Street Railroad Company and the Cleveland City Cable Railway Company sent to the council a joint communication announcing their agreement to consolidate the lines of the two formerly separate companies into the Cleveland City Railway Company, to take effect June 1, 1893. The communication contained this statement: "It is proposed on June 1, 1893, to immediately issue proper transfers without extra charge so that passengers on any line of the Woodland Avenue & West Side Street Railroad Company may be transferred and have a continuous ride upon any line of the Cleveland City Cable Railway Company within the limits of the city of Cleveland, and also that passengers upon any line of the Cleveland City Cable Railway Company may be transferred and have a continuous ride upon any line of the Woodland Avenue & West Side Street Railroad Company within the city of Cleveland, only one fare to be charged for such ride; and, as soon as the necessary improvements can be made, additional Cross-Town lines will be run, and only one fare charged for any continuous ride upon said additional lines within the city of Cleveland." On receiving this communication the city council passed the following resolution: "That the communication from the Woodland Avenue & West Side Street Railroad Company and from the Cleveland City Cable Railway Company, setting forth their consolidation into the Cleveland City Railway Company, be received; and that this council approve such consolidation upon the terms and conditions stated in such communication; and that such consolidated company shall be subject to all the ordinances or regulations now or hereafter in force." It is to be noted that neither in the communication from the railway companies to the council nor in the resolution of the common council approving the consolidation is there any suggestion of an extension of the life of the franchise of any of the lines embraced in the consolidation, nor is there any mention of a claim or of a consent that the consolidated company was to obtain, in any respect, any greater rights than then possessed respectively by the constituent companies forming the organization.

2. The Erie Street extension: On July 3, 1893, about one month after the consolidation, the common council passed an ordinance "granting permission

[as stated in its title] to the Cleveland City Railway Company to extend its tracks from Superior street along Erie street to St. Clair street." This extension was one city block in length, from the Superior Street line (whose franchise would expire January 26, 1910) to the St. Clair Street line (whose franchise was by its terms limited to January 5, 1910). The Superior and St. Clair Street lines were part of the old cable company's lines included in the consolidation of June 1, 1893. The connection had thus no direct effect upon the Woodland Avenue and West Side lines here in question, except as those lines were, when the Erie Street extension ordinance was passed, part of the consolidated system known as the Cleveland City Railway Company. This ordinance granted permission to the Cleveland City Railway Company "to extend its double track street railroad on and along Erie street from its present tracks at the intersection of Superior and Erie streets, to the intersection of St. Clair and Erie streets, connecting its tracks on Superior street with its tracks on St. Clair street, with the necessary curves and also poles and overhead wires, and to construct and maintain said extension, and to operate the same by means of electricity as a motive power, upon the following terms and conditions." Sections 5, 6 and 8 are the only ones containing conditions deemed material to this controversy. Section 5 requires that the railway company shall "comply with and perform all the terms and conditions set forth" in the joint communication of the two companies announcing the consolidation, requires that the most approved cars and appliances be used upon all the company's lines, with the right in the council to require the company to operate its cars over the entire length of any of the lines or branches of the constituent companies in the same manner and between the same terminals as cars were operated prior to the consolidation of the constituent companies, and that night cars shall be operated throughout the entire length of each of the lines of the company at least hourly each way between midnight and 6 a. m., also, that the company be required to sprinkle between all its tracks on all its lines; the company agreeing "in consideration of the grant made by this ordinance" that "all the terms and provisions of this section (which was section 5 referred to) shall apply to and be a condition upon each and all of the grants heretofore made by the council under which the existing lines of street railroad now operated by the Cleveland City Railway Company have been constructed." Section 6 provides that "this grant shall be in force until the 26th day of January, 1910." Section 8 provides for the forfeiture "of this grant and the rights or privileges hereby granted" upon the failure or refusal of the company at any time to comply with and perform "all and singular the terms and conditions of this ordinance, or the general ordinances of the city relating to street railroads now or hereafter in force."

3. The Corwin Avenue and South Woodland Avenue grant: On July 17, 1893, the common council passed an ordinance "granting permission [as stated in its title] to the Cleveland City Railway Company to lay an additional track upon South Woodland avenue between Southern avenue and Corwin avenue and a double track street railway on said South Woodland avenue from Corwin avenue to Woodland Hills avenue." Section 1 contains the grant in substantially the language of the title, with specific authority "to construct and maintain said tracks and operate the same in connection with the other lines of street railroad now owned by said company with electricity, or the same motive power as is used upon other portions of its lines, upon the following terms and conditions." Section 6 expressly provided that "this grant shall be and remain in force until the 26th day of January, 1910," and section 8 makes the failure of the company to comply with the terms of the ordinance and other ordinances work a forfeiture "of this grant and the rights and privileges hereby granted." The other sections of the ordinance are, so far as material to this opinion, substantially the same as in the Erie Street extension ordinance. The extension provided by this ordinance was of the tracks of what had formerly been the Woodland Avenue & West Side Street Railroad Company.

4. The Ansel Avenue line: On March 12, 1894, the common council passed an ordinance (as shown by its title) granting permission to the Cleveland City Railway Company to "extend its tracks from Superior street in and along Ansel avenue to the city limits." Section 1 of this ordinance provides for the

operation by electricity and "in connection with the other lines of street railway owned, with the same motive power as is used upon other portions of its lines, upon the following terms and conditions"—which are substantially the same as in the Erie Street and Corwin Avenue extension ordinances, except: First, that in the Ansel Avenue ordinance no mention is made of the company's communication in connection with the consolidation; second, the provision for transfers is confined to the old cable company's lines, of which the extension formed a part; and, third, section 5 provided that "this grant shall terminate at the expiration of the other grants made to this company, to wit, January 26, 1910." This extension, it will be noted, was from certain tracks of the cable company (comprising lines in Superior street and Payne avenue), whose franchise would expire January 26, 1910, which was the date of expiration stated in section 5 of the Ansel avenue ordinance. This Ansel avenue line was never built.

The grant relied upon as extending the life of the Woodland Avenue and West Side grants to July 1, 1914, is this: On February 19, 1894, the council passed an ordinance (known as the Willson Avenue or Cross-Town ordinance), "granting permission [as stated in its title] to the Cleveland Electric Railway Company and the Cleveland City Railway Company to extend their tracks in Willson avenue." These two railway companies were at that time entirely independent of each other. The construction provided for was to be jointly made by the two companies. The Cleveland City Railway Company was granted permission "to extend its double track street railroad on and along Willson avenue from the present tracks at the intersection of Woodland avenue and Willson avenue (Woodland avenue being part of the Woodland Avenue & West Side system) to its present tracks at the intersection of Lexington and Willson avenues (the Lexington tracks being a part of the Superior lines of the old cable company); and from its present tracks at the intersection of Payne and Willson avenues (the Payne avenue tracks being part of the Superior line referred to) to the northerly terminus of said Willson avenue."

The Cleveland Electric Railway Company was granted permission to extend its double track street railway "on and along Willson avenue from its present tracks at the intersection of Scovill and Willson avenues to its present tracks at the intersection of Perkins and Willson avenues, and from its present tracks at the intersection of Hough and Willson avenues to the northerly terminus of said Willson avenue." The Scovill Avenue grant had been limited to expire January 26, 1910, and the Perkins Avenue line in 1914. Section 6 of the Willson Avenue grant provided that a passenger on any car operated on Willson avenue, on payment of one fare, should be entitled, without additional charge, to a transfer to any other line of either of the companies intersecting or coming to said Willson avenue. Section 10 provides "this grant shall be in force until the first day of July, 1914." Section 12 provides for a forfeiture of the grant created by the ordinance in question on failure or refusal of either of the companies to comply with its terms and conditions, or the general ordinances relating to street railroads.

W. B. Sanders and John G. White, for the Railway Company.
D. C. Westenhaver and Newton D. Baker, for the City of Cleveland.

KNAPPEN, District Judge (after stating the facts as above). In determining the effect upon the life of the franchises in question created by the action of the common council in approving the consolidation of 1893, and in the passage of the various subsequent extension ordinances, the principles governing the interpretation of such municipal acts must be had in mind. That the common council had power to make the claimed extensions is beyond dispute. It is equally beyond dispute that the council could effect such extension by ordinance previous to the expiration of the franchises sought to be extended. Cleveland v. Cleveland City Ry. Co., 194 U. S. 517, 24 Sup.

Ct. 756, 48 L. Ed. 1102; Cleveland v. Cleveland Electric Ry. Co., 201 U. S. 529, 26 Sup. Ct. 513, 50 L. Ed. 854.

The controlling question is one of the intention of the common council in taking the action invoked. The rule applicable to the ascertainment of that intention is that only that which is granted in clear and explicit terms passes by a grant of property, franchises, or privileges in which the government or the public has an interest. Statutory grants of that character are to be construed strictly in favor of the public. Whatever is not unequivocally granted is withheld, and nothing passes by implication. Knoxville Water Co. v. Knoxville, 200 U. S. 22, 34, 26 Sup. Ct. 224, 50 L. Ed. 353; Blair v. Chicago, 201 U. S. 400, 471, 26 Sup. Ct. 427, 50 L. Ed. 801; Cleveland Electric Ry. Co. v. Cleveland, 204 U. S. 116, 129, 27 Sup. Ct. 202, 51 L. Ed. 399.

In Knoxville Water Co. v. Knoxville, at page 34 of 200 U. S., at page 228 of 26 Sup. Ct. (50 L. Ed. 353), Mr. Justice Harlan, after announcing the proposition above stated, said:

"The authorities are all agreed that a municipal corporation, when exerting its functions for the general good, is not to be shorn of its powers by mere implication. If by contract or otherwise it may, in particular circumstances, restrict the exercise of its public powers, the intention to do so must be manifested by words so clear as not to admit of two different or inconsistent meanings."

In Blair v. Chicago, at page 471 of 201 U. S., at page 445 of 26 Sup. Ct. (50 L. Ed. 801), Mr. Justice Day, in speaking of certain legislative grants relied upon as sustaining public franchises, said:

"It may be that the very ambiguity of the act was the means of securing its passage. Legislative grants of this character should be in such unequivocal form of expression that the legislative mind may be distinctly impressed with their character and import, in order that the privileges may be intelligently granted or purposely withheld. It is a matter of common knowledge that grants of this character are usually prepared by those interested in them, and submitted to the Legislature with a view to obtain from such bodies the most liberal grant of privileges which they are willing to give. This is one among many reasons why they are to be strictly construed."

In Cleveland Electric Ry. Co. v. Cleveland, supra, Mr. Justice Peckham, in discussing certain ordinances, one of which is involved here, used this language:

"The rules of construction which have been adopted by courts in cases of public grants of this nature by the authorities of cities are of long standing. It has been held that such grants should be in plain language, that they should be certain and definite in their nature, and should contain no ambiguity in their terms. The legislative mind must be distinctly impressed with the unequivocal form of expression contained in the grant 'in order that the privileges may be intelligently granted or purposely withheld' "—quoting the paragraph above set out in the opinion in Blair v. Chicago.

Applying the rules of interpretation above stated, we turn first to the consolidation of 1893. It is contended on the part of the railway company that because previous to the consolidation each of the two companies was operating independently, with no interchange of traffic, and as by the consolidation the public right to continuous passage for one fare over the entire line of the consolidated company was secured, the intention of the council is made manifest to author-

ize the operation of each of these consolidated lines to January 26, 1910, as being the date of expiration of the franchises having the longest time to run, viz., those of the Superior Street and Payne Avenue lines. This interpretation is, to my mind, without support upon either reason or authority. Advantageous as such consolidated operation might be, there is nothing in the action referred to announcing the intention of the common council to extend the lives of the franchises of the Woodland Avenue and West Side lines to the termination of the cable franchises. To hold otherwise would be to violate the rules of interpretation above invoked. To my mind, the only reasonable interpretation is that the two companies had the right to operate together so long as the franchises of those companies permitted. The cable company's lines could, after the termination of the franchises of the Woodland Avenue and West Side lines, be operated independently as well as they had been before the consolidation.

In Cleveland Electric Ry. Co. v. Cleveland, 204 U. S. 116, 139, 27 Sup. Ct. 202, 211, 51 L. Ed. 399, a contention that the termination of one of the lines of the Cleveland Electric Railway Company was postponed by a similar consolidation occurring in the same year (1893) was rejected; Mr. Justice Peckham saying:

"Nor do we think the time for the termination of the Garden Street branch was in any degree affected by the consolidation of the various roads in 1893. * * * Its intention to issue transfer checks, so as to have a continuous ride for one fare, gave no greater rights to the company than it theretofore had, nor did the resolution of the council, consenting to the consolidation on condition that but one fare should be charged for a continuous ride, give any greater rights to the consolidated company than each of the constituent companies had theretofore enjoyed. The consolidation does not require, in order to comply with the conditions specified in the resolution consenting to the consolidation, that the consolidated companies should be permitted to operate until the expiration of the longest grant to any of the companies. At the expiration of the grant to the Garden Street branch the operation of that road might terminate, while the operation of the rest of the consolidated roads could go on perfectly well."

The argument here presented, that the consolidation of the Cleveland City Railway Company operated to extend the franchises of each of the constituent companies for the life of the longest franchise, rests, to my mind, on no better foundation than did the same contention in the case of the Cleveland Electric Railway Company. The consolidation in each case was approved upon the same conditions. The only noticeable difference in the respective dealings between the city and the two consolidated companies is that in the communication to the council announcing the agreement of consolidation of what is known as the Cleveland Electric Railway Company there was an express disclaimer of any rights by virtue of the consolidation "greater than the constituent companies forming the organization," while in the communication made by the companies forming the Cleveland City Railway Company such disclaimer was omitted. The omission, however, is not significant, because there is nothing in the fact of the consolidation which necessarily implies a claim that the consolidated companies should be permitted to operate or intended to operate under such consolidation (without further authority) until the expiration of the longest grant to any of the companies.

As to the Erie Street extension: The argument made, in support of the proposition that by the granting of this extension the common council has clearly evidenced an intention to extend the life of each of the constituent lines until the termination of the grant to operate the extension, is: That the subject-matter of the ordinance is not merely the extension in question, but embraces the future operation of the entire consolidated lines; that through the burdens imposed upon the lines connected by the extension, and by the obligation imposed upon the company to perform all the terms and conditions of the contract engendered by the consolidation proceedings, a modification is effected of every ordinance and contract then existing between the railway company and the city, for which the latter thus receives a new consideration; that the council accordingly determined that all the lines must be operated together during the period provided for the operation of the extension, and so selected the date of termination of the franchise of the constituent company having the longest time to run, viz., January 26, 1910. This argument assumes that by the Erie Street extension ordinance the council imposed upon the railway company the absolute duty to operate all its lines in connection with the extension, as a part thereof, during the entire period of the Erie Street extension grant. Surely no such requirement is imposed in express terms. If imposed at all, it is only by implication. In my judgment the implication to that effect is by no means clear and necessary.

It is true that by the Erie Street extension grant additional burdens are imposed upon the other lines, but these obligations are imposed as conditions to the Erie Street grant. They are merely a part of the consideration paid by the railway company for the grant. The life expressed in the grant is of the grant thereby made, and not of the former grants to the constituent companies. Had the council intended to extend the life of the grants to each of the constituent companies, the natural course would have been to so state in express terms. Nor is the extension ordinance made a substitute for the franchises of either of the constituent lines. Failure to perform the conditions imposed by the grant in question is not declared to be to cause a forfeiture of any of the other grants, but it is expressly declared that the failure or refusal of the company to perform the terms and conditions of the extension ordinance shall work a forfeiture "of this grant and the rights or privileges hereby granted"; thus by natural implication leaving the other grants in the same condition they would have been but for the extension grant. The extension ordinance may not have assured the power to effectively operate the extension for the full period required by the grant unless the existing franchises of the other lines be extended; but it would be more in accord with the rules of interpretation of contracts of this nature to hold the franchise for the extension limited by the contingency of the subsequent renewal of the franchises for connecting lines, than to raise by doubtful implication an intention to extend the life of such other lines.

In my opinion the decision in Cleveland Elec. Ry. Co. v. Cleveland, 204 U. S. 116, 27 Sup. Ct. 202, 51 L. Ed. 399, supports this conclu-

sion. It seems impossible to believe that it would have occurred naturally to the minds of lay members of the common council that by granting this extension the life of the franchise of each constituent company was prolonged. There is nothing in the title of the ordinance suggesting such a purpose, and it is proper to consider the title in determining the intention of the council in passing the ordinance. If such can be held to be the effect of this extension, the public may lose valuable rights through what is, at most, an implication neither clear nor necessary. The language of Judge Tayler, in deciding against a similar contention of the Cleveland Electric Railway Company with respect to the Garden Street extension, is highly pertinent. Cleveland Elec. Ry. Co. v. Cleveland (C. C.) 137 Fed. 111, 125 and following.

There is, to my mind, nothing in the decision of either the Low Fare Case, 194 U. S. 517, 24 Sup. Ct. 756, 48 L. Ed. 1102 or the 1904 Expiration Case, 201 U. S. 529, 26 Sup. Ct. 513, 50 L. Ed. 854, supporting the proposition that the effect of the Erie Street extension grant has been to prolong the life of the Woodland Avenue and West Side grants to the end of the Erie Street grant. In the Low Fare Case (involving agreements requiring that the consolidated lines be operated as one system and at one fare) three extension ordinances under consideration not only provided that a single fare be charged between points on the main lines and extensions, but in each of them there was express provision that the rights granted should terminate with the existing main line grant, to wit, on the 10th day of February, 1908, which was in fact the date of the expiration of the grant of the West Side lines then a part of the consolidated company. In respect to the decision in the 1904 Expiration Case, it is to be noted that by the ordinance of March 22, 1899, which authorized the equipment of the Woodland Avenue and West Side lines with electricity, it was expressly provided that "said company shall have the right to maintain and operate its present lines and any and all extensions until the expiration of the present grant to said company, to wit, the 10th day of February, 1908"—a date which was in fact the expiration of the franchises of the West Side lines. There was thus express language declaring an intention and purpose to extend the grant of the main line until February 10, 1908, not only in the ordinance last referred to, but also in the three ordinances before mentioned. Mr. Justice McKenna accordingly said:

"It (the language used by the city in the ordinance) recognized a main line not in one ordinance but many ordinances, and the purpose was to join the initial grant and its extensions together, and continue it, and those combined, until 1908. There could have been no mistake in the language used or misunderstanding of it. We might suppose a mistake in one ordinance, but we cannot suppose a mistake in four ordinances."

The contrast between the case presented here and that presented in the cases last referred to is, to my mind, sharply defined, for here there is an utter lack of express declaration of an intention to extend the franchise of the main line. The conclusion reached is that the Erie Street extension grant did not impose the duty upon, or create the right in, the railway company to operate the company's other lines

in connection with the extension longer than the lives of the existing grants of such other lines, viz., February 10, 1908.

As to the Corwin Avenue and South Woodland Avenue grant: This grant is of the right to construct an additional track and a double track extension, each for a short distance at the extreme outlying end of one of the Woodland Avenue lines. In the case of this grant, as in that of the Erie Street extension, there is no express declaration that the life of the grants of the constituent companies shall be extended during the period of the grant conferred by the extension ordinance. Here, as in the case of the Erie Street extension, such intent is left to be discovered, if at all, by implication. Here, again, the extension granted is not a substitute for the earlier grants to the constituent lines. The only respects, material to this decision, in which the grant in question may be thought to differ from the Erie Street grant, are these: First, the extension is of the Woodland Avenue lines rather than of the cable lines; second, the authority to operate the extension "in connection with the other lines of street railroad now owned by said company" is expressed, instead of being left to implication, as in the case of the Erie Street extension. The question of the effect of the Erie Street extension has been discussed on the theory that an operation of the extension in connection with the other lines was contemplated. The considerations advanced in this opinion as controlling the effect of the Erie Street extension equally forbid a distinction in favor of the grant under consideration merely from the fact of its connection with the Woodland Avenue line. Why the date of January 26, 1910, was selected as the date of expiration of the extension grant is not clearly apparent. It is quite as likely to have been inadvertently selected because contained in the Erie Street extension ordinance, which was substantially copied in this ordinance. The adoption of this date, to my mind, falls short of clearly showing an intention on the part of the common council to extend thereby the life of the Woodland Avenue and West Side grants.

It is urged that the decision of the Supreme Court in Cleveland Elec. Ry. Co. v. Cleveland, 204 U. S., at page 137, 27 Sup. Ct., at page 202, 51 L. Ed. 399, to the effect that it would be unreasonable to hold that a right to use the second or additional track was intended to be limited to a different time than that which existed with relation to the first track, is decisive of the proposition that the lives of the extension and the constituent lines were intended to expire at the same time. It seems sufficient to suggest that the remark referred to was made with respect to an express provision (in the grant of the right to operate a second track) that it should continue until the expiration of the grants for the company's main lines, and in connection with the determination of the meaning of the term "main line."

As to the Ansel Avenue line: This avenue was an outlying street, extending to the city limits. As appears by what has been before said, as to the terms of the ordinance, it affords less ground for an implication of an extension of previous grants to other lines than

either of the ordinances before considered. Further discussion of this ordinance would seem unnecessary.

It is urged on behalf of the city that its intention not to extend (by the extension grants under consideration) the life of the other connecting lines is shown by an ordinance of November 12, 1900, for an extension of tracks in Hough avenue, by which ordinance the life of the extension is made to expire with that of the line extended; also by two ordinances of April 2, 1901, which provide that the right granted "shall terminate at the same date as the rights and privileges granted to said company for its lines" so extended. As the three ordinances last referred to were passed after the commencement of litigation in the Low Fare Case, they are not by this opinion taken into account.

It is also urged on behalf of the city that the understanding on the part of the railway company that the franchise of the Woodland Avenue and West Side lines expired in 1908 conclusively appears from the allegations in the original and amended bills of complaint filed in the Low Fare Case which was begun in 1898. No estoppel, however, could well arise by reason of the taking of such position in the litigation referred to, and, while such admissions are not without weight, I prefer to place my decision upon a construction of the ordinances themselves, which are relied upon by the railway company as extending the life of the Woodland Avenue and West Side lines.

The conclusion I have reached is that the lives of those lines have not been extended by the action of the council with reference to either the consolidation of 1893, or the Erie Street or Corwin Avenue extensions, or the Ansel Avenue grant.

It remains to consider whether the Willson Avenue or Cross-Town ordinance of February 19, 1894, has extended the life of the Woodland Avenue and West Side lines to July 1, 1914. It is the contention of the railway company that, inasmuch as this ordinance provides for the operation of the Cross-Town line in connection with the two other systems of railways then in operation, the intention of the council is clearly shown not only to permit, but to require, the operation of all the other lines of both systems connecting with Willson avenue until the expiration of the Cross-Town grant, and thus to extend to July 1, 1914, the life of the franchise of every line of both of the two otherwise independent systems connecting with the Cross-Town line.

It will be noted that the title of the Cross-Town ordinance is limited to granting permission to the two otherwise independent companies "to extend their tracks in Willson Avenue." It will also be noted that there is nowhere in the act any express language referring to the life of the grants of the connecting roads, and that the argument in favor of the extension of the life of the other lines is based entirely upon an implication alleged to arise from the facts that the other lines are to be operated in connection with the Cross-Town line, and that the life of the latter extended to July 1, 1914. In my opinion no implication of the extension of the life of such other lines necessarily arises. Much that has been already said with reference to the other ordinances is applicable to this ordinance.

The same proposition was presented to the Supreme Court in the case of Cleveland Elec. Ry. Co. v. Cleveland, and was there rejected; Mr. Justice Peckham saying (204 U. S., at page 141, 27 Sup. Ct., at page 212 [51 L. Ed. 399]):

"While the council consented to the extension by the complainant and the Cleveland City Railway Company of the line of railway in Willson avenue, and also to the operation of that line in connection with other lines of the consolidated company, which included the Garden Street branch, yet it cannot be held that there arose from that ordinance, when accepted by the company, a contract which should extend the time on all of the roads until the expiration of the grant contained in that ordinance, July 1, 1914. By such means an implied extension of time, affecting over 200 miles of track, as is stated, would be accomplished by making these conditions in regard to the Willson Avenue grant a substitute for a grant, in plain language, affecting the Garden Street branch. On the contrary, we think that the effect of that ordinance was simply to make it necessary for the Garden Street branch and the other roads, also, to comply with the conditions set forth in the ordinance until the expiration of their respective and existing grants, but that ordinance did not thereby extend the various other railroad grants by implication. There is no such connection between the various roads as to make it necessary, in order to operate one, that all the others should be in operation as a unit, and as comprehending one indivisible system. There is nothing in this record which shows any difficulty whatever in operating the Garden Street branch as separate from the rest of the so-called system, or in operating that system separate from the branch. If the council had intended to extend the time of the termination of the various grants to these railroads, it surely would have said so, and not left it to such vague and uncertain presumptions."

In my judgment the case presented here is not distinguishable from the case cited by reason of the fact (as stated) that the Garden Street line was independent from the other lines of the Cleveland Electric Railway Company, and that as such independent line it had no tracks upon Willson avenue; while the Cleveland City Railway Company had as part of its system tracks upon Willson avenue, the extension of which was provided by the ordinance in question for the purpose of creating a Cross-Town line. If the intention of the council in passing the Cross-Town ordinance is to be determined by the question whether a given line in the system could be operated independently of the extension (a proposition to which I am not prepared to assent), there appears no reason why the Garden Street line involved in the case of the Cleveland Electric Railway Company can be said to be capable of operation, independently of the Cross-Town feature, any more than can the Cleveland City Railway Company's system, which was in fact operated without the Cross-Town feature previous to the adoption of the ordinance therefor. Unless it was the intention of the council in passing the Cross-Town ordinance to extend the lives of all the lines connecting with the Cross-Town section, there is, to my mind, no room for a contention that such intention was expressed as to portions of these lines. That it was not the intention of the council to so extend all the lines has been authoritatively decided.

It is my opinion: That the Willson Avenue ordinance did not extend the franchises of the Woodland Avenue and West Side lines; that the latter franchises thus expired February 10, 1908; and that the receivers should be instructed accordingly.

ROBINSON v. SEA VIEW R. CO.

(Circuit Court, D. Rhode Island. April 7, 1909.)

No. 2,844.

EMINENT DOMAIN (§ 242*)—PROCEEDINGS TO TAKE PROPERTY—PERSONS CONCLUDED BY JUDGMENT.

A landowner, who appeared in a state court in a condemnation proceeding by a railroad company, and filed a claim for damages on account of land taken from her, and had a hearing thereon, is estopped to deny the validity of the proceeding for want of notice or other irregularity, or to attack the decree collaterally by a suit in a federal court against the company, based on a claim of title in herself.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 626; Dec. Dig. § 242.*]

Percy W. Gardiner, for plaintiff.
T. F. I. McDonnell, for defendant.

BROWN, District Judge. On June 5, 1907, within the period fixed by order of the state court for the filing of claims, the plaintiff filed in that court her claim for damages for the taking of her land and injury to the remainder of her said tract of land, in the total sum of $10,000.

It seems to be settled by the decision of the Supreme Court in Great Falls Manufacturing Company v. Attorney General, 124 U. S. 581, 597, 600, 8 Sup. Ct. 631, 637, 638, 31 L. Ed. 527, that a claim for damages for a taking is inconsistent with a claim that there was no taking. In the opinion of the court it is said:

"In reference to the allegation that the survey and map made by the Secretary were not sufficiently accurate, and that the notice published by the Attorney General was materially defective, it may be further said that all such objections were waived by the company when, proceeding under Act July 15, 1882, c. 294, 22 Stat. 168, it invoked the jurisdiction of the Court of Claims to give judgment against the United States for such compensation as it was entitled to receive for its land and water rights."

Various objections were urged to the act itself, but the court said of these:

"They have become immaterial by the act of the plaintiff in instituting suit against the United States in the Court of Claims. In that suit compensation was sought for its property taken for public use, while the present suit proceeds upon the ground that it has not been lawfully taken, and that it is entitled to be placed in possession thereof. Congress prescribed a particular mode for ascertaining the compensation which claimants of property * * * were entitled to receive. * * * The plaintiff by adopting that mode has assented to the taking of its property by the government for public use, and has agreed to submit the determination of the question of compensation to the tribunal named by Congress."

The claim contains this language:

"And the said Ann Eliza Robinson hereby represents that this claim for damages to her said property is filed solely and only for the purpose of protecting and saving her rights in this matter in case the courts of this state should determine that she had received proper notice of these proceedings or that any of the said proceedings are legal and binding upon her."

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

In spite of this attempted reservation of rights, there is a positive claim for damages. There is a clear inconsistency between the present contention that the proceedings are void, and the claim now on file in the state court for damages for a taking of her lands. In the case of Great Falls Manufacturing Co. v. Attorney General it was alleged that:

"From great caution and fear lest it might lose all benefit of any provision of said act by limitation, it then filed a petition in that court setting forth its claim, in order to save its rights, and for no other purpose whatever; but it protests that what the Secretary of War and the Attorney General did are simple trespasses and wrongs done to the plaintiff, and that for the want of legal steps on their part for the condemnation of its property the Court of Claims is without jurisdiction to ascertain and award compensation to it."

Yet in respect of this contention the opinion makes the following observation:

"It is scarcely necessary to say that it is immaterial that the plaintiff invoked the jurisdiction of the Court of Claims from fear that, if it did not file its petition in that court within the time limited, it might lose the right to demand compensation for its property. If the act of the Secretary of War in taking possession of the property was in violation of law, neither he nor his agents could rightfully hold possession against the plaintiff, in which case the plaintiff might have stood upon its rights under the Constitution, and invoked judicial authority for such protection as the law would afford against the unauthorized acts of public officers. But the plaintiff chose to acquiesce in the taking of its property for public use, and to accept the offer of the government to have the amount of compensation fixed by the Court of Claims, according to its peculiar modes of procedure. The reason inducing it to adopt such a course can have no influence upon the action of that court, nor affect its power to ascertain and award just compensation for the loss of the property."

See, also, Robb v. Vos, 155 U. S. 13, 15 Sup. Ct. 4, 39 L. Ed. 52; Wabash Railroad v. Brow, 164 U. S. 278, 17 Sup. Ct. 126, 41 L. Ed. 431.

So far as the plaintiff's objections are based upon lack of notice, they have been waived by her appearance by attorney in the proceedings in the state court; and so long as the decree of the state court, in proceedings to which, by her voluntary appearance, she has become a party, remains in force, it cannot be collaterally impeached in the present suit.

It should further be borne in mind that this railroad is not a mere private enterprise, nor a matter of purely private concern. The road, when constructed, is affected by the public interest, and if there was any irregularity in the proceedings in the state court the company could not be dispossessed before it had an opportunity to amend or to perfect condemnation proceedings, if amendment or further proceedings were necessary. Winslow v. Balto. & Ohio R. R. Co., 188 U. S. 646, 660, 661, 23 Sup. Ct. 443, 47 L. Ed. 635.

In addition to the filing of the claim in the state court, it appears that the plaintiff has had her hearing before the commissioners on the question of assessing damages.

As the plaintiff has elected to claim damages for the taking, and as this election is inconsistent with the present contention that title still remains in the plaintiff, the proceedings in the state court must be held a bar to the present action.

Judgment will be entered for the defendant.

CITY OF WINONA v. BOTZET.

SAME v. NICHOLS.

(Circuit Court of Appeals, Eighth Circuit. March 26, 1909.)

Nos. 2,840, 2,841.

1. MUNICIPAL CORPORATIONS (§§ 733, 852*) — GOVERNMENTAL FUNCTIONS — NEGLIGENCE.

The city of Winona maintained a shrill, startling steam whistle on its waterworks building within 110 feet of its bridge across the Mississippi river, which was 40 feet in height at that point. This whistle was connected with its fire-alarm system, so that it gave notice automatically by its blasts of fires and their location when an alarm was sent in. The city directed the engineer of its waterworks to blow this whistle daily by hand at 5 p. m. to give notice to union men and its employés of the end of their day's work. There was substantial evidence that the blasts from this whistle had frightened horses traveling on the bridge for years before this accident. As Nichols was driving his horses over the bridge at a point about 110 feet from the whistle at 5 p. m., the assistant engineer of the waterworks blew a blast of the whistle which frightened his horses, caused them to run away, to throw him and a girl who was riding with him to the ground below, and to kill him and injure her.

Held: (1) The whistle was not blown in the exercise of the city's power to protect itself and its inhabitants against fires, but in the exercise of its power to maintain waterworks and to care for its own property.

(2) There was substantial evidence that it failed to discharge its duty to so use its property as to do no unnecessary damage to others, and its duty to use reasonable care to keep its bridge reasonably safe for travelers.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1547–1549, 1809; Dec. Dig. §§ 733, 852.*]

2. NEGLIGENCE (§ 125*)—EVIDENCE OF PRIOR SIMILAR ACCIDENTS COMPETENT.

In an action for damages caused by frightening horses on a highway by the blast of a whistle, evidence that tractable and gentle horses had been frightened previously by blasts of the same whistle under similar circumstances was competent.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 241; Dec. Dig. § 125.*]

3. NEGLIGENCE (§ 136*)—QUESTION FOR JURY UNLESS BUT ONE FINDING SUSTAINABLE.

It is only when the material facts and the rational inferences from them are so clearly established that but one finding would be sustained by the court that the question of the negligence of the defendant is for the court. Evidence considered, and *held* sufficient for the consideration of the jury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 257–353; Dec. Dig. § 136.*]

4. NEGLIGENCE (§§ 56, 58, 62*)—"PROXIMATE CAUSE"—"INTERVENING CAUSE"—FACTS—CONCLUSION.

The proximate cause of an injury is the primary moving cause without which it would not have been inflicted, and which in the natural and probable sequence of events, without the intervention of any new and independent cause, produces the injury.

The intervening cause which will relieve of liability for an injury is an independent cause which intervenes between the original wrongful act or omission and the injury, turns aside the natural sequence of

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

events, and produces a result which would not otherwise have followed and which could not have been reasonably anticipated.

The blast of a whistle frightened horses on a bridge, they ran, the tugs came unhooked, the tongue slipped from the yoke, fell to the bridge and broke, the wagon box crashed against the railing, threw the occupants over it to the ground, and injured them.

Held: The blast of the whistle was the proximate cause of the injuries, and the subsequent events preceding the injuries were dependent upon and caused by it.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 69, 71, 76–79; Dec. Dig. §§ 56, 58, 62.*

For other definitions, see Words and Phrases, vol. 6, pp. 5758–5769; vol. 8, p. 7771.]

5. NEGLIGENCE (§ 66*)—ASSUMPTION OF RISK—KNOWLEDGE AND APPRECIATION OF THE DANGER ESSENTIAL.

Notice or knowledge and appreciation of the danger are indispensable to an assumption of the risk of it.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 86–89; Dec. Dig. § 66.*]

6. NEGLIGENCE (§§ 122, 136*)—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF—INSTRUCTION OF GUILT WHEN PERMISSIBLE.

The burden of proof to establish the contributory negligence of the plaintiff is upon the defendant.

It is only when the evidence of it is so clear that the court would not sustain a finding to the contrary that it is the duty of the court to instruct the jury that the plaintiff was guilty of it. Evidence considered, and *held* for jury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 221–223, 226–234, 333–346; Dec. Dig. §§ 122, 136.*]

7. NEGLIGENCE (§ 93*)—DRIVER'S NEGLIGENCE NOT IMPUTED TO PASSENGER.

The negligence of the driver of a vehicle may not be imputed to a passenger who is riding with him without charge or compensation.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 147–150; Dec. Dig. § 93.*]

8. MUNICIPAL CORPORATIONS (§§ 764, 847*)—BRIDGES (§ 37*)—NEGLIGENCE—DUTY TO KEEP BRIDGE SAFE AND USE PROPERTY WITH CARE EXTENDS BEYOND LIMITS OF BRIDGE AND PROPERTY.

The duty of a city to exercise reasonable care to keep its bridge or street reasonably safe for travelers is not limited to acts of commission and omission within the limits of the bridge or street, but extends to those outside the bridge or street that render it unsafe for travelers.

The duty to so use its own property as to do no unnecessary injury to others extends to effects produced by the use beyond the limits of its property.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1616–1620; Dec. Dig. §§ 764, 847;* Bridges, Cent. Dig. §§ 103–105; Dec. Dig. § 37.*]

9. MUNICIPAL CORPORATIONS (§ 755*)—BRIDGES (§ 35*)—DAMAGES—INJURIES TO PERSONS.

Damages sustained by injuries to persons as well as to property are recoverable for a breach of these duties.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1587, 1589, 1590; Dec. Dig. § 755;* Bridges, Cent. Dig. §§ 80, 96, 98; Dec. Dig. § 35.*]

10. NUISANCE (§ 6*)—PUBLIC NUISANCE—UNAUTHORIZED BY LEGISLATIVE GRANT WHERE UNNECESSARY FOR ITS ENJOYMENT.

Where the use and enjoyment of a legislative grant does not necessarily and naturally create a nuisance, but the nuisance results from the method

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

of the use and enjoyment, the grant is no defense to an action on account of the creation or continuance of the nuisance or its effects.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 35-37; Dec. Dig. § 6.*]

11. MUNICIPAL CORPORATIONS (§§ 57, 745½*)—GOVERNMENTAL AND PRIVATE OR CORPORATE POWERS—CITIES EXEMPT FROM LIABILITY FOR EXERCISE OF FORMER, SUBJECT TO LIABILITY FOR EXERCISE OF LATTER—"PUBLIC POWERS"—"PRIVATE POWERS."

Municipalities have two classes of powers, the one political, public, in the exercise of which they govern their people and act as delegates of the state, the other private, business, in the exercise of which they act for the advantage of their inhabitants and themselves.

They are not liable for damages for the acts and omissions of their officers and agents in the exercise of the former. But they are liable for damages for the wrongful and negligent acts and omissions of their officers and agents within the scope of their authority in the exercise of the latter.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 144, 1568, 1569; Dec. Dig. §§ 57, 745½.*

Liability for torts of public officers, see note to City of New York v. Workman, 14 C. C. A. 534.]

12. MUNICIPAL CORPORATIONS (§ 747*)—POWER TO CONSTRUCT AND MAINTAIN WATERWORKS A BUSINESS POWER.

The municipal power to construct, maintain, and operate waterworks is a private or business power, and a city is liable for damages caused by the wrongful or negligent acts and omissions of its officers and agents in the exercise of that power to the same extent as a private corporation or individual.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1572; Dec. Dig. § 747.*]

(Syllabus by the Court.)

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

At 5 o'clock in the afternoon of a cold blustering day in January, 1907, the assistant of the engineer of the waterworks of the city of Winona blew a steam whistle on the waterworks building for the purpose of notifying union men and city employés that their workday was over, and thereby scared a team of horses which James N. Nichols was driving about 110 feet distant from the whistle over the city's bridge across the Mississippi river, so that they ran away, threw him and Irene Botzet, a schoolgirl 13 years old who was riding with him, over the railing of the bridge to the frozen ground 40 feet below, killed him, and seriously injured her. Mary Alice Nichols, the administratrix of his estate, brought an action against the city for alleged negligence in causing the death of Mr. Nichols in this way. August Botzet, the father of Irene, brought an action against the city for alleged negligence in causing the injuries to her. The two causes were tried together, and resulted in judgments for the plaintiffs, of which the city complains.

For more than 20 years the city of Winona has maintained waterworks, and as a part thereof a building in which the pumping engines are located and operated. It has also maintained an organized fire department under legislative authority. In 1888, under this authority, it installed an electric fire-alarm system, and as a part of it a 12-inch fire whistle, which it placed on the roof of the waterworks building, and which automatically notified the members of the fire department and others by its blasts in what part of the city a fire was whenever an alarm was sent in from any one of some 60 fire-alarm boxes scattered throughout the city. This whistle, including the fire-

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

alarm system, was tested three times a day, so that it gave forth many blasts, sometimes about 100 in a day. After this whistle and fire-alarm system had been established, and in 1891, the city of Winona, under authority conferred upon it by the Legislatures of Minnesota and Wisconsin, constructed and has maintained ever since a toll bridge across the Mississippi river for the use of pedestrians, teams, and carriages. It constructed this bridge in such a way that the driveway of the approach to it upon the Minnesota side started on an easy ascent at the intersection of Second and Main streets in Winona, ran north on Main street about 400 feet, then turned and ran west one block of 300 feet to Johnson street, where it was at least 45 feet above the ground. At that point the driveway turned and ran east across the river about 300 feet to a point where it connected with a pile bridge and a road leading across the Wisconsin bottoms. Where the roadway turned east on the Minnesota side it was not more than 110 feet distant from the steam whistle on the waterworks building, which was in a plane not more than 15 feet below it. The roadway of the bridge was provided with a sidewalk on one side of it 6 feet in width, a driveway for carriages 18 feet in width, and substantial wooden railings 4 feet 2 inches in height.

In May, 1905, the city council of Winona, on a petition of the trades and labor council, adopted a recommendation of its fire committee that this fire whistle should be blown at 5 in the afternoon to notify mechanics and others when their workday ceased. Thereupon the water commissioner directed the engineer of the waterworks to blow this whistle at that hour each day, and he did so by means of a cord attached to the valve from that time until the injuries were inflicted which resulted in these actions.

By chapter 165, p. 238 of the General Laws of Minnesota, 1903, the management of the waterworks was transferred on May 1, 1906, to the board of municipal works of the city of Winona; but that board gave no directions concerning the blowing of this whistle, and the engineer who continued in charge of the waterworks building continued to blow the whistle as before.

The blast of this whistle was produced by a steam pressure of about 100 pounds to the square inch, and it sent forth a shrill, startling sound which could be heard 5 miles, and much farther under favorable conditions. In the discharge of its function as a fire whistle it was blown automatically by the action of the fire-alarm system. But in the discharge of its function as a time whistle it was blown by hand by the engineer of the waterworks, or his assistant, who pulled the valve open by means of a cord attached to it. Gentle and tractable horses had been scared by the blasts of this whistle and had attempted to run away while they were traveling upon the bridge, and this had occurred many times during the preceding nine years. Mr. Nichols was a dairyman who lived about 12 miles distant from Winona in the state of Wisconsin, and who had been accustomed for four years to drive over the bridge once a week and sometimes more frequently, so that he probably knew that the whistle sounded for fire alarms; but the evidence does not indicate whether or not he was aware that it blew at five in the afternoon. He drove into Winona on the morning of the day of the accident a pair of young horses, four and five years old, and started to return about 5 o'clock in the afternoon. Irene Botzet, a schoolgirl who lived in Wisconsin and attended school in Winona, asked him for a ride across the bridge, and he granted her request. As he drove up the approach of the bridge toward the turn near the whistle, he was holding his horses down to a slow walk so that another team walked past him. There were then two teams in front of him on the bridge, and he was following. Just after he arrived at the turn of the driveway to the east the steam whistle blew, and his team, and that next in front of him, began to run. He held onto his horses and guided them past the two teams in front of him, but one, and a little later two more, of the tugs in his harnesses unhooked, the end of the tongue slipped out of the yoke, dropped, and broke, the horses ran on, drove the end of the broken tongue against the guard rail, raised the box on which the occupants were sitting, and threw them over the railing to the frozen ground on the Wisconsin side 40 feet below. The court submitted to the jury the questions, was the city guilty of negligence which was the proximate cause of the injuries inflicted by the runaway, and were the victims guilty of negligence which

contributed to cause these injuries? and the jury answered the former in the affirmative, and the latter in the negative.

W. J. Smith (Richard A. Randall and Tawney, Smith & Tawney, on the brief), for plaintiff in error.

Edward Lees and M. L. Fugina (M. B. Webber, on the brief), for defendants in error.

Before SANBORN, VAN DEVANTER, and ADAMS, Circuit Judges.

SANBORN, Circuit Judge (after stating the facts as above). The city of Winona is a municipal corporation created, endowed with its powers, and charged with its duties by the Legislature of the state of Minnesota. The character and the limits of the powers and liabilities of such corporations are questions of local law, upon which the decisions of the highest judicial tribunals of the states which create them are authoritative in the national courts, because these questions are determinable by the construction of the constitutions and statutes of the states under which the municipalities are organized. Detroit v. Osborne, 135 U. S. 492, 499, 10 Sup. Ct. 1012, 34 L. Ed. 260; Claiborne County v. Brooks, 111 U. S. 400, 410, 4 Sup. Ct. 489, 28 L. Ed. 470; Madden v. Lancaster County, 12 C. C. A. 566, 570, 65 Fed. 188, 192; Blaylock v. Incorporated Town of Muskogee, 54 C. C. A. 639, 640, 117 Fed. 125, 126. So far, therefore, as the Supreme Court of Minnesota has decided the extent of the powers and liabilities of municipal corporations, those decisions must control in this case. The opinions of other courts become immaterial, and it will be unnecessary to notice or consider them.

Under the decisions of the Supreme Court of Minnesota municipal corporations are charged with the duty to exercise ordinary care to make and to keep their roads, streets, and public ways reasonably safe for travelers thereon, and also with the duty to exercise reasonable care to so use their property and rights as to inflict no unnecessary injury upon persons or upon their property. Shartle v. City of Minneapolis, 17 Minn. 308 (Gil. 284); Blyhl v. Village of Waterville, 57 Minn. 115, 58 N. W. 817, 47 Am. St. Rep. 596; Wiltse v. City of Red Wing, 99 Minn. 255, 260, 109 N. W. 114.

The bridge across the Mississippi river on which this accident occurred is a public highway, and the city of Winona is liable for negligence in its maintenance and care to the same extent as it is for negligence in the care and maintenance of its public streets. Willis v. Winona City, 59 Minn. 27, 60 N. W. 814, 26 L. R. A. 142. With these established rules in mind, let us consider the complaints concerning the trial of these cases.

The first specification of error presented is that the court received in evidence the petition of the Trades and Labor Assembly that the fire whistle be blown daily at 5 in the afternoon, the action of the city council of the defendant in May, 1905, granting that petition, and the curfew ordinance passed in January, 1906, whereby the engineer of the waterworks was directed to designate 9 in the afternoon each day by nine short blasts of the whistle; and the argument is that, inas-

much as on May 1, 1906, the management of the waterworks building passed to the board of municipal works, the water commissioner, who in May, 1905, directed the engineer to comply with the order of the council, then went out of his office, and the board never gave the engineer any direction on the subject thereafter, these acts of the common council were immaterial. But the question at issue was, did the city exercise ordinary care to keep the bridge reasonably safe for travelers, and to use its waterworks and steam whistle so as to inflict no unnecessary injury upon the persons or property of travelers over the bridge? The acts of the council which were introduced in evidence clearly indicated the degree of care the city was exercising in the use of this whistle, and for that reason they were not immaterial. Again, the act of the city council which directed the blowing of the whistle at 5 in the afternoon unquestionably gave the engineer the authority and the direction of the city of Winona to blow it at that hour until that authority was revoked or an inconsistent instruction was given to him by the city. The same engineer remained in charge of the waterworks building and of the whistle after the control of them was transferred to the board of municipal works, and he undoubtedly had the same authority to blow the whistle thereafter that he had to continue to run the engines and to pump the water through the city. His authority continued until it was revoked. Moreover, this action of the council in connection with the continued blowing of the whistle subsequent to May 1, 1906, was competent, and persuasive evidence of the alleged negligence of the board of municipal works, for the board must have been aware that the whistle was being blown after it came into control of the waterworks, and it did not stop it, and by the express terms of the act under which it was created the city is liable for its acts of commission and omission within the scope of its authority. Gen. Laws Minn. 1903, p. 241, c. 165; Kleopfert v. City of Minneapolis, 90 Minn. 158, 160, 95 N. W. 908; Barnes v. District of Columbia, 91 U. S. 540, 545, 551, 555, 23 L. Ed. 440; District of Columbia v. Woodbury, 136 U. S. 450, 10 Sup. Ct. 990, 34 L. Ed. 472. There was no error in the admission of the acts of the city council.

It is assigned as error that the court permitted the introduction in evidence of testimony that other horses of ordinary gentleness and tractability were frightened while traveling over this bridge by the blasts of this steam whistle at various times during nine years preceding the accident in question. The reasons urged in support of this specification of error are: (1) That Nichols' horses were frightened by a single blast of the whistle, five seconds in duration, while the horses of the witnesses were scared by several blasts in quick succession caused by the automatic action of the fire-alarm system, but it was evidently the first sudden sound that tended to frighten the horses far more than its subsequent repetition; (2) that the first blast is not at its commencement as loud as it becomes later, because there is at first stationary steam in the pipe which must be started forth, but there could have been no very substantial difference in the blasts on that account, because the steam pressure was constantly from 85 to 110

pounds to the square inch, and that pressure necessarily must have produced almost instant action and sound when the valve was released; and (3) because the defendant was charged with liability for the effect of the blast which it directly caused, so that this evidence was not necessary or competent to prove notice to the city of its dangerous character, and because this evidence introduces a collateral issue. But the main issue in this case was whether or not the blasts of this whistle were of such a character that a person of ordinary intelligence and prudence would have anticipated the frightening of horses traveling upon the bridge, and their rapid flight as the natural and probable effect of the blast. If these blasts were of that character, the production of them was actionable negligence; if they were not, it was not actionable negligence to make them. There were but two ways in which that question could be determined. It must be determined by the opinions or speculations of witnesses, or by the experience of those who had actually tried it. The latter is certainly more persuasive and convincing and more likely to accord with the fact than the former. The material conditions under which the horses of the witnesses were frightened were substantially the same as those under which the accident happened. They were scared while they were traveling upon the same bridge upon which the horses of Nichols were frightened. They were terrified by the same whistle located in the same place at the same distance from the bridge, and the testimony of the witnesses who were driving or observing these animals that gentle and tractable horses had been frightened while they were traveling upon this bridge by the blasts of this whistle at various times preceding the accident was upon both reason and authority material and persuasive evidence that these blasts were of a character likely to frighten horses under such circumstances, that their fright and flight were natural and probable consequences of the production of the blasts, and that these facts were so notorious that they might be considered by the jury to constitute notice to the city of the dangerous character and probable effects of the blowing of this whistle. Darling v. Westmoreland, 52 N. H. 401, 13 Am. Rep. 55; Nye v. Dibley, 88 Minn. 465, 93 N. W. 524; District of Columbia v. Armes, 107 U. S. 519, 525, 2 Sup. Ct. 840, 27 L. Ed. 618; C. & N. W. Ry. Co. v. Netolicky, 14 C. C. A. 615, 622, 67 Fed. 665, 672; Wigmore on Evidence, § 458, subd. 2; Chicago Great Western Ry. Co. v. McDonough, 161 Fed. 657, 667, 88 C. C. A. 517.

Counsel for the city argue that the refusal of the court to instruct the jury to return a verdict in its favor was error: (1) Because there was no lack of care in the construction and the maintenance of the bridge, and the city was not liable for injuries caused by its acts of commission or omission outside of that structure; (2) because the whistle was blown for a governmental and not for a private or corporate purpose, and the city is exempt from liability for acts so done, and the rights of the injured were not thereby infringed; (3) because the location and the use of the whistle were discretionary with the city, and the exercise of that discretion was not reviewable by the courts; (4) because the act of blowing the whistle to indicate the

time of day was beyond the corporate power of the city; (5) because there was no evidence of the city's negligence, or that its negligence was the proximate cause of the injury, and the persons injured assumed the risk of the blast of the whistle; and (6) because Nichols was guilty of contributory negligence, in that his whiffletree hooks were not in such a condition that they prevented the tugs from becoming unhooked while his horses were running away.

It is only when the material facts and the rational inferences from them are so clearly established that but one finding from them would be sustained by the court that the duty is imposed upon it to withdraw the question of the causal negligence of a defendant from the jury. Grand Trunk Ry. Co. v. Ives, 144 U. S. 408, 417, 12 Sup. Ct. 679, 36 L. Ed. 485; Chicago Great Western Ry. Co. v. Price, 38 C. C. A 239, 243, 97 Fed. 423, 427. Ten witnesses testified to 13 occasions within 9 years preceding this accident upon which gentle and tractable horses upon this bridge near the turn where Nichols was when the whistle blew had been frightened by blasts of this whistle, and had jumped or run or turned around. One witness testified that his horse was so terrified that he jumped and broke the shafts of his buggy, another that his horses were so scared that they ran and tore the yoke near the tongue and broke a strap from the evener, still another that his horses were so frightened that they ran and caused a tug to unhitch, and another still that his horses were so terrified that they ran while he was driving them so that they threw his wife out of his wagon and injured her. At the time of this accident Losinski was driving the leading team across the bridge, Duff the second team, and Nichols was either holding his team stationary or at a slow walk very near the turn of the bridge when the whistle blew. Losinski testified that his horses immediately jumped and became frightened, but he held them. Duff testified that Nichols stopped his horses near the turn to let him pass, that he passed Nichols, that the latter's horses were then quiet, that just after he passed him the whistle blew, that the moment it blew both teams were on the dead run, that his horses were gentle, but they were frightened, ran, and jumped and nearly got away. This was substantial and persuasive evidence that the blowing of this whistle was likely to frighten horses passing it on the bridge, that it rendered the bridge unsafe for drivers of teams thereon, and that, in the light of the evidence that the sound it gave forth was shrill, startling, "awful loud," and could be heard from 5 to 10 miles, this fact was so notorious that a jury was warranted in finding that it must have been known to the city, and that a person of ordinary prudence and intelligence would have anticipated as its natural and probable result the fright and flight of passing horses and serious injuries to those who should be drawn by them.

Nor can the contention be sustained that the unhooking of the tugs, the breaking of the pole, or any of the other events between the blowing of the whistle and the injuries and death was, and the blast of the whistle was not, the proximate cause of those dire effects. The proximate cause of an injury is the primary moving cause without which it would not have been inflicted, but which, in the natural and

probable sequence of events, and without the intervention of any new or independent cause, produces the injury. The intervening cause that will insulate the original wrongful act or omission from the injury and relieve of liability for it must be an independent, intervening cause which interrupts the natural sequence of events, prevents the ordinary and probable result of the original act or omission, and produces a different result which could not have been reasonably anticipated. Union Pacific Ry. Co. v. Callaghan, 6 C. C. A. 205, 210, 56 Fed. 988, 993, 994; Cole v. German Savings & Loan Soc., 59 C. C. A. 593, 597, 600, 124 Fed. 113, 117, 120, 63 L. R. A. 416. The blast of this whistle was the primary moving cause without which the accident would not have happened. It was the cause which set in motion all the other events, the cause which set the horses into a dead run, made them uncontrollable, brought about the unhooking of the tugs, the breaking of the pole, the crash of the wagon against the railing, and the throwing of its occupants to the ground below. All these intermediate acts were dependent, not independent, causes. They were mere links in the chain of causation between the blowing of the whistle and the injuries and death it produced, and were themselves caused by the blast of the whistle.

There is a statement in the brief that Nichols and Irene Botzet knew that the whistle was blown daily at 5 in the afternoon and that they assumed the risk of injury from it. The place in the record where the evidence that they had this knowledge may be found is not pointed out, and a search of the record for it has proved vain. The transcript, however, does show that Irene testified that she did not know that the whistle blew at 5 o'clock, and that just as Nichols was approaching the turn of the bridge nearest to the whistle a few seconds before 5 o'clock he held his horses to a walk while Losinski passed him, and then stopped them very near the turn while Duff passed him, and then it was 5 o'clock, the whistle blew, the two rear teams ran instantly, and the injuries and death followed. It is difficult to believe that Nichols would have walked and then stopped his horses at the most dangerous place on the bridge at 5 o'clock in the afternoon if he had known that the whistle blew daily at that hour, when he might just as easily have driven them on and been a few hundred feet distant when the blast came.

Notice or knowledge and appreciation of the danger are indispensable to the assumption of the risk of it (Chicago Great Western Ry. Co. v. Price, 97 Fed. 423, 38 C. C. A. 239, 247), and the evidence that the victims of this accident knew and appreciated the danger from the blast of the whistle was far from being so conclusive that it was the duty of the court to instruct the jury that they assumed the risk of it.

The burden was upon the defendant to prove contributory negligence, and it was the duty of the court to instruct the jury that Nichols and Irene were guilty of it, only in case the evidence of it was so clear that the court would not sustain a finding to the contrary. The evidence upon this subject was the testimony of one witness who said that some days before the accident he rode with Nichols behind the

team which ran away, and they were hitched up so loosely that he was of the opinion that Nichols was negligent in that regard; the testimony of Losinski that when Nichols' horses had run ahead of him three or four rods he saw that one of his tugs was unhooked and one was hooked; the established fact that at some time during the run all but one of the tugs became unhooked; the testimony of two witnesses that they were of the opinion that if three tugs came unhooked at the same time the horses could not have been properly hooked up; and the testimony of the livery man, who unhitched the horses when they came into Winona and assisted Nichols to hitch them up when they started out of Winona on the day of the accident, that they were properly hitched up when they came in and when they went out, that the hooks, the harnesses and the straps were strong and right, and that the horses were so hitched up that the tongue of the sled could not slip out of the yoke. Since it does not appear that Nichols knew that the whistle was to blow at 5 in the afternoon, no duty was imposed upon him to so harness his horses that its blast and the fright and flight it caused would not unhitch his tugs, break his tongue and his harnesses, and even if he had been aware of the coming blast the evidence in this case was far from conclusive that he failed to fairly discharge the duty he would have owed. The evidence that he exercised reasonable care was the testimony of an eyewitness. The testimony that he failed to exercise such care was inference and opinion from more remote facts, and the refusal of the court to disregard the positive testimony and withdraw this question from the jury was not error.

There was no evidence in the cases that Irene Botzet was guilty of any contributory negligence, and, even if Nichols had been guilty of it, his negligence could not have been imputed to her. Union Pacific Ry. Co. v. Lapsley, 51 Fed. 174, 2 C. C. A. 149, 152, 16 L. R. A. 800.

The city concedes that it might be liable for defects and obstructions within the limits of the roadway of the bridge which rendered that highway unsafe for travelers, but its counsel insist that it was not liable for the blowing of its whistle although it rendered the bridge unsafe, because the whistle and the blowing were beyond the limits of the bridge; and they argue that the declaration of the court below that the city was not liable in this case if the horses were frightened by the whistle of a locomotive of a railroad company sustains their position. But the city was not liable for the blast of the whistle of the locomotive, because there was no evidence that the whistling of this or other locomotives had theretofore scared horses on the bridge so as to impose upon the city the duty to suppress it, while the evidence was plenary that the blowing of the city's fire whistle had terrified horses in this way.

The general duties were imposed upon the city to exercise ordinary care to keep the roadway of this bridge reasonably safe for travel, and to so use its waterworks building and the whistle thereon as to inflict no unnecessary injury upon the rights or property of persons or corporations. These duties were not limited to care to prevent injuries arising from acts and omissions within the limits of the highway

or bridge itself. The duty to care for the bridge and driveway extends to the prevention of any act outside its limits, the danger from which to travelers thereon may be reasonably anticipated by the city, such as unfenced excavations or depressions near but not in the highway or street (City Council of Augusta v. Dozier, 126 Ga. 524, 55 S. E. 234; Bassett v. St. Joseph, 53 Mo. 290, 14 Am. Rep. 446; Halpin v. City of Kansas, 76 Mo. 335; Parker v. City of Macon, 39 Ga. 729, 99 Am. Dec. 486), walls, billboards, and other structures on private property beyond the limits of a street (Kiley v. City of Kansas, 69 Mo. 102, 108, 33 Am. Rep. 491; Id., 87 Mo. 103, 56 Am. Rep. 443; Duffy v. City of Dubuque, 63 Iowa, 171, 18 N. W. 900, 50 Am. Rep. 743; Bliven v. City of Sioux City, 85 Iowa, 346, 351, 52 N. W. 246; Cason v. City of Ottumwa, 102 Iowa, 99, 71 N. W. 192), an acrobat sliding on a wire above the street fastened to a building beyond its limits and to a pole (Wheeler v. City of Fort Dodge, 131 Iowa, 566, 108 N. W. 1057, 1059, 9 L. R. A. [N. S.] 146). And the duty of the city to so use its own property as not to unnecessarily injure persons or property of others extends to their protection against injuries from such use on their own property or on the property of others, such as from sewage leaking into the property of citizens (Allen v. City of Boston, 159 Mass. 324, 327, 34 N. E. 519, 38 Am. St. Rep. 423; Hunt v. Lowell Gas Light Co., 8 Allen [Mass.] 169, 85 Am. Dec. 697; French v. Connecticut River Lumber Co., 145 Mass. 261, 14 N. E. 113), from a pesthouse which sends the seeds of disease to persons on private property near (Clayton v. City of Henderson, 103 Ky. 228, 44 S. W. 667, 44 L. R. A. 474, 476; Haag v. Vanderburgh County Com'rs, 60 Ind. 511, 28 Am. Rep. 654), from garbage on a lot belonging to the city which sends forth upon the property of others bad odors (City of Ft. Worth v. Crawford, 74 Tex. 404, 12 S. W. 52, 54, 15 Am. St. Rep. 840), from fireworks in a street which set fire to private property adjoining (Speir v. City of Brooklyn, 139 N. Y. 6, 34 N. E. 727, 21 L. R. A. 641, 36 Am. St. Rep. 664; Landau v. City of New York, 180 N. Y. 48, 72 N. E. 631, 105 Am. St. Rep. 709).

Persons and private corporations that negligently injure persons rightfully traveling upon a street or highway by blasting rock on their own premises, thereby throwing stones upon the highway, or by negligently frightening their horses by blowing whistles upon their own property, do not escape liability for the damages they thus cause (Albee v. Shoe Company, 62 Hun, 223, 16 N. Y. Supp. 687; Knight v. Goodyear, etc., Rubber Co., 38 Conn. 438, 9 Am. Rep. 406; Powell v. Nevada C. & O. Ry., 28 Nev. 305, 82 Pac. 96), although it is not their special duty to care for the safety of streets and highways, and a fortiori a city upon which the law imposes that particular duty may not escape liability for the injuries it causes in that way.

Nor is the damage which may be recovered for negligence of this character limited to that inflicted upon property. Damages for injuries to the person are likewise recoverable, because the duty imposed on the municipality to avoid unnecessary injury to persons is at least as imperative and sacred as the duty to avoid injury to their property.

Allen v. City of Boston, 159 Mass. 324, 337, 34 N. E. 519, 38 Am. St. Rep. 423; Clayton v. City of Henderson, 103 Ky. 228, 44 S. W. 667, 44 L. R. A. 474, 476; City of Ft. Worth v. Crawford, 74 Tex. 414, 12 S. W. 52, 54, 15 Am. St. Rep. 840.

The statutes of Minnesota provide that:

"A public nuisance is a crime against the order and economy of the state and consists in unlawfully doing an act, or omitting to perform a duty, which act or omission * * * shall unlawfully interfere with, obstruct, or tend to obstruct, or render dangerous for passage a * * * street, alley or highway." Rev. Laws Minn. 1905, §§ 4987, 4988.

And the Supreme Court of Minnesota has adjudged that:

"Where the statute, for the protection and benefit of individuals prohibits a person from doing an act or imposes upon him a duty, if he disobeys the prohibition or neglects to perform the duty, he is liable to those for whose protection the statute was enacted for any damages resulting proximately from such disobedience and neglect." Baxter v. Coughlin, 70 Minn. 1, 4, 72 N. W. 797, 798.

The duty was imposed upon the city to exercise care to render this highway reasonably safe for travelers, and it blew a whistle within 110 feet of it which made it unsafe for travelers, and which constituted a public nuisance within the express terms and plain meaning of this statute.

But counsel contend that the city is not liable to pay damages for the injuries inflicted by the whistle, because, in locating it and blowing it, it was exercising one of its governmental powers in the establishment and maintenance of its fire department and fire-alarm system, and this upon the ground that for the acts and omissions of its officers and agents in the exercise of a governmental power of this nature it is, like the state, exempt from civil liability. There is more than one answer to this argument. In the first place, if the blast of the whistle which caused the injuries had been made in the exercise of the city's power to protect against fires, it would not have been exempt from liability, because the blowing of the whistle was a public nuisance, and it was not necessary for the city to create or to continue that nuisance in order to rightly exercise its power to establish and maintain a fire department. It could have exercised that power as completely and as beneficially without locating or blowing this whistle daily within 110 feet of this bridge. If the exercise of a legislative power does not necessarily and naturally create a nuisance, but that results from the manner of exercising the power, the legislative grant is no defense to an action for the damages it causes. Village of Pine City v. Munch, 42 Minn. 342, 44 N. W. 197, 6 L. R. A. 763, Hill v. Mayor, 139 N. Y. 495, 34 N. E. 1090.

A city has two classes of powers, the one legislative, public, in the exercise of which it acts as a political subdivision and delegate of the state and governs its people, the other private, corporate, business, in the exercise of which it acts for the advantage of the inhabitants of the city and of itself as a legal personality. For the acts and omissions of its officers and agents in the exercise of powers of the former class, such as the police power (Wilcox v. City of Rochester, 190 N. Y. 137, 82 N. E. 1119, 17 L. R. A. [N. S.] 741; City of Kansas City

v. Lemen, 57 Fed. 905, 6 C. C. A. 627, 631; Claussen v. City of Luverne, 103 Minn. 491, 115 N. W. 643, 15 L. R. A. [N. S.] 698; Gullikson v. McDonald, 62 Minn. 278, 279, 280, 64 N. W. 812; City of New Kiowa v. Craven, 46 Kan. 114, 26 Pac. 426), the power to erect, maintain, and operate a city hall and courthouse (Snider v. City of St. Paul, 51 Minn. 466, 473, 53 N. W. 763, 18 L. R. A. 151), the power through its board of health or other agency to protect its inhabitants against disease and unsanitary conditions, and to care for the sick (Bryant v. St. Paul, 33 Minn. 289, 23 N. W. 220, 53 Am. St. Rep. 31; Maxmilian v. Mayor, 62 N. Y. 160, 20 Am. Rep. 468; Ogg v. City of Lansing, 35 Iowa, 495, 14 Am. Rep. 499; Benton v. Trustees of Boston City Hospital, 140 Mass. 13, 1 N. E. 836, 54 Am. Rep. 436; Barbour v. City of Ellsworth, 67 Me. 294), the power to maintain and operate a fire department to protect its inhabitants against conflagrations (Grube v. City of St. Paul, 34 Minn. 402, 26 N. W. 228; Miller v. City of Minneapolis, 75 Minn. 131, 77 N. W. 788; Smith v. City of Rochester, 76 N. Y. 506; Mayor v. Workman, 67 Fed. 347, 14 C. C. A. 530; Fisher v. City of Boston, 104 Mass. 87, 6 Am. Rep. 196), the power to promote education (Ham v. Mayor, 70 N. Y. 459; Lane v. District Township of Woodbury, 58 Iowa, 462, 12 N. W. 478), the power to inspect steam boilers (Mead v. City of New Haven, 40 Conn. 72, 16 Am. Rep. 14), and the power to administer public charities (Haight v. Mayor [D. C.] 24 Fed. 93), the city, like the state, is not liable to pay damages in civil actions.

But for damages caused by the wrongful acts and omissions of its officers and agents within the scope of their authority in the exercise of its powers of the latter class, such as its power to build and maintain bridges, streets, and highways, the power to construct and keep in repair sewers (Murphy v. City of Indianapolis, 158 Ind. 338, 63 N. E. 469; Williams v. Town of Greenville, 130 N. C. 93, 40 S. E. 977, 57 L. R. A. 207, 89 Am. St. Rep. 860; Hamlin v. City of Biddeford, 95 Me. 308, 49 Atl. 1100; City of Denver v. Rhodes, 9 Colo. 554, 13 Pac. 729), the power to collect refuse and to care for the dump where it is deposited (City of Denver v. Porter, 126 Fed. 288, 294, 61 C. C. A. 168), the power to construct and operate the draws of bridges (Naumburg v. City of Milwaukee. 146 Fed. 641, 77 C. C. A. 67), and the power to build, maintain, and operate waterworks to furnish water to the city and to its inhabitants for compensation (Wiltse v. City of Red Wing, 99 Minn. 255, 260, 109 N. W. 114; Lynch v. City of Springfield, 174 Mass. 430, 54 N. E. 871), the city is liable to the same extent as a private individual or corporation under like circumstances. The power of a city to construct and operate waterworks is not a political or governmental, but a private or corporate, power, granted and exercised, not to enable it to control its people, but to authorize it to furnish to itself and to its inhabitants water for their private advantage. Illinois Trust & Savings Bank v. City of Arkansas City, 22 C. C. A. 171, 182, 76 Fed. 271, 282, 34 L. R. A. 518; Pike's Peak Power Co. v. City of Colorado Springs, 44 C. C. A. 333, 342, 105 Fed. 1, 10; Omaha Water Co. v. City of Omaha, 77 C. C. A. 267, 271, 147 Fed. 1, 5, 12 L. R. A. (N. S.) 736.

The blast of the whistle which frightened Nichols' horses was not blown by the city in the exercise of its power to protect its inhabitants against fire and to operate its fire-alarm system or its fire department. It had no connection with or tendency to perform any of these functions. The blasts for those purposes were blown automatically through the fire-alarm system. This blast was blown by hand by the assistant engineer of the waterworks building by direction of the water commissioner and the city council in the exercise of the power of the city to maintain waterworks and care for the pumping station which was a part of them. It, therefore, falls far within the line of municipal liability.

The argument that the discretion of the city in the construction, location, and operation of its fire-alarm system is not reviewable by the courts has not escaped attention. But if sound it is not material, and hence will not be discussed, because it was not the exercise of that discretion, but the blowing of the whistle by the assistant engineer of the waterworks building, that was the proximate cause of the injuries and death and that is the foundation of these actions. The location and use of the whistle for the fire department, dangerous as it was, would never have caused the death of Nichols and the injury to Irene if the assistant engineer of the waterworks building had not pulled open the valve and sent forth the blast at 5 in the afternoon of that fatal day.

Finally, it is said that the city is not liable because it had no corporate power to cause this whistle to be blown for the purpose of notifying union men and the employés of the city of the time of day. But it had plenary power to erect, maintain, and operate the waterworks building. It had the power and it was its duty to so use that building and the whistle upon it that it would not inflict any unnecessary injury upon travelers upon the bridge, to prevent and, when it arose, to suppress, the public nuisance of the startling, dangerous 5 o'clock blasts of this whistle upon it, and to exercise ordinary care to keep the bridge reasonably safe for travelers thereon. For damages caused to travelers by the failure to discharge these duties it was liable in these cases, and the evidence of such a failure was so substantial that the refusal of the court below to direct a verdict in its favor was not error.

In the Botzet Case attention is called to the facts that while the whistle was blown, and the horses were frightened and started to run in the state of Minnesota, Irene was not thrown over the railing of the bridge and was not injured until they had carried her into the state of Wisconsin; that there is a statute of the latter state which limits the amount of recovery from any city, county, town, or village, on account of any defects in a bridge or highway, to $5,000, and that the verdict and judgment in that case were far in excess of this amount, and in excess of the amount specified in the notice of the claim upon which the action is based which was originally given to the city. But this action was brought in the state of Minnesota, the city committed the wrong on which it is founded in that state, the statute of Wisconsin had no effect beyond the limits of the state of Wiscon-

sin, and the plaintiff was not limited in his recovery to the amount claimed in his original notice. Terryll v. City of Faribault, 84 Minn. 341, 342, 87 N. W. 917.

There was no error in the trial of these cases, and the judgments below must be affirmed.

It is so ordered.

CUNNINGHAM v. PETTIGREW.

(Circuit Court of Appeals, Eighth Circuit. January 23, 1909.)

No. 2,755.

1 MINES AND MINERALS (§ 54*)—FRAUDULENT CONCEALMENT—DUTY TO DISCLOSE FACTS—JOINT PURCHASERS OF PROPERTY.

A lease for mining claims gave the lessees an option to purchase the property for $75,000, and by another and separate contract the owner agreed, in case of purchase, to refund to them $35,000 of the purchase money. By false representations and showing the lease, while concealing the fact of the other agreement, the lessees induced complainant to become a joint purchaser with them, paying $37,500 for a half interest in the property. Not having sufficient money, the lessees applied to defendant, stating the facts and showing him both contracts, and he agreed to advance the money necessary to make the payments until the real consideration of $40,000 should be paid, when he was to secretly receive the subsequent payments made by complainant. For this accommodation he was to receive interest, and also a third interest in the lessees' half of the property. The first payment of $20,000 was made, when complainant became suspicious and refused to pay more, and through some arrangement with the lessees defendant completed the payments and obtained title to the property. *Held*, that by intentionally joining with the others in the deception of complainant he became a joint purchaser and assumed the obligations of good faith incident to that fiduciary relationship, and that both he and the property in his hands were liable for the amount necessary to make restitution for the fraud.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 54.*]

2. TRUSTS (§ 95*)—CONSTRUCTIVE TRUSTS—FRAUD IN ACQUISITION OF PROPERTY.

Where one was induced by fraud to contribute to the purchase price of real property, the title to which became vested in another, who was cognizant of the fraud and received the benefit of the payment, such owner and the property are both chargeable with a constructive trust in favor of the person defrauded to the extent of the amount paid by him.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 145–147; Dec. Dig. § 95.*]

3. CONTRACTS (§ 259*)—GROUNDS FOR RESCISSION BY PARTY—FRAUD.

The right to rescind a contract on the ground of fraud depends on the existence of the fraud, and not on the accuracy or conclusiveness of the party's knowledge of it when he exercises the right.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1153–1172; Dec. Dig. § 259.*]

4. CONTRACTS (§ 272*)—RESCISSION—ACTS CONSTITUTING RESCISSION.

Where a party to an executory contract, after part performance, unequivocally refused to further perform on the ground of fraud, and his refusal was accepted by the other parties as conclusive, there was a com-

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

plete rescission which fixed the rights of the parties without the necessity of a suit.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1192, 1193; Dec. Dig. § 272.*]

5. EQUITY (§ 87*)—LACHES—SUIT FOR RELIEF ON THE GROUND OF FRAUD—DUE DILIGENCE.

Rev. St. Utah 1898, § 2877, limits the time for bringing an action for relief on the ground of fraud to three years after the cause of action accrued; provided, however, that the "cause of action in such cases shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud." Complainant entered into a contract with others for the joint purchase of a mine in Utah, and they made the first payment thereon. Before the second came due complainant became satisfied that there was a secret agreement between his associates and the vendor by which he was being defrauded, and refused to make further payments, whereupon the purchase was completed by his associates and defendant, and the title to the mine became vested in defendant, who was in fact a party to the fraud, although not a party to the contract. Complainant caused inquiries to be made of the vendor, but was unable to obtain confirmation of his suspicions until three years later, and a year afterward, when he first secured evidence of a secret agreement by which the vendor was to return to his associates nearly one-half of the nominal price of the mine and that defendant was to share in the benefits, he brought suit in equity to charge defendant and the property with a trust in his favor. *Held*, that he was under no duty to make inquiries directly of the parties implicated respecting the fraud, which was essentially one of concealment, nor to file a bill of discovery, and that, applying the state statute by analogy, the suit was within the time limited, and complainant was not barred from relief by laches, the situation of the parties not having materially changed.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 242–244; Dec. Dig. § 87.*]

6. EQUITY (§ 75*)—LACHES—CONSIDERATIONS AFFECTING.

The defense of laches is affected by the facts whether rights of innocent persons have intervened, whether witnesses are dead or have disappeared, whether the situation of the parties in interest has changed, and other like considerations.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 75.*]

7. EQUITY (§ 65*)—HE WHO COMES INTO EQUITY MUST COME WITH CLEAN HANDS—NATURE OF UNCONSCIONABLE CONDUCT.

Conduct by a complainant toward the defendant which would have been inequitable as between co-tenants cannot affect complainant's right to maintain the suit in equity, where any relation of co-tenancy between the parties had been previously wholly repudiated and was not recognized by either party.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 65.*

He who comes into equity must come with clean hands, see note to Knapp v. S. Jarvis Adams Co., 70 C. C. A. 543.]

8. EQUITY (§ 65*)—HE WHO COMES INTO EQUITY MUST COME WITH CLEAN HANDS—CONDUCT WITH RESPECT TO DIFFERENT TRANSACTIONS.

The inequity which will repel one from courts of equity under the maxim that "he who comes into a court of equity must do so with clean hands" must relate directly to the very transaction concerning which he complains.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 185–187; Dec. Dig. § 65.*]

Philips, District Judge, dissenting.

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

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

In October, 1901, James Johnston, the owner of certain unpatented mining claims in Nevada, executed a written lease to one Hyde, and in the same instrument gave him an option to purchase the leased property on or before the expiration of the lease, upon the payment of $75,000, in installments as follows: $20,000 on or before December 20, 1901; $15,000 on or before February 20, 1902; $15,000 on or before April 20, 1902; $15,000 on or before June 20, 1902; and $10,000 on or before August 20, 1902. Simultaneously with the execution of the lease, Johnston executed another paper modifying the option agreement by agreeing to refund to Hyde the sum of $35,000 out of the payments when made, making the real consideration to be paid for the claims $40,000 instead of $75,000. Although Hyde's name alone appeared as lessee, one Jesse W. Fox, his friend, was interested equally with him in the venture. Negotiations were soon set on foot to interest the complainant, Pettigrew, in the project. Hyde, acting for himself and Fox, exhibited the first-mentioned paper to him to show the terms and conditions of their option, but concealed from him the existence and contents of the second paper. Pettigrew agreed to take one-half interest in the purchase and to pay $37,500 therefor on the assurance that Hyde and Fox were taking the other half interest at the same cost. The latter, not having the necessary money, approached defendant Cunningham for assistance. He was informed of the true condition of things —the real price required, and the pretended price. In fact, the two agreements with Johnston were exhibited to him, and we are satisfied from the evidence that the purpose of deceiving Pettigrew and inducing him to become apparently equally interested with Hyde and Fox on the same terms, but really to pay practically the full option price for the whole mine in order to secure an undivided half of it, was made known to Cunningham. As a result of negotiations, Cunningham agreed to advance for Hyde and Fox one-half of the several installments as they became payable, until such advances, together with what Pettigrew paid, should reach the sum of $40,000, the true consideration. For this accommodation Cunningham was to receive 8 per cent. interest on the money advanced, and one-third of Hyde's and Fox's interest, or one-sixth interest in the whole mine.

The further payments as they became due from Pettigrew were to be formally paid to Johnston, but surreptitiously returned to Cunningham in satisfaction of the advances made by him to Hyde and Fox. The proposed result was that if Pettigrew should complete his payments on the basis of the option, represented to him to be $75,000, his one-half would cost him $37,500, and the one-half of Hyde, Fox, and Cunningham would cost $2,500. There was some deal between Hyde and Fox and Cunningham with reference to paying this $2,500 which need not now be stated. The evidence, although somewhat conflicting, satisfies us that Hyde and Fox originally entered into a fraudulent scheme to get Pettigrew to pay for the whole mine and to secure one-half for themselves at the nominal price of $2,500 or less, and that defendant, Cunningham, with full knowledge of the purpose, soon after joined them in it. Their venture was to be a joint one. They and Pettigrew were to become joint purchasers of the mine. Pettigrew trusted Hyde and Fox, not knowing at first that Cunningham was interested with them, and, on the faith of their representations concerning the cost of the mine and their willingness and ability to go in with him on an equal footing, entered upon performance of the agreement. He paid $10,000, one-half of the first installment due December 20th, and Hyde and Fox paid the other half in a check of Cunningham's, which they exhibited to Pettigrew to show their ability to perform. Before the next installment fell due on February 20, 1902, Pettigrew became suspicious that he had not been treated fairly, and then or soon after refused to make further payments. Some new deal was made between Hyde and Fox on the one hand and Cunningham on the other by which Cunningham advanced the necessary amount to make the further payments of $20,000 due to Johnston. Hyde and Fox failed to repay the advances made by Cunningham, and ultimately, on July 1, 1902, the title to the mine became legally and equitably vested in Cunningham alone. After repeated and unsuccessful efforts to verify his suspicion, Pettigrew was on October 17, 1904, by a letter written to him by Fox, and later in the fall of 1905, by an inspection of the real option agreement, advised of the true facts of the case, and on October

26, 1905, instituted this suit against Cunningham to secure either a conveyance to him of a one-fourth interest in the mine, or the return of the amount of money with interest which he had paid, or any other relief consistent with the facts of the case. The court below awarded Pettigrew a judgment for $16,035.54, and a lien upon the property in the nature of a mortgage to secure the payment of the same. From this decree the defendant appeals.

Andrew Howat (H. R. Macmillan, on the brief), for appellant.

J. L. Rawlins, for appellee.

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

ADAMS, Circuit Judge (after stating the case as above). The bare recital of the facts of this case discloses the existence of a flagrant breach of trust among business associates between whom a relation of confidence and trust existed for which the law ought to furnish a remedy, and we think it does. Plainly stated, Hyde and Fox devised a scheme to get one-half of the mine for nothing by inducing the complainant, Pettigrew, to become a joint purchaser of it with them under the belief that he was paying only one-half of the purchase price thereof. In the case of Walker v. Pike County Land Co., 71 C. C. A. 593, 139 Fed. 609, which involved facts very similar to those now under consideration, this court, speaking of the defendant in that case, said:

"As a joint purchaser he stood in a fiduciary relationship to his associates, and was bound to the utmost good faith in his dealings with them. The law demanded of him, not only that he should not be guilty of positive fraud, but that he should not conceal from them any fact material to the transaction. Any profit which he secured by violating this legal duty he was bound to account for to them."

That is wholesome morals as well as sound law. If the deal had been executed according to the original design—that is, if complainant had paid on the basis of $75,000 for the mine, and Hyde and Fox had secured as a result of that payment a one-half interest in the mine with complainant as originally intended—there would be no doubt that complainant would be entitled to some form of redress against them. Does the fact that defendant, Cunningham, acquired the title in the way indicated in the statement of the case, exonerate him or the mine owned by him from responsibility? We think not. The evidence satisfies us that defendant knew of the fraud intended to be practiced on complainant, and that he aided in its accomplishment by agreeing to advance the money to Hyde and Fox for that purpose and to take one-sixth interest in the mine as his reward. The evidence, including the undisputed fact that both the false and true option agreements were exhibited to Cunningham at the outset of negotiations with him, to say nothing of the testimony of witness Fox, which is criticised, convicts Cunningham of inconceivable stupidity, or charges him with knowledge of the purpose to deceive Pettigrew while he was negotiating with Hyde. Let him speak. While testifying in his own behalf he was asked this question:

"In the conversation you had on or about the 8th day of December, what, if anything, was said by Mr. Hyde as to how much money he wanted you to advance, and what interest in the property they would give you if you did so?"

To which he made the following answer:

"Mr. Hyde stated that the net price he had to pay to Mr. Johnston was $40,000; that Mr. Pettigrew was to pay $37,500 for one-half, and that I was to advance money enough for Hyde to pay the balance; and that the subsequent payments from Senator Pettigrew were to come to me. When the final payment was made, there would be $2,500 that would still be owing on the property by him; otherwise I would have the balance refunded to me. In consideration of my doing that, loaning them the money, at 8 per cent. per annum interest, he agreed to give me as a bonus one-third interest of the profit that was realized out of their one-half interest."

Again, on cross-examination, Cunningham was asked:

"Q. Hyde came to you and says, 'Now, here: Fox and myself and Pettigrew are going in to buy this property from Johnston, and Fox and I, if the transaction goes through, are going to get our one-half interest at a net outlay of $2,500, and Pettigrew is going to pay the balance. I have had a contract drawn up showing the consideration to be $75,000, which I have shown Pettigrew, and Pettigrew has agreed to put up $37,000.' That is about what Hyde told you, isn't it? A. Well, in substance—yes."

This and other evidence of like character given by him satisfies us of Cunningham's intentional co-operation with Hyde and Fox in the deception of Pettigrew. They all became, according to their respective interests, joint purchasers of the property in controversy, and Cunningham assumed the obligations incident to that relationship to complainant, and, like Hyde and Fox, became bound to the utmost good faith in his dealings with him.

The trial court reached the same conclusion on other grounds equally tenable. In answer to the contention of defendant's counsel that Hyde, having the option to buy the mine for $40,000, was at liberty to sell it for any obtainable price he could get, the learned trial judge said, "This would only be true if Hyde had done nothing to conceal the fact which was not disclosed." Hyde, Fox, or defendant, if not occupying a confidential relation, were not bound to disclose anything to complainant. They could have observed strict silence as to terms of their option as well as concerning their interest in the purchase, and if complainant had treated with them at arm's length, relying on his own judgment, he could not lawfully complain; but in this case the facts are not that way. The indubitable fact is that they not only suppressed the truth, but affirmatively misrepresented and concealed material and important facts within their exclusive knowledge, and thereby distracted complainant's attention from the real facts of the case, and caused him to enter into a contract which otherwise he would not have done. Such being the case, their conduct was fraudulent irrespective of the breach of the confidential relationship existing between them. Files v. Rankin, 82 C. C. A. 491, 153 Fed. 537, and cases cited; Laidlaw v. Organ, 2 Wheat. 178, 4 L. Ed. 214; Stewart v. Wyoming Ranch Co., 128 U. S. 383, 388, 9 Sup. Ct. 101, 32 L. Ed. 439; Tyler v. Savage, 143 U. S. 79, 12 Sup. Ct. 340, 36 L. Ed. 82; C. & A. R. R. Co. v. Shea, 66 Ill. 471.

Induced by their fraudulent conduct, complainant innocently invested $10,000 in the mine now owned by defendant. His money to that extent aided the ultimate acquisition of title by defendant, and went into the property. Defendant holds the legal title, but he ac-

quired it, to the extent of one-fourth thereof, by means of the fraud practiced upon complainant. Ordinarily trusts arise from agreements, express or implied, manifesting an intention to create them. But there is another class of trusts which arise as a result of frauds committed by one party upon another, and they are known as "constructive trusts." Perry on Trusts, § 166. Such a trust arises when, among other things, a person clothed with some fiduciary character, by fraud or other wrongful conduct, gains some advantage himself. Perry on Trusts, § 27. This court in Trice v. Comstock, 57 C. C. A. 646, 121 Fed. 620, 61 L. R. A. 176, held that a fiduciary relation and a breach of duty imposed by that relation are sufficient to raise a constructive trust. To the same effect are Burnes v. Burnes, 70 C. C. A. 357, 137 Fed. 781, and Steinbeck v. Bon Homme Mining Co., 81 C. C. A. 441, 152 Fed. 333.

Measured by the test thus declared, the facts of the present case, in our opinion, clearly and unequivocally charge defendant and the mine to which he holds the legal title with a constructive trust in favor of complainant to the extent of his money which went into it. The trial court by its decree awarded complainant a personal judgment against defendant for $10,000, with interest from December 20, 1901, the date of payment by complainant, and the further sum of $1,000, which will be explained later, and fastened a lien upon the mine for that aggregate amount until paid. This was perhaps less, or at any rate a different remedy, than the complainant was entitled to. When a constructive trust is raised in favor of another, the courts may order the trustee to hold the legal title for the benefit of the person deceived, or may decree a reconveyance of the property to the fiduciary entitled to it on such terms and conditions as are deemed best. But the complainant has not appealed, and is satisfied with his personal judgment against defendant, with the lien to secure its payment. This relief comes fairly within the scope of the prayer for general relief, and is well warranted by precedent.

Speaking of constructive trustees, Pomeroy in his work on Equity Jurisprudence, vol. 3, § 1080, where sustaining authorities are cited, says:

"The trustee incurs a personal liability for a breach of trust by way of compensation or indemnification, which the beneficiary may enforce at his election. * * * The trustee's personal liability to make compensation for the loss occasioned by a breach of trust is a simple contract equitable debt. It may be enforced by a suit in equity against the trustee himself, or against his estate after his death."

Defendant invokes the rule expressed in Upton v. Tribilcock, 91 U. S. 45, 23 L. Ed. 203, Grymes v. Sanders, 93 U. S. 55, 23 L. Ed. 798, and Richardson v. Lowe, 79 C. C. A. 317, 149 Fed. 625, and cases cited, requiring vigilance to detect fraud and prompt repudiation of a contract based on fraud as a necessary prerequisite to rescission, and contends that complainant is barred from recovery by that rule. It is urged that complainant as early as February, 1902, either knew or had the means of knowledge of the fraud practiced by Hyde and his associates, or failed to exercise due care and diligence in discovering it, and that he failed to rescind within due time thereafter. The facts

of the case afford a sufficient answer to this contention. If actual rescission was necessary as a perequisite to enforcing the constructive trust created by defendant's fraud, as to which it is unnecessary to express an opinion, the complainant did in fact rescind the contract as soon as he had a suspicion of the fraud which had been practiced upon him. In February, 1902, when the second installment of purchase money became due, he refused to pay his portion of it; he refused to perform his contract obligation, and left his associates to their own devices. He was guilty of no vacillation. He announced his purpose and adhered to it. This was an unequivocal act of repudiation on his part. His associates so understood it, and acted accordingly; they understood he would no longer act with them or further perform his part of the joint undertaking, and immediately made a new arrangement, totally inconsistent with any claim of continuing obligation on the part of complainant, for completing the payment of the mine. They accepted the refusal as a conclusive act of rescission. Although complainant acted on suspicion only, he was justified in rescinding, provided his suspicions of fraud were subsequently verified. The right of rescission depends on the existence of the fraud, and not on the accuracy or conclusiveness of the party's knowledge of it when he exercises the right. Peterson v. Chicago, Milwaukee & St. Paul Ry. Co., 38 Minn. 511, 39 N. W. 485; Lawson on Contracts, § 248. By his prompt rescission his associates were left in no uncertainty, and he was foreclosed of any opportunity to speculate on the success or failure of the venture. The die was irrevocably cast. In some cases the institution of a suit to rescind is the first act of repudiation and rescission; but it is not the only way to bring it about. Rescission is a fact, the assertion by one party to avoidable contract of his right (if such he had) to avoid it, and when the fact is made known to the other party, whether by a suit or in any other unequivocal way, the rescission is complete. As a result of it, a suit may or may not be necessary. In the present case the facts which justified the rescission and the rescission itself affected defendant and the mine owned by him with a constructive trust in favor of complainant, and this resultant right is what complainant seeks to establish and enforce in this action. This remedy follows, and is entirely consistent with the rescission which had been accomplished.

But it is claimed that this remedy is barred by the laches of complainant. Courts of equity, in considering the defense of laches, while not bound by the provisions of statutes of limitations applicable to actions at law of like character, usually proceed in analogy with them. Boynton v. Haggart, 57 C. C. A. 301, 120 Fed. 819.

Section 2877 of the Revised Statutes of 1898 of Utah applicable to this case limits the time within which an action for relief on the ground of fraud or mistake can be brought to the period of three years after the cause of action accrued, provided, however, that the—

"cause of action in such cases shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud."

It may be conceded that discovery of the fraud within the purview of this statute occurs when the party invoking it has notice of the main

facts constituting the fraud, or has the means of discovery in his power. Wood v. Carpenter, 101 U. S. 135, 25 L. Ed. 807; Redd v. Brun, 84 C. C. A. 638, 157 Fed. 190, and cases cited. Whether due diligence is observed for the discovery of fraud is largely dependent upon its peculiar character in a given case. Mr. Justice Miller, speaking for the Supreme Court in Norris v. Haggin, 136 U. S. 386, 392, 10 Sup. Ct. 942, 945, 34 L. Ed. 424, said:

"It is a part of this general doctrine that, to avoid the lapse of time or statute of limitation, the fraud must have been one which was concealed from the plaintiff by the defendant, or which was of such a character as necessarily implied concealment."

This cause of action, except for the alleged undisclosed fraud, accrued in December, 1901, when complainant paid $10,000 of the purchase price of the mine. This suit was not instituted until October 26, 1905, but we cannot say, in view of the facts disclosed by the proof, that complainant knew, or had means of discovering, the fraud before October, 1904, when one of the participants gave him detailed information upon which, when further corroborated by papers obtained from Mrs. Cunningham in the fall of 1905, he subsequently acted and brought this suit.

The facts are briefly these: In the first place, the fraud complained of was in its nature secret, and required actual concealment for its successful accomplishment. The complainant resided in South Dakota, and had no occasion to visit Utah, and did not do so after the first of the year 1902 until about the time this suit was brought. Cunningham and Hyde, who resided in Utah, where the transaction was had, were both absent from that state a considerable portion of the time between December, 1901, and 1905. In February, 1902, complainant had a suspicion that Johnston was not getting the full sum of $75,000 for the mine, but he had no information sufficient to warrant a suit against anybody, and particularly against defendant Cunningham, the only solvent participator in the fraud. Later, and at different times, the complainant secured the services of two men to interview Johnston, the seller of the mine, to ascertain if possible the real facts, but Johnston repeatedly refused to impart any information to them. Neither of the parties to the original transaction nor any of their witnesses had died or disappeared, the title to the mine had not fallen into innocent hands, and the situation of the parties in interest had not otherwise been materially changed. The facts just recited should be kept in mind in making proper application of the equitable doctrine of laches to this case. Mere lapse of time is interposed to protect the defendant from accountability for inequitable conduct towards one who in lawful reliance upon his good faith was deceived. It cannot escape observation that this is not a highly equitable attitude. This court in treating of a similar case, Stevens v. Grand Central Min. Co., 67 C. C. A. 284, 133 Fed. 28, speaking by Judge Van Devanter, said:

"Statutes of limitation, applied in courts of law, are inflexible and framed upon the theory that mere lapse of time, irrespective of other considerations, should bar the claim, while the doctrine of laches, applied in courts of equity, is sufficiently flexible to give reasonable effect to the special circumstances of any case, and rests not alone upon the lapse of time, but upon the inequity of

permitting the claim to be enforced because of some change in the condition or relations of the property or the parties. * * * If unusual conditions or extraordinary circumstances make it inequitable to permit the prosecution of a suit after a briefer, or to forbid its maintenance after a longer, period than that fixed by analogous statute, the chancellor will not follow the statute, but will determine the case in accordance with the equities which arise from its own conditions or circumstances."

The doctrine so declared applies with great force to the present case. No rights of innocent persons are here involved, and no change of circumstances has occurred which would tend to prevent the ascertainment of the truth. With these wholesome principles in view, let us consider what is claimed to constitute laches fatal to recovery by the deceived party. It is said Pettigrew ought to have inquired of Cunningham, Hyde, and Fox, or some of them, concerning the fraud, and that his failure to do so was negligence on his part. It seems to us that the unreasonableness of expecting those men, who were the perpetrators of the fraud, to voluntarily give self-inculpating evidence, excused any effort to induce them to do so. Their personal interest, the strongest of human motives, impelled them not to do so, and any attempt to secure from them information which would necessarily expose them to civil liability, at least, for their wrongful conduct, would, in our opinion, be not only an unreasonable requirement, but one which might have thwarted any ultimate discovery. In such circumstances we cannot regard the failure to do so as fatal laches.

Attention is called to the case of Geyser-Marion Gold Min. Co. v. Stark, 45 C. C. A. 467, 106 Fed. 558, 53 L. R. A. 684, as authority for the proposition that the duty rested on Pettigrew to resort to Cunningham, Hyde, and Fox for discovery of the fraud, but we fail to find in it authority for defendant's present contention. The facts in that case disclosed no such fraudulent conduct as is involved in this case, and no reason appeared why the officers of the bank there charged with negligence in transferring a certificate of stock should not have resorted to the trustee named in the certificate with confident expectation of securing information concerning his cestui que trust.

It is suggested that the bill itself fails to disclose sufficient excuse for the delay in bringing this suit beyond the period permitted by the statute of limitation; but we think this is not so. The facts which under the statute of Utah excused the bringing of the action within the time limited by the statute, to which we have already called attention, appear by direct averment or by necessary implication in the bill, were fully proved at the trial, and, in our opinion, were sufficient to postpone the running of the statute. They were certainly sufficiently specific to satisfy the defendant, as no exception was taken to the bill on that account. It is also suggested that the complainant might, after his suspicion had been aroused, have instituted a suit, either a bill for discovery or an action at law against Hyde, Fox, and Cunningham, or some of them, and by the discovery, or by a deposition taken in the case, might have learned the fraud. We do not think the rule of diligence applicable to this matter requires such an experimental and expensive proceeding in court. This suit was instituted well within the time prescribed therefor by the statute of Utah after the discovery of

the facts constituting the fraud, and we perceive no reason why we should not observe the analogy of that statute in this equitable action.

It is next contended that complainant does not come into court with clean hands, and should therefore be dismissed without relief. The inequitable conduct charged against him is briefly this: He, claiming an interest in the mine by reason of the use of his money in acquiring title to it, and by reason of the fact that he had expended money in developing it, and Fox, claiming some interest in it by reason of work done and money expended by him, in the early part of the year 1905, endeavored to protect their interests in another way. Defendant, Cunningham, claiming that he had acquired Hyde's and Fox's interest in the mine, applied for a patent for the claims as originally located. Pending this application complainant and Fox, maintaining that there were defects in the original locations, and that there had been a failure to do some of the annual assessment work, relocated some of the claims, filed adverse claims to defendant's application, and instituted the requisite suits in support thereof. Defendant invokes the principle that complainant as a co-tenant, and bound by the obligations which mutual interests imposed, could acquire no outstanding title to the exclusion of his co-tenant, and that the attempt to do so was inequitable. Conceding the rule stated to be correct, its application to this case is not perceived. Defendant strenuously denies the existence of any obligations incident to the relationship of co-tenants between him and complainant. Complainant makes no claim of any co-tenancy after he rescinded his contract of purchase on suspicion of the fraud which had been practiced upon him. Accordingly, in 1905, when complainant and Fox undertook to relocate the mining claims, there was no rule of law which prevented it. The true attitude was that of belligerency. Complainant had a cause of action against the defendant for relief on the ground of fraud, and nothing more. We can perceive no reason why he might not properly and equitably reenforce his position to secure the money invested by him by acquiring the outstanding legal title to the mining claims in which he had an equitable right. He owed defendant no duty springing from any existing confidential relation which stood in his way.

If, however, it be conceded that the conduct of complainant in 1905 was inequitable in the respect complained of, it would not affect complainant's right to relief for the wrong done in 1901 and 1902 now sued for. The one is quite independent of the other. The supposed inequity involved in the attempt made in 1905 to prevent the complainant from securing a patent has no relation in time, character, or circumstance to the equity sought to be enforced in this action. It is well settled that the inequity which will repel one from courts of equity under the maxim that "he who comes into a court of equity must do so with clean hands" must relate directly to the very transaction concerning which he complains. Shaver v. Heller & Merz Co., 48 C. C. A. 48, 108 Fed. 821, 834, 65 L. R. A. 878; Trice v. Comstock, supra, and cases cited therein.

The trial court awarded complainant a judgment and lien for $1,000 and interest, in addition to the $10,000 and interest already considered.

This first-mentioned sum appears to have been advanced by complainant to Hyde prior to December, 1901, before defendant had any connection with the purchase of the mine. It was advanced under an agreement that Hyde should use it for development purposes. The proof fails to show that it was secured by any fraudulent conduct of Hyde, and much less of defendant, Cunningham. It also fails to show that the money was actually expended in any way beneficial to the mine. We see no reason for charging defendant, Cunningham, with, or subjecting his property to, a lien for this money.

The decree below must be modified by reducing the amount of complainant's recovery to the extent of $1,000 and interest allowed thereon; in all, $1,457.77. In all other respects the decree as rendered was right, and is affirmed. One-tenth of the costs of this appeal and one-tenth of cost of the transcript will be taxed against the appellee, the remainder against the appellant. The cause is remanded to the Circuit Court, with directions to make the required modification.

PHILIPS, District Judge (dissenting). A more detailed and exact statement of the issues presented by the bill of complaint and the evidence will better develop the questions of law and fact involved in this discussion. The bill is framed upon the theory that Hyde, representing himself and Fox, after he had obtained an optional contract from Johnston for the actual consideration of $40,000, to be paid in installments, had a contemporaneous written contract expressing the consideration to be $75,000, and that Cunningham, with knowledge thereof, entered into a conspiracy with Hyde and Fox to sell an undivided one-half interest in the property to Pettigrew at $37,500, and that Hyde, in pursuance of this fraudulent conspiracy, represented to Pettigrew that the actual purchase price to be paid to Johnston was $75,000, and that Pettigrew was given to understand that he was being admitted into the adventure on equal terms, and that in reliance upon the knowledge of Hyde and Fox as miners and of the mines in question, and upon said assurances, he was induced to agree to buy the one-half interest at $37,500, and to pay thereon the sum of $10,000, one-half of the first installment due December 21, 1901. The bill alleges that before the 20th day of February, 1902, when the second installment became due, the complainant was informed and believed that Hyde, Fox, and Cunningham had entered into some scheme to cheat and defraud him, and that the real purchase price for the mining claim was not as represented, but he remained in ignorance of the nature of said scheme and the real purchase price of said property; that on account of the information he possessed he refrained from making any further advancement on the contract. The bill further alleges that, pursuant to the confederation between Hyde, Fox, and Cunningham, the latter was to advance one-half the installment to be paid on the contract, and was to receive back the sum of $10,000 out of the third installment, and all of the fourth and fifth installments; that upon the refusal of the complainant to make further payments Cunningham paid the sum of $20,000, which, with the first $20,000, constituted the full purchase price of said mining claims; that by reason of the premises said Cunningham became and ever since has been, and still

is, a trustee of an undivided one-fourth interest in said mining claims, for the benefit of the complainant.

The prayer of the bill is that Cunningham be decreed to be a trustee for the complainant as to an undivided one-fourth interest in said mining claims, and by a good and sufficient deed of conveyance he be required to convey to the complainant the said undivided one-fourth interest; and, in the event that the complainant is unable to procure the relief aforesaid, Cunningham be decreed to pay him the sum of $11,000, with interest thereon from the 18th day of December, 1901; and for such other and different relief as may be deemed equitable and proper, in accordance with the facts stated therein.

The evidence shows that Pettigrew and Fox were acquaintances and friends of long standing, and that Hyde first met Pettigrew in the spring of 1901. They were then, and for some time afterwards, jointly interested in a mining adventure. The circumstances which brought Hyde and Pettigrew together, after Hyde obtained the option contract from Johnston, are as follows: Pettigrew was interested in other mining property in the state of Nevada, and as he was going out to examine it he telegraphed Hyde to procure for him a mining expert to meet him at Ogden, Utah. As Hyde was going out to examine the mines on which he held said option contract, they met by agreement at Ogden, and went out together to Nevada. At Pettigrew's instance, Hyde accompanied him to see his (Pettigrew's) mine, after which the latter accompanied Hyde to look at the mines in question. It was on this trip that Hyde informed Pettigrew of his option and the contract with Johnston, which expressed $75,000 as the purchase price, and his hope to sell the property in time to raise the required sum to meet the first payment due December 20, 1901, as otherwise he did not have the money. Whereat Pettigrew expressed a willingness to come in and take a half interest if the property proved satisfactory on further examination before the expiration of the option. It was then agreed between them that Pettigrew would furnish the money for the development work in the meanwhile to prove the value of the mine. The $1,000 mentioned in the majority opinion was furnished by Pettigrew for that purpose.

Hyde, after his return to Salt Lake City, made arrangement with a third party to loan him the $10,000 to meet his one-half of the first payment; but as the time for this payment approached, he discovered that said friend had gone to New York and might not return in time for him to rely upon this source of assistance. Thereupon, perhaps about the 8th day of December, 1901, he called upon Cunningham to see if he could obtain from him the necessary money. Cunningham was a resident of long standing in Salt Lake City, of high respectability, president of a bank, and was understood to be a man of wealth. Cunningham was unwilling to make this advancement without a personal inspection of the mines, to be advised of the probability of getting his money back. Accordingly, he and Hyde went out and made an inspection of the mines, brought back some specimens, and after having them assayed Cunningham consented to advance the money to meet Hyde's one-half of the installments as they became due on the option contract, with the understanding, ac-

cording to his testimony, and as I hold all the facts and circumstances confirm, that Hyde and Fox (the latter being understood to be associated with Hyde in the purchase) were to pay him 8 per cent. interest per annum on the money advanced, and a bonus of one-third of the profit Hyde and Fox might make out of the adventure, or in case of sale by them of the property.

It is not borne out by the evidence, as stated in the majority opinion, that Cunningham at that time, or at any other time, was shown the two written agreements between Johnston and Hyde. Cunningham distinctly denied this in his cross-examination, and there is no contradictory proof. It is conceded, however, that Hyde did advise Cunningham that when the $40,000 was paid to Johnston the deed to Hyde would be delivered. Both Hyde and Cunningham, the only persons present at their convention, testified that the $10,000 advanced by Cunningham was only a loan, to be repaid to him out of the first moneys received, either on a sale of the property by Hyde or of surplus money received from Pettigrew, and the bonus of one-third of the profit realized by Hyde and Fox. As proof of the loan of the $10,000, Hyde and Fox at the time of its advancement executed to Cunningham their promissory note therefor.

Pettigrew did not return to Utah until just a few days prior to the 20th of December, 1901. He was unwilling to make the payment of the first $10,000 until after he made further inspection of the mines. Accordingly, Hyde met him at Ogden, and they revisited the mines, and after further inspection Pettigrew brought samples therefrom to be assayed in Salt Lake City. They arrived at the latter place about two or three days before the date of the maturity of the first payment, and, as the assays were not completed in time to satisfy Pettigrew by the 20th of December, Johnston consented that the first payment might be made on the 21st day of December. On the last-named date Pettigrew, being satisfied with the result of the assay, gave his check for the $10,000 and Cunningham gave his to Hyde for a like sum, which were turned over to the bank that held the deed in escrow from Johnston.

It is conceded, as it must be, that the instant Pettigrew parted with his money, if obtained from him by fraudulent representations and deceit, a cause of action arose to recover it from Hyde. The majority opinion seems to proceed upon the theory that Pettigrew likewise at the time could have maintained action directly against Cunningham for a judgment in personam for the recovery of the $10,000 advanced by the former. This position, it must be conceded, is sustainable alone upon the ground that Cunningham was particeps criminis in the alleged fraudulent representation and deceit which induced Pettigrew to part with his money. This would present a simple action for fraud and deceit ad damnum. To sustain such an action, it is the settled law that the burden rests upon the actor to show that the defendant made a representation as to a material fact, that such representation is false, not believed by the defendant to be true, that it was made with the intent that it should be credited and acted on, and that the complainant in ignorance of the fact relied thereon. Or, as stated by Mr. Justice Catron, in Lord et al. v. Goddard, 13 How.,

loc. cit. 211, 14 L. Ed. 111, "this action could not be sustained without proving actual fraud in the defendant, or an intention to deceive the plaintiff by false representations." In other words, it must be a false representation and deceit practiced by the defendant. See Schagun v. Scott Mfg. Co. (C. C. A.) 162 Fed., loc. cit. 213.

The evidence is undisputed that, when Pettigrew paid the $10,000, he and Cunningham had never met, and had never had a word of conversation respecting this or any other subject. The whole dealing in regard to the sale was between Pettigrew and Hyde. By its direct averment the bill predicates the actionable fraud perpetrated upon Pettigrew of the fact that Hyde gave him to understand that he was being admitted into the transaction on the basis of one-half of the sum Hyde was in fact to pay Johnston for the property. This is the gist of the complaint. For, as Pettigrew bought in only after personal examination of the mines and assays of samples selected by himself, he had no cause of action without said assurance. As Cunningham made no such assurance to Pettigrew, the only ground upon which accountability can be attached to him must be that when the false assurance was given to Pettigrew there existed a conspiracy between Hyde, Fox, and Cunningham to thus deceive and cheat Pettigrew, and that any representations or assurances thereafter made by Hyde in furtherance of the conspiracy are binding upon Cunningham. This record has been searched through in this division of opinion without developing one iota of tangible proof to support the suggestion of any such conspiracy on the part of Cunningham. The majority opinion asserts the proposition, in effect, that if Cunningham knew that Hyde was selling to Pettigrew a one-half interest in the property at $37,500, when the whole consideration to be paid to Johnston was only $40,000, it was a fraud on Pettigrew, and that Cunningham thereby "aided in its accomplishment by agreeing to loan the money to Hyde for that purpose and to take a one-sixth interest in the mine as his reward." This postulate is predicated, in my judgment, of both a misconception of the law and the facts. It is the recognized American doctrine that it does not vitiate a contract of A. to loan B. money to carry out such a contract. To render the lender particeps criminis, the evidence must go further and show that by some additional, positive, overt act the lender assisted the contriver of the fraud in its perpetration.

This is illustrated by the early English case of Holman v. Johnson, Cowp. 341, growing out of the sale of goods in France by a Frenchman to an English subject for the known purpose of being smuggled into England in violation of her revenue laws; and also by the case of Faikney v. Reynous, 4 Burr. 2069, in which the rule was laid down that to make the vendor, as the lender, particeps criminis, he should do some act, such as in so shipping and marking the goods as to conceal the fact that they were being smuggled. But mere knowledge of the vendor, or lender, of the unlawful intent on the part of the vendee, or borrower, does not make the former a participant in the guilt or wrong of the latter. Tracy v. Talmage, 14 N. Y. 162, 170, 67 Am. Dec. 132; Williams v. Campbell, 3 Metc. (Mass.) 209; Graves v. Johnson, 179 Mass. 53, 58, 60 N. E. 383, 88 Am. St. Rep. 355; Anheuser-Busch

Brewing Association v. Mason, 44 Minn. 318, 46 N. W. 558, 9 L. R. A. 506, 20 Am. St. Rep. 580; Kerwin & Company v. Doran, 29 Mo. App., loc. cit. 406, and citations; Michael v. Bacon, 49 Mo., loc. cit. 476, 8 Am. Rep. 138; Howell v. Stewart, 54 Mo. 400.

The advancement of the $10,000 by Cunningham, for which he took the note of Hyde and Fox at four months, with interest at 8 per cent., to meet the first payment by Hyde, did not even give Cunningham an equitable lien on the property therefor, much less an interest in the res itself. Eyster v. Hatheway, 50 Ill. 521, 525, 99 Am. Dec. 537; Heuisler v. Nickum, 38 Md. 279; Wooldridge v. Scott, 69 Mo. 669; Price v. Estill, 87 Mo. 381.

Cunningham's testimony was that, as an inducement to him to advance the $10,000 and subsequent installments due by Hyde, he was to receive a bonus of one-third of the profits Hyde might make out of the transaction. That his version of the understanding is correct is irrefutably demonstrated by the acts and conduct of all the parties to that compact. When on the approach of the maturity of the second payment, in February, 1902, Hyde informed Cunningham that Pettigrew declined to go further with the sale by making the payment then maturing, Cunningham declared his unwillingness to put into the transaction any further money, which would require $20,000 from him to meet the payment due the 20th day of February, 1902, unless, as security for his protection, the legal title to the property was put in him. This was finally acceded to by Hyde and Fox on the distinct agreement that the latter were to develop the property without expense to Cunningham, with an option to them to sell within a given time and make recompense to Cunningham for the money advanced by him. Hyde and Fox failing to make the sale within the prescribed time, Cunningham became insistent for his money, but yielded to another extension of the time of redemption. This period having again expired, Cunningham demanded possession of the property, which Hyde and Fox refused to yield. Cunningham's testimony respecting this, which is without contradiction, is that in the option that was given to Hyde and Fox in August, 1903:

"We figured up at the time the amount of money I had advanced and interest on it, and gave him credit for the difference, this $2,400 and whatever it was, on that, leaving a balance at that time of about $31,000 or $32,000, and that was mentioned as the purchase price under that option."

This would cover the $30,000 advanced by Cunningham and interest. When, as stated, the last extension had expired, and Cunningham was insisting on Hyde and Fox yielding possession of the property to him, and their refusal, they met in the law office of Judge Howat, who advised the parties that under the agreement between them Cunningham held the legal title only as an equitable mortgagee to secure him for his advancements, and therefore he could not oust Hyde and Fox summarily, but would have to resort to a proceeding of foreclosure. After some parleying this was agreed to, to save the expense and delay. Hyde and Fox made Cunningham a quitclaim deed to the property and surrendered the possession, he delivering up to them their said promissory note for the $10,000. All of which clearly confirms Cunningham's

contention that he never came into the transaction as a speculative purchaser with Hyde and Fox, but as a lender for hire of the money. So that, had Hyde and Fox at any time returned him his money and paid for the use and risk of the loan, he was bound to have surrendered all claim to them. At most, the case presented was a mere promise as a means of compensating Cunningham for the risk of the credit given Hyde and Fox, and did not constitute between them the relation of equitable joint tenants. No case of recognized authority can be found supporting the proposition that such agreement brings it within the rule of making Cunningham particeps criminis in the alleged fraud by Hyde, constituting it an act by Cunningham in aid thereof. The evidence is all one way that the representations and assurances which Pettigrew testified constituted the inducement to him parting with his money came from Hyde anterior to Cunningham's advancing the money, which clearly brings Cunningham within the protection of the rule laid down in Armstrong v. Toler, 11 Wheat. 258, 6 L. Ed. 468, that if the promise be entirely disconnected from the illegal act, and is founded on other considerations, it is not vitiated by the act, "although it was known to the party to whom the promise was made."

The learned counsel who drew this bill of complaint did not conceive that he could present a case, even on paper, based on the ground that it was sufficient to bind Cunningham or the property for restitution of the money paid by Pettigrew by alleging that when Cunningham agreed to advance the money he knew that Hyde was to account to Johnston for only $40,000. Therefore, it was distinctly charged in the bill that Cunningham came in as a part purchaser with Hyde with knowledge of the claimed fact that to induce Pettigrew to become a part purchaser Hyde represented to him that he was to be admitted on the basis of the actual purchase price to be paid to Johnston.

The only reliance for support of the charge aforesaid, suggested by appellee's counsel, is the testimony of the man Fox. This witness, by his whole conduct in this case, his treachery first and last to both sides, transferring his allegiance to whichever afforded the best prospect of gain to himself, is not entitled to be credited without strong corroboration. The cross-examination of this witness demonstrated beyond reasonable contention that his testimony in this respect inculpatory of Cunningham was wholly hearsay, so much so that the sense of justice of the majority would not permit them to rest their judgment upon this man's statements. But the majority opinion says, let Cunningham speak for himself, and then proceeds to quote an isolated question, in the form of an argument and bald assumption of a fact not proven, and the answer thereto. I earnestly protest that such is hardly a fair treatment of Cunningham's testimony. Hyde testified that he never did say to Pettigrew that the $37,500 was one-half of the sum he was to pay Johnston for the property, and Cunningham testified distinctly that he never heard of such a statement having been made by Hyde to Pettigrew until the taking of testimony herein. He stated that while he knew Hyde held a contract from Johnston expressing the consideration to be $75,000, and was to account for only $40,000, that such option contracts were quite usual; and that in letting Hyde have the mon-

ey he did not consider that that matter concerned him. He was then asked on cross-examination if Pettigrew was to have one-half and he a one-sixth interest in the property.

"A. I was to have a one-sixth in the profit. Q. You were to have a one-sixth interest in the mine, weren't you? A. No, not in the mine, because I didn't expect to put up money to develop the property. * * * My understanding was one-sixth interest in the profit. * * * I had nothing to do with the expenses. They were to pay all expenses, and I was only going to get one-third of the profit. If there was no profit in it, I wouldn't get any, only my 8 per cent. interest on the investment, and my principal, of course. * * * I had no interest in the mine at all, excepting in the profit."

Then counsel interrogating inquired of Cunningham if it did not strike him as singular that Pettigrew was going to pay $37,500 for a one-half interest and pay all the expenses of development.

"A. No, sir. * * * It is an everyday occurrence all over the country. * * * Q. And you say positively, now, as I understand you, that you never asked Hyde or Fox to show you any correspondence between them and Pettigrew at any time? A. No, sir; I never did, at any time. Q. You saw the agreement between Johnston and Hyde? A. I saw that at the time that I made the second payment."

The cross-examiner followed this up with the question: If the taking of that contract from Johnston was not for the purpose of leading the purchaser to think that the consideration was much higher than the real one?

"A. No, sir; that isn't the intent. * * * The object of a different price is that a party can make a sale and make a profit over and above the original amount."

Again, the question was put to him to the effect if he did not believe on the 8th day of December, 1901, and also on the 21st day of December, before the money was paid, that Hyde had induced Pettigrew to believe that the real consideration was $75,000, for the property.

"A. Not from the way he told it to me. Q. You had no doubt that that was true at that time, had you? A. No; I don't think so. I think it was just as he stated."

Having failed, as thus shown, to establish the essential, issuable fact, counsel then, as if it were a mere question of casuistry, and in an argumentative way, put the hypothetical question mentioned in the majority opinion and the answer quoted; but the witness further stated: "It might be a little different." He was then inquired of if Hyde had not held out to Pettigrew, by showing him the contract, that the consideration was $75,000, and whether or not Pettigrew would ever have gone into such an arrangement; to which he answered:

"I didn't believe he would go into it unless, after his examination of the mine, it would warrant him in paying that for it."

After that counsel put the distinct question that Pettigrew, having been invited by Hyde to go and see the property, had undertaken to put up some money for development, and Hyde had shown him a contract with Johnston reciting the consideration to be $75,000, and Pettigrew had undertaken to take one-half of the property and pay one-half of the consideration, the witness began the answer as follows, "All I

know about that," whereat he was interrupted by counsel with the question:

"Q. Didn't you know that on December 8th, 1901? A. No, sir; I didn't know anything about that; never heard about that until to-day, when Hyde was on the witness stand. * * * He didn't tell me anything about the contract, as he stated here, that expired on the 31st of December. I never heard of that until to-day."

Then he was asked if he ever heard about a deed from Hyde to Pettigrew which was drawn up and presented for signature.

"A. No, sir; never heard of it until it was produced here before the chancellor; that is the first intimation I had of it."

So, taking Cunningham's evidence in its extremest view in favor of the appellee's contention, it treads back to the fundamental proposition, hereinbefore discussed, that Cunningham's knowledge that Hyde was selling the one-half interest to Pettigrew for $37,500, when he was to account to Johnston for only $40,000, did not render Cunningham particeps criminis in the alleged fraud, as he did no act to impose upon Pettigrew or to influence his action.

The bill, as already shown, was framed upon the theory that Cunningham became in equity a joint purchaser with Pettigrew, and was impressed with the obligations of a fiduciary relation, in which equity exacts absolute equality of right and fair dealing; and, therefore, while Cunningham held the legal title to the property, Pettigrew is an equitable tenant in common to the extent of the purchase money paid by him. The majority opinion, at times, adopts this theory, and in support thereof cites the case of Walker v. Pike County Land Company, 139 Fed. 609, 71 C. C. A. 593, where an agent for the sale of land joined with others in purchasing the same for speculative purposes, under an agreement that a holding corporation should be formed. It was held that he stood in a fiduciary relationship to his associates in the purchase, and as to them he was bound to the utmost good faith, and, because he misrepresented to them the price paid (whereby he obtained a secret profit on the sale), he was accountable to the corporation and his associates, as the sole stockholders, for such profits. If this suit were alone between Pettigrew and Hyde, that case would be relevant; but it fails of applicability in that Cunningham, at the time that Pettigrew made his first payment, had not come into the transaction as an associate with Hyde to make a sale of the property to Pettigrew as another associate in a joint adventure. And later on the majority cite the case of Stevens v. Grand Central Min. Co., 133 Fed. 28, 67 C. C. A. 284, which asserts the equitable principle that co-tenants in a mining claim stand in a fiduciary relation to each other, so that neither by relocating or by adverse acquisition can exclude the equitable rights of the other. Yet the majority opinion asserts that:

"In February, 1902, when the second installment of purchase money became due, he (Pettigrew) refused to pay his portion of it; he refused to perform his contract obligation, and left his associates to their own devices. He was guilty of no vacillation. He announced his purpose and adhered to it. This was an unequivocal act of repudiation on his part. His associates so understood it and acted accordingly; they understood he would no longer act with

them or further perform his part of the joint undertaking, and immediately made new arrangement, totally inconsistent with any claim of continuing obligation on the part of the complainant, for completing the payment of the mine. They accepted the refusal as a conclusive act of rescission."

Such finding is not predicated of any allegation in the bill—a rescission of the contract is not asserted or relied on by the pleader. But if the finding be correct, what right had Pettigrew to complain of any subsequent act or conduct of Cunningham in respect of the property? If Cunningham, as he had a right to do, had likewise refused to put up another dollar for Hyde and then abandoned the whole matter, the option contract would have been forfeited on February 20, 1902, and Cunningham would have lost the $10,000 advanced to Hyde and Fox, and Pettigrew would have lost the $10,000 paid by him, as he claims that Hyde and Fox are both insolvent.

I do not understand that a complainant can occupy the two positions the decree and the opinion assume. If Pettigrew abandoned and repudiated the contract in February, 1902, and his refusal was accepted "as a conclusive act of rescission," he could neither in law nor equity thereafter assert any right under the contract to the property, and his remedy would have been an action at law to recover back the money which had been obtained from him by fraud and deceit, in which action the parties would have been entitled to a trial by jury. Having elected, as the majority opinion asserts, he must adhere to it; he cannot play fast and loose. It is the settled rule of law that where the attitude of a party is one of complaint of a fraud perpetrated in a contract of sale of interest in land, if he claim a rescission, he must take his position immediately upon the discovery; and he is not at liberty to hesitate and delay and wait for a future view of his own convenience, or the chances of the market value of the property, before determining the question of the affirmance or rescission of the contract. "He must on the discovery of the fraud elect to rescind, or to treat the transaction as a contract." Hart v. Handlin, 43 Mo. 172–175; Taylor v. Short, 107 Mo. 392, loc. cit. 393, 17 S. W. 970. How can he, after waiting three years and eight months, come into a court of equity, asserting the right of an equitable owner of an interest in the property based on a contract with Hyde that he was to pay according to what Hyde was to pay Johnston, praying that—

"Cunningham be decreed to be a trustee for your orator as to an undivided one-fourth interest of said mining claims hereinbefore described, and by good and sufficient deed of conveyance to convey the said undivided one-fourth interest thereof to your orator; or, in the event that your orator is unable to procure the relief aforesaid, that the said Cunningham be decreed to pay to your orator the sum of $11,000, with interest thereon from the 18th day of December, 1901?"

And the decree affirmed by the majority is, first, a straight judgment in personam against the defendant for the money advanced by Pettigrew, with interest from the date of payment; and then, treating the case as one in equity, that in some way the complainant was entitled to an equitable lien on the property (which the opinion asserts he abandoned in February, 1902), the decree orders Cunningham to execute a mortgage on the whole property to secure the money judg-

ment; and, as evidencing the court's notion that the complainant had an equitable interest in the property, it further decreed "that thereupon said complainant be debarred from claiming any other right in respect to said claims or either of them."

The Statute of Limitation and Laches.

If it were conceded that Pettigrew ever had a cause of action against Cunningham, either at law or in equity, it arose on the 21st day of December, 1901, when Pettigrew parted with his money. This cause of action was barred in three years thereafter, to wit, the 21st day of December, 1904, unless the facts constituting the fraud were not discovered within that period, in which event the statute would not attach until such discovery. The settled rule of pleading, where the action is not brought within the statutory period of limitation, is that the complainant must specifically plead and prove—

"what the impediments were to the earlier prosecution of his claim; how he came to be so long without knowledge of them; the means, if any, by which the defendant concealed them; how and when he first came to know them; and such other facts and circumstances as would appeal to the conscience of a chancellor." Redd v. Brun, 157 Fed. 192, 84 C. C. A. 640.

So Judge Story, in Stearns v. Page, 1 Story, 204, 215, 217, Fed. Cas. No. 13,339, said:

"And especially must there be distinct averments of the time when the fraud, mistake, and concealment, or misrepresentation, was discovered, and how discovered, and what the discovery is, so that the court may clearly see whether, by the exercise of ordinary diligence, the discovery might have been before made. For, if by such diligence the discovery might have been before made, the bill has no foundation on which it can stand in equity, on account of the laches." See Hardt v. Heidweyer, 152 U. S. 547, 559, 14 Sup. Ct. 671, 38 L. Ed. 548; Johnston v. Standard Mining Company, 148 U. S. 360, 370, 13 Sup. Ct. 585, 37 L. Ed. 480; Foster v. Mansfield & Coldwater Railroad Co., 146 U. S. 88, 100, 13 Sup. Ct. 28, 36 L. Ed. 899.

The excuse pleaded in the bill for the delay is: (1) That the defendants since December, 1901, had been absent from their homes in Salt Lake City about two years; and (2) that the complainant was not in possession of all the facts in detail; that while he learned a portion of the facts on the 17th day of October, 1904, to wit, that only $40,000 was paid for said mining claims, yet he did not learn all the particulars until his solicitor obtained copies of all the documents between Johnston and Hyde. An analysis of these excuses and the evidence in support of them will demonstrate their insufficiency. In the first place, it is not obvious why the absence of Hyde and Cunningham from their homes should have obstructed the institution of a suit in equity for relief. A proceeding in rem could have been instituted in the state of Nevada, where the land was located, and service by order of publication. The complainant's equitable rights in and to the claimed interest in the property could have been enforced without the personal appearance of Cunningham or Hyde. But the evidence shows that Cunningham did not visit the Sandwich Islands until December, 1903, returning to his home January 25, 1904. He visited Mexico in September, 1904, for about five days, and on his return home was ill at El Paso, Tex., for about three weeks. He visit-

ed the state of California two or three times, but was not absent over a week at a time. Hyde was absent altogether, during the three years, for four or five months, while the evidence of Pettigrew himself shows that he was absent from his home, in New York, Mexico, and California, two years of the time. He does not disclose in his excuse what particular effort he made to discover the facts, nor the means by which the defendant concealed them. Nor does the bill state what essential fact necessary to constitute notice was not disclosed by said Fox. Objection to the sufficiency of the excuse pleaded is not waived by failure to demur. Redd v. Brun, supra; Willard v. Wood, 164 U. S. 502, 524, 17 Sup. Ct. 176, 41 L. Ed. 531.

It is the settled rule applicable to such a statute as that of Utah that the discovery by the aggrieved party of facts constituting the fraud dates from the time the party has notice of the particular facts in question, or is conscious of having the means of knowing, although he may not employ them for the purpose of gaining further information. Notice in such case "embraces all degrees and grades of evidence, from the most direct and positive proof to the slightest circumstance from which notice might be inferred"; and, where he has knowledge of any fact sufficient to put him on inquiry as to the existence of a fact, he is presumed either to have made the inquiry and ascertained the extent thereof, or to have been guilty of a degree of negligence fatal to his claim to be considered by a court of equity. Williamson v. Brown, 15 N. Y. 359; Leading Cases in Equity (3d Ed.) 152.

In Wood v. Carpenter, 101 U. S. 135, 143, 25 L. Ed. 807, the rules are declared as follows:

"Whatever is notice enough to excite attention and put the party on his guard and call for inquiry is notice of everything to which such inquiry might have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant of it. * * * Concealment by mere silence is not enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry. * * * The circumstances of the discovery must be fully stated and proved, and the delay which has occurred must be shown to be consistent with the requisite diligence."

In Johnston v. Standard Mining Co., 148 U. S. 370, 13 Sup. Ct. 589, 37 L. Ed. 480, the court said:

"The law is well settled that, where the question of laches is in issue, the plaintiff is chargeable with such knowledge as he might have obtained upon inquiry, provided the facts already known by him were such as to put upon a man of ordinary intelligence the duty of inquiry."

Accordingly, in Foster v. Mansfield & Coldwater Railroad Company, 146 U. S., loc. cit. 99, 13 Sup. Ct. 32, 36 L. Ed. 899, the court said:

"The defense of want of knowledge on the part of one charged with laches is one easily made, easy to prove by his own oath, and hard to disprove; and hence the tendency of courts in recent years has been to hold the plaintiff to a rigid compliance with the law which demands, not only that he should have been ignorant of the fraud, but that he should have used reasonable diligence to have informed himself of all the facts."

Aside from the admissions in the bill, Pettigrew testified that between the first payment and the next installment due he was advised that Hyde was dishonest and tricky—that by reason of information

he had received from one Wilson, who had just sold to Johnston a part of the mines in question amounting to about one-fourth, at a price that indicated that the whole group had not cost Johnston over $36,000; and that, therefore, some time in the forepart of January, before the second payment became due, he placed the matter in the hands of his counsel at Salt Lake City, who, to test Hyde, drew up a deed from him to Pettigrew for the one-half interest in the property, reciting that, by the terms of the agreement between them, "each of said parties is to advance and pay one-half of the cost of acquiring the same." This Hyde refused to sign, but presented, instead, a deed drawn by himself omitting that recitation. On the 8th day of January, 1902, the said counsel wrote Pettigrew advising him of what he had done in the premises; that Hyde, after looking over the deed, declined to sign it, and had written a deed leaving out said recital; that he had urged Hyde as strongly as possible, without disclosing the object, to sign the first deed, and he was unable to give any valid excuse for not doing so. It must be conceded that this was sufficient to create more than a suspicion. It was a tacit admission on Hyde's part that he was unwilling to admit the truth. And most certainly Pettigrew ought not now to be heard to controvert the effect of this action on the part of Hyde when he himself deemed the information he had sufficient to warrant him in not proceeding further with the execution of the contract. Moreover, Pettigrew's counsel called on Johnston to ascertain the facts, and his counsel informed him by letter that Johnston refused to give any information. In this letter his counsel advised him, in view of the conversation he had with Johnston, that "the transaction was not straight." Again, on the 5th day of February, 1902, his counsel wrote to Pettigrew that he believed with him that:

"The proof of the facts supposed to exist will eventually be forthcoming, and I also think that I can perhaps be of some service to you in ferreting out these matters, or at least put you in communication with some people who know something in relation to the facts. I think, however, it would be well to let the matter rest until your arrival here, when we can discuss the same in all its different phases."

On September 11, 1902, said counsel wrote Pettigrew that he was satisfied Hyde never put a dollar of his own money into the property in question, and he believed a thorough investigation would disclose the fact that the only money that went into the property was advanced by Pettigrew. In this letter he suggested that as Hyde was a very energetic man, and in time would doubtless succeed in making a considerable amount of money, it would be advisable "for you to obtain a judgment against him for the money advanced in case he does not return the same, which I have no idea that he will do. There is plenty of time, however, in which to commence such an action if you shall deem it advisable." All this was more than three years before the institution of this suit. His counsel thought there was sufficient evidence to obtain a judgment against Hyde, but Pettigrew acted upon his advice that there was plenty of time, and so he did nothing. According to his own testimony, he went off and spent half of his time in New York, Old Mexico, and California. He admits having passed through Ogden, only 37 miles from Salt Lake City, at least twice without stopping

over. He stated in one of his letters that he believed his "friend Fox" knew and would tell him the facts about the transaction; and Fox testified that he wrote to Pettigrew time and again asking him to call and see him, as he had something of information to discuss with him. He did not go to see Fox or even write to him. He was simply indifferent and let the matter drift. Cunningham testified that at any time he would have told Pettigrew all he knew about the transaction, as he had nothing to conceal. Although Pettigrew must have known that the $10,000 paid by Hyde on the 21st of December, 1901, was through the check of Cunningham, as he was present in the bank when the check was delivered, he never sought Cunningham or made any inquiry of him as to his relations to and knowledge of the transaction.

The majority opinion repudiates the idea that Pettigrew should be expected to have applied to the adversary for information. Of course, I would not lay it down as a hard and fast rule that the defrauded party should be regarded as derelict in duty under any and all circumstances for not applying to the adversary for information. His nonaction in this respect should be measured by the circumstances of the particular case. There was nothing in the attitude or character of Cunningham that did not invite an inquiry of him for information. He was a respected citizen and the president of a bank in Salt Lake City. Nothing would have been more natural than to have assumed that Cunningham had nothing to conceal and would have advised him of the actual facts. He knew, for he so testifies, that Hyde and Fox had no money, and that when he refused to put up his half of the money due on the 20th of February, 1902, the option would be lost unless Hyde and Fox procured some party to meet this payment. When Cunningham did meet it he took, as already stated, a deed from Hyde for the property, which carried the title from Johnston and vested it in Cunningham. This deed was duly recorded and therefore the most reasonable inquiry on the part of Pettigrew would have developed this fact.

In Curtis v. Lakin, 94 Fed., loc. cit. 254, 36 C. C. A. 225, Judge Thayer commented upon the failure of the complainant in that case "to have ever held personal communication with the defendant." And Judge Sanborn, in Geyser-Marion Gold Mining Company v. Stark, 106 Fed., loc. cit. 562, 45 C. C. A. 471, 53 L. R. A. 684, said:

"The old excuse for this dereliction that the word 'trustee' pointed to no one but the trustee himself, of whom inquiry could have been made, and such an inquiry would have been idle, because he who would violate his trust would make false answers, is again presented. Its futility has been often shown, and perhaps nowhere better than by Sir John Romilly, Master of the Rolls, in Jones v. Williams, 24 Bevans, 62."

The only criticism made upon this authority by the majority opinion is that there the party to be inquired of was the trustee, the force of which I do not perceive, because the excuse for not calling on the trustee, who was the offending party, was that "he who would violate his trust would make false answers." In the case of Jones v. Williams, above referred to, the Master of the Rolls, in discussing a cognate question, said:

"I concur in the argument of the plaintiffs' counsel that the rule with respect to the consequence of abstaining from making inquiries by purchasers

does not depend exclusively on a fraudulent motive for such abstinence; and that though it be true, that a purchaser will be fixed with the knowledge of such facts as would have been contained in answers, which he would have got if he had put questions, which he refrained from asking solely from the fear of the consequences, still, in my opinion, the rule goes beyond this, and that whenever, from the circumstances of the case, the purchaser is put on inquiry, he must be fixed with the knowledge which that inquiry would have produced, although the omission to put the question did not proceed from any fraudulent motive. * * * With respect to the argument that it was unnecessary to make any inquiry because it would have led to no result, I think it is impossible to admit the validity of this excuse. I concur in the doctrine that a false answer, or a reasonable answer given to an inquiry made, may dispense with the necessity of further inquiry; but I think it impossible, beforehand, to come to the conclusion that a false answer would have been given which would have precluded the necessity of further inquiry. A more dangerous doctrine could not be laid down, nor one involving a more unsatisfactory inquiry, viz., a hypothetical inquiry as to what A. would have said if B. had said something other than what he did say."

In view of the fact that Pettigrew was put upon inquiry by the refusal of Hyde to execute the deed with the recital aforesaid, and the refusal of Johnston to make any statement, the most natural thing, if he was exercising reasonable quest after further information, would have been to have gone to Cunningham, who was advancing the money and taking the title to the property, for information.

Furthermore, I insist that in view of the information that Pettigrew had, as aforesaid, he must be held to have been conscious of the means of obtaining full information more than three years before the institution of this suit. He was a lawyer, and he and his astute counsel are presumed to have known that they could have filed a bill of discovery against Hyde and Cunningham and compelled them to answer on oath, under the pains and penalties of perjury, as to the facts in question. This is the rightful office of such equity jurisdiction. He could have taken the deposition of Johnston and made him talk. Instead of this, he simply waited for them to make voluntary disclosures of the particulars, or he was entirely indifferent.

The excuse pleaded in the bill for not bringing suit, after receiving positive information that the real consideration to be paid by Hyde to Johnston was only $40,000, that he was not in possession of all the facts, is simply puerile. The fact which the bill admits, and which the evidence, without dispute, establishes, is that in October, 1904, within the three-years period, he was informed by Fox, one of the parties to the transaction, that the real consideration was only $40,000. He knew according to his testimony, prior to December 21, 1901, that Hyde had assured him he was being admitted as a purchaser of one-half interest on the basis of the purchase price to Johnston. Thus he knew the essential facts in controversy, and he had two witnesses—Fox and himself—to support it. But he pleads in extenuation of his failure then to sue that he did not see the written contracts between Hyde and Johnston until the 5th day of October, 1905. The law is that the subsequent discovery of some additional evidence of the fraud is no excuse for the failure to act energetically and promptly upon notice and knowledge of the essential facts. Such additional particulars "can only be considered as strengthening the evidence of the original fraud, and it cannot re-

vive the right of repudiation which has been once waived." Fry on Specific Performance of Contracts (2d Ed.) §§ 703, 704, approved by Sherwood, P. J., in Taylor v. Short, 107 Mo. 384, 393, 17 S. W. 970. In Curtis v. Lakin, supra, the syllabus is:

"The delay of plaintiffs in commencing suit against their copartner for dissolution and an accounting, and to declare a third person purchasing partnership property from him a trustee, is not excused by the fact that the partnership agreement had been misplaced, and was not found until shortly before the suit was commenced;" for the reason that they could and should have applied to the defendant therefor.

Indeed, there could be no limitation upon a party's delay in bringing such suit for relief, if it were an excuse that he was not in possession of all the evidence in its details, which is rarely developed until in the progress of the trial itself.

It is not to be lost sight of for one moment, in considering the question of the laches of Pettigrew in bringing this action, that the property on which he is seeking to impress an equitable interest, asserting an equitable co-tenancy in common with Cunningham, is mining property. With emphatic reiteration the courts have announced the rule that without reference to statutes of limitation, where property of a speculative character is involved, subject to contingencies as to value:

"It is the duty of a man complaining of fraud to put forward his complaint at the earliest possible time. He cannot be allowed to remain passive, prepared to affirm the transaction if the concern should prosper, or to repudiate it if that should prove to his advantage." Hayward v. National Bank, 96 U. S. 618, 24 L. Ed. 855.

In Patterson v. Hewitt, 195 U. S. 318, 319, 25 Sup. Ct. 37, 49 L. Ed. 214, Mr. Justice Brown said:

"In actions at law courts are bound by the literalism of the statute, but in equity the question of unreasonable delay within the statutory limitation is still open. * * * Even if the statute of limitations be made applicable in general terms to suits in equity, the defendant may avail himself of the laches of the complainant, notwithstanding the time fixed by the statute has not expired. * * * Indeed, in some cases the diligence required is measured by months rather than by years; and in others a delay of two, three, or four years has been held fatal."

The majority opinion seems to adopt the notion of the Circuit Court that this doctrine of laches has no special application here, as it does not appear that during the inaction of the complainant the mine had disclosed great increase in value by the discovery of rich ore. The rule of increased diligence exacted does not rest upon any such fact; but it is predicated of the peculiar character and incidents of such property, which is regarded as highly speculative. It rests upon the fact that a mining property which for days and months, and even years, may have been little productive or promising, may at any day, through the energy and money of the occupant, develop vast mineral wealth; that this expectancy and possibility, always to be indulged and anticipated, demands "that the claimant should be awake to his rights, prompt in their assertion, and eager in their pursuit." Reed v. Munn, 148 Fed., loc. cit. 760, 80 C. C. A. 238.

So it is said in the case of Patterson v. Hewitt, supra:

"There is no class of property more subject to sudden and violent fluctuations of value than mining lands. A location which to-day may have no salable value may in a month become worth its millions. Years may be spent in working such property apparently to no purpose, when suddenly a mass of rich ore may be discovered, from which an immense fortune may be realized. Under such circumstances, persons having claims to such property are bound to the utmost diligence in enforcing them, and there is no class of cases in which the doctrine of laches has been more relentlessly enforced."

Now, let us see what were the real underlying motives which influenced further delay in bringing this suit. On October 17, 1904, Fox wrote to Pettigrew reminding him that he had promised to come that way several times and failed; that had he come there would have been no need of the letter, as he had desired to see him and go over the ground. After stating that the actual purchase price was $40,000, that Cunningham had paid $30,000, he said:

"Now, this is what I desire to say: That I expect to work at, and with the Iron Mine property until both your and my money is made good. There will be a car of ore here in about ten days taken from the Buzzard Claim. The returns I will send you when a settlement for the same is made. The mines are in process of patent."

The information that the mines were being worked, which was being done at Cunningham's expense, and that there was such development of the ore as to justify shipment, at once aroused the cupidity of Pettigrew, and turned his mind from his position of having repudiated the contract. Fox, as cunning as he is perfidious, a little later in another letter informed Pettigrew that he had been advised by a lawyer in Nevada that on account of some irregularity there was some question as to the validity of the original locations, and suggested that they make relocations and adverse any application by Cunningham for a patent, and thereby compel Cunningham to submit to their terms. As evidence of Fox's lawless character, he suggested in one of his letters to Pettigrew the advisability of taking forcible possession of the mines, boasting of the fact that in another transaction out there he had disobeyed an injunction of a court by a like lawless act. This was more than a purpose to enable Pettigrew to get back the money invested by him; it was also to enable Fox to exact from Cunningham any sum which he deemed demandable to satisfy his chronic hunger. With full knowledge of Fox's treachery and dishonesty, that he was making these suggestions while he was in the employ of Cunningham, Pettigrew with alacrity entered into this scheme. And Fox, with money furnished by Pettigrew, entered upon the work of relocations, and to cover up his tracks he took in, by overlapping boundary lines of some of the claims, additional ground and gave them different names. He bought in for Pettigrew a claimed outstanding title to the Buzzard mine (one of the group), and begun shipping ore therefrom; on the discovery of which Cunningham attached the consignment when it reached Salt Lake City. Then to conceal the presence of the discovered ore therein, he shot down earth over it.

Suspiciously enough, neither Pettigrew nor Fox produced, on request, the letter from Pettigrew in response to this suggestion of Fox, disclosing what the exact arrangement between them was. But enough

does appear from the correspondence to show that Pettigrew furnished the money to carry on this conspiracy, and sufficient to show that they were jointly interested in the result. In one letter Pettigrew wrote respecting the matter of shipping the ore, that he was unwilling to do so "unless there is a decided profit in it"; that he would sign a power of attorney authorizing Fox to file protest against the issuing of a patent, "and thus protect our interests against the patenting of those claims. * * * I will write Cunningham at any time you think I better do so." Again he wrote to his "Dear Friend Fox":

"I note what you say about the Battle Mountain mine, and that you have given an option on our interest for 25 per cent. This is all right. I think it is better for us to let it go, and look for something else."

The majority opinion undertakes to justify this double dealing and conduct of Pettigrew by making for him a case different from the one asserted in the bill, which was and is that Cunningham "became, ever since has been, and still is, a trustee of an undivided one-fourth interest of, in, and to said mining claims for your orator"; praying that Cunningham be decreed to make him a deed therefor. If this does not present the attitude of an assertion of an equitable co-tenancy in the proportion of three-fourths in Cunningham and one-fourth in Pettigrew, pleading is a useless formula. As such part equitable owner, seeking to enforce a lien on the entire property, his attempt clandestinely to acquire the entire title, to the ruin of Cunningham, was not only inconsistent with his attitude assumed in the bill, but was most unconscionable. The argument of the majority opinion to extenuate Pettigrew's conduct is quite different from that of the lawyer complainant and his astute counsel. On cross-examination of Pettigrew respecting his reasons and purpose for joining with Fox in so trying to obtain the whole title to the property, to the exclusion of Cunningham, he was pressed with the inquiry as to whether he intended thereby that Cunningham should lose the $30,000 he had invested in the property, or whether he intended, after he should get back the money he placed in it, to turn it back to Cunningham, he fenced and evaded direct answers, and finally took refuge under the position that his purpose was simply to protect himself by preventing Cunningham from obtaining a patent which would endanger his claim; and such was the argument of his counsel, both in his brief and orally before this court. And now when this contention, so flimsy as to discredit its sincerity, is exposed by the legal proposition that the obtaining of a patent could in no wise affect Pettigrew's claim and rights as an equitable co-tenant (Stevens v. Grand Central Mining Company, 133 Fed. 28, 67 C. C. A. 284), the majority opinion comes to their rescue by falling back on the bald proposition that "the complainant had a cause of action against the defendant for relief on the ground of fraud, *and nothing more.*" (Italics mine.) If this be so, I again inquire, what business has the complainant on the equity side of the court? He does not seek by the bill to enforce any judgment that might be rendered for the recovery of the money advanced as an equitable charge or lien on the property. If the bill had so charged and sought such relief, the circuit court of Utah would have had no

jurisdiction to enforce such lien, for the palpable reason that the res—the real estate—is situate in the state of Nevada. The learned counsel who framed the bill of complaint recognized this fact, and therefore the case he presented for equitable relief was and is on the theory that Pettigrew is the equitable owner of a one-fourth undivided interest in the mine; and the prayer is that Cunningham be required by a decree of the court to convey by deed this one-fourth interest to Pettigrew—a decree that would operate in personam.

And, as hereinbefore shown, the chancellor, in decreeing a money judgment, and directing that it be secured by a mortgage on the mines, proceeded upon the notion that Pettigrew had an equitable interest in this property at the time of the decree. It, therefore, follows, inevitably, that the complainant cannot escape from the rigid application of the doctrine of laches as applied to mining property, nor can he escape from the imputation of appealing to a court of equity for relief with unclean hands, made so by a dishonest conspiracy with Fox to acquire the whole title to the property to the exclusion of Cunningham, and then appeal to a court of equity for protection as an equitable tenant in common with Cunningham in the very property he spent a year in an attempt, unconscionable as to Cunningham, to exclusively acquire.

The clear inference to my mind is that neither Pettigrew nor Fox, until this bill was filed, entertained the belief for one moment that Cunningham was personally liable to Pettigrew for the alleged fraud perpetrated upon him by Hyde. In no letter written by Fox to Pettigrew was it ever suggested that Cunningham was in any conspiracy to defraud Pettigrew, or that he had any notice of the claimed assurance by Hyde that Pettigrew was to pay one-half of the purchase money on the basis of what was to be paid to Johnston. But the whole gravamen of Fox's complaint about Cunningham was that he had not dealt fairly with him in respect of the option to him and Hyde to sell the property, and that he felt that Pettigrew should have back the $10,000 advanced by him.

If Pettigrew had assumed the attitude of a purchaser who elected to rescind the contract on discovery of the alleged fraud, leaving Hyde and Cunningham thereafter (as stated in the majority opinion) to work out their own devices respecting the property, and then after being advised that the property, under the development work done at the expense of Cunningham, was disclosing sufficient ore to justify its shipment, he undertook, by relocations and adversing the claims of Cunningham for a patent, in order, as he and his counsel claim, to protect his equitable one-fourth interest, common justice and fairness demand at most that he should now be compelled to accept from the defendant a quitclaim deed therefor, which counsel in open court on this hearing offered to do (as a choice of two evils or burdens), and that he should not be preferred to have a money judgment for the recovery of the $10,000 advanced by him with interest thereon from the date it was paid, secured by mortgage. His declinature to accept this proposition leaves no doubt in my mind that he was more than content with his money judgment, because of his discovery that the mining property ultimately proved to be comparatively worthless.

As if to still further favor Pettigrew and punish Cunningham, the majority opinion imposes upon Cunningham the burden of nine-tenths of the costs of this appeal. The sum awarded Pettigrew by the decree of the Circuit Court was concededly excessive by $1,457.77. While the appeal was from the whole decree, the record of the evidence in equity was a unit and indivisible. Therefore, to obtain relief from the excessive decree, Cunningham had to bring up the whole record, because the facts relied upon were so interlaced as to make them inseparable. To the last syllable of the argument before this court, counsel for the appellee insisted upon his right to maintain the decree in its entirety. As applied to such situation, it seems to me that no part of said costs should be taxed against the appellant.

The decree should be reversed.

DONOVAN v. WELLS, FARGO & CO.

(Circuit Court of Appeals, Eighth Circuit. April 5, 1909.)

No. 2,929.

1. REMOVAL OF CAUSES (§ 89*)—PROCEDURE—PETITION—BOND.
Judiciary Act Aug. 13, 1888, c. 866, § 3, 25 Stat. 435 (U. S. Comp. St. 1901, p. 510), authorizes the removal of a cause on the filing of a petition disclosing a right to remove and the giving of the prescribed bond.
[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 189–201; Dec. Dig. § 89.*]

2. REMOVAL OF CAUSES (§ 89*)—JURISDICTION—SURRENDER BY STATE COURT.
On the filing of a removal petition, it becomes a part of the record, and if, on the face of the record as so constituted, the suit appears to be a removable one, the state court is bound to surrender jurisdiction.
[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 189–201; Dec. Dig. § 89.*]

3. REMOVAL OF CAUSES (§ 89*)—PETITION—DETERMINATION BY STATE COURT.
A removal petition presents for the state's court consideration a question of law only as to whether, assuming the facts stated in the petition to be true, the face of the record discloses a removable cause.
[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 189–201; Dec. Dig. § 89.*]

4. REMOVAL OF CAUSES (§ 107*)—GROUNDS—CONTROVERTING FACTS.
Plaintiff, in order to controvert the facts stated in a removal petition must make an issue with respect thereto in the federal court in which the issue must be tried.
[Ed. Note.—For other cases, see Removal of Causes, Dec. Dig. § 107.*]

5. REMOVAL OF CAUSES (§ 92*)—PETITION—DENIAL—FILING RECORD.
Where a state court refuses to order the removal of a cause, defendant within the prescribed time may file a copy of the record in the proper federal court and have the cause docketed there, after which the federal court is required to proceed in the exercise of the jurisdiction lost by the state court, which can be regained only by an order of the federal court remanding the cause.
[Ed. Note.—For other cases, see Removal of Causes, Dec. Dig. § 92.*]

6. REMOVAL OF CAUSES (§ 97*)—GROUNDS—WRONGFUL EXERCISE OF JURISDICTION.
Where a state court wrongfully attempted to exercise jurisdiction after the case had been transferred to the federal court by defendant filing a

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

copy of the record therein after the denial of his petition to remove, such subsequent exercise of jurisdiction by the state court would be enjoined.

[Ed. Note.—For other cases, see Removal of Causes, Dec. Dig. § 97.*]

7. REMOVAL OF CAUSES (§ 86*)—PETITION—VERIFICATION.

Under Judiciary Act Aug. 13, 1888, c. 866, § 3, 25 Stat. 435 (U. S. Comp. St. 1901, p. 510), providing for the removal of causes on petition, a removable petition is not defective because not verified.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 177; Dec. Dig. § 86.*]

8. REMOVAL OF CAUSES (§ 89*)—PETITION—SUFFICIENCY.

Where a petition for the removal of a cause is demurrable on its face, the state court may properly decline to order the removal, and will not lose jurisdiction; but, if the petition is not demurrable, jurisdiction thereby passes, however inartificial the petition may be.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 192–195; Dec. Dig. § 89.*]

9. REMOVAL OF CAUSES (§ 86*)—PETITION.

Where a removable petition alleged the requisite diversity of citizenship, that the matter in dispute exceeded, exclusive of interest and costs, the sum of $2,000, that a separable controversy existed between plaintiff and petitioner, and that a codefendant was fraudulently joined to defeat federal jurisdiction and prevent removal, it was sufficient for that purpose, though it was defective in detail as to what constituted the alleged fraud.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 166–179; Dec. Dig. § 86.*]

10. REMOVAL OF CAUSES (§ 107*)—PETITION—AMENDMENT.

Where a removal petition set forth the ultimate facts required by law, but did not allege in detail the facts constituting an alleged fraudulent joinder of parties defendant, it was amendable in the federal court in that regard.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 178; Dec. Dig. § 107.*]

11. REMOVAL OF CAUSES (§ 89*)—PARTIES—FRAUDULENT JOINDER—BURDEN OF PROOF.

A petitioner for the removal of a cause was not bound to prove an alleged fraudulent joinder of defendants to prevent a removal, until issue was joined on such allegation.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 192–193; Dec. Dig. § 89.*]

12. REMOVAL OF CAUSES (§ 107*)—PARTIES—FRAUDULENT JOINDER—JOINDER OF ISSUE.

Where a petition for removal alleged fraudulent joinder of defendants, it was plaintiff's duty to appear and submit to the jurisdiction of the court on the merits or to plead in abatement, putting in issue the allegations of fact on which the removability of the cause depended, in which case the federal court would acquire jurisdiction to hear and determine the issue of such joinder.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 226; Dec. Dig. § 107.*

Fraudulent joinder of parties to prevent removal, see note to Offner v. Chicago & E. R. Co., 78 C. C. A. 362.]

13. COURTS (§ 280*)—FEDERAL COURTS—DETERMINATION OF JURISDICTION.

The rule that federal courts must take notice of a want of jurisdiction whenever it appears does not apply when such want of jurisdiction depends, not on a single uncontroverted fact, but on a finding of an issue of

fact as to the fraudulent joinder of defendants to prevent a removal, which is determinable only after a hearing on the facts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 816–818; Dec. Dig. § 280.*]

14. REMOVAL OF CAUSES (§ 97*)—PROCEEDINGS IN STATE COURT AFTER REMOVAL—INJUNCTION—JURISDICTION OF STATE COURTS.

A bill to restrain a state court from proceeding in an action at law after jurisdiction had been removed to the federal court until the question of removability had been determined was maintainable as an auxiliary proceeding to protect the federal court's jurisdiction and to prevent unnecessary, embarrassing, fruitless, and expensive litigation.

[Ed. Note.—For other cases, see Removal of Causes, Dec. Dig. § 97.*]

15. REMOVAL OF CAUSES (§ 97*)—PROCEEDINGS IN STATE COURT AFTER REMOVAL—STATE COURT'S JURISDICTION—SCOPE OF DETERMINATION.

Where a state court, after denying a petition to remove an action at law to the federal court, continued to exercise jurisdiction notwithstanding the cause was removed by the filing of a certified transcript of the record, whereupon the removing party obtained an injunction restraining plaintiff from proceeding in the state court until the federal court could pass on the issue determinative of its jurisdiction, the determination of such issue should have been by the federal court having jurisdiction of the action at law, and not as a part of the injunction suit.

[Ed. Note.—For other cases, see Removal of Causes, Dec. Dig. § 97.*]

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

Stephen S. Brown (John E. Dolman, on the brief), for appellant.

Cyrus Crane (Gardiner Lathrop, James P. Gilmore, and George J. Mersereau, on the brief), for appellee.

Before ADAMS, Circuit Judge, and RINER and AMIDON, District Judges.

ADAMS, Circuit Judge. A suit at law was instituted by Donovan in the circuit court of Buchanan county, Mo., to recover damages from the Wells Fargo Express Company and Joseph McKee for negligence in the handling of a valuable horse intrusted to the former for transportation from Boston to St. Joseph, Mo. In due time the express company filed its petition, accompanied by the required bond for the removal of the cause into the proper Circuit Court of the United States. It alleged in its petition, among other things, that the plaintiff, Donovan, was a citizen of the state of Missouri, and that it, the express company, was a corporation and a citizen of the state of Colorado; that a separable controversy solely between them was involved in the case, and that McKee, a citizen of Missouri, was fraudulently joined as a defendant to defeat the right of the express company to remove the cause into the federal court. The state court denied the prayer of the petition, but notwithstanding that fact the express company, in the exercise of its right under section 3, Judiciary Act Aug. 13, 1888, c. 866, 25 Stat. 435 (U. S. Comp. St. 1901, p. 510), caused a complete copy of the record showing all the proceedings taken in the state court to be filed in the Circuit Court of the United States for the proper district. Donovan failed to file any motion to remand the

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

cause to the state court, or in any other manner to test the question of jurisdiction of the federal court, but prepared for trial and threatened to proceed with the cause in the state court, notwithstanding the removal. The present bill discloses these facts, and is brought to restrain Donovan from proceeding in the state court. The learned trial court granted the relief prayed for, and this appeal is to secure a reexamination of the question.

Section 3 of the judiciary act, supra, according to its clear import and as uniformly interpreted by the Supreme Court, authorizes the removal of a cause from a state court to the proper federal court upon the filing of a petition disclosing the right to remove and the giving of the prescribed bond. Upon the filing of such petition it becomes a part of the record, and if, on the face of the record so constituted, a suit appears to be removable, the state court in which the petition is filed is bound to surrender its jurisdiction and proceed no further. Such a petition presents for the consideration of the state court a question of law only, whether, assuming the facts stated in the petition to be true, the face of the record discloses a removable cause under the law. Insurance Co. v. Pechner, 95 U. S. 183, 185, 24 L. Ed. 427; Stone v. South Carolina, 117 U. S. 430, 432, 6 Sup. Ct. 799, 29 L. Ed. 962; Carson v. Hyatt, 118 U. S. 279, 287, 6 Sup. Ct. 1050, 30 L. Ed. 167; Carson v. Dunham, 121 U. S. 421, 7 Sup. Ct. 1030, 30 L. Ed. 992; Burlington, etc., Ry. Co. v. Dunn, 122 U. S. 513, 515, 7 Sup. Ct. 1262, 30 L. Ed. 1159; Crehore v. Ohio, etc., Ry. Co., 131 U. S. 240, 244, 9 Sup. Ct. 692, 33 L. Ed. 144; Traction Co. v. Mining Co., 196 U. S. 239, 245, 25 Sup. Ct. 251, 49 L. Ed. 462.

When the right of removal is made to depend upon the existence of certain facts, they must be taken by the state court to be true as averred in the petition. If it is desired to controvert such facts or any of them, the plaintiff must make an issue with respect to them in the federal court, and that issue must be tried in that court. Stone v. South Carolina; Carson v. Hyatt; Railway Co. v. Dunn; Crehore v. Ohio, etc., Ry. Co., supra; Chesapeake & O. Ry. Co. v. McCabe (decided April 5, 1909) 29 Sup. Ct. 430, 53 L. Ed. ——; St. Louis Southwestern Ry. Co. v. Adams (Ark.) 112 S. W. 186. If the state court refuses to make the order of removal on the showing made by the face of the record, the defendant may nevertheless, within a prescribed time, enter a copy of the record as it stood, on the filing of the petition, in the proper federal court and have the cause docketed there. Thereupon the latter court is required to proceed in the exercise of the jurisdiction lost by the state court upon the filing of the petition and bond with it. Railroad Co. v. Koontz, 104 U. S. 5, 26 L. Ed. 643; Railroad Co. v. Dunn, supra.

In the light of the foregoing summary of principles which must control the determination of the present case, attention will now be given to the petition for removal in order to see whether it, taken in connection with the full record, disclosed on its face that the express company had the right of removal. If it did, the state court thereby lost jurisdiction of the cause, and its threatened exercise of it was an interference with the jurisdiction acquired by the Circuit Court to

which the removal was taken, and, for reasons hereinafter stated, must be enjoined.

The petition and record disclosed, among other things, that the plaintiff Donovan was a citizen of the state of Missouri; that the defendant express company was a citizen for jurisdictional purposes of the state of Colorado; that the matter in dispute exceeded, exclusive of interest and costs, the sum of $2,000, and as a result the cause as between those parties was a removable one according to the provisions of the judiciary act of 1887–88. But as the record disclosed that the defendant McKee was a citizen of Missouri with the plaintiff, the express company's right of removal was lost unless the result of that fact could be overcome.

The recent case of Wecker v. National Enameling Co., 204 U. S. 176, 27 Sup. Ct. 184, 51 L. Ed. 430, involved a question similar to the one now under consideration, and, after discussing the merits of the case, the court said:

"While the plaintiff, in good faith, may proceed in the state courts upon a cause of action which he alleges to be joint, it is equally true that the federal courts should not sanction devices intended to prevent a removal to a federal court where one has that right, and should be equally vigilant to protect the right to proceed in the federal court as to permit the state courts, in proper cases, to retain their own jurisdiction."

Apparently following the doctrine of that case, the express company undertook in its petition for removal, which was not verified by affidavit, to assail the good faith of the joinder of McKee, and alleged, among other things, that McKee had no participation in any of the negligent acts charged against the two defendants jointly in the complaint, and, in the language of the petition:

"That plaintiff has fraudulently and improperly joined said Joseph McKee as codefendant with your petitioner for the sole purpose of avoiding and defeating the jurisdiction of the courts of the United States and the right of your petitioner to remove this cause to said courts; * * * that the joining of said Joseph McKee by plaintiff as codefendant with your petitioner is not made in good faith for the purpose of determining the question of liability of said McKee to plaintiff, or for the purpose of obtaining a judgment against said McKee, but is a mere pretense and device to oust and defeat the lawful jurisdiction of the courts of the United States."

Criticism is made of this petition on the ground that it was not verified by the oath of the petitioner, and because the specification of what constituted the fraudulent conduct of Donovan was not sufficient in law to constitute legal fraud. Is the petition sufficient?

The statute does not require verification of the petition, and the Removal Cases, 100 U. S. 457, 25 L. Ed. 593, in recognition of that fact, hold a petition good which was not only not verified but which was otherwise very inartificial and informal.

Section 3 of the judiciary act provides merely that the defendant "may make and file a petition." This petition when so made and filed performs the office in many respects of a pleading. If it fails to state facts sufficient to entitle the petitioner to a removal—in other words, if it is demurrable on its face—the state court may properly decline to order the removal, and it will not lose jurisdiction of the

cause. But if it is not demurrable—if the facts, however inartificially stated, disclose the right of removal—jurisdiction is lost to the state court and is lodged in the federal court. Cases supra.

Tested by well-recognized rules of pleading, the petition for removal was good. It stated the ultimate facts which, in law, entitled the express company to remove the cause, notwithstanding the joinder of McKee. Even if there was a deficiency of detail with respect to what constitutes the alleged fraud, the petition might have been amended in the federal court by making a fuller statement of the facts undertaken to be alleged in the petition; or, in other words, it might have been amended so as to "set forth in proper form what had before been improperly stated." Carson v. Dunham, supra.

As plaintiff Donovan failed to appear in the federal court and deny the allegations of fraudulent joinder, the petition for removal might in due time have been taken as confessed, and the cause have proceeded in the usual course of practice. When issue is joined on allegations of the petition for removal, and not till then, the burden of establishing the affirmative thereof rests upon the petitioner. Judge Dillon in his Removal of Causes, § 158, says:

"If the petition, in connection with the record, is sufficient on its face, but states as ground of removal facts which are not true, * * * issue may be taken thereon in the Circuit Court by a plea in abatement; but such an inquiry cannot be gone into in the state court."

To this he cites Coal Co. v. Blatchford, 11 Wall. 172, 20 L. Ed. 179. In Plymouth Min. Co. v. Amador Canal Co., 118 U. S. 264, 270, 6 Sup. Ct. 1038, 30 L. Ed. 232, the Supreme Court said:

"Under these circumstances, the averments in the petition that the defendants were wrongfully made to avoid a removal can be of no avail in the Circuit Court upon a motion to remand, until they are proven, and that, so far as the present record discloses, was not attempted. The affirmative of this issue was on the petitioning defendant. That corporation was the moving party, and was bound to make out its case."

In Kansas City Suburban Belt Ry. Co. v. Herman, 187 U. S. 63, 70, 23 Sup. Ct. 24, 47 L. Ed. 76, the Supreme Court, obviously for the purpose of amplifying or making certain the language employed in Mining Co. v. Amador Canal Co., so as to make it appear that issue must be joined before any duty or burden is cast upon the defendant, said:

"The averments of fraud were specifically denied, and, so far as this record discloses, the petitioner, who had the affirmative of the issue, failed to make out its case."

In Dishon v. Cincinnati, N. O. & T. P. Ry. Co., 66 C. C. A. 345, 133 Fed. 471, the Court of Appeals for the Sixth Circuit said:

"They [the averments of the petition] charged a case of fraudulent joinder. If, as they alleged, Coffman did not in any sense contribute to the death of the plaintiff's testate; if the plaintiff knew this fact, and, although Coffman was not a citizen of Kentucky, made him a party defendant for the sole purpose of defeating the removal of the case to the United States court—a case for removal, regardless of Coffman's nominal presence, was presented. If

these averments were not true, the plaintiff should have denied them, and an issue would then have been made for the court below to try and determine."

See, to the same effect, Board of Com'rs v. Toronto Bank (C. C.) 128 Fed. 157.

It follows from the foregoing that the federal court to which the removal was taken, in the absence of a denial of the fraudulent joinder of McKee, acquired full jurisdiction of the removed cause, and in case of such denial it acquired jurisdiction, at least for the purpose of hearing and determining the issue as to such joinder. Donovan might have been unable or unwilling to join in that issue, or he might have been able and disposed to do so. In the former event he should have appeared generally to the action in the federal court, submitted himself to its jurisdiction, and gone to trial of the case on the merits at the peril of his case being disposed of in default of such appearance. In the latter event he should have seasonably filed a plea in the nature of a plea in abatement, putting in issue the affirmative allegations of fact upon which depended the removability of the cause. Instead of taking either of these courses, he ignored the tribunal which alone could lawfully determine the issue, sought to deprive it of the jurisdiction conferred upon it by law, and persisted in his attempt to subject the express company to the jurisdiction of the state court which on the face of the record had been lost.

The present bill contains a prayer for general relief, and is doubtless sufficient in formal averment to justify a hearing and final determination of the issue of fraudulent joinder presented by it. The Circuit Court first issued an ad interim order restraining defendant Donovan from proceeding in the state court until further order of the federal court, and set down the application for a temporary injunction to be heard at a later date. On the hearing of that application, affidavits and depositions taken in the state court in the same case were submitted, and upon them the court below entered a decree sustaining the jurisdiction of the federal court, and enjoining the prosecution of the action in the state court.

Learned counsel for Donovan insist that the court below misconceived the true meaning of the facts proven and erroneously found them in favor of the express company. As to this, for reasons hereinafter stated, we shall not undertake to decide. He also calls attention to that part of section 5 of the judiciary act of March 3, 1875, c. 137, 18 Stat. 472, unrepealed by the subsequent judiciary acts of March 3, 1887, c. 373, 24 Stat. 555, and August 13, 1888, c. 866, 25 Stat. 436 (U. S. Comp. St. 1901, p. 511) which enacts that:

"If it shall appear to the satisfaction of said Circuit Court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said Circuit Court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed as justice may require,"

and insist that, if the court in equity cannot make the final order determining the matter of jurisdiction in the court of law wherein

the removed case was pending, the judge of that court, being also the chancellor of the equity court, ought, on the facts disclosed at the hearing of the application for a preliminary injunction, to reach the conclusion that McKee was not collusively joined with the express company in the action at law, and therefore that the cause was improperly removed to the federal court, and of his own motion ought to have made an order in the action at law remanding the suit. The contention is that from such evidence "it appears to the satisfaction of the court" that the case was improperly removed to the federal court, and it thereby became the duty of the court sua sponte to order the suit dismissed or to remand it to the state court.

We are not disposed to adopt this circuitous route when a plain and clear way is pointed out for us to take. While the federal courts in some cases may and must of their own accord take notice of a want of jurisdiction whenever it appears, that rule obviously has no application when such want of jurisdiction depends not upon a single uncontroverted fact, but upon a finding of an issue of fact like that involved in this case, which may or may not be raised, and which if raised is solvable only as a result of a hearing. In such a case the want of jurisdiction must "appear to the satisfaction of the court" as the result of the hearing of the issue joined as required by law. This most obvious conclusion finds support in the phraseology of sections 2 and 3 of the judiciary act of 1887–88. Section 2 provides that "whenever any cause shall be removed from any state court into any Circuit Court of the United States, and the Circuit Court *shall decide* that the cause was improperly removed * * *." Section 3 conditions the bond for removal upon "paying all costs that may be awarded by the Circuit Court if said Circuit Court *shall hold* that such suit was wrongfully or improperly removed thereto * * *." The words italicized indicate that something more is contemplated by the words "shall appear to the satisfaction of said Circuit Court" than an impression formed by the judge as a result of some extraneous observation or information.

The Supreme Court held in the case of Barry v. Edmunds, 116 U. S. 550, 559, 6 Sup. Ct. 501, 29 L. Ed. 729, and Deputron v. Young, 134 U. S. 241, 252, 10 Sup. Ct. 539, 33 L. Ed. 923, that the discretion contemplated by section 5 of the act of 1875 was a legal and not a personal discretion. In the first-mentioned case it was said:

> "It might happen that the judge, on the trial or hearing of a cause, would receive impressions amounting to a moral certainty that it does not really or substantially involve a dispute or controversy within the jurisdiction of the court. But upon such a personal conviction, however strong, he would not be at liberty to act, unless the facts upon which the persuasion is based, when made distinctly to appear on the record, create a legal certainty of the conclusion based on them. Nothing less than this is meant by the statute when it provides that the failure of its jurisdiction, on this account 'shall appear to the satisfaction of said circuit court.'"

The present bill, in so far as it seeks to temporarily restrain the prosecution of the action at law in the state court until the question of fraudulent joinder of McKee can be properly heard and determined, is clearly maintainable as an auxiliary proceeding to protect a juris-

diction already committed to it by the removal proceedings in the action at law, and at the same time to restrain expensive litigation which may be unnecessary, embarrassing, and fruitless. Traction Co. v. Min. Co., supra; McAlister v. Chesapeake & O. Ry. Co., 83 C. C. A. 316, 157 Fed. 740, and cases cited. But such federal court, in the exercise of its equitable jurisdiction for the purpose just mentioned, ought not to undertake to hear and determine the question of fraudulent joinder. Jurisdiction for that purpose is an incident to the action at law, and should be left for determination to the court in that cause. Cases supra.

The trial court did not stop with temporarily enjoining Donovan from proceeding in the state court until the federal court could pass on the issue determinative of its jurisdiction, but made a conclusive finding on the informal proof before it that the joinder of McKee was fraudulent, and that the federal court had by the removal proceedings acquired jurisdiction of the subject-matter of the removed cause. The decree then finally enjoined Donovan from taking any action in the state court in that cause. We think this went too far. The federal court as a court of equity was not the tribunal ordained by the law to try the disputed question of fact on which the right of removal depended. The Circuit Court of the United States in equity and in law are two different judicatories. They administer different principles, pursue different methods of practice in reaching their conclusions, and, notwithstanding the disposition on the part of many of the states to merge them into one, their essential difference, even in trying jurisdictional questions, is scrupulously maintained in the national courts. Wetmore v. Rymer, 169 U. S. 115, 120, 18 Sup. Ct. 293, 42 L. Ed. 682; Griesa v. Mutual Life Ins. Co. (C. C. A.) 165 Fed. 48.

As already observed, the law devolves a duty upon the Circuit Court to pass upon and determine the questions of fact upon which the right of removal depends. The petition for removal, taken by itself or with the complaint in the case, tenders the issue determinative of the right. If the plaintiff disputes the right, he must meet the issue so tendered, and, most obviously, he must do it in the court and in the cause in which it is tendered. That court in that pending cause has the exclusive jurisdiction to hear and determine that issue. Cases supra.

The court below, instead of hearing and finally determining the issue as to the fraudulent joinder of McKee, should have, after finding that the petition for removal stated on its face a good ground therefor, enjoined Donovan from proceeding further in the state court until he should appear in the federal court and join issue in the cause there docketed with the express company on its allegations of fraudulent joinder, and secure an adjudication of that issue in his favor. The decree is accordingly reversed, and the cause remanded to the Circuit Court with directions to enter a decree as above outlined.

CHICAGO JUNCTION RY. CO. v. KING.

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

No. 1,520.

1. RAILROADS (§ 229*)—SAFETY APPLIANCE ACT—VIOLATION.
Under the provision of the safety appliance act (Act March 2, 1893, c. 196, § 2, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]), making it unlawful to haul any car used in interstate traffic not equipped with automatic couplers, and which can be uncoupled without the necessity of men going between the ends of the cars, where such a car having a broken coupler could reasonably have been repaired where it stood on a switch track, the mere fact that it could be repaired more conveniently at another place did not justify its being moved in its defective condition.
[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. MASTER AND SERVANT (§ 234*)—RAILROADS—SAFETY APPLIANCE ACT.
The protection given to railroad employés by the safety appliance act (Act March 2, 1893, c. 196, § 2, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]), requiring cars to be equipped with automatic couplers, is not limited to employés injured while coupling or uncoupling cars, but extends to a switchman who was injured as a direct result of the movement of a train containing a car with a broken coupler while, acting within the scope of his duty, he was between the cars engaged in replacing the broken part, and he cannot be charged with contributory negligence because of his so going between the cars with knowledge of the defect.
[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 706; Dec. Dig. § 234.*]

3. RAILROADS (§ 229*)—SAFETY APPLIANCE ACT—VIOLATION.
The duty of seeing that no cars used in interstate commerce are hauled by a railroad company unless equipped with the required safety appliances is imposed by the statute on the company, and cannot be evaded by delegating the same to the conductor of a train or other employé whose action in that respect is that of the company.
[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 229.*]

4. MASTER AND SERVANT (§ 201*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE OF FELLOW SERVANT—NEGLIGENCE OF FELLOW SERVANT.
That the negligence of a fellow servant contributed to the injury of an employé does not relieve the master from liability, where its own negligence was also a contributing cause.
[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 515–534; Dec. Dig. § 201.*]

5. MASTER AND SERVANT (§ 289*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.
The question of the contributory negligence of an employé *held*, under the evidence, properly submitted to the jury in an action for his injury against the master.
[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089–1132; Dec. Dig. § 289.*]

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

Defendant in error as plaintiff below recovered judgment for damages on account of personal injuries. The two counts on which the case was sub-

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

mitted to the jury were based on an alleged violation of the safety appliance acts. Act March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174); Act April 1, 1896, c. 87, 29 Stat. 85; Act March 2, 1903, c. 976, 32 Stat. 943 (U. S. Comp. St. Supp. 1907, p. 885). In one count it was alleged that the defendant, an interstate carrier, "negligently, unlawfully, and contrary to the statutes of the United States in such case made and provided, hauled and used upon its said railway line and certain tracks connected therewith in moving interstate traffic a certain car equipped with a certain automatic coupler, which said coupler, the plaintiff alleges, was then and there in such a defective, broken, and inoperative condition of repair that it could not be coupled from the side of said car without the necessity of its switchman going between the end of said car and the car to which it was to be coupled; and the plaintiff further alleges that it then and there became his duty to the defendant as such switchman to couple said car so equipped with said defective, broken, and inoperative coupler onto a certain other car then standing upon the same track and but, to wit, a few feet from it, and as a direct result and in consequence of said defective, broken, and inoperative condition of said coupler he was then and there required to, and did, go between the ends of said cars for the purpose of repairing and adjusting said defective and inoperative coupler, so that said cars could be coupled together, and while he was so between the ends of said cars for the purpose and engaged in the work aforesaid, and while, as he alleges, he was exercising ordinary care and caution for his own safety, said cars were then and there shoved together, and as a direct result and in consequence of his being so required to go and be between the ends of said cars as aforesaid his right hand and wrist and arm were thereby then and there caught between said couplers and cars." The other count contained additional allegations to the effect that the engineer knew or ought to have known that plaintiff was between the cars and negligently moved the cars without giving plaintiff warning.

Questions regarding the applicability of the statute, the character of the conduct of the parties, and the correctness of certain instructions require that a summary of the evidence be given; and we adopt for the most part the statement given by counsel for the railway company.

Plaintiff had been employed by defendant for a year and a half as switchman in the Union Stockyards district in the city of Chicago. He had worked for three months prior to the accident with the same crew, consisting of engineer, fireman, conductor, rear switchman, and head switchman. He was the head switchman, and it was his duty to follow the engine.

In the Union Stockyards there were several different sets of tracks known by different names, and each constituted a different switching division. Plaintiff had worked at different times on all of these tracks; but for about three months prior to the accident he had switched up and down the Packingtown tracks, which consist of two tracks called the "east and west main tracks" running north and south from Fortieth street to Forty-Seventh street, and platform tracks and side tracks running at short intervals in both directions from these main tracks into different industries and switching yards. About three times a day during this time plaintiff's crew went for cars to the north end of the Packingtown west main track, and shoved them south, and distributed them over these different side tracks. The great bulk of business from that point was toward the south. The engine usually worked from the north end of the train, upon the west main track, but occasionally, when that track was blocked, would go over onto the east main track to do the same business. The business was purely a switching business.

The accident occurred December 7, 1906, between 9 and 10 o'clock in the morning. A train consisting of 14 or 15 freight cars, including car No. 6189 of the Armour Refrigerator Line, was standing on the north end of the Packingtown west main track for about an hour before 9 o'clock. The south car was several car lengths north of a street crossing known as "Exchange avenue." The engine with which plaintiff was working came from the south on the east main track without cars attached, and at about the north end of the cars standing on the west main track followed the curve in the track to the northwest to a switch clear around the curve, and then came back east

and south through the switch onto the west main track where plaintiff made a coupling of the engine with the north end of the standing train. The conductor, Corrigan, had gotten off the engine at Exchange avenue to walk north along the standing cars and take the number of the cars, and to learn where they were to be switched. The rear brakeman, Shaw, stayed with the engine until about the time the coupling was made. Shaw gave a signal to the engineer to go back north, at which time Shaw discovered that the train was cut in two, six cars from the engine. He thought Conductor Corrigan had made the cut there, as the fifth and sixth cars from the engine were for delivery to Nelson Morris & Co. at a point northeast of where the train was standing. The six cars were pulled back northwest around the curve, and then shoved east onto the Nelson Morris & Co. track, where the fifth and sixth cars were cut off, and the engine with the four remaining cars attached went back again to the switch and shoved the four cars in again on the west main Packingtown track. Shaw rode on top of the fourth car from the engine, and plaintiff stood on top of the car next to the engine. As the four cars approached the standing train, Shaw gave a signal to stop, and, just before the cars came in contact, he saw that the knuckle upon the north car of the standing train was broken. This was Armour Refrigerator Line car 6189.

Up to that time Shaw had no knowledge that the coupler was broken. Conductor Corrigan also did not learn of the broken knuckle until that time. The conductor was then standing on the ground at a point near the opening between the cars in the standing train and the cars attached to the engine. Corrigan and Shaw examined the broken knuckle, and found that there was a new break at the point where the knuckle fitted into the lock which held the knuckle shut after the cars were coupled. The front part of the knuckle was in the same condition as though there had been no break, and there was nothing about the character of the break to prevent the car from being shoved further south.

Corrigan was assistant yardmaster as well as the conductor of this particular train, and he testified that he had authority to decide what to do with the car. He decided to shove it south to a repair shop belonging to Armour & Co., known as the "Old Lipton House," which was about three blocks south of the point where these cars stood, and where a supply of knuckles of this type was kept, in order to get a knuckle to fit into the coupler. He testified that he could have repaired the car where it stood, but thought it more convenient to move the car. He walked south along the tracks to line up the switches for this movement, and Shaw went to the south end of the train and got up onto the last car so as to signal the engineer when the switches had been set.

A short distance south of Exchange avenue Corrigan met a car inspector for Armour & Co., one Tony Tozinski, and told Tony there was a broken knuckle on an Armour refrigerator car, and that they were going to shove the train down, and asked Tony to get a good knuckle to replace it. Tony said that he would get it. He went to the car, looked at the coupler, found that it was a new Gould coupler with a fresh break across the tongue, and went back to his repair shanty and got another knuckle.

Plaintiff from the top of the car next to the engine saw Corrigan and Shaw talking, but did not know what they were doing, and remained on the car until he saw Corrigan walk down towards Exchange avenue to throw the switches. He knew that throwing the switches in this manner was the regular thing in switching south. He also saw Shaw walk down towards Exchange avenue. Plaintiff then walked down to where he had seen Corrigan and Shaw talking, and saw the opening between the cars and the broken knuckle. There was testimony, including that of Corrigan, that it was customary for brakemen on defendant's road whenever they found defects in couplers to repair them if they could. Plaintiff saw that the defect was in a Gould Improved Knuckle, and remembered that there was a knuckle of this description lying on the front end of the engine which plaintiff had himself picked up alongside the track, and placed there a short time before. Neither Corrigan nor Shaw knew that this knuckle was on the engine, and Corrigan did not know of any knuckle of that type nearer than the Lipton repair yard. There are 97 different catalogued varieties of knuckles, which

are not interchangeable, and will not work properly in any coupler except those of which they are especially designed as a part, and they are of varying weights. The weight of the knuckle of the Gould improved knuckle is 51 pounds. The testimony was conflicting in regard to there being a custom on defendant's road to carry a variety of these knuckles for repair purposes upon the front end of engines. The space on the front of the engine was four to five feet across and two to three feet wide.

Plaintiff walked up the west side of the train toward the engine for the purpose of getting the knuckle which he had placed there. On the next track west, parallel to the track upon which his train stood, a train of loaded coal cars was standing, and these cars also extended around the curve to the northwest. The space between the two trains was not more than three or four feet. They were so close to the train to which the engine was attached that the switchman could not see the engine from the point where the broken knuckle was, on account of the curve in the track; nor could the engineer see the point where the knuckle was located.

When plaintiff reached the engine, he had no talk with anybody. The engine pump was working and making a noise, and there was a stock train pulling out which made quite a noise. As to what took place at the engine the bill of exceptions is as follows: "I stepped up on the footboard, reached across and pulled the knuckle across to me, and then reached my left hand up and waved it like that [indicating], and the engineer saw it and looked right at me. I took hold of the knuckle and held it up and motioned like that [indicating]. It was about 12 or 14 feet from the engineer's windows to the front end of the engine, where I stood at the time. I never measured the distance. The engineer was on the west side of the engine, which is his side. I then went down to the opening with the knuckle."

Upon reaching the point where the break was, plaintiff took out the old knuckle and put the new one in place, and, while reaching for the pin to make the new knuckle fast, the car north of him was shoved south by the engine and his hand was caught. At almost the same time he heard a blast of the whistle.

Neither the conductor, nor the rear brakeman, nor the engineer, nor the fireman saw plaintiff at any time while he was attempting to replace the broken knuckle, and he did not tell any of them of his intention to make the replacement, unless plaintiff's signs to the engineer informed him. The conductor, the rear brakeman, and the fireman testified at the trial. The engineer died some months before the trial. The signal for the movement of the train which resulted in the injury to plaintiff was given by Conductor Corrigan after he had lined up the switches in the yard to the rear brakeman, Shaw, who transmitted them to the engineer. The fireman testified that two whistles were blown by the engineer before the engine started to move, and plaintiff and a track laborer, Patrick Shaw, testified that they heard the whistle signals at about the same time that the train started to move.

When the accident occurred, plaintiff cried out, and Switchman Shaw, hearing the shout, gave a signal to the engineer to stop the train, which moved only 20 feet. Shortly afterwards the car inspector, Tony, returned with the new knuckle and replaced it in the car as the train stood where it had been brought to a stop.

It was stipulated at the trial that Armour Refrigerator Line car 6189 was delivered to defendant during the morning of December 6th at a point about three-quarters of a mile distant from the place of this accident; that a car inspector of defendant inspected it at about 4 o'clock in the morning of December 6th and examined the couplings to see if they were in proper order and discovered no defect; that a number taker of defendant took a car record of a train in which this car was moving at 9 o'clock in the morning of December 7th, the day of the accident; and that the train showed no break or opening at any point at that time. John [illegible]
or for defendant, testified that he was in charge of the engine which moved the train containing this car onto the Packingtown west main track on the morning of December 7th; that he had no report, record, or recollection of discovering a broken coupler on the train, and that in the regular course of business, if a break had been discovered, a report would have been made of it.

A part of the court's charge to the jury was as follows:

"Now, when Corrigan discovered that the coupler was in such defective condition that it was necessary for a switchman to go between the ends of the cars to replace the knuckle in order that the cars might be coupled—that it was necessary for a switchman or other person to go between the ends of the cars to replace the knuckle in order that the cars might be coupled—it was his duty not to haul or use the car while the coupler was in that condition unless there was a necessity for so doing, and, if it was reasonably practicable in the prosecution of the defendant's business for him to have repaired the coupler or had it repaired where the car stood, it was his duty to do so, and the mere fact that it was more convenient for him to repair the knuckle at the place where the evidence shows he intended to repair it did not justify him in unnecessarily moving the car in its then condition to that place."

Opposed to this, defendant requested an instruction "that if it was a proper railroading proposition that the car could be repaired sufficiently by the movement to where supplies were kept, that if that was a reasonable thing to do, the defendant had the right to make that movement."

In another part of the charge the court told the jury that "ordinarily the conductor, engineer, fireman, and switchman of a train are fellow servants, and ordinarily neither can recover damages from the employer on account of an injury occasioned by either of the others; but in this case if you believe from the evidence that the authority which the defendant conferred upon Corrigan as conductor of the train in question, as assistant yardmaster, authorized and empowered him to decide whether to repair the coupler or have it repaired where the car stood, when he discovered it was broken, or to remove the car to another place for repair—and I charge you that the evidence in this case shows that Corrigan did have such authority—then Corrigan, in deciding which one of the two courses he would follow, was in that respect not a fellow servant of the plaintiff, but was a direct representative of the defendant company in that regard, and his action and conduct in that respect was in law the action and conduct of the defendant company."

Under various assignments of error the contentions for reversal are (1) that the safety appliance acts are unconstitutional; (2) that the acts do not apply to the car movement disclosed by the evidence; (3) that plaintiff in doing the work of repairing a coupler was not within the protection of the acts, the coupler provisions of which were designed only for those who are engaged in the work of coupling and uncoupling cars; (4) that plaintiff was guilty of contributory negligence as a matter of law on the undisputed facts; (5) that plaintiff's injury was caused or contributed to by the negligence of fellow servants, and therefore no recovery was permissible; (6) that error was committed in giving and refusing instructions; and (7) that plaintiff's counsel in argument to the court on the admissibility of testimony made improper and prejudicial statements in the presence and within the hearing of the jury.

John D. Black, for plaintiff in error.

James C. McShane, for defendant in error.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

BAKER, Circuit Judge (after stating the facts as above). In Wabash R. Co. v. U. S. and Elgin, etc., R. Co. v. U. S. (herewith decided) 168 Fed. 1, we have expressed our judgment that the safety appliance acts are constitutional

Was the car movement in question unlawful? From the acts of plaintiff and of the car repairer, Tony, in bringing new parts to the place where the defective car stood, the jury were justified in finding that it was reasonably practicable to make the repairs without

moving the car. Corrigan decided in favor of pushing the car to the place of supplies because he thought that there the repairs could more conveniently be made. The movement that was intended and under way when the plaintiff was caught was of a defective interstate car in connection with other cars on an interstate highway, and so was within the letter of the original act of 1893 as well as of the interpretative amendment of 1903. Now, if the exercise of reasonable care in maintaining the statutory standard of equipment will not exempt a car movement as being beyond the spirit, and therefore the reach, of the statute (St. Louis, Iron Mountain, etc., R. Co. v. Taylor, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. 1061; Chicago, Milwaukee & St. Paul R. Co. v. U. S. [C. C. A.] 165 Fed. 423 [decided Nov. 27, 1908]; U. S. v. Atchison, Topeka & Santa Fé R. Co. [C. C. A.] 163 Fed. 517; U. S. v. Denver & Rio Grande R. Co. [C. C. A.] 163 Fed. 519), much less will mere convenience be accepted as an excuse. Whether or not "overwhelming necessity" (Bishop on Stat. Crimes [3d Ed.] § 132; 1 Wharton's Cr. L. § 95) would be available as a ground of exemption is a question not properly arising on this record.

There was evidence to support a finding that it was within the scope of plaintiff's duty to endeavor to repair the coupler so that the train might be put together and the crew proceed with their work of distributing the cars. According to this view, plaintiff's act in substituting a new knuckle for the broken one in preparation for a coupling by impact was quite similar to Voelker's (Chicago, M. & St. P. R. Co. v. Voelker, 129 Fed. 522, 65 C. C. A. 226, 70 L. R. A. 264), in adjusting a defective coupler so that it would couple automatically. But we find nothing in the statute that limits the classes of persons to whom the carrier shall be responsible for damages that result directly and immediately from its illegal doings.

Section 8 provides that:

"Any employé of any such common carrier who may be injured by any locomotive, car, or train in use contrary to the provision of this act shall not be deemed thereby to have assumed the risk thereby occasioned."

The statute would be honored only in its breach if the same facts that would defeat the employé under the common-law rule of assumed risk can be used to defeat him under the name of contributory negligence. Schlemmer v. Buffalo, etc., R. Co., 205 U. S. 1, 27 Sup. Ct. 407, 51 L. Ed. 681. So plaintiff's knowledge of the physical conditions cannot be charged against him in determining the quality of his conduct in going and being between the cars. And, since he could not be crushed between quiescent cars, his knowledge that at every instant of time there was the possibility of the cars being moved by the act or direction of other employés is likewise irrelevant. The inquiry in our opinion is limited to whether other facts, independent of his knowledge of conditions and possibilities as aforesaid, establish plaintiff's negligence so conclusively that it was error to submit the matter to the jury as a question of fact. Plaintiff observed the conductor and rear brakeman talking together at the opening between the cars. When he went to the place, he saw the broken knuckle. The jury might well have inferred from this that plaintiff believed and had

reason to believe that the conductor and rear brakeman knew of the defect, and therefore of the unlawfulness of moving the car in that condition as a matter of mere convenience. The engineer, on account of the curve in the track and the other cars, could not see the opening. But he saw plaintiff carry a knuckle back along his train. Plaintiff made certain signs to the engineer. Before judge and jury plaintiff reproduced the pantomime. This is not preserved in the bill of exceptions. Defendant, having the burden here, therefore fails to show that there was no evidence from which the jury might warrantably have found that plaintiff believed and had reason to believe that the engineer knew that plaintiff was about to replace a broken knuckle somewhere in the train, and that it would be negligent, if not criminal, to move the train meanwhile. Under such circumstances, plaintiff would have the right to assume, until he had some notice to the contrary, that the conductor would not order the train to be moved and that the engineer would not start the locomotive. Contention is made that plaintiff was negligent because he did not put out car repairers' flags, for which a rule of the company provided. The purpose of such flags is to give notice that the car being repaired should not be moved. There was testimony that the rule was not applicable to situations like that disclosed in this case. Besides, if the posting of flags would not have further advised the engineer and conductor of their duty not to move the train, the jury presumably determined that the failure to post did not contribute to the injury. We conclude that the evidence in its entirety justified the submission of the issues to the jury.

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 defendant. As to the negligence of the engineer, it is immaterial whether it be taken as that of 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. Civ. App.) 106 S. W. 443.

That the instructions respecting fellow servants and the nature of the duty imposed by the statute are deemed by us to be correct sufficiently appears from our consideration of the case upon the evidence. Defendant's other requests need not be particularly noticed, for on comparison of them with the charge as given we find that they were substantially covered.

So far as we can determine from the printed page, no just criticism can be made of counsel's offers to prove or of his arguments in support thereof; and we accept the action of the trial judge in denying a new trial as proof that there was no impropriety in the manner in which the offers were presented.

The judgment is affirmed.

SPENCER et al. v. WATKINS et al.

(Circuit Court of Appeals, Eighth Circuit. April 8, 1909.)

No. 2,860.

1. COURTS (§ 259*)—JURISDICTION OF FEDERAL COURTS—POWERS OF STATE LEGISLATURE.

Jurisdiction of cases at law or in equity involving controversies between citizens of different states is conferred by the Constitution and laws of Congress upon the courts of the United States, and such jurisdiction cannot be defeated or impaired by the laws of a state. If a suit, when viewed in the light of recognized principles of jurisprudence, appears to be a suit of a civil nature at common law or in equity, it matters not that by a local statute exclusive cognizance has been in terms reserved to the courts of the state generally or to some specially designated local tribunal.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 795; Dec. Dig. § 259.*

Jurisdiction as affected by state laws, see note to Barling v. Bank of British North America, 1 C. C. A. 513.

Diverse citizenship as ground of federal jurisdiction, see notes to Shipp v. Williams, 10 C. C. A. 249; Mason v. Dullagham, 27 C. C. A. 208.]

2. COURTS (§ 259*)—JURISDICTION OF FEDERAL COURTS—POWER OF STATE LEGISLATURES.

Where the laws of a state enlarge the jurisdiction of the probate courts, which ordinarily embraces proceedings in rem in respect to estates of decedents, as the probating of wills and the administration of estates by which the property of a decedent is devolved, to include also suits formerly cognizable in the form of ordinary suits at law or in equity in courts of general jurisdiction, they are dealing with that which may also be subject to the judicial power of the United States, and, while they may properly regulate the jurisdiction of the courts of the state, they cannot restrict that of the federal courts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 795; Dec. Dig. § 259.*]

3. COURTS (§ 262*) — JURISDICTION OF FEDERAL COURTS — CASES IN LAW AND EQUITY.

A suit by heirs at law of a testatrix, brought after the will has been probated and the estate fully administered, except the payment of a bequest of the residuary estate for charitable purposes, against the executors and a corporation organized to take and administer the charity, to have the bequest declared void as contrary to the laws of the state, is not a probate proceeding, but has all the elements of a plenary suit inter partes, and is within the jurisdiction of a federal court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 797; Dec. Dig. § 262.*]

4. JUDGMENT (§ 570*) — MERGER AND BAR OF CAUSE OF ACTION—JUDGMENT ON MOTION TO DISMISS.

A testator left as his only heirs his widow and daughter, and by his will bequeathed a part of his estate in trust in part for their benefit, and ultimately, in case the daughter should die without leaving children, to be devoted to a charitable purpose. The daughter died without issue, and later the widow died testate, bequeathing her residuary estate to found a charity in conformity with the wills of her husband and daughter, and a corporation was formed to take and administer the same. The trustees under the husband's will brought a suit in a state court to obtain a construction of the same, in which heirs of the widow intervened, claiming that the charitable bequests in both wills were void, and that the widow's residuary estate, including the property inherited as an heir of her hus-

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

band, descended to her heirs. To such suit the executors of both wills and the charitable corporation were parties. A motion to strike out the complaint in intervention, equivalent under the statute to a demurrer, was sustained on the ground that the bequest in the widow's will was valid, and interveners therefore had no standing to attack the will of the husband, which judgment was affirmed by the Supreme Court of the state. *Held*, that such question was directly in issue, and the judgment was an adjudication thereof on the merits, which bound all parties, and was a bar to a subsequent suit brought by the heirs in a federal court to have the bequest declared invalid.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1032; Dec. Dig. § 570.*]

5. JUDGMENT (§ 584*) — BAR OF CAUSE OF ACTION — NATURE, RENDITION, AND FORM OF JUDGMENT.

To render a judgment conclusive as an estoppel between parties to a suit, it is not always essential that there should have been a formal joinder of issue between such parties; nor does it matter that the question decided was purely one of law, and the decision rendered on motion or demurrer, provided the merits were involved and decided, and the decision was final.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1079; Dec. Dig. § 584.*]

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

Edward F. Treadwell (A. E. Macartney, N. H. Clapp, and George H. Mastick, on the brief), for appellants.

Frank B. Kellogg (C. A. Severance and Robert E. Olds, on the brief), for appellees.

Before VAN DEVANTER, HOOK, and ADAMS, Circuit Judges.

HOOK, Circuit Judge. This was a suit by heirs at law of Fanny S. Wilder, deceased, to defeat a charitable bequest in her will upon the ground that it was void under the laws of the state of Minnesota, where she was domiciled, and for the allotment to them of the property embraced in the bequest. It was brought against the executors and the "A H. Wilder Charity, Founded by Fanny S. Wilder," a charitable corporation organized to accept the bequest by trustees named in the will and conformably to directions therein. The trustees themselves were also made parties defendant. The ground of federal jurisdiction was diversity of citizenship. The cause having been submitted upon the pleadings and stipulated facts, the Circuit Court held with the defendants and dismissed complainants' bill. The court was of opinion that prior litigation in the courts of the state involved the same question, that the heirs had participated therein, had been heard, and were defeated, and consequently the judgments of those courts barred further controversy. The heirs prosecuted this appeal. The defendants say the Circuit Court did not have jurisdiction of the cause, but that, if it did, its decree dismissing the bill was right.

It is said, in substance, that the Circuit Court was without jurisdiction, because the suit was not one at common law or in equity, within the meaning of the Constitution of the United States and the judiciary act, but, on the contrary, was of a probate character, and

pertained to the administration of an estate of a deceased person, of which the local probate court was invested with exclusive cognizance by the Constitution and statutes of the state. See Appleby v. Watkins, 95 Minn. 455, 104 N. W. 301.

If the case was not one of probate or administration within the proper meaning of those terms, but in nature and form was one at law or in equity, the right of the heirs to invoke the jurisdiction of the Circuit Court is not affected by the law of the state. Jurisdiction of cases in law and equity involving controversies between citizens of different states was conferred by the Constitution upon the courts of the United States; and the laws of Congress, passed in pursuance of the Constitution, creating the courts inferior to the Supreme Court, and defining and distributing the jurisdiction, have given the Circuit Courts original cognizance of such cases. Nothing is more clearly settled than that the jurisdiction so conferred cannot be defeated or impaired by the laws of a state regulating the distribution of its own judicial power among its own courts. When this is asserted to have been done, the inquiry always turns to the intrinsic character of the controversy, and if, when viewed in the light of recognized principles of jurisprudence, it appears to be a suit of a civil nature at common law or in equity, it matters not that by local statute exclusive cognizance has been in terms reserved to the courts of the state generally, or to some specially designated local tribunal. This must, of necessity, be so; otherwise, the judicial power of the United States, as understood at the adoption of the Constitution, would have no uniform or permanent measure, but would depend upon the varying legislative action of the several states, and as to that founded on diversity of citizenship the tendency would be towards its extinction by absorption in the exclusive jurisdiction of the local tribunals. The equity jurisdiction conferred by the Constitution upon the courts of the United States is the same as that then possessed by the High Court of Chancery in England in its judicial capacity, as distinguished from the jurisdiction of a political or governmental character which was exercised by the Chancellor as the representative of the crown. It is uniform throughout the United States, not differing in one state from that in another, and is subject to neither limitation nor restraint by state legislation. True, where a state gives a remedy, not theretofore existing, by civil action in its courts of general jurisdiction, such remedy may also be had in the courts of the United States, if consistent with their forms and modes of procedure; but that is an extension or enlargement of jurisdiction, and not a limitation or impairment.

It is quite true that, if the controversy before us was purely one relating to probate or administration, the Circuit Court was without jurisdiction; but was the case of that character? The right to take property by inheritance or by will is not a natural right, but is a privilege which is the creature of the law. The power to authorize and regulate the disposal and distribution of property at death rests with the state, and it may impose such conditions as may be deemed necessary to its interests and policy as the sovereign. So in a sense the estate of a deceased person is without an owner until the way has been cleared by the execution of the laws regulating its devolution. The

state, by its court of probate, therefore, steps in and takes possession; and the proceedings in such court to prove and establish an instrument as the will of the deceased duly made according to the statute, in the granting of letters testamentary and of administration, and in the usual administration which precedes the delivery of an estate according to the testamentary directions of the testator, or according to the prescribed rule of distribution in case of intestacy, partake of the character of proceedings in rem, to which all the world are parties. Though much that is done is in form ex parte, yet because of the custody of the estate and the nature of the proceedings every one is bound. Jurisdiction over the probating of wills and the granting of administrations, which was formerly in the ancient ecclesiastical courts of England, has fallen to the modern probate courts, where, generally speaking, it is exclusively exercised. In some states, as in Minnesota, the statutes have added much that was formerly cognizable in the form of ordinary suits at law or in equity in courts of general jurisdiction; but it is manifest that in doing so they are dealing with that which may also be subject to the judicial power of the United States. Statutes of that character may very properly regulate the jurisdiction of the courts of the states, but they cannot restrict that of the courts of the United States. Security Trust Co. v. Bank, 187 U. S. 211, 227, 23 Sup. Ct. 52, 47 L. Ed. 147.

We think that a controversy like that before us is not one strictly pertaining to probate and administration, but, on the contrary, has every element of a plenary suit inter partes, and that it belongs to a class of which the English courts of chancery were accustomed to take cognizance as involving the execution of trusts. 3 Pomeroy's Eq. Juris. § 1127. The suit of the heirs was not a will contest in the customary acceptation of that phrase. No question was involved that would properly arise at the presentation of a will for admission to probate. The heirs did not seek to annul the probate of the will in question. They did not challenge the testamentary capacity of the testatrix or the sufficiency as to authentication or form of the written expression of her testamentary purposes. On the contrary, it was averred in their bill of complaint and admitted in the answer that the instruments in question had been duly admitted to probate as the last will and testament of the deceased, and that letters testamentary had been duly issued to the defendant executors. It was likewise averred and admitted that all allowable debts and claims had been paid, all bequests preceding that of the residuary estate had been discharged, the estate had been fully administered up to the time for final decree assigning the residue to the persons by law entitled thereto, and that an application of the executors for a final decree of distribution had been filed in the probate court. The suit was brought after the ordinary matters incident to probate and administration had been fully disposed of and when final distribution was at hand, and its object was to have the bequest of the residuary estate declared contrary to the laws of the state relating to the disposition of property for charitable purposes, and to secure for the complaining heirs their respective shares thereof upon the ground that the deceased had

died intestate as to the estate in question. In probate and administration proceedings controversies do not ordinarily arise having the characteristics of a suit at law or in equity, in which there is a clear division and alignment of parties litigant; but in the case before us the contending parties are distinctly ranged upon opposing sides—upon one the heirs who would inherit as in case of intestacy if the bequest were held void, and upon the other the Wilder Charity, the charitable corporation, which would take as legatee if the bequest were sustained, and also the executors in possession of the estate, whose course would be affected by the litigation. This was a civil suit in equity, within the jurisdiction of the Circuit Court. It should be added that in purpose and effect it no more interfered with the probate court in its rightful custody of the estate than would an ordinary action and judgment at law in the Circuit Court establishing a claim or demand on contract. We forbear citing the many precedents on these questions, as we think there is no distinction in principle between a suit like this, brought after the course of administration has run, to establish the rights of heirs as against a bequest claimed to be void, and one brought to determine which of two classes of heirs inherits in case of admitted intestacy, as in Byers v. McAuley, 149 U. S. 608, 13 Sup. Ct. 906, 37 L. Ed. 867.

Upon the defense of estoppel of the heirs by prior judgment we need refer to but one of the proceedings in the state courts. The facts necessary to an understanding of it are as follows: Amherst H. Wilder, of Ramsey county, Minn., died testate in 1894, leaving as his sole heirs his widow, Fanny S. Wilder, and their daughter Cornelia, who afterwards became Mrs. Appleby. By his will, after certain specific bequests, he left one-third of his estate to his widow, and the residue to trustees upon certain trusts, in part for the benefit of the widow and daughter, all ultimately to be devoted to charitable purposes in certain contingencies. In January, 1903, Mrs. Appleby died, leaving a will in which she devoted her residuary estate to purposes similar to those described in the will of her father. Mrs. Wilder died in April, 1903. As already observed, she bequeathed the residue of her estate to a charitable corporation, to be formed by trustees charged with that duty, and the Wilder Charity was thereupon brought into being. Trustees under the will of Mr. Wilder, being doubtful as to its meaning and their duties, brought a suit in the district court of Ramsey county, Minn., to obtain an authoritative judicial construction of its terms and directions as to their conduct upon which they might safely rely. There were made parties defendant the respective executors of the three wills, the Wilder Charity, which took the charitable bequest under the will of Mrs. Wilder, and various other persons interested in the estates. The suit was known as "Watkins v. Bigelow." The complainants in the suit now before us, heirs of Mrs. Wilder, not having been made parties, requested the executors of her will to file an answer in Watkins v. Bigelow, contesting the validity of Mr. Wilder's bequest to charity, and to permit their counsel to speak in the names of the executors on that issue. To explain their interest in the matter they claimed that his bequest to charity was void, and the

property covered by it should descend to his heirs, of whom Mrs. Wilder was one; that the charitable bequest of the residuary estate of Mrs. Wilder was substantially similar, was likewise void, and that that estate, enriched by the failure of her husband's bequest, should, therefore, descend to her heirs. Mrs. Wilder's executors responded that her will disposing of her estate was entirely valid, and, as her heirs had no standing to contest the prior will of her husband, excepting upon the assumption of her intestacy, they denied the request. The heirs then filed in Watkins v. Bigelow a petition for leave to answer and defend, and also a complaint in intervention, each containing assertions like those in their request of Mrs. Wilder's executors, with the addition that the daughter's bequest of her residuary estate to charity was also void, and the property affected by it passed to the estate of her mother. The complaint in intervention was in express terms directed against all the plaintiffs and defendants in that cause, and under the Minnesota practice (Gen. St. 1894, § 5273), if they had an interest in the matter in litigation, it was filed and could be maintained as of right, and did not depend upon grace or favor. The plaintiffs and various defendants moved to strike the complaint in intervention from the files upon the ground, among others, that the intervening heirs had no interest in the subject-matter of the action. This was proper practice. The statute prescribes an interest in the matter in litigation as ground of intervention. A complaint in intervention is demurrable, if it fail to state a ground of intervention. Shepard v. County of Murray, 33 Minn. 519, 24 N. W. 291. The motion to strike from the files was equivalent to a demurrer (McAllen v. Hodge, 92 Minn. 68, 99 N. W. 424), and it was so treated. After due hearing the district court denied the petition for leave to answer, and sustained the motion to strike the complaint in intervention from the files, upon the sole ground that the charitable bequest of Mrs. Wilder was valid, and therefore her heirs had no interest in the action. The court said:

"The heirs of Fanny S. Wilder have a right to be in this case if her gift to charity is invalid. If it is valid, they have no right here. The court has jurisdiction to determine the validity of Mrs. Wilder's will in this action, if it is necessary to do so in order to decide these motions. It is necessary to do so, because the court must decide whether the complaint in intervention or the proposed answer shows that the heirs have an interest in the fund in this case."

Upon appeal by the heirs to the Supreme Court of the state, the order was affirmed. Watkins v. Bigelow, 93 Minn. 210, 100 N. W. 1104. The following brief excerpt from the opinion shows definitely what was there decided:

"Whether the appellants have any interest in the result of this action depends upon the answer which shall be given to this question: Is Mrs. Fanny Spencer Wilder's will valid? This is the sole question presented for our consideration by the record."

The question was answered in the affirmative. It is now contended that the validity of Mrs. Wilder's residuary bequest was not involved in Watkins v. Bigelow, and therefore, there is no bar to the present suit. It is said the object of that case was to secure a con-

struction of the will of Amherst H. Wilder, and that of the intervention was to have his bequest to charity annulled, so the property involved would pass to the estate of his widow. If we look no further than this, it might truly be said the validity of Mrs. Wilder's bequest was not in issue, and that the heirs and the Wilder Charity were not adverse parties; for whatever would enlarge her residuary estate would benefit the persons lawfully entitled thereto, whoever they might be. But that was not all. The heirs had first to show a right to intervene in the principal case, and were, therefore, compelled to assert that Mrs. Wilder's bequest, which stood between them and inheritance, was also void, and that the Wilder Charity took nothing as legatee. If they were right in this, they could maintain their intervention as heirs at law and assail the prior will; otherwise, not. Mrs. Wilder's residuary bequest was an obstacle they had to destroy to gain an assured foothold in the litigation, and in their complaint in intervention they expressly tendered that issue to all of the parties plaintiff and defendant. It is manifest that, as regards the controversy so raised, the interests of the heirs on the one hand and of the Wilder Charity on the other were directly antagonistic and conflicting. They were adverse parties.

The question involved was not a mere collateral one arising during the progress of a cause, but was of the ultimate and substantial rights of the parties. The order of the district court was not in an inconclusive summary proceeding. It went to the very foundation of their claims, and was in terms decisive of the merits after a full hearing. It was a final and appealable order, and was affirmed upon like hearing by the highest judicial tribunal of the state. The matter directly in issue now, as then, is the validity of Mrs. Wilder's residuary bequest. The grounds of attack upon it are the same, with no new feature of fact or law, and there is also an exact identity of parties in interest. There would, therefore, seem to exist all of the elements of an estoppel by judgment. It is not material that the Wilder Charity did not expressly join in the motion to strike the complaint in intervention from the files. The heirs made it a party to the intervention by general designation, and also by name made it a party to the appeal to the Supreme Court. A formal joinder of issue is not always essential. United States Fidelity & Guaranty Co. v. Haggart (C. C. A.) 163 Fed. 801. Neither does it matter that the question decided in the prior case was purely one of law (Mitchell v. Bank, 180 U. S. 471, 21 Sup. Ct. 418, 45 L. Ed. 627), nor that the decision was upon a motion or demurrer (Com'rs v. McIntosh, 30 Kan. 234, 1 Pac. 572; Truesdale v. Trust Company, 67 Minn. 454, 70 N. W. 568, 64 Am. St. Rep. 430; Oregonian Ry. Co. v. Navigation Co. [C. C.] 27 Fed. 277), provided the merits were involved and were decided, and the order or decision of the court was final. We think the complaining heirs have had their day in court upon the validity of Mrs. Wilder's bequest, and, having been defeated, are concluded.

The decree of the Circuit Court is affirmed.

BANKS LAW PUB. CO. v. LAWYERS' CO-OPERATIVE PUB. CO.

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

No. 183.

COPYRIGHTS (§ 15*) — EXTENT OF RIGHTS ACQUIRED—OFFICIAL REPORTS OF SUPREME COURT.

Conceding the right of the official reporter of the Supreme Court of the United States to secure a copyright on his work in the volumes of published Reports, the mere arrangement of reported cases in sequence, and their paging and distribution into volumes, are not features of such importance as to entitle him to copyright protection of such details.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 12; Dec. Dig. § 15.*

Matter subject to copyright, see note to Cleland v. Thayer, 58 C. C. A. 273.]

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

The following is the opinion of the Circuit Court by Hazel, District Judge:

The bill alleges infringement by the defendant of the rights and privileges of the complainant under copyright laws of the United States. The material facts are not disputed by the defendant. The complainant and defendant are publishers of Reports of the decisions of the Supreme Court of the United States, the former being engaged in printing, publishing, and selling reports of such decisions as compiled, edited, and arranged by the official reporter of the Supreme Court, while the defendant prints, publishes, and sells an edition of such decisions, commonly known as the "L. Ed."—lawyers' edition. The original bill charged the defendant with reproducing the syllabuses of the cases, table of cases, index digest, together with the pagination and order of arrangement of printing the decisions copyrighted by complainant and its predecessors. By stipulation of the parties the bill was amended to include only the charge of infringement arising out of the arrangement of the cases, the division into volumes, the table of cases, and the numerical or star pagination to indicate where in the official reports the different cases and points decided may be found. Proofs were taken under the bill and amended bill, and it is shown that the various official reports herein involved are volumes 156 to 171, inclusive, 173 to 178, inclusive, and 180 to 195, inclusive, which were edited by the official reporter, Hon. J. C. Bancroft Davis, and subsequently by his successor, Hon. Charles H. Butler, and the corresponding publications of the defendant.

The complainant, The Banks Law Publishing Company, is the successor in business of the law book publishers well known to the profession as "Banks & Bros.," and which firm assigned to the complainant various copyrights to the United States Reports. The validity of such assignments is in controversy, and therefore an outline of the source of complainant's title is deemed necessary. At different periods there were two firms or partnerships known as "Banks & Bros.," which for convenience will herein be designated as firm Nos. 1 and 2, respectively. Firm No. 1 had been established many years as law book publishers in New York and Albany, and on July 1, 1897, they were succeeded by firm No. 2. Concededly the earlier firm copyrighted the official editions of the United States Reports from volume 156 down to and including three parts of volume 167, and volumes 167 (fourth part), 168 to 171, inclusive, were separately copyrighted by firm No. 2. All subsequently published United States Reports were separately copyrighted, and after editing by the official reporter, who duly assigned his interest in his origination and copyright for the same, were issued and sold to the public by complainant. On the dissolu-

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

tion of the firm No. 1, David Banks and Anthony Bleecker Banks, sole partners, entered into a written agreement with firm No. 2, by which among other things they contributed to the capital of the new partnership all stock in trade and "copyrights." Later, on February 9, 1899, the partnership of Banks & Bros. No. 2 was dissolved. The partners executed an agreement of dissolution, and directed a sale of the assets of the company by one Bush, and (quoting from the agreement) "copyrights and all rights, privileges and emoluments of and pertaining to the volumes so sold." Under the agreement to dissolve firm No. 2 an auction sale was had in the presence of the partners, and David Banks purchased the first 171 volumes of the United States Reports. There was no express mention at the sale of the copyrights for the books so struck down to David Banks, but on July 29, 1899, a confirmatory assignment was executed by the latter and by Bush, as trustee, purporting to convey the said volumes or reports to the complainant, "together with all copyrights and rights to copyrights and renewal and renewals thereof." As to the earlier transfer of the copyrights to firm No. 2, as evidenced in the contribution by David Banks and Anthony Bleecker Banks, to the capital stock of firm No. 2, the defendant contends that such act of transfer, although in writing, was not in fact an assignment of the copyrights, but was merely an executory agreement which did not convey the legal title. The defendant claims generally that title to the copyrights never passed to the complainant under the said several assignments, because such instruments did not comply with the requirements of the copyright act.

In my estimation, the transactions between the parties to the conveyances of the copyright as to them amounted to a legal assignment thereof. It is probably true that they were not drawn in precise legal phraseology, nor were they recorded in strict compliance with the provisions of the copyright act, but such recording is thought only necessary to protect subsequent purchasers without notice claiming title from the assignor. The assignors have evidently acquiesced in complainant's ownership, and it appears that royalties have been paid by it. Under such circumstances the presumption is warranted that complainant's predecessors had legal title to the said copyrights, and that for a good consideration they parted with it to the complainant. Belford v. Scribner, 144 U. S. 488, 12 Sup. Ct. 734, 36 L. Ed. 514; Dennison v. Ashdown, 13 T. L. R. 226 Q. B. Div. 1897. In Drone on Copyright, p. 321, it is substantially stated that the ownership of a copyright will pass to another by any writing which clearly expressed the intention of the parties. The hiatus, if any, in the chain of title in relation to the first 171 volumes of the Reports, undoubtedly was cured by the confirmatory instrument (Jacques v. Hall, 3 Gray [Mass.] 194), and evidence of such later assignment was properly received under the supplemental bill.

Coming now to the question of infringement of the copyrights which are the subject of this controversy, and the right of the official reporter of the Supreme Court to secure to himself such copyrights and privileges, it may be helpful to set out the act of Congress passed August 29, 1842 (5 Stat. 545, c. 264), defining the duties of the reporter. The act as amended (Rev. St. § 681 [U. S. Comp. St. 1901, p. 560]) reads as follows:

"Sec. 681. The reporter shall cause the decisions of the Supreme Court made during his office to be printed and published within eight months after they are made; and, within the same time, shall deliver three hundred copies of the volumes of said Reports to the Secretary of the Interior. And he shall, in any year when he is so directed by the court, cause to be printed and published a second volume of said decisions, of which he shall deliver, in like manner and time, three hundred copies."

The amendatory act passed August 5, 1882 (22 Stat. 254, c. 389, § 1 [U. S. Comp. St. 1901, p. 561]), increasing the compensation of the reporter, does not expressly require him to print and publish the volumes of decisions, but requires him to furnish such volumes to the public at the price therein provided and to the Secretary of the Interior without charge. Section 681 was not repealed by the amendment, and, read in connection therewith, it still remains the duty of the reporter to print, publish, and furnish the volumes. According to the defendant, under such amendatory act the reporter cannot have a copyright for any of the work produced by him in his official capacity. It is broadly suggested that such labor is that of a paid employé and accord-

ingly vests in the employer. The official reporter of the Supreme Court, though a sworn public officer, is not, however, confined to this strict rule. There is abundant precedent for holding that a salaried reporter of the court, unless forbidden by statute, may secure copyright of the headnotes, statements of cases, title of the volume, arrangement or grouping of cases, index digest, synopsis of the arguments, and in short, such portions of his compilation or authorship as requires the exercise of intellectual thought and skill. The opinions or decisions of the judges, and the syllabuses if prepared by the court, are not the subject of copyright interest. Neither the court nor the reporter, from motives of public policy, can have any exclusive rights in the written or oral opinions of the court. Banks v. Manchester, 128 U. S. 244, 9 Sup. Ct. 36, 32 L. Ed. 425. The case at bar is analogous to Callaghan v. Myers, 176 U. S. 617, 9 Sup. Ct. 177, 32 L. Ed. 547, where the Supreme Court says:

"Even though a reporter may be a sworn public officer, appointed by the authority of the government which creates the court of which he is made the reporter, and even though he may be paid a fixed salary for his labors, yet, in the absence of any inhibition forbidding him to take a copyright for that which is the lawful subject of copyright in him, or reserving a copyright to the government as the assignee of his work, he is not deprived of the privilege of taking out a copyright, which would otherwise exist. There is, in such case, a tacit assent by the government to his exercising such privilege. The universal practical construction has been that such right exists, unless it is affirmatively forbidden or taken away; and the right has been exercised by numerous reporters, officially appointed, made sworn public officers, and paid a salary under the governments both of states and of the United States." Sweet v. Benning & Lovell, 16 C. B. Rep. 458; Nash v. Lathrop, 142 Mass. 29, 6 N. E. 559.

This unequivocal holding upon this point was not obiter, as claimed by the defendant, although the reporter held office under a state statute. In view of the existence of the federal statute (section 681), which, as stated, is not essentially different from the later enactment, defining the duties of the reporter of the Supreme Court, the Callaghan Case must be regarded as authoritative of this point. It had been held in the federal courts previous to the date of that decision that an official court reporter is entitled to copyright protection for his marginal notes or synopsis of case, statement of cases, abstract of arguments of counsel, and indexes to volumes. See Wheaton v. Peters, 8 Pet. 591, 8 L. Ed. 1055; Gray v. Russell, 1 Story, 11 Fed. Cas. No. 5,728.

The defendant contends that to arrange the cases in sequence, subdividing a volume to indicate to the printer the number of lines on each page, the size or the pagination of the volume as in complainant's edition, was not the exercise of such a degree of skill or intellectual labor as to entitle the reporter, in view of the statute prescribing his duties, to the exclusive protection of the copyright laws. That the defendant had the right to publish and sell the printed decisions and reports of decisions of the Supreme Court, irrespective of such publication by the official reporter, is conceded. Nor does the complainant object to the defendant independently arranging the decisions, paging them in their order, and indexing and supplying table of cases, and binding them into a volume for circulation and sale, either separately or collectively; but it is contended that the defendant has not the legal right to adopt complainant's arrangement of cases, nor to indicate by marginal paging and asterisks where such decisions or points discussed by the court are found in the official publication, and in its table of cases point out where a case is reported in the official publication, and to so divide the volume published by it as to reproduce in one volume four volumes of the official publication. Whether the orderly arrangement of the cases, together with the pagination by the official reporter, as distinguished from his labor in preparing the syllabus, abstract of argument, index, digest, notes, or annotations, is a question not free from difficulty. Complainant contends that the proofs show that the reporter in his arrangement in the printed reports must intelligently familiarize himself with the written opinions of the court to enable him to select the important cases with which to commence a volume, and, so far as possible, to group or assemble in such volume the cases of one justice, and also that he collects and arranges the opinions upon the same subject, so that for conven-

lence they may be printed near together. Upon this point the witness Davis, for the complainant, testifies:

"Q. Now, Mr. Davis, who did the work of arranging the cases? A. I did it.

"Q. In arranging the cases in the order in which they were sent to the printers, did you observe any plan or system? A. Well, I used to look the cases over and determine for myself the order in which I would have them published.

"Q. Did you make that a matter of serious consideration? A. Yes; personal examination in every case.

"Q. Can you state any particulars with reference to which you make your arrangement? A. Largely with reference to what I considered the importance of the cases. Tried to commence a volume with the most important cases that I had; but so far as possible I put together all the cases that I had of one judge—to put all his cases together. That was my wish generally; I didn't always do it.

"Q. Did you observe any other plan than what you have named? A. If there was any argument to be submitted I prepared that—put that into the report of the case where it ought to go.

"Q. Now, I am speaking at present simply in regard to the matter of arrangement, Mr. Davis. In making the arrangement for the printer, which you say was the arrangement followed in the volumes, did you pay any attention to the subject-matter of the cases? A. Yes, I tried to; would try to. But then I cannot say that I did in every case. I tried to get the cases of the same subject as nearly together as I could. Frequently the same argument would apply to two or three cases; not always, however, but frequently.

"Q. Who determined where each bound volume was to end? A. I did. My rule was to terminate it as near the seven hundredth page as I could.

"Q. But as a matter of fact, were you usually able to end it at the seven hundredth page? A. Well, as I remember, I did. It didn't go much over it generally. But the books will show for themselves.

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"Q. You made no attempt to divide up the decisions into the parts of the volumes, did you? A. No. I took them as they came. Sometimes there would be a whole part in a week, and other times it would take three or four weeks to get a part. I took them as they came, but I arranged them by subjects so far as possible.

"Q. Do you recall to mind any particular cases that were arranged by subjects? A. No, I cannot now.

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"Q. Wasn't it necessary sometimes to take out a case which you had arranged in your manuscript to terminate a volume, and put in a shorter case? A. I don't remember that I ever did it. I may have done it.

"Q. You state that in arranging the cases you put the important cases first. That didn't interfere with the chronological arrangement of the cases, did it? A. No, not necessarily. But I didn't assume to regulate the cases chronologically, except as they appeared as a whole at the end of each week."

It will be observed from this testimony and that of Mr. Morey, the printer, that the plan or system of arranging the cases was not unalterable, and at different times any asserted preconceived plan yielded to the exigencies of the situation. To intelligently prepare the headnotes or syllabuses of the cases, the official reporter manifestly had to become familiar with the opinions of the court and discussion of the points passed upon. Such intelligent labor and skill beyond doubt is correctly classified as being that of an author who by his writings is entitled to the protection of the statute; but concededly it was the duty of the reporter under his appointment to make a report of the decisions of the court, cause them to be printed and published, and constitute them into volumes. A reasonable interpretation of the statute prescribing his duties implies pagination, volumes of uniform size and reasonable thickness, together with a suitable and convenient arrangement of the cases. If the reporter, owing to his familiarity with the decisions, chooses to arrange them in the order of their importance, or so far as possible conveniently group the opinions of each justice instead of in order of time or date of filing, he does so voluntarily and in evident compliance with the proper and faithful discharge of

his official duties. True, the statute prescribing his duties does not point out how the cases shall be arranged into volumes and printed, but to fittingly reproduce the decisions and opinions in volumes it is necessary to supply pagings, together with an orderly arrangement of the cases. It is inconceivable to me that to merely arrange the cases in sequence (though concededly the reporter uses good judgment in so doing) and paging the volumes—things essential to be done to produce the volumes—are features or characteristics of such importance as to entitle him to copyright protection of such details. In my estimation no valid copyright for these elements or details alone can be secured to the official reporter. A different question would be presented if, for instance, infringement of the headnotes, or syllabuses, index digest, synopses of arguments or statements of the cases, or an abridgment thereof were claimed. Upon this proposition the case of Callaghan v. Myers, supra, is instructive. Mr. Justice Blatchford, writing the opinion of the court, quoted with approval from the opinion of Judge Drummond, who heard the case in the Circuit Court, as follows:

"The fact appears to be, and indeed it is not a subject of controversy, that in arranging the order of cases and in the paging of the different volumes the Freeman edition has been followed by the defendants; but, while this is so, I should not feel inclined, merely on that account and independent of other matters, to give a decree to the plaintiff, although it is claimed that the arrangement of the cases and the paging of the volumes are protected by a copyright. Undoubtedly in some cases, where are involved labor, talent, judgment, the classification and disposition of subjects in a book entitle it to a copyright. But the arrangement of law cases and the paging of the book may depend simply on the will of the printer, of the reporter or publisher, or the order in which the cases have been decided, or upon other accidental circumstances. Here the object on the part of the defendants seems to have been that there should not be confusion in the references and examination of cases; but the arrangement of cases and the paging of the volumes is a labor inconsiderable in itself, and I will regard it, not as an independent matter, but in connection with other similarities existing between the two editions, when I say, taking the whole together, the Freeman volumes have been used in editing and publishing the defendants' volumes."

This excerpt conspicuously intimates that, if the elements infringed consisted simply of the arrangement of the cases and the pagination, a different conclusion would have been reached.

No authority is cited which supports the contention that complainant is entitled to be protected in its pagination and arrangement of cases where the substance of the origination is not pirated, and in the absence of such authority I hesitate to hold that the scope of the copyright act protects the reporter in the details of his employment mentioned. The United States Reports in their entirety are not to be viewed as an independent publication, and the reporter's right to protection must be limited to his intellectual labor, which, of course, may include the arrangement of cases and paging in connection with his writings or literary matter, but for another to simply adopt the plan of grouping of the cases, making marginal reference to the paging of the volumes issued under his direction, without in any way pirating the substance of his origination, is not enough, in my judgment, to establish infringement. The trend of some of the decisions and of the text-writers indicates that an arrangement of the material matter of a book may be the subject of a valid copyright; but any principle upon which such cases are based is not thought applicable where the arrangement of the cases, though involving some merit, so obviously was necessary to produce the volumes required by the statute. Such labor, under the circumstances presented, like the decisions and opinions of the court, became the property of the public.

In Howell v. Miller, 91 Fed. 129, 33 C. C. A. 407, it was claimed that the publication of an edition of the statute laws of the state of Michigan was an infringement of a copyright held by the plaintiff, and Mr. Justice Harlan, speaking to the point, says: "If Miller had cut from Howell's books, delivered to him by the state, the General Laws of Michigan as therein printed, and the pages so cut out had been used when his compilation was printed—

if this had been done and nothing more—there would have been no ground of complaint."

Applying this holding to the facts under consideration, an action for infringement does not lie if the defendant's asserted wrongdoing simply consisted of reprinting the decisions of the court with the paging, the defendant independently supplying headnotes, statements of cases, etc.

One other point remains to be considered; that is, has the court power to grant relief to the complainant, irrespective of the question of copyright, on the ground of injury to property rights of a continuing trespass? The jurisdiction of the court arises from the asserted infringement of copyright, and no diversity of citizenship being shown, the court is without jurisdiction, even conceding that the bill alleges a cause of action other than for infringement of copyright.

The bill is dismissed, with costs.

Russell & Winslow (Wm. Hepburn Russell, of counsel), for appellant.

Frederick F. Church (Frank F. Reed and Edward S. Rogers, of counsel), for respondent.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

PER CURIAM. It is not necessary to discuss so much of the opinion below as deals with the questions of assignment and of the right of the official reporter to secure copyrights. We concur with Judge Hazel in his reasoning and conclusion that the arrangement of reported cases in sequence, their paging and distribution into volumes, are not features of such importance as to entitle the reporter to copyright protection of such details.

The decree is affirmed, with costs.

DUNTLEY et al. v. ANDERSON.

(Circuit Court of Appeals, Eighth Circuit. March 26, 1909.)

No. 2,925.

1. MINES AND MINERALS (§ 78*)—OIL AND GAS LEASE—FORFEITURE—DEFAULT—WAIVER.

An oil and gas lease declared that, if no well was sunk within 12 months, the lease should be void, unless the lessees should pipe gas to within 100 feet of the lessors' premises and give them free gas until the well was drilled. *Held*, that where an assignee of the lessee piped the gas as required, and the lessors commenced and continued to use the same "under the lease" until the trial of a suit to cancel the same, such use constituted a waiver of his right to cancel the lease because no well was sunk within 12 months.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 206; Dec. Dig. § 78.*]

2. MINES AND MINERALS (§ 73*)—OIL AND GAS LEASE—CONSTRUCTION.

Where an owner of agricultural land executed an oil and gas lease providing that, if it should be detrimental to a sale of the place, the lease should be returned to him, such provision should be construed only to require a rescission if the lease was detrimental to a sale of the land for agricultural or other purposes to which it was then devoted, and did

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

not authorize a rescission to permit the lessor to dispose of his oil rights to greater advantage.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 73.*]

8. MINES AND MINERALS (§ 73*)—OIL AND GAS LEASE—TERMINATION.

An oil and gas lease provided that, in case no oil or gas well was sunk within 12 months, the lease should be void unless the lessee should pipe gas to within 100 feet of the lessor's residence and give him the right to use gas "till well is drilled," and that the lease should be returned if detrimental to a sale of the place. *Held*, that the lessor, while using gas under the lease which had been piped to within 100 feet of his residence free of charge, was not entitled to a cancellation of the lease in equity as detrimental to a sale of his property.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 73.*]

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

Roscoe Pound (W. E. Ziegler and J. H. Dana, on the brief), for appellants.

W. P. Dillard and George R. Snelling, for appellee.

Before ADAMS, Circuit Judge, and RINER and AMIDON, District Judges.

RINER, District Judge. This is an appeal from a decree canceling a lease made by T. L. Anderson and Netta M. Anderson, his wife, to the Pennsylvania Oil Company, to sink wells for the purpose of obtaining oil and gas upon land owned by the appellee. The lease was executed on the 28th of June, 1900, and gave to the lessee an exclusive right for 10 years from its date to enter upon and "operate" for oil and gas upon the land owned by Anderson, a description of which is set out in the lease. The lease also contained the following provision:

"In case no oil or gas well is sunk on the premises within 12 months from this date, this lease shall become absolutely null and void unless the second parties shall pipe gas to within 100 feet of the residence of parties of the first part and give the parties of the first part the right to use gas for three stoves and four lights in consideration of lease till well is drilled. If this lease shall be detrimental to the sale of this place, this lease shall be returned to the first party."

Prior to the commencement of this suit, and on the 21st day of May, 1904, the appellee, Anderson, served a written notice of cancellation on the appellants, reciting that the lease had now become detrimental to the sale of the property, and demanding that the lease be canceled of record and returned. The notice further prohibited the appellants from going on the land for the purpose of sinking wells for gas or oil. Thereafter Anderson brought this suit in the state court, and it was removed to the federal court by the appellants. The pleadings were there recast to conform to the practice of the federal court, and the case referred to a master to take the testimony and report his findings of fact and "recommendations as to what decree should be entered in the cause."

The master found that Anderson, the appellee, was the owner of the land described in the lease; that the lease was executed by Ander-

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

son and his wife on the day of its date; that subsequent thereto, and on the 29th of June, 1903, Netta M. Anderson, wife of T. L. Anderson, died; that she at no time owned any interest in the land, other than the interest she might have contingent upon her survival of her husband; that the Pennsylvania Oil Company, the lessee, was a partnership owned by W. P. Brown and Mattie Brown; that on January 3, 1901, the Pennsylvania Oil Company sold and assigned the lease to the Coffeyville Gas Company, a corporation; that on September 15, 1902, the Coffeyville Gas Company, by warranty deed, sold and assigned the lease to the People's Gas Company, a corporation; that on the 14th of October, 1902, the People's Gas Company sold and assigned all its oil rights under the lease, except one-fortieth, to W. P. Brown; that on August 23, 1903, W. P. Brown sold and assigned all rights held by him to the Calumet Oil & Gas Company, a corporation; that on February 17, 1904, the Calumet Oil & Gas Company sold and assigned all its rights under the lease to the Southern Development Company, a corporation; that on the 24th of March, 1904, the Southern Development Company sold and assigned all its oil rights under the lease to the appellants, J. W. Duntley, J. A. Odell, and W. O. Duntley.

The master further found that neither the original lessee nor any of its assigns at any time within 12 months from the date of the lease drilled any wells for oil or gas; neither did they pipe gas to within 100 feet of the residence of the appellee, as provided in the lease; that in September, 1901, the Coffeyville Gas Company, the then holder of the lease, did pipe gas to within 100 feet of appellee's residence upon the leased premises and gave him the right to use the gas for three stoves and four lights; and that he accepted the gas without protest and had continuously used same until the institution of this suit. The testimony shows that one-half mile of pipe was laid for the purpose of conducting the gas to within 100 feet of Anderson's house, and that he at once connected and commenced using the gas, and continued using it up to the time his testimony was taken in this cause. On cross-examination Anderson said:

"Q. You accepted the gas? A. Yes. Q. And commenced using it in your house? A. Yes. Q. You were using it for domestic purposes under the terms of this lease up to the time this action was commenced? A. Yes, sir. Q. You are using it up to this time? A. I used it; but there was none to-day. Q. Well, you used it yesterday? A. Yes. Q. Most of the time you have gas there? Sometimes there may be something the matter with the line, or something of that character, and the flow is not so good as other times; but from the time they first piped the gas to your place, you have used it for domestic purposes? A. Yes, sir."

As shown by the testimony quoted above, the appellee continued to use the gas under the terms of the lease after his notice of rescission, after this suit was brought, and down to the time his testimony was taken. The master found that these facts constituted a waiver of the forfeiture otherwise incurred for not acting within 12 months, but recommended the cancellation of the lease under the second clause, namely:

"If this lease shall be detrimental to the sale of this place this lease shall be returned to the first party."

This recommendation was adopted by the Circuit Court, and a decree entered accordingly.

The finding of the master that the use of the gas by the appellee after the expiration of the 12 months constituted a waiver of the forfeiture for nonaction on the part of the lessee within that time was unquestionably right. The lessor had the undoubted right at the expiration of the 12 months to take advantage of this forfeiture clause for nonaction, if he desired to do so. It was a provision for his interest and his benefit. He was not bound to insist upon it, but might do so if he wished. If he desired to insist upon it, he should have forbade the laying of pipe upon his land and refused to take the gas; but this he did not do. On the contrary, within 15 months after the execution of the lease, he permitted gas to be piped to within 100 feet of his house, connected it up with his house, and continued to use it, as he states, "under the lease," until the time his testimony was taken. We think the master was right in holding that there could, in such circumstances, be no forfeiture under this clause of the lease.

The rule is well settled, we think, that where a party, with full knowledge of his rights, freely does anything which amounts to a recognition of a transaction, or acts in any manner inconsistent with its repudiation, or for a considerable time deliberately permits another to deal with the property or incur expense under the belief that the transaction has been recognized, these acts constitute acquiescence and ratification. Here the appellee had the right to accept or reject this lease at the expiration of 12 months. Instead of declaring it forfeited, he elected to take and retain the benefits under it, and has thereby become bound by the transaction, and cannot avoid its obligation or effect by now taking a position inconsistent therewith. Watkins v. Green, 101 Mich. 493, 60 N. W. 44; Union Bank v. Jefferson, 101 Wis. 452, 77 N. W. 889; Kenny v. Seu Si Lun, 101 Minn. 253, 112 N. W. 220, 11 L. R. A. (N. S.) 831; Hartford Wheel Club v. Traveler's Insurance Co., 78 Conn. 355, 62 Atl. 207.

Neither do we think the lease can be forfeited under the clause which provides that if it proves detrimental to the sale of the property it shall be returned, for the reason that the appellee did not discontinue the use of gas and restore to the lessor what he had received under the lease, and for the further reason that in our view the lease is one and indivisible and the consideration is one and indivisible, and therefore he cannot be permitted to rescind and cancel the part creating the oil rights and leave the part creating the gas rights in force, and in this way continue to receive the benefit of his gas connections, while relieving himself of the substantial burden of the lease. The appellee is seeking relief in a court of equity. He asks the cancellation of a lease, and at the same time is retaining the benefits of the lease by the use of the gas for the purpose of light and fuel, and for which he pays nothing. This we think he cannot do. It is not a question of estoppel, but rather a question of the appellee doing equity before he can get relief in equity. He is here in a court of equity, seeking relief without doing or offering to do equity, and is asking the court to cancel a lease under which for several years, and during the progress of the cause he was obtaining benefits. The consideration

for keeping the lease in force, both as to gas and oil rights after the first year, was to furnish him with gas for three stoves and four lights for his house, and no provision whatever is made for apportioning the consideration between the gas and the oil rights, and the lessor was only to receive gas until a well was drilled. The gas company, not having drilled the well, continued to furnish gas only because it had assigned the oil rights and was bound to carry out its assignment.

The effect of sustaining the decree would be to enjoin the appellants from drilling a well and at the same time would give the appellee the right to receive gas until a well is drilled free of charge. It is insisted in appellee's brief that the oil was not bored for within a reasonable time, and hence he had a right to set aside the lease on that ground. That would be true, but for the fact that he waived it by going on and taking gas under the lease, which the lease provided he might do "until the well was sunk," without making any objection because of the delay.

It is quite true that in equity restitution is not at all events a condition precedent to rescind in the first instance. The plaintiff may offer it in his bill, he may make restitution at the hearing, or restitution may be provided for in the decree; but in this case there is no attempt to make restitution at any time or in any way, and the appellee seeks, not only to hold all that he has got, but to go on taking more, at the very time he seeks to cancel the lease. We think, with counsel who made the oral argument, that this clause of the lease provides the power to rescind in case the lease proved detrimental to the sale of the land for agricultural or other purposes, to which it was then devoted, and that that was in the minds of the parties at the time the lease was executed. It is clearly shown, we think, from the appellee's testimony, that he conceived the notion of taking advantage of this clause only after oil was found on adjacent premises, and he now insists that this clause gives him power to rescind, the effect of which would be to permit him to dispose of the oil rights at a greater advantage. The master in his report says that it is inconceivable that any one should make such a contract as that which he holds these parties did make, and in this view we concur, if this clause of the lease is susceptible of the construction given it by the master. We think, however, that it is not susceptible of that construction, and that the lessor has no right to insist, as suggested by counsel at the argument, upon an interpretation which in common sense is conceded to be inconceivable. We think a more reasonable construction is that if, prior to the boring for oil, the sale of the land as a farm was injured by the lease, the lease should be returned. This view is not inconsistent with the language of the lease, and under the circumstances as disclosed by the record we think it is the only reasonable construction to be placed upon this provision.

Some other questions were discussed in the briefs of counsel, which have all been attentively considered; but, in the view we have taken of this cause, it is not necessary to discuss them.

The decree of the Circuit Court is reversed.

HASHAGEN v. UNITED STATES.†

(Circuit Court of Appeals, Eighth Circuit. April 26, 1909.)

No. 2,769.

1. PERJURY (§ 34*)—EVIDENCE—WEIGHT—SINGLE WITNESS—CORROBORATING CIRCUMSTANCES.

A conviction of perjury may be sustained by the testimony of a single witness corroborated by circumstances proven by independent evidence sufficient to warrant the jury in saying that they believed one rather than the other, as where the evidence of one witness with other facts and circumstances proved are more than sufficient to counterbalance the oath of defendant and the legal presumption of his innocence.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 125–132; Dec. Dig. § 34.*]

2. PERJURY (§ 34*)—EVIDENCE—FALSITY OF TESTIMONY.

In a prosecution for perjury, the testimony of one witness and corroborating circumstances *held* sufficient to sustain a finding that the evidence alleged to have been perjured was false.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 129, 130; Dec. Dig. § 34.*]

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

Thomas T. Fauntleroy (Shepard Barclay, on the brief), for plaintiff in error.

Henry W. Blodgett, U. S. Atty.

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

RINER, District Judge. On the 20th day of March, 1906, the plaintiff in error, hereafter called the defendant, was indicted in the District Court for the Eastern Division of the Eastern District of Missouri for the crime of perjury. The indictment, in substance, charged that one Fred W. Hashagen was adjudged a bankrupt on the 13th day of December, 1905, by the District Court for the Eastern Division of the Eastern District of Missouri; that the case was referred to a referee; that, in the course of the administration of the bankrupt estate, Henry Hashagen, a brother of the bankrupt, pursuant to an order of the referee, appeared before him, was sworn and examined in relation to the property owned by the bankrupt, what disposition the bankrupt had made of his property and effects, and also whether any of the property and effects of the bankrupt had been concealed or secreted on the premises known as "Hashagen's Auditorium" in the city of St. Louis, where he formerly conducted his business. It is then charged in proper form that the defendant falsely, willfully, and corruptly testified that he had no knowledge of any property having been removed from the premises known as the "Hashagen Auditorium" in the city of St. Louis, where the bankrupt formerly conducted his business; that he, the defendant, never took any property away from the premises; that no other person had ever

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

† Rehearing denied July 12, 1909.

taken any property away from the premises at his request; that he never requested any one to secrete or hide any property in or upon the premises, and had no knowledge that any property had been secreted or concealed in or upon the premises; whereas, in truth and in fact, he, the defendant, then and there well knew that a large amount of property belonging to the bankrupt, describing it, had theretofore been removed from the premises by himself and another, who, at his request, assisted in removing it, and that he had requested certain other persons to secrete and hide, in and on the premises, other property described in the indictment. The indictment is in two counts, but, as the second count is substantially the same as the first, it need not be separately mentioned. To this indictment the defendant entered a plea of not guilty, a trial was had, resulting in a verdict of guilty, and a judgment was entered thereon sentencing the defendant to imprisonment in the Montgomery county jail for a term of six months.

It is conceded, or at least not denied, on the part of the defendant: (1) That the proceeding before the referee in which the oath was administered was a proceeding in which the oath was authorized; (2) that the defendant, having been sworn, gave evidence therein; (3) that his testimony as set out in the record was given; (4) that it was material to the issue or point of inquiry, leaving only the question of the falsity of his testimony for determination. At the close of all of the evidence the defendant requested the court to instruct the jury to acquit, which request was denied, and this action of the court is the only assignment of error relied upon in this case.

In order to determine this question, it becomes necessary to examine the evidence offered by the government in support of the indictment. In doing so, we adopt in part the abstract of the evidence found in the government's brief. Six witnesses were sworn for the government, but as the testimony given by two of them, relating to some sheet music and a small stereopticon, was withdrawn from the consideration of the jury by the court, it will not be necessary to consider it.

Theodore Bierey testified that he had been employed at Hashagen's Auditorium as a bartender prior to February 6, 1906; that he had taken some property from the auditorium under the direction of Henry Hashagen right after Christmas, 1905; that Henry Hashagen had asked him to, and he did take certain property, describing it, to his house to keep it there until the bankruptcy case was concluded; that the defendant requested him to secrete certain other property in the cellar and bury it in the cinders so that the trustee would not find it; that the defendant was present and helped him cover this property with cinders; and that the defendant requested him to secrete other property, some of it over the ceiling and some of it underneath the stage.

George Neff testified that he was employed as an engineer at the Hashagen Auditorium during the month of December, 1905; that he had been employed there for about two years; that he operated two picture machines, and was employed at that place at the time Fred Hashagen went into bankruptcy. The witness testified in regard to

the picture machines, or stereopticons, and that a bill of sale had been executed to him for the large one, without consideration, by Henry Hashagen, so that he could claim it at the time of the hearing in the bankruptcy case. He corrected this statement, however, in answer to a question by the court, as follows:

"The Court: Q. Let me understand. You got the bill of sale for that machine from whom? A. Henry Hashagen. Q. And not from Fred? A. I mean, from Fred. Q. And not from Henry? A. No, sir.

"The Court: Now, then, that explains it. He says that it was from Fred all the time.

"The Court: Q. In your examination you mentioned Henry. Then you were mistaken as to that? A. Yes, sir; I mean Fred.

"Mr. Blodgett: There is no dispute about that.

"The Court: But in his testimony he said Henry.

"Mr. Blodgett: He afterwards corrected it. I concede it was Fred."

This witness also testified that he had secreted some property in the basement at the request of the defendant.

William C. Connett testified that he was the trustee of the Fred W. Hashagen estate; that he was appointed on the 3d of January, 1906, and took charge of the estate; that he thereafter went out to the Hashagen Auditorium and took official charge of the property there; that the defendant went over the premises with him and pointed out what property belonged to the bankrupt; that he then had appraisers appointed, and went back and listed the property which was there; that the defendant went around from place to place and showed him and the appraisers all the property which he said belonged to the bankrupt; that at the time he took official charge of the premises he saw Bierey, Neff, the defendant, and the sheriff, who was then in charge; that on the occasion of his first visit, in a conversation had with the defendant, he asked him where Fred was; the defendant replied that he was not there at that time; that he then requested the defendant to show him the property which belonged to Fred; that the defendant took him over the premises and pointed out the various pieces of property which belonged to the bankrupt, also certain property which he said belonged to him, and certain other property which he said belonged to other people; that he asked the defendant at the time to show him all of the property that belonged to the bankrupt; that none of the property described in the indictment was pointed out to him by the defendant; that the defendant told him that the property he had pointed out was all of the property of the bankrupt; that the property described in the indictment was subsequently discovered, part of it secreted at different places on the premises, and part of it at Bierey's house. He then described in detail the property found at the different places.

H. G. Cleveland testified that he was appointed one of the appraisers in the Fred W. Hashagen estate; that he visited the Hashagen Auditorium on February 6th or 7th, in his official capacity; that he discovered certain property, describing it, under a pile of cinders in the basement next to the engine room, and other property between the rafters on the ceiling of a water-closet, under the stage, and in a closet in another portion of the building.

We have thus set out at some length the substance of the testimony offered on behalf of the government. It is contended by the defendant that he cannot be convicted of the crime charged in the indictment except upon the testimony of two credible witnesses, or of one credible witness who must be corroborated strongly by other evidence as to the falsity of defendant's statement under oath. He insists that there is no corroboration of Bierey's testimony; that finding the property at the place where Bierey said it was secreted only corroborated Bierey as to that fact, and not as to his statement that he secreted it there at the request of the defendant. Standing alone, that would probably be true, but the record shows that the defendant, at the time the trustee took possession, pointed out the property which he said belonged to his brother, and assured the trustee that that was all of the property on the premises which was owned by his brother, and in addition to that we have the statement of Neff that he secreted certain property at the request of the defendant. The record shows that the defendant had been employed there for a number of years by his brother, and was entirely familiar with the premises and with all of the property, so that the case does not rest alone upon Bierey's testimony and the property secreted by him, but is to be determined from a consideration of all of the facts and circumstances disclosed by the evidence at the trial.

It was formerly held, Archibald's Criminal Pleading, 157, that:

"Upon an indictment for perjury, there must be two witnesses; one alone is not sufficient, because there is in that case only one oath against another."

In Starkie's Law of Evidence, the rule is stated thus:

"It is a general rule that the testimony of a single witness is insufficient to warrant a conviction on a charge of perjury. This is an arbitrary and peremptory rule, founded upon the general apprehension that it would be unsafe to convict in a case where there is merely the oath of one man to be weighed against another. Nevertheless, it very frequently happens, in particular cases, that the testimony of a single witness preponderates against the limited testimony of many."

And the same author again says:

"So, in the case of perjury, two witnesses are essential; for otherwise there would be nothing more than the oath of one man against that of another, upon which the jury could not safely convict."

But this strictness has long since been relaxed, and we find many cases in the books where convictions have been sustained upon the testimony of a single witness, corroborated by circumstances proved by independent evidence sufficient to warrant the jury in saying that they believe one rather than the other. In other words, the evidence of the witness, together with the other facts and circumstances proved on the trial, must be something more than sufficient to counterbalance the oath of the defendant and the legal presumption of his innocence.

After a careful examination of the record, we are of opinion that the evidence, upon the whole, was sufficient to warrant the submission of the case to the jury, and the judgment of the District Court is affirmed.

GRADY v. ST. LOUIS TRANSIT CO.

(Circuit Court of Appeals, Eighth Circuit. April 5, 1909.)

No. 2,514.

1. CARRIERS (§ 317*)—STREET RAILROADS—INJURIES TO PASSENGERS—ORDINANCES.

Where, in an action for injuries to a street car passenger, plaintiff claimed he was injured by the sudden starting of the car after it had stopped to discharge passengers on the "near" crossing, while defendant denied that the car stopped, claiming that it had only slackened speed before crossing an intersecting track and was proceeding to the "far" crossing in accordance with its rules when plaintiff endeavored to alight, the court did not err in admitting certain city ordinances requiring that, at all points where street railway tracks intersect or cross each other, the car should be stopped immediately before crossing the same so as to avoid danger or collision, and should be stopped to take or discharge passengers on the "far" side of the intersecting streets.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 317.*]

2. CARRIERS (§ 317*)—STREET RAILROADS—INJURIES TO PASSENGERS—ALIGHTING FROM CARS—RULES.

Where, in an action for injuries to a street car passenger, defendant claimed that he endeavored to alight at the "near" side of the street before the stopping place had been reached as the car slowed down before crossing intersecting tracks, evidence of defendant's rules regulating the crossing of other car lines at street intersections was admissible as some evidence of reasonable care on defendant's part in the operation of its cars.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1305; Dec. Dig. § 317.*]

3. TRIAL (§ 251*)—INSTRUCTIONS—APPLICABILITY TO ISSUES.

Where, in an action for injuries to a street car passenger while attempting to alight, plaintiff's petition charged that the car stopped and was standing still when he attempted to get off, and that before he could do so the car started suddenly and threw him to the ground, and there was no evidence that plaintiff was injured by the sudden increase of speed or by a sudden jolt of the moving car, while he was attempting to alight, a request to charge that if the car had slowed down, and while plaintiff, having reasonable ground to believe that the car had stopped or was about to stop, attempted to alight, when it started again, and in so starting the car defendant's servants were negligent, plaintiff was entitled to recover, was properly refused as not within the issues.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 251.*]

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

Ford W. Thompson (W. B. Thompson, on the brief), for plaintiff in error.

Thomas M. Pierce (Boyle & Priest and G. T. Priest, on the brief), for defendant in error.

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

RINER, District Judge. This was an action brought in the Circuit Court by the plaintiff in error, hereafter called the "plaintiff," against

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

the defendant in error, hereafter called the "defendant," to recover damages for personal injuries in the sum of $35,000. The trial resulted in a verdict for the defendant. Plaintiff alleges in his petition: That on the 25th of April, 1904, he was a passenger on a street car operated by the defendant, on Olive street, in the city of Saint Louis; that said car was west bound; that he boarded the car at the corner of 18th and Olive streets, going west on Olive street to Vandeventer avenue, which intersects Olive street. He further alleges that when the car was stopped at Vandeventer avenue, and while passengers were leaving the car in front of him and plaintiff was awaiting his turn to leave the car, believing and having good and sufficient reason to believe that the car was stopped for the purpose of discharging passengers, and while he was in the act of alighting and was stepping down upon the street, and before he had been given a reasonable time to alight, defendant's servants in charge of the car negligently and carelessly caused the car to be suddenly started forward, thereby throwing plaintiff violently into the street, whereby he sustained the injuries for which he seeks to recover damages.

The defendant answered, first, by a general denial, and, second, alleged that whatever injuries the plaintiff sustained were caused by his own negligence, in carelessly and negligently attempting to alight from a moving car at a place other than a regular stopping place for the purpose of discharging passengers, and after having been warned by the conductor in charge of the car not to alight therefrom until the car should be stopped at a regular stopping place.

The plaintiff and some of his witnesses testified that the car stopped on the east side of Vandeventer avenue, while witnesses for the defendant, including the conductor and motorman, gave evidence: That the car did not stop, but merely slowed down; that the regular stopping place was on the west side of Vandeventer avenue; that the reason for slowing down on the east side of Vandeventer avenue was for the purpose of ascertaining, as they expressed it, "whether Vandeventer avenue was clear," there being a car line upon that street which the Olive street line crossed, at right angles. There was no evidence that there was any sudden increase in the speed or movement of the car while it was moving. The only evidence was that after the car had stopped, and while the plaintiff was in the act of alighting, the car started with a sudden jerk, and threw the plaintiff to the street.

The court instructed the jury that the law required of a common carrier the utmost practicable care and diligence in transporting passengers, and that it would be liable for the smallest carelessness, either upon its part or upon the part of its servants, if any injury resulted directly from such carelessness. The court further said to the jury:

"If, from all the evidence before you, you find and believe that the car in question came to a stop at or near the east side of Vandeventer avenue before proceeding westward and crossing that avenue, and remained stopped for a sufficient length of time to permit passengers to leave the car at that point, and that defendant's servants in charge and in control of the car saw passengers leaving the car at that point while said car was stopped, or by the exercise of that degree of care which they owed to passengers, as hereinbefore explained, might have seen the passengers who left the car, or who might with reasonable probability attempt to leave the car at that point

while the same was stopped, and that defendant's servants or agents either saw plaintiff leaving the car and in the act of departing therefrom, or by the exercise of the degree of care already mentioned could have seen him leaving the car or in the act of departing therefrom, and that by holding the car still and permitting the plaintiff to alight before starting the car forward plaintiff would not have been injured, and that they nevertheless started it forward, and that in so starting the defendant failed in its duty, and that as a direct result of the failure it caused plaintiff to be thrown to the street and suffer injury, you should find for the plaintiff, unless you find and believe that in so acting the plaintiff failed to exercise reasonable care on his part for his own safety."

Four errors are assigned:

First. That the court erred in admitting in evidence certain sections of the ordinances of the city of St. Louis, which contained the following provisions:

"At all points where the street railway track intersects or crosses other street railway tracks the car shall be stopped immediately before crossing the same, so as to avoid danger of collision," and "Street cars shall be stopped for taking or discharging passengers, as follows: * * * Those going westward shall stop on the west side of the intersecting streets."

We do not think it was error to admit these provisions of the ordinances. Jackson v. Grand Avenue Ry. Co., 118 Mo. 199, 24 S. W. 192. In that case the court said:

"The ordinance was admissible as the foundation of the rule adopted by the defendant that its cars should only stop at the far crossing to let off passengers for that crossing. The rule was in obedience to, and in harmony with, the ordinance. Moreover, it was admissible in connection with the testimony of plaintiff and the conductor that she notified him when she got on the car and paid her fare that she wanted to get off at Ninth street. In the absence of any subsequent notification of a change in her intention or desire to get off before reaching Ninth street, he might well presume she would wait till the car reached the place, fixed by the ordinance for its stopping at that junction; and it was also competent in connection with his evidence that the car did not stop, but merely slacked its speed while approaching the crossing. Defendant might fairly argue that, as the ordinance required the car to go to the farther side of the street, any stop on the south side would naturally be only momentary, and to get the signal, and not to let off passengers, as was testified by the conductor. We can see no impropriety in this evidence. We think it was proper to put all the circumstances before the jury."

It was also insisted under this assignment that the court erred in admitting evidence in regard to the rules of the defendant company regulating the crossing of other car lines at the intersection of streets. In Frizzell v. Omaha St. Ry. Co., 124 Fed. 176, 59 C. C. A. 382, where this exact question was involved, Judge Sanborn, speaking for this court, said:

"The adoption and enforcement of such a rule was certainly some evidence of reasonable care in the operation of all its cars across the streets of the city of Omaha, including the car upon which the plaintiff was riding. In view of this fact, the admission of the rule in evidence cannot be said to be error."

In that case the rule required defendant's employés to cross the street before stopping the car. In this case the testimony tends to show that the rule required the employés in charge of the car to have the car under control and to stop if there was danger of collision.

The second error complained of is the refusal of the court to give to the jury an instruction offered by the plaintiff, to the effect that if the jury found from the evidence that the plaintiff inquired of the conductor whether or not he was near his destination—

"and that the conductor replied that the next stop would be Vandeventer avenue, and that thereafter, without another stop, the car approached the east side of Vandeventer avenue, and, in so approaching Vandeventer avenue, slowed down to a very slow rate of speed, and either stopped still or nearly came to a stop on said east side of Vandeventer avenue, and that at such time and place plaintiff believed, and under all circumstances had reasonable ground to believe, that said car had stopped, or was about to stop to discharge and let off passengers desiring to leave said car at Vandeventer avenue, and that plaintiff thereupon proceeded to leave said car, and in so leaving the said car exercised such a degree of care and caution as reasonably prudent and careful persons of ordinary intelligence may reasonably be expected to make use of under like circumstances, and that, while so leaving and departing from said car, defendant's servants in charge of said car caused said car to be started forward, and that under all the facts and circumstances detailed in evidence you believe that in so starting said car forward defendant's servants failed to exercise the very highest degree of care which may reasonably be expected of prudent and cautious men under like circumstances, and that as direct result of their failure so to do plaintiff was thrown from said car and injured, you will find for the plaintiff."

This instruction was properly refused because no such issue was presented or tried.

Plaintiff charged in his petition that the car stopped, that while it was standing still he attempted to alight, and that before he could do so the car was started with a sudden jerk and threw him to the ground. The court properly limited its instructions to the issues as made by the pleadings and disclosed by the evidence. There is no other evidence tending to show that the plaintiff was injured by the sudden increase of speed or by a sudden jolt or movement of a moving car while he was in the act of alighting. The allegation in the petition and his testimony is that the car had stopped still at the time he attempted to alight. This was denied by the defendant, and the defendant offered testimony to show that the car merely slowed down and did not stop. And as was said by Judge Sanborn in Frizzell v. Omaha St. Ry. Co., supra:

"Instructions to the jury should be limited to the facts of the case on trial, and to the rules of law which apply to those facts, and which govern the real issues they present, and neither theories which there is no evidence to sustain, nor rules of law which are inapplicable to the evidence actually presented, should be embodied in the charge of the court."

The view we have taken of the question presented by the second assignment of error renders it unnecessary to discuss the third and fourth assignments.

We think the charge of the court fairly presented to the jury the issues in the case and properly stated the rules of law applicable thereto, and that there was no reversible error in the trial of the case.

The judgment of the Circuit Court is affirmed.

UNION STOCKYARDS CO. OF OMAHA v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. April 2, 1909.)

No. 2,821.

COMMERCE (§ 27*)—CARRIERS—INTERSTATE COMMERCE—STOCKYARDS COMPANY CONDUCTING PART OF TRANSPORTATION BY RAILROAD FOR CARRIERS—SAFETY APPLIANCE LAW—"COMMON CARRIER ENGAGED IN INTERSTATE COMMERCE."

A stockyards company which owns and maintains at a large shipping point an extensive stockyards which is in effect the live stock depot of all the railroad companies doing business at that point, and which owns and maintains several miles of railroad tracks extending over its own premises from its stockyards to a transfer track (also on its own premises) connecting with the several tracks of the railroad companies, and which by means of its own locomotives and servants transports for hire over its tracks all shipments of live stock accepted by the railroad companies for carriage to and from such stockyards, including such shipments as are interstate, is a common carrier engaged in interstate commerce by railroad within the meaning of the safety appliance law of Congress, although the cars in which it transports such shipments are in every instance the cars of the railroad company from which the shipment is received or to which it is delivered at the transfer track, and although the stockyards company does not collect the compensation for its service directly from the shippers or consignees, but only from the railroad companies delivering the loaded cars to it, or receiving them from it, at the transfer track, and although its service is performed and its compensation is paid in accordance with a contract between it and the railroad companies.

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

(Syllabus by the Court.)

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

For opinion below, see 161 Fed. 919.

Frank T. Ransom, for plaintiff in error.

Luther M. Walter, Special. Asst. U. S. Atty. (Charles A. Goss, U. S. Atty., and A. W. Lane, Asst. U. S. Atty., on the brief).

Before VAN DEVANTER, Circuit Judge, and W. H. MUNGER, District Judge.

VAN DEVANTER, Circuit Judge. The single question to be considered in this case is, Is the Union Stockyards Company of Omaha a "common carrier engaged in interstate commerce by railroad," within the meaning of the safety appliance law of Congress, Acts March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), April 1, 1896, c. 87, 29 Stat. 85, and March 2, 1903, c. 976, 32 Stat. 943 (U. S. Comp. St. Supp. 1907, p. 885)? In the District Court, where the question arose upon an agreed statement of facts, it was answered in the affirmative. 161 Fed. 919. The facts disclosed by the agreed statement are substantially as follows: The stockyards company is a Nebraska corporation, and owns and conducts an extensive stockyards at

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

South Omaha equipped with many sheds or pens wherein it receives, feeds, waters, cares for, and otherwise handles live stock as directed by the owners thereof. On the margin of and adjoining its yards are several large packing houses wherein live stock is slaughtered and the product is prepared for shipment to market. Some other industrial plants are also similarly located. Upon its premises it owns, maintains, and uses, conformably to its articles of incorporation, 35 miles of railroad tracks extending from its sheds or pens to a transfer track (also upon its premises) which connects with the railroads of the 8 or 10 railroad companies doing business at South Omaha. It receives from these companies at the transfer track cars loaded with live stock and other freight, and then, with its own locomotives and employés, moves them over its tracks to their ultimate destination, whether that be its sheds or pens or one of the packing houses or other industrial plants, where it delivers each shipment to the proper consignee. In like manner it moves cars loaded with live stock and other freight from its sheds or pens and the several packing houses and other industrial plants to the transfer track, and there delivers them to the railroad companies designated by the shippers. And in the same way it returns the empty cars to the transfer track after the in-bound freight has been unloaded, and takes empty cars from that track to its sheds or pens and to the several packing houses and other industrial plants so that out-bound freight may be loaded into them. The cars moved over its tracks are in every instance the cars of the railroad company from which the shipment is received, or to which it is delivered. Neither in-bound nor out-bound shipments are broken or transferred from one car to another at the transfer track, but instead are carried in the same cars from the point of origin to the point of ultimate destination, including that part of the carriage which is over the stockyards company's tracks. Of the in-bound live stock about 45 per cent. is from states other than Nebraska, and of the out-bound about 87 per cent. is destined to other states. The stockyards company does not issue any bills of lading, does not collect any charge for its service directly from shippers or consignees, and does not participate in establishing any through rates inclusive of its service, but it does exact fixed charges (on the car basis) for that service, and collects them monthly from the several railroad companies from which the shipments are received or to which they are delivered. It has no stations in its yards other than the places where live stock and other freight are unloaded and loaded at its sheds or pens and at the several packing houses and other industrial plants. It does not hold itself out as ready or willing generally to carry freight for the public, but only to carry such as is offered in the manner and at the places here described. All of the railroad companies whose roads connect with the transfer track are common carriers engaged in moving interstate commerce, and it is in accordance with a contract with them that the carriage over the tracks of the stockyards company is conducted, and the compensation therefor is paid, in the manner here described. In the contract this carriage is spoken of as "switching," and the compensation therefor as a "switching charge." The number of cars carried by the stock-

yards company over its tracks each day is about 625. Other facts disclosed in the agreed statement are deemed immaterial.

It is the contention of counsel for the stockyards company that the service performed by it is such only as the railroad companies are bound to perform for their patrons; that having no facilities for performing this service at South Omaha the railroad companies merely employ the stockyards company to furnish the requisite facilities and to operate them; that the performance of this service under such an employment does not make the stockyards company a common carrier, or its property used therein a railroad; and that this service is purely a local switching service, which follows or precedes transportation, and is not interstate commerce.

The discussion will be simplified, but not otherwise affected, if we put out of view the dead freight to and from the packing houses and other industrial plants, and consider only the live freight to and from the sheds or pens.

It must be conceded that the stockyards company would not be a common carrier, nor the property used by it a railroad, if its operations were confined to maintaining the sheds or pens, to unloading shipments thereto, to loading shipments therefrom, and to feeding, watering, caring for, and otherwise handling live stock therein. But its operations are not thus confined. On the contrary, they include the maintenance and use of railroad tracks and locomotives, the employment of a corps of operatives in that connection, and the carriage for hire over its tracks of all live stock destined to or from the sheds or pens, which, in effect, are the depot of the railroad companies for the delivery and receipt of shipments of live stock at South Omaha. The carriage of these shipments from the transfer track to the sheds or pens and vice versa is no less a part of their transit between their points of origin and destination than is their carriage over any other portion of the route. True, there is a temporary stoppage of the loaded cars at the transfer track, but that is merely incidental, and does not break the continuity of the transit any more than does the usual transfer of such cars from one carrier to another at a connecting point. And it is of little significance that the stockyards company does not hold itself out as ready or willing generally to carry live stock for the public, for all the railroad companies at South Omaha do so hold themselves out, and it stands ready and willing to conduct, and actually does conduct, for hire a part of the transportation of every live stock shipment which they accept for carriage to or from that point, including such shipments as are interstate. Moreover, the Supreme Court of Nebraska pronounces it a common carrier in the special line to which it devotes its energies, although not a common carrier for all purposes. State ex rel. v. Union Stockyards Co. (Neb.) 115 N. W. 627, 631. In these circumstances controlling decisions leave no room to doubt that it is a common carrier engaged in interstate commerce by railroad within the meaning of the safety appliance law. United States v. Colorado & N. W. R. Co., 157 Fed. 321, 85 C. C. A. 27, 15 L. R. A. (N. S.) 167, petition for certiorari denied 209 U. S. 544, 28 Sup. Ct. 570, 52 L. Ed. 919; United States v. Colorado & N. W. R.

Co., 85 C. C. A. 48, 157 Fed. 342; Chicago, M. & St. P. Ry. Co. v. Voelker, 129 Fed. 522, 65 C. C. A. 226, 70 L. R. A. 264; Johnson v. Southern Pacific Co., 196 U. S. 1, 22, 25 Sup. Ct. 158, 49 L. Ed. 363; McNeill v. Southern Ry. Co., 202 U. S. 543, 26 Sup. Ct. 722, 50 L. Ed. 1142; Missouri Pac. Ry. Co. v. Larabee Flour Mills Co., 211 U. S. 612, 624, 29 Sup. Ct. 214, 218, 53 L. Ed. ——; Louisville & Nashville R. Co. v. Central Stockyards Co., 212 U. S. 132, 29 Sup. Ct. 246, 248, 53 L. Ed. ——.

The judgment is accordingly affirmed.

UNITED STATES v. SOUTHERN PAC. CO.

(Circuit Court of Appeals, Eighth Circuit. April 3, 1909.)

No. 2,892.

1. RAILROADS (§ 229*)—EQUIPMENT OF TRAINS—SAFETY APPLIANCE ACTS.
   The safety appliance acts (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]; Act April 1, 1896, c. 87, 29 Stat. 85; Act March 2, 1903, c. 976, 32 Stat. 943 [U. S. Comp. St. Supp. 1907, p. 885]), prohibiting railroads from using equipment not fitted with couplers which can be uncoupled without the necessity of a man going between the ends of the cars, imposes an absolute duty on carriers of interstate commerce to so maintain their equipment used in interstate commerce, which duty is not performed by the exercise of reasonable care.
   [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 ACTS—MOVING DEFECTIVE CARS—PENALTIES—INSTRUCTIONS.
   In an action against an interstate carrier to recover penalties for the moving of equipment in interstate commerce not equipped with automatic couplers which can be operated without the necessity of a man going between the ends of the cars, an instruction that if the cars in question were defective, and were being actually used in moving interstate traffic, or in connection with other cars at the time of moving such traffic, defendant might continue such movement, if and as long as it was reasonably necessary to do so in order to get the cars repaired, was erroneous.
   [Ed. Note.—For other cases, see Railroads, Dec. Dig. § 254.*]

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

Hiram E. Booth (William M. McCrea and Luther M. Walter, on the brief), for plaintiff in error.

George H. Smith (P. L. Williams and John G. Willis, on the brief), for defendant in error.

Before VAN DEVANTER, HOOK, and ADAMS, Circuit Judges.

ADAMS, Circuit Judge. This was a civil action in eight counts to recover penalties for that number of violations of the safety appliance laws of the United States. Act March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174); Act April 1, 1896, c. 87,

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

29 Stat. 85; Act March 2, 1903, c. 976, 32 Stat. 943 (U. S. Comp. St. Supp. 1907, p. 885). These statutes make unlawful the use of any locomotive engine in moving interstate traffic unless it is equipped with a power-driving wheel brake and an appliance for operating the train brake system, and render unlawful the hauling or using of any car in moving interstate traffic when not equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of a man going between the ends of the cars. Two counts of the complaint are founded upon the use of engines, and the other six upon the use of cars, not equipped, the former with brakes, and the latter with couplers, as required by law. A verdict was found and judgment rendered in favor of the United States on the two counts relating to the engines, and in favor of the defendant on the other six counts. This writ of error, prosecuted by the United States, challenges the judgments rendered against it on these last-mentioned counts.

The evidence tended to show that at the several times stated in the complaint the couplings on each of the six cars in question were defective, that all but one of them carried interstate traffic, and that one formed a part of a train of other cars which were being used in that traffic. There was evidence tending to show that these cars, in their defective condition and loaded as just stated, were hauled by the defendant carrier from a repair track to an interchange track, or vice versa, and otherwise in and about the yard of the defendant company in Ogden, Utah; that this yard was much congested; that the scarcity of repair men, who ordinarily made repairs on the repair track, made an unusual amount of switching necessary; that the system of handling bad-order cars in the Ogden yard was to move them only so far as was necessary in order to get them out of the way of cars which were in good order; that the movement of such cars was limited to the Ogden yard, and made only for the purpose of separating the bad-order cars from the good-order cars, or to place them where they could be conveniently repaired. In view of this and other like evidence the trial court charged the jury as follows:

"It is immaterial as to the distance over which the car is used, unless it was used simply for the purpose of repairing the defect, and used only when necessary for that purpose. There is no mechanism, no device, that may not get out of repair; and an interpretation must not be placed on the statute that will impose a liability for the failure to perform a duty impossible of discharge. So that a movement of these cars after the coupler is out of repair, that is simply for the purpose of having it repaired, and is reasonably necessary for that purpose, under the conditions then confronting the defendant, would not be a violation of this act. But any greater movement than is reasonably necessary for that purpose, under the existing conditions then confronting the defendant, provided this greater movement is also a movement of interstate traffic, to which I have already called your attention, is a violation of the law."

Exception was duly preserved to this portion of the charge, and the giving of it is the only error assigned and now relied on by the United States. This portion of the charge declares, in substance, that a movement of cars used in interstate traffic not equipped as prescribed by the safety appliance law, when and so far only as is reason-

ably necessary for repair, is not a violation of the law. Since the decision by the Supreme Court of the case of St. Louis, I. M. & S. Ry. Co. v. Taylor, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. 1061, we have uniformly held that the safety appliance law imposed an absolute duty upon carriers of interstate commerce to equip and maintain their engines and cars used in or in connection with that service in the way prescribed by that law, and that the performance of this duty is not excused by the exercise of reasonable care. United States v. Atchison, T. & S. F. Ry. Co. (C. C. A.) 163 Fed. 517; United States v. Denver & R. G. R. Co. (C. C. A.) 163 Fed. 519; Chicago, M. & St. P. Ry. Co. v. United States (C. C. A.) 165 Fed. 423. In the recent case of Chicago & N. W. Ry. Co. v. United States (C. C. A.) 168 Fed. 236, we recognized the doctrine of the former cases, and in view of the amended act of 1903 (32 Stat. 943), which enlarged the scope of the original law, so as to include, not only the engines and cars contemplated in the act of 1893, but "all trains, locomotives, tenders, cars and similar vehicles" used in interstate commerce and "all other locomotives, tenders, cars and similar vehicles used in connection therewith," we undertook to classify the vehicles embraced in the original act as amended. We there said:

"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."

As a corollary to the classification so made we reached and stated the conclusion that any movement of vehicles after they became defective, for the purpose of repairing them, must, in order to escape the penalties imposed by the act, be "wholly excluded from commercial use themselves, and from other vehicles which are commercially employed." Conformity to the requirements of the law, as so interpreted, it must be admitted, will often be inconvenient and sometimes impracticable; but Congress had before it for consideration the important question of promoting the safety of employés and travelers upon railroads, and in the accomplishment of its purpose it may well be that the legislative mind considered the inconvenience and impracticability of a literal compliance at times with the law, and the consequent infliction of the light penalties imposed for its violation to be of little moment compared with the greater importance of protecting life, limb and property. Drastic measures are frequently necessary to protect and safeguard the rights and interests of the people.

The present case was tried before this court had decided any of the above-mentioned cases, and the learned trial judge, in that part of the charge complained of, plausibly enough applied the rule of diligence recognized by the common law, and thereby modified the absolute duty imposed by Congress upon carriers of interstate commerce. He told the jury, in substance, that even if the cars in question were defective, and were being actually used in moving inter-

state traffic, or in connection with other cars which were at the time moving such traffic, the defendant might continue such movement if, and as long as, it was reasonably necessary to do so in order to get the cars repaired.

This was clearly erroneous, and the judgment must accordingly be reversed, and the cause remanded, with directions to grant a new trial. It is so ordered.

In re BAUM.

(Circuit Court of Appeals, Eighth Circuit. April 5, 1909.)

No. 91.

1. BANKRUPTCY (§ 446*)—PETITION TO REVISE—SCOPE OF REVIEW.
Where, on a petition to revise and review an order requiring a bankrupt to pay into the registry of the court a certain sum of money or stand committed, the record did not contain the evidence, only such matters of law as were apparent on the face of the record could be considered; it being presumed that the facts disclosed by the evidence were sufficient to sustain the finding and order.
[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 446.*]

2. BANKRUPTCY (§ 446*)—CONCEALED ASSETS—ORDER FOR DELIVERY.
Where the court found, in an order requiring a bankrupt to pay over money, that the bankrupt had concealed assets, and the order required the payment of money, it would be presumed that the court found that the assets consisted of money which was under the bankrupt's control when the order was made and that he was able to comply therewith.
[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 446.*]

3. BANKRUPTCY (§ 136*)—ADJUDICATION—EFFECT.
A bankruptcy adjudication operates to transfer to the trustee title to all the bankrupt's property subject to distribution among his creditors, and, if it appears to the court's satisfaction that property of the bankrupt's estate was in the bankrupt's control or possession, a lawful order for its delivery may be made.
[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 136.*]

4. BANKRUPTCY (§ 136*)—WITHHELD ASSETS—PAYMENT.
An order requiring a bankrupt to pay over withheld money should require payment to the trustee, and not into the registry of the court.
[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 136.*]

5. BANKRUPTCY (§ 136*)—WITHHELD ASSETS—PAYMENT—CONTEMPT.
An order required a bankrupt to pay over withheld money, and declared that in default thereof he be held guilty of contempt, and directed the marshal to arrest and confine him in a specified jail and there safely keep him until the order of the court was complied with or he was discharged. *Held*, that such order was erroneous as leaving the question of the bankrupt's default and consequent contempt to the determination of the marshal, the bankrupt being entitled to a hearing after default on an order to show cause why he should not be punished for contempt.
[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 136.*]

Petition for Revision of Proceedings of the District Court of the United States for the Western Division of the Eastern District of Arkansas.

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

Joseph Loeb (Morris M. Cohn, on the brief), for petitioner.
J. H. Carmichael, for respondent.

Before HOOK, Circuit Judge, and RINER and AMIDON, District Judges.

RINER, District Judge. On the 26th of December, 1907, Newman Baum, the petitioner herein, was adjudged a bankrupt by the United States District Court for the Western Division of the Eastern District of Arkansas upon a voluntary petition. The petition was referred to a referee on the same day, and on the 10th day of January, 1908, James A. Comer was elected trustee by the creditors and duly qualified. On the 24th of April, 1908, the trustees filed a petition with the referee praying that the bankrupt be required to appear on the 15th day of May, 1908, to show cause why he should not turn over to the trustee certain moneys or merchandise alleged to have been knowingly and fraudulently concealed by the bankrupt. A response or answer was filed to the petition of the trustee by the bankrupt denying all of the allegations of the petition. The testimony was taken, and on the 16th of June, 1908, the referee found that the bankrupt withheld from the trustee the sum of $17,929.54. A petition for review was filed by the bankrupt with the referee, and the proceeding, including the evidence taken before the referee, was certified to the District Court. Upon consideration of the record and testimony, the District Court entered the following order:

"This cause coming on to be heard on the petition of Newman Baum, the bankrupt herein, for a review of the order of the court entered herein by the Honorable Charles C. Waters, one of the referees of this court, requiring said Newman Baum to pay over to James A. Comer, trustee in bankruptcy of the bankrupt herein, the sum of $17,929.54, and a certification of said referee as to the disobedience of said Newman Baum of said order and of the recommendation of said referee, and this court, reviewing the testimony, doth find that said Newman Baum has concealed assets and failed to turn over to the trustee the sum of $16,461.62, and he is hereby ordered to pay the said sum of $16,461.62 into the registry of this court within thirty days from the date hereof, and in default thereof that he be held guilty of contempt of this court, and the marshal of this court is directed to arrest said Newman Baum and confine him in the Pulaski county jail, and there safely keep him until the orders of this court shall be complied with or he be discharged by the court."

And a petition to revise and review this order was filed in this court. The record does not contain the evidence taken by the referee which was before the District Court. We must therefore presume that the facts disclosed by the evidence were sufficient to sustain the finding and order of the court. By this proceeding only matters of law apparent upon the face of the record can be considered. It is insisted by the petitioner that the court erred in ordering him to turn over the sum of $16,461.62 in cash, because the petition to show cause did not state whether the bankrupt had concealed money or merchandise. The court found in its order that he concealed assets, and from the fact that it ordered the bankrupt to pay over money it must be presumed, we think, that it found that the assets consisted of money, and that the same was in his possession and under his control, at

the time the order was made, and that he was able to comply with the order.

An adjudication in bankruptcy operates to transfer to the trustee the title to all of the property of the bankrupt which was subject to distribution among his creditors, and, if it appears to the satisfaction of the court that property of the bankrupt's estate is in the control or possession of the bankrupt, a lawful order for its delivery may be made. The court, of course, could not require the petitioner to do an impossible thing and then punish him for refusing to perform it. Therefore, from the fact that the court ordered him to pay over the money, it must necessarily have had before it testimony sufficient to satisfy it of his ability to comply.

The order, however, should be modified in two respects. It directs the petitioner to pay the money into the registry of the court within 30 days. We think the order should require him to pay the money to the trustee. It further provides—

"and in default thereof that he be held guilty of contempt of this court, and the marshal of this court is directed to arrest said Newman Baum and confine him in the Pulaski county jail, and there safely keep him until the orders of this court shall be complied with or he be discharged by the court."

This leaves the question of his default and consequent contempt of court to be determined by the marshal, without further action on the part of the court. He was entitled to a hearing upon that question, and it would then be a question for the court to determine whether or not he was guilty of contempt. The order should be modified, directing the bankrupt to pay the sum, which the court found he concealed, to the trustee within 30 days, and in default thereof that he show cause why he should not be punished for contempt.

The case is remanded to the District Court with instructions to modify its order in conformity with the suggestions made in this opinion, and, as so modified, the order is approved and confirmed, and the petition for review dismissed at the costs of the respondent.

AMERICAN STEEL & WIRE CO. v. DENNING WIRE & FENCE CO.

(Circuit Court of Appeals, Eighth Circuit. April 10, 1909.)

No. 2,867.

1. PATENTS (§ 39*)—NOVELTY—USE OF NEW MEANS OF CONSTRUCTION.
The validity of a patent for a product or structure is not affected by the process or means by which it is made or whether it is made by hand or by machinery.
[Ed. Note.—For other cases, see Patents, Dec. Dig. § 39.*]

2. PATENTS (§ 328*)—INVENTION—WOVEN WIRE FENCE.
The Bates patent, No. 561,193, for woven wire fencing having parallel strand wires and a series of single plain stay wires connecting the strand wires together by being coiled at their end portions around the strand wires and intercoiled at their meeting ends, and in one form having the spaces between both the strand wires and stay wires graduated so as to form graduated meshes, in view of the prior art, 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 Northern District of Iowa.

For opinion below, see 160 Fed. 125.

Thomas W. Bakewell and Paul Bakewell (Charles MacVeagh, on the brief), for appellant.

Thomas A. Banning (Grimm, Trewin & Moffitt and Banning & Banning, on the brief), for appellee.

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

PER CURIAM. The Circuit Court adjudged that claims 1 and 3 of letters patent No. 561,193, issued on June 2, 1896, to Albert J. Bates, disclosed no patentable invention, and it dismissed a bill for their infringement. The American Steel & Wire Company of New Jersey appealed, and its counsel have urged with great force and ability many reasons why in their opinion the decree should be reversed; but the opinion of Hon. Henry T. Reed (160 Fed. 125), the judge who rendered the decree in the court below, and the arguments of opposing counsel, have convinced that the decree was right, and that it must be sustained. The opinion of Judge Reed sets forth the material facts in the case and the reasons for the decree so satisfactorily that it is approved and adopted as the opinion of this court.

Affirmed.

JORDAN AUTOMATIC SIGNAL CO. v. BROOKLYN HEIGHTS R. CO. et al.

(Circuit Court, E. D. New York. March 25, 1909.)

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—ELECTRIC RAILWAY SIGNAL SYSTEM.
The Jordan patent No. 497,408, for an electrical signaling system for railways, has for its special object the setting of a light or other signal at electric street railroad crossings to give notice of the proximity of a

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

car. It covers a combination of devices by which an auxiliary wire extending a distance either way from a crossing is placed parallel with and near to the trolley wire or main circuit, but normally insulated therefrom. The trolley wheel or other contact device on the car, however, connects the two wires and keeps them in connection until it passes beyond the auxiliary wire, and a current is sent through the same to and through a signal circuit, where it lights a lamp or sets some other danger signal and passes to the earth or other return circuit. *Held*, that such patent was not anticipated, and discloses invention if limited so as to include as an element the signal circuit, but as so construed it is not infringed by a train-signaling device by which a signal is normally held at safety by a current through an auxiliary wire which is shunted by an approaching train.

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

In Equity. On final hearing.

D. Frank Lloyd (William S. Jackson and E. Hayward Fairbanks, of counsel), for complainant.

George D. Yeomans (Thomas Ewing, Jr., of counsel), for defendants.

CHATFIELD, District Judge. The patent in question is one of the many growing out of the rapid development and extension of the methods of propelling street cars by electricity, soon after the successful commercial use of the transmission of a constant current to the dynamo of the car by means of a conductor in electrical and moving contact with the feed wire, in the form known as a "trolley." The patentee, one William H. Jordan, seems to have had in mind the particular advantage and utility of giving a signal at a street crossing, or at other point of danger, upon the approach of a car, by means of the transmission of a portion of the current from the feed wire to the signal, when the car in question should reach a certain point, and to continue the operation of the signal or light until the car had passed along the track to a desirable distance upon the other side of the crossing. The transmission of a signal by an electric current, set in operation by a mechanical device, or by contact with an electrical conductor, was known in the art, and had been the subject-matter of various patents which will be referred to later. But Jordan used the idea of maintaining (by means of a second wire, in close proximity, but insulated, when not in use, from the feed wire of the trolley system) a signal current, active while the car should be passing over the space in which the presence of a car was to be signaled. Jordan did this by causing a portion of the current from the feed wire to be supplied by a sliding or rolling contact to this auxiliary wire, and, after passing through the signal, to return through the earth or other return conductor. He depicts in the drawings of his patent the placing of the auxiliary wire, with reference to the feed wire, in such manner that the concave rim of the trolley wheel would force the flexible auxiliary wire directly against the main feed wire, as the trolley wheel rolled along the feed wire, under the motion of the car.

The patent to Jordan was issued under number 497,408, dated May 16, 1893, and contains the following specifications, among others:

"The present invention relates to means for displaying signals, particularly at road crossings, which signals are illuminated, or otherwise operated, by being connected to a trolley or supply wire extending along a track or way on which vehicles are adapted to travel," etc.

He states that the objects of the invention are to reduce expense and to simplify the circuit connections and apparatus.

The claims of the patent are 11 in number, but it is agreed by the witnesses and attorneys for each party to this suit that the first claim sufficiently sets forth the principle involved and the application of the patent, and that the result with reference to this claim would determine that with reference to the others as to which infringement is charged.

Claim 1 is as follows:

"(1) In an electrical signaling system for railways, the combination of a main circuit, an auxiliary circuit, a signal circuit connected between said auxiliary circuit and the earth or other return of the main circuit, and means carried by a car for maintaining electrical connection between the said main and auxiliary circuits, substantially as set forth."

In the course of his specifications Jordan states that:

"The signal lamps will ordinarily be out of circuit and unlighted. As a car comes along" the contact will be made, the lamps lighted, and the illumination continued, "until the car passes from the signal trolley wire at the opposite end," when the lamps will remain out of circuit, and connection be had only with the trolley or feed wire until a place is approached where it is necessary to give another signal.

Jordan further states that different means for supporting the signal trolley wire may be used, and that the wires need not be placed over the car.

With reference to this patent, as in the case of many others, the growth of the use of electricity as a motive power for street cars, and the adoption of what is known as the "third rail" or "shoe" system of contact alongside the car, and the underground conduit, in which there is also a third rail or wire, with a shoe or trolley connection, has made no difference in the scope of the patent. Similarly, the terms of the patents, speaking of devices with relation to trolley cars, have come to be frequently used indiscriminately with reference to any one of these three systems.

The defendant corporation maintains, among other electric car lines, a system of trains propelled by electric motors, upon an elevated track, in the city of Brooklyn, in this district, and at the particular points in question supplies current to the motors of the cars of these trains by means of a third rail placed alongside the track rails upon the elevated structure, and with a shoe or sliding contact continuously in position of contact with this third rail.

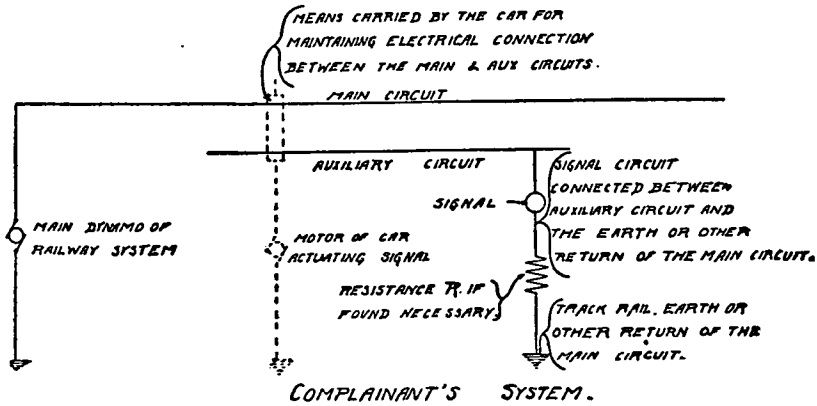
The particular signals examined by the witnesses in the case, and treated as typical of the subject-matter of the action, are located alongside of both the up and down tracks, near what is known as the "Boerum Place Station," where a sharp curve, together with a change in grade, makes it desirable to give notice to the oncoming train in either

direction of the presence of a preceding train within the limits of dangerous proximity. The engineers of the defendant railroad, however, were not content with the setting of a signal by either train, which should stand at danger or be lighted only upon the approach of another train. It was thought that the better method was to maintain a signal by a continuous current, which signal would be immediately released and set at danger, either by the presence of another train, or by any interruption in the passage of the current through the signal. This method of proving the integrity of the system seems to have been an outgrowth of the many devices by which an electrical current is maintained as a test, and the interruption of that current taken as a sign of danger or injury to the apparatus involved, and has long been known through the operation of telephone and telegraph lines, as well as in connection with electric railroads.

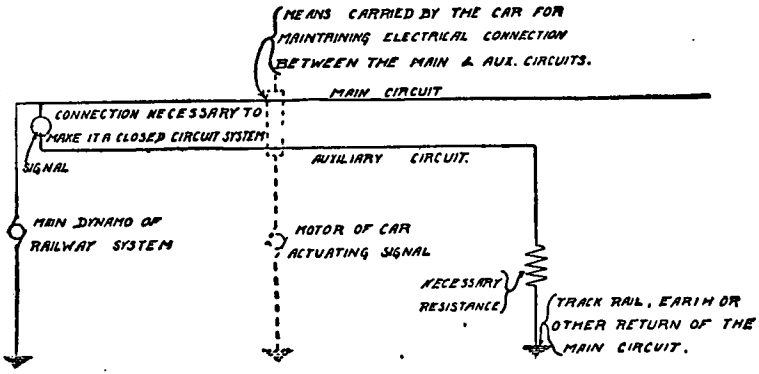
The defendant corporation, through its engineers, however, added to the idea of a test current of this nature the continuing contact current described by Jordan in his patent. They supplied an increased current to the auxiliary or signal wire by so locating the signal wire as to bring the shoe of the trolley car into an electrical connection with the signal wire at a point immediately in front of the signal connection through which the weak auxiliary current had previously been passing. This shoe acted as a shunting device and supplied an easier path to the current which passed through the auxiliary circuit or signal wire, until the shoe should leave or become out of contact with that signal wire at its further terminus. So long as this contact was maintained, the weak current, which had previously been sufficient to maintain the signal in place, would be absent, the signal would cease to be operated, and (in the form used by the defendant company) the magnet holding an arm with a colored disk would release that arm, whereupon the signal, from its own weight, would fall into a position plainly designating danger. The presence of artificial resistance at some point in the auxiliary circuit adds to the efficiency of the operation of this auxiliary current, and the device has proven a useful, convenient, and economical plan of protecting the track at the point in question from the presence of two trains in dangerous proximity.

As has been said, there is and can be no difference in principle between the application of the patent or of the defendant's method to a third rail rather than to a trolley wire, and aside from the fact that the patent calls for an open circuit, before contact is formed by the car, while the system of the defendant makes use of a closed circuit at all times, the greatest difference lies in the location of the signal. In the Jordan patent the signal is to be located at a point in the auxiliary circuit between the point of contact and the return conductor. In the defendants' system the signal is placed between the main conductor and the point of contact. The reason for this is apparent from the preceding explanation of the use made of the various currents. But the two questions, of location of the signal, and method of operating the signal, are necessarily involved with each other in considering whether the defendants' mode of construction is an infringement of the patent in question.

The following diagrams simply and plainly show the arrangement and operation of these two systems, and the claim of infringement



COMPLAINANT'S SYSTEM.



DEFENDANT'S SYSTEM

is based upon the fact that the defendant has made use of an auxiliary circuit, which is brought into electrical contact, for a certain time, with the main feed wire of the trolley system, in a similar way to that in which the auxiliary circuit is electrified in the Jordan patent.

It is claimed on behalf of the complainant that the Jordan patent was novel, and completely protected for Jordan's benefit, during the period of its existence, any use of an auxiliary electric circuit located in the manner described by him, and intended or used to operate a signal, i. e., lamp or disk or sound, by means of the current carried to the auxiliary circuit by the automatic contact. The complainant seems to maintain that no difference can be discovered between setting and keeping a signal in operation by an electric current transmitted through the auxiliary circuit and the operation of releasing a signal by removing the supply of an electric current to the signal, through providing an easier path for the electrification of the auxiliary

circuit. It is true that the maintenance of the auxiliary circuit, its method of construction and location, and the means of supplying the current to it, are similar in the complainant's patent and in the defendants' structure. It is also true that the operation of both the patent and the structure causes the sending of a current through the auxiliary circuit while the car is moving over a certain portion of the track; and if these last two functions comprise the scope of the complainant's patent, and if the methods and construction described by him therefor were new in the art and not anticipated by earlier patents, there would seem to be a plain infringement, and the validity of his patent should not be questioned.

As has been said before, the doctrine of equivalents does not seem to be disputed so far as these parts of the invention claimed are concerned, nor does the question of mere mechanical execution enter into the present question. But the complainant's patent adds to the two matters specified the actual operation of a signal, and an examination must be made of the prior art and previous patents in order to see whether the patent in suit is valid, in its claim of invention of a method of operating a signal, and the construction of the apparatus therefor, and at the same time whether (if the electrical operation of a signal be old) the patent can be held valid for the method of construction and supplying of an auxiliary signal current alone; in other words, the giving of a signal by the use of an auxiliary current supplied in the manner described, without reference to the patentability of the method of construction of this auxiliary circuit itself.

Claims 9, 10, and 11 of the patent, as issued, would appear to protect the combination of a trolley wire, with a comparatively short secondary wire, capable of use for signal purposes, and so placed as to be thrown into electrical connection with the trolley wire by the trolley wheel or appliance of the car. The language alone used in these claims would seem to cover a method of construction not necessarily confined to the devices or combinations referred to in the first 8 claims of the patent. But the history of the patent in suit, and the testimony offered in the case, show that the words "substantially as described" in these claims do in fact limit them to the uses and devices described in the earlier claims numbered 1 to 8.

An examination of the file wrapper in evidence and other testimony in the case shows that certain patents, especially that to Leonard, No. 405,896, Loomis, No. 479,138, and Cheney, No. 468,787, were considered, and some of Jordan's original claims rejected upon the ground of these patents.

The Leonard patent was for an electric light, and covered the combination of a series of short wires and a series of long wires, a generator on a moving steam car, a conductor leading from the generator to the wires, and a series of lamps, etc; the idea being that currents should be transmitted from the generator carried by a train to the lamps along a short wire, for the purpose of lighting a particular section of the track. The movement of the train brought the conductor in contact with the short wire, and thus supplied current to the lamps in the circuit thus made, and supplied that current until the conductor moved beyond that particular circuit.

The Loomis and the Cheney patents relate to a device for closing a signal circuit by the passing of a trolley car, and the opening of that circuit when the car reaches a point at the end of the section to be protected; in the Loomis patent this being done by a trigger, through the movement of which the circuit is closed and again opened at the other extreme, while in the Cheney patent the signal circuit would be closed and opened through the movement of a disk, fixed in contact with the trolley wire, in such position as to be forced upward by the trolley wheel.

The Patent Office caused the withdrawal of the claims of the Jordan application, which provided simply for:

"The combination of a trolley wire, one or more signal trolley wires supported adjacent thereto and parallel therewith, but normally insulated therefrom and adapted to be electrically connected, and held connected with the first-mentioned wire by a trolley passing the same, and signal lamps," etc.

It would thus appear that in the first eight claims of the patent as allowed, and in claims 9, 10, and 11, the Jordan patent as allowed could not have covered the mere combination in juxtaposition of a trolley wire and a signal wire with insulation between the two, with some device for causing a current to pass through the signal wire by a conductor set in motion or in electrical contact when the car passes a certain point, and breaking this connection when another point was reached. But the Jordan patent did cover, and was intended to cover, the arrangement of wires in that form, or substantially that form, together with a device or plan for connecting the trolley wire and the signal wire in electrical contact, and for maintaining that contact, and sending a continuous signal current through a device carried by and moving with the car, and thus operating the signal during such contact.

This patent to Jordan was primarily a method of transmitting a signal to some other point along a trolley track, and everything in the patent indicates that Jordan had in mind the necessity of warning persons crossing the track, or in the neighborhood of the track, of the presence of the car which set in motion the signal, rather than the protection of that car, or the reservation of that portion of the track for the use of that car, such as is accomplished by the operation of a block system under any method of signaling. The defendants, on the elevated structure, do not need to set a signal against persons crossing the track, but they do need to keep cars from approaching too near one another, in certain localities, and the defendants' device is therefore used purely for the purpose of a block system.

It is evident that Jordan's device could have been used to set a light near the railroad track for a warning to a car upon the track, instead of a warning to people approaching the crossing. It is also evident that the defendants' block signal could be used at a crossing, and so arranged as to give a signal, or even, by other attachments, ring a bell, when the circuit is closed by the presence of a car. But the question we have to deal with here is whether the defendants are infringing; that is, making use of the ideas and devices actually set forth in the words of the Jordan patent or plainly to be inferred as

within the scope of the language used, or, by the doctrine of equivalents, to be the same principles, but in another form, through changes that are mechanical rather than inventive.

In this aspect of the case, the fact that Jordan's device could be used for the purpose of a block signal is of importance in considering whether Jordan had in mind or provided for the giving of a signal in any other way than by sending a current through the signal itself. We must also determine whether the construction of the main and auxiliary circuits, as in the Jordan patent, was anticipated by patents intended to furnish block signals or signals to preceding and following trains.

Before discussing this question any further, the scope of some of the other patents relied upon as anticipating must be noted.

The Jenkin & Elliott English patent of 1884, No. 8,460, shows a trolley wire or main circuit with an auxiliary circuit and contact caused by a shoe or other sliding contrivance moving with the car. The auxiliary circuit is not grounded, except as it passes through the motor of the car behind, and it there operates a magnet breaking the electrical circuit to the motor of that car. This was not primarily a signaling circuit, except in so far as the breaking of the circuit might be considered a signal, or as examination of the armature might indicate, but the device was intended to be a mechanical circuit-breaker, to prevent collisions. It is doubtful, according to the testimony in this case, whether the Jenkin & Elliott device could be used for the purposes of the defendants' system. Not only did there have to be an insulated return for the entire distance for the signal current, but the breaking of the current would not give information as to the reason therefor. The motorman would not be warned, but would be hindered from proceeding.

The Wicks patents, No. 350,790, of October 12, 1886, and No. 362,409, of May 3, 1887, show a device for maintaining a main and auxiliary circuit, and the passing of a continuous current while the device is in operation, for the purpose of sounding a bell in a locomotive cab, or upon a car, when the signal circuit was closed by the presence of two locomotives or cars within the same section of the signal circuit, the main circuit in the Wicks patent not being intended for the transmission of power to the train, but only of current to the signal.

The Woods patent, No. 385,034, June 26, 1888, shows the presence of an auxiliary circuit, in connection with a main power conductor, but without connection with the ground, and apparently inoperative so far as use like that intended by either Jordan or the defendants is concerned.

The Bentley patent, No. 430,263, of June 17, 1890, shows a device for an electric signal operated by the current which propels the electric motors of the car, and which is transmitted to the signal by a circuit closer, the circuit thus closed remaining until a reverse current is set by the operation of another device, to break the first circuit.

The other patents, Loomis, Leonard, and Cheney, which make use of devices for momentary contact with the moving trolley car, have been spoken of before, and their examination leads to the conclusion that Jordan could not have claimed as original nor patentable the

mere idea of maintaining a signal wire in proximity to the main current wire, nor the idea of sending, by some contact device moving with the car, a current (momentary or constant) through a wire circuit.

Jordan's patent must be confined to the combination of the moving contact over both the main power and the auxiliary signal circuits, and the continuous sending of a current to a signal, from which the ground or other return wire will carry away the current at a sufficiently low potential to make the device operative.

To this extent the Jordan patent would seem to be valid, and the idea contained in the Jordan patent was in that respect novel and patentable.

An examination of the defendants' device, however, does not show the use of Mr. Jordan's idea, nor any infringement of his patent. The defendants' system of signaling must be divided into two parts. By means of the first part a continuous current, through the aid of artificial resistance, is derived from the main power wire through a signal, which is ordinarily set at safety. Any interference with this circuit releases the signal so that it is set at danger. Up to this point there is no similarity to Jordan's ideas. The defendants' system then makes use of the old idea of a sliding contact, as shown in the English Jenkin & Elliott patent, and in the American Leonard and Wicks patents, in order to provide an easier path or a shunting of the current to the auxiliary wire, by which the signal shall be deprived of the current which ordinarily passes through and actuates the magnet holding the signal disk at safety. No attempt is made to send a signal anywhere through or by means of the auxiliary circuit, but the signal is given by changing the position of the device which is to be read as a signal, by depriving it of current, and the Jordan patent neither in terms nor by any proper inference anticipated or planned such a result. In this respect the effect of the defendants' device is more like the action of the English patent than it is like that of Jordan, and the conclusion must be reached that the defendants are not infringing any of the claims of the Jordan patent, in so far as those claims cover a combination of ideas patentable at the time of the issuance of that patent.

The defendant Winter is shown to be merely an officer of the defendant corporation, and to be responsible for the use of the defendant's device only as such an officer, and as to him, apart from his office, no injunction could issue, since no use of the device is shown to have been made by him as an individual. But inasmuch as the defendant corporation does not seem to infringe, his position in the case is no different from that of the defendant corporation, and the complainant's bill must be dismissed as to both defendants.

LEWIS v. MESTA MACH. CO.

(Circuit Court, W. D. Pennsylvania. April 7, 1908.)†

No. 5.

PATENTS (§ 328*)—INFRINGEEMNT—MOLD FOR CASTING ROLLS.

The Lewis patent, No. 574,616, for a mold for casting rolls, designed to hold the roll at equal distance from the inner wall of the chill mold while cooling, and thus secure a uniform depth of chill, construed, and *held* not infringed.

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

In Equity. On final hearing.

Christy & Christy and Bayard H. Christy, for complainant.
Bakewell & Byrnes, for defendant.

BUFFINGTON, Circuit Judge. This bill, filed by John L. Lewis against the Mesta Machine Company, charges infringement of all the claims of patent No. 574,616, granted to him January 5, 1897, for a mold for casting rolls. Rolls consist of three parts: The outer ends, called "wobblers," serve to couple them to the motive power; then come the necks, on which the rolls are journaled; and next the actual rolling surface. Rolls are cast in a vertical position, and to meet the wear and tear of service it is necessary during the process of casting to chill or harden the rolling surface. It is also highly desirable, in order to meet stress and strain, contraction and expansion, to secure a chill of relatively uniform depth. As it is not necessary to chill or harden the wobbler and neck sections, they are cast in sand, contained in a cope at the upper end of the mold and in a drag at the lower. The intermediate portion of the mold is a cylindrical metal matrix, and in this the chilled, rolling surface is cast. The molten metal is poured in a lateral standpipe, the head of which is higher than the mold. The metal enters the drag from the side, and rises through drag, chill-mold, and cope until all are filled. As the rising metal comes in contact with the central or metal part of the mold, called the "chill-mold," it chills or hardens, thus forming an external, cylindrical shell. This shell is filled with mobile, molten metal. The chilling of the shell causes its horizontal contraction and its withdrawal from the supporting surface of the chill-mold. At the same time a vertical contraction of the shell takes place. By one of such two agencies the shell, filled with the mobile, molten metal, is sometimes tilted, and the sag of the molten metal may crack the shell or lead to uneven depths of chill. These dangers were thus described by Lewis in his specification:

"As is well known among roll manufacturers, it is nearly impossible to obtain at all times a uniform depth of chill at all points on the roll surface. It is also well known that almost as soon as the fluid metal comes into contact with the inner wall of the chill the metal is solidified, forming a thin shell, while the metal within the shell remains liquid for a considerable time. The contraction which occurs on the formation of the thin shell of chilled iron draws the latter out of immediate contact with the mold chill, so that

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

† Received for publication April 15, 1909.

such shell is subjected to considerable internal pressure, due to the liquid column of metal, while nearly or entirely unsupported externally. This internal pressure against the unsupported shell frequently produces longitudinal cracks in the roll, rendering the latter useless, except for scrap. The object of the present invention is to provide for the maintenance of the cooling and solidifying metal in such position within the mold that all points on the surface of the roll shall be equidistant from the internal wall of the chill of the mold, or that the solidifying metal shall be held in such relation to the chill of the mold that an approximately uniform depth of chill may be obtained at all points. It is a further object of the invention to provide a series of circumferential supports for the solidifying metal until such time as it is relieved from the internal pressure of the liquid column, or, in other words, until such time as the chilled shell shall have become strong enough by cooling to resist the fluid pressure within. * * * I have found that when a mold of the character or construction above described is filled with metal, and the latter begins to contract during cooling and solidification, the roll will frequently take an inclined position; that is, it will lean aganst the chill of the mold on one side, and consequently will be separated from it at other points. Whenever the roll remains in contact with the chill of the mold by reason of the bending or inclination of the roll body, the depth of chill may be considerable, while at those points which are not in contact the depth of chill will be less; such shallowness of chill being proportioned to the distance between the surface of the roll and the internal wall of the chill. It frequently occurs that the roll, in cooling and contracting, will change its position one or more times. Hence there will be one or more points having a considerable depth of chill and a corresponding number of points having lesser depth of chill."

To overcome such difficulties Lewis cut annular channels or grooves, downwardly beveled, in the theretofore substantially plane surface of a chill-mold. As the outer shell contracted horizontally and shrank away from the mold wall, and contracted vertically as well, it slid down the beveled side of the annular groove and so maintained contact with, and support from, the mold wall; or to describe the process in the patentee's words:

"This centralization of the roll may be effected in different ways, as, for example, the chill of the mold may be so constructed as to be provided with a series of downwardly beveled or inclined shoulders, which will bear upon correspondingly inclined shoulders formed on the roll during casting. During cooling and solidification the roll contracts longitudinally and diametrically, and as the longitudinal contraction will necessarily produce a sinking or downward movement of the roll in the chill of the mold the inclined shoulders on the roll and chill of the mold will bear upon each other and hold the roll centrally within the chill of the mold."

Both in illustration by figures and by description in specification Lewis made his invention consist of annular grooves or annular zones of indentations, cut or notched in the plain surface of a chilled mold. Moreover, these notched bands or grooves he contrasts with the other or unindented portions of the chill-mold, which latter parts of the mold he describes in the claim as a "substantially smooth inner surface." This localizing of his supporting bands he carried into the claims by describing his chill-mold as consisting of two parts, viz.: One where his bands or grooves were located; the other, which remained a substantially smooth surface, such as was found in an ordinary chill-mold. In other words, his claim consisted, inter alia, of a chill-mold made up of two parts, viz.:

(1) "A substantially smooth inner surface;" (2) "and supports for the casting constructed and arranged to bear on the surface of the casting during cooling."

How these supports are "constructed and arranged," and that they constitute a part only of the chill-mold wall, are pointed out by the patentee, where in his specification he says:

"It will be readily understood by those skilled in the art that the recessing, notching, or cutting away of portions of the wall of the chill of the mold will result in the production of shoulders or projections on the roll; such shoulders or projections having bevels or inclines corresponding to similar bevels or inclines in the recesses, grooves, or cavities in the chill of the mold."

We are the more strongly impelled to hold these localized bands or grooves marked the scope of Lewis' invention and the limitations of his claims when we study the roll-molding art. Prior to Lewis' invention the practice was common in machining the inner surface of chill-molds to make a substantial spiral rough-cut. These rough-cuts served to better hold the paint with which such molds are coated before casting, and gave a rough, spirally grooved surface to the roll, which better adapted it for machining. This practice was, of course, known to Lewis; but the fact, which has since been learned, was not then known that by making these spiral rough-cuts of proper depth practically the entire chill-mold surface can be made to aid in centering rolls. But this Lewis did not disclose or contribute to the art, nor are his claims broad enough to cover it. On the contrary, his method localized single, annular bands or zones, and his claims only covered the practice of cutting or notching the particular and local annular sections of the chill-mold, which alone he had found efficacious. The subsequent discovery that the old-time rough-cuts of the remainder of the "substantially smooth inner surface" of the chill-mold, which he did not utilize, could be utilized as a roll support by simply deepening the grooves, he neither discovered nor disclosed. To give him a monopoly for that which he did not contribute to the art would be unjust and at variance with the purpose of the patent system. Thus construed, his claims are not infringed. The respondent company does not groove annular, localized bands, but whatever grooving they have done consists in more deeply cutting the spiral rough-cuts of the old practice which covered the entire inner surface of the chill-mold.

A decree may be drawn dismissing the bill.

NEIDICH v. EDWARDS.

(Circuit Court, E. D. Pennsylvania. April 2, 1909.)

No. 181.

1. PATENTS (§ 310*)—SUITS FOR INFRINGEMENT—DEMURRER TO BILL.

A patent will not be held invalid, on demurrer to a bill for its infringement, unless the court is entirely satisfied from its face that by no possible proof can patentable invention and validity be made to appear.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 536, 538; Dec. Dig. § 310.*]

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

2. PATENTS (§ 328*) — VALIDITY — METHOD OF ASSIMILATING PRINTED AND TYPEWRITTEN WORK.

The Neidich patent, No. 640,013, for a method of assimilating printed and typewritten work, *held* not void on its face.

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

In Equity. On demurrer to bill.

Howson & Howson, for complainant.

Robert M. Barr, for defendant.

HOLLAND, District Judge. This is a suit on a patent for a process of making imitation typewritten letters, wherein the body of the letter is printed on a printing press and the address on a typewriter. The patent in suit is No. 640,013, granted December 26, 1899, to Samuel A. Neidich, and bears the title of "Method of Assimilating Printed and Typewritten Work." The defendant has filed a demurrer to the bill, averring that the patent set forth therein is absolutely void on its face, for the reasons: (1) That it is not for a patentable invention, but simply an obvious adaptation of what, years before the date of the application, was common printing practice, within the judicial knowledge of the court; (2) because there is a fatal variance between the process set out in the claims; and (3) because it is simply a mechanical operation, the function of mechanism.

We are very forcibly reminded of the importance of observing the rule that a patent is not to be held bad on demurrer unless the court is entirely satisfied, from the face of the patent, that by no possible proof can patentable invention and validity be made to appear, by the fact that in this district, in the case of Hogan v. Westmoreland Specialty Co. et al., 154 Fed. 66, 83 C. C. A. 178, in which the Circuit Court of Appeals of this circuit reversed the decree of the Circuit Court on demurrer (145 Fed. 199), which decree found the patent for a salt dredge, having a celluloid cap, bad on its face for want of patentability, and when this case came on to final hearing upon answer and proofs the patent was held valid by the Circuit Court (163 Fed. 289), and this decree has recently been affirmed by the Circuit Court of Appeals (167 Fed. 327). The history of that case shows how necessary it is to act with the greatest caution in the disposition of a demurrer to a bill filed for infringement of a patent. Yet, where it plainly appears that by no possibility can proof be produced to show the patentability of the invention, the court will sustain the demurrer. A demurrer based on the same ground, lack of patentable invention appearing on the face of the patent, in a suit brought upon this same patent, was overruled in the Circuit Court of the United States, by Judge Coxe, in the Southern district of New York, in Neidich v. Fosbenner et al., 108 Fed. 266. In overruling the demurrer Judge Coxe said:

"The defendants demurred on the ground that the patent on its face is void for want of patentable novelty. Unless the court is satisfied that by no possibility can the complainant succeed, the suit should not be dismissed in this summary manner. It is true that upon the face of the patent there is plausibility in the argument that the method covered by the claims involved

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

only simple changes in the printer's art, within the knowledge of every skilled workman; but it is also true that the complainant may be able to produce testimony which will convince the court that invention was involved. That this may be done is enough. The demurrer must be overruled upon the following authorities: New York Belting & Packing Co. v. New Jersey Car Spring & Rubber Co., 137 U. S. 445, 11 Sup. Ct. 193, 34 L. Ed. 741; Ballou v. Edward A. Potter & Co. (C. C.) 88 Fed. 786; Electric Vehicle Co. v. Winton Motor Carriage Co. (C. C.) 104 Fed. 814; Industries Co. v. Grace (C. C.) 52 Fed. 124; Beer v. Walbridge, 40 C. C. A. 496, 100 Fed. 465; American Fibre Chamois Co. v. Buckskin Fibre Co., 18 C. C. A. 662, 72 Fed. 508; Bottle Seal Co. v. De La Vergne Bottle & Seal Co. (C. C.) 47 Fed. 59; Krick v. Jansen (C. C.) 52 Fed. 823; Lalance & Grosjean Mfg. Co. v. Mosheim (C. C.) 48 Fed. 452; Lyons v. Drucker, 106 Fed. 416, 45 C. C. A. 368."

It is, however, now urged that the patentability of the invention is attacked for different reasons than those urged before Judge Coxe; but this contention can only be sustained by bringing into the consideration of the question matters dehors the record, and in a demurrer this will not be permitted.

The demurrer is overruled, with leave to answer.

BRYANT ELECTRIC CO. v. MARSHALL.

(Circuit Court, D. Massachusetts. March 24, 1909.)

No. 537.

1. JUDGMENT (§ 713*)—SUIT FOR INFRINGEMENT—OPERATION AND EFFECT OF DECISION.

Where a patent of several claims is made the basis of a bill in equity to restrain its infringement, and the bill makes no discrimination between the claims and is dismissed generally on the merits, the complainant may not thereafter by another bill seek to restrain the same defendant from doing the acts complained of in the first suit merely by alleging in his later bill an infringement of certain claims not pressed in the argument of the first suit nor mentioned in the opinion of the court.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1234–1241; Dec. Dig. § 713.*

Operation and effect of decision in equitable suit for infringement of patent, see note to Westinghouse Electric & Mfg. Co. v. Stanley Instrument Co., 68 C. C. A. 541.]

2. JUDGMENT (§ 675*)—CONCLUSIVENESS OF ADJUDICATION—PERSONS BOUND.

Where, in a suit for infringement of a patent against a customer, it was stipulated on the record that the manufacturer of the alleged infringing article was defending the suit, such manufacturer was a party in such sense that the decree was binding as between it and the complainant.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1190–1194; Dec. Dig. § 675.*]

In Equity. On demurrer to bill and motion for preliminary injunction.

Howson & Howson and Hubert Howson, for complainant.

Whipple, Sears & Ogden, for defendant.

LOWELL, Circuit Judge. Marshall, the defendant in the suit now before the court, brought a bill in equity, hereinafter called the "first

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

suit," against the Pettingell-Andrews Company, to restrain the infringement of letters patent No. 784,695. This bill alleged that the defendant, "in infringement of said letters patent and the claims thereof, * * * infringed said letters patent," and sold large quantities of articles embodying the patented invention. The Pettingell-Andrews Company answered denying the validity of the patent and its infringement. A replication was duly filed, and evidence was taken. At the beginning of his examination, the complainant's expert was asked if he had read the above-mentioned patent, "and particularly claims 5 and 9 thereof." A general examination of the record shows that the complainant's case was limited in effect to claims 5 and 9. The learned judge sitting in the Circuit Court began his opinion by stating that claims 5 and 9 were in suit. His opinion was confined to a consideration of these claims. He said, "I find that both claims are void in view of the prior art," and thereupon the bill was dismissed. 153 Fed. 579. The complainant thereupon appealed to the Circuit Court of Appeals. In delivering the opinion of the Circuit Court of Appeals, 164 Fed. 862, Judge Colt said:

"The present bill is brought for infringement of claims 5 and 9 of the Marshall patent. * * * The complainant in the present suit has seen fit to rely upon claims 5 and 9 of the Marshall patent, and the only question before us is whether these claims are void for want of invention. * * * We now come to the claims of the patent, and we will first consider some of the claims which are not in issue." Reference was made to claims 1, 2, 3, 4, and 6. "We now come to the consideration of the two claims in issue. * * This case is limited to the consideration of the validity of claims 5 and 9 of the Marshall patent, and for the reasons given we must hold that these broad claims are void for want of invention in view of the prior art. Other claims of the patent are not before us, and we therefore express no opinion as to their validity."

The decree of the Circuit Court dismissing the bill was affirmed.

Thereafter Marshall brought a bill in equity in this court against the Western Electric Company, hereinafter called the "second suit." This bill, as now amended, alleged that Marshall—

"through a mistake, and without willful default or intent to defraud or mislead the public, included in his specifications (of the above-mentioned letters patent) two claims, to wit, claims 5 and 9, which have been subsequently held by the United States Circuit Court of Appeals for the First circuit in a suit between said Marshall and the Pettingell-Andrews Company to be invalid, and this suit is now prosecuted for the infringement of the other parts of said letters patent, and the claims thereof excluded claims 5 and 9."

The rest of the bill, in the usual form, alleged infringement of the patent, "excluding claims 5 and 9." Thereafter the complainant filed the bill in equity now before the court, hereinafter called the "third suit," to enjoin Marshall from proceeding with the second suit. The bill in the third suit alleged the facts above stated, and, in addition, that the Bryant Electric Company was the manufacturer of the articles alleged to infringe in the first and second suits; that it took full and exclusive charge of the defense of both the first and the second suits; that the articles alleged to infringe in the two suits were similar; that Marshall by his proceedings sought to harass the complainant in the third suit by bringing suits successively against

its customers; that these suits injured the complainant's business, wherefore, inasmuch as this court had already decided that no infringement existed, the complainant prayed that Marshall might be restrained by injunction from proceeding with the second suit, and from bringing like suits against the complainant's other customers.

To this bill the defendant demurred upon the following grounds: (1) That in the first suit the court passed only upon claims 5 and 9 of the patent, while in the second suit those claims were excluded, and only the other claims of the patent were relied upon. Hence the invalidity of the Marshall patent generally was not res judicata. (2) Because the complainant was not a party to the first suit. The case was heard by this court upon the demurrer, and upon the complainant's motion for an injunction pendente lite.

In Kessler v. Eldred, 206 U. S. 285, 27 Sup. Ct. 611, 51 L. Ed. 1065, a case of first impression, and chiefly relied upon by the complainant, the Supreme Court held that a defendant who had established the defense of invalidity in a suit for the infringement of a patent was entitled to an injunction protecting his customers from suits brought by the same complainant to restrain like alleged infringements of the same patent. To establish its right to the relief sought in the third suit, the complainant Bryant Company must therefore show, first, that the decree in the first suit barred other proceedings between the parties to restrain similar alleged infringements of the claims of the Marshall patent other than claims 5 and 9; second, that the Bryant Company was in legal effect a party to the first suit. If the complainant shall establish these two points, the defendant does not dispute that the case at bar is brought within the decision in Kessler v. Eldred.

1. The language both of the Circuit Court and of the Circuit Court of Appeals in the first suit shows plainly that those courts considered no claim of the Marshall patent other than claims 5 and 9. Neither of those courts intended to pass expressly or by implication upon the general validity of any of the other claims. These other claims were expressly omitted from the consideration of the higher court. But the complainant contends that the decree in the first suit, although the opinion therein was limited to claims 5 and 9, effectually barred proceedings between the same parties to restrain similar infringements of other claims of the Marshall patent, whether those claims be deemed generally valid or invalid as between other parties. The complainant's contention comes to this: that a patentee may bring but one suit against one party for one infringement of one patent, although that patent has many claims. The defendant, on the other hand, contends that a patentee may bring against a given defendant suits for the same infringement of a patent as many as the patent has claims. The question thus presented is of great interest, and, strange to say, appears to be of first impression. May a patentee so subdivide his patent as to bring separate suits upon its several claims for the same alleged infringement against the same person, or, in the case of one patent, one defendant, and one infringement, is he limited to one suit?

The history of American patent law, as concerned with the joinder of several claims in one patent, is set out in Suddard v. American Motor Co. (C. C.) 163 Fed. 852. In that case this Court said:

"In the old practice the patentee brought suit on his patent. Now he brings suit on certain claims of his patent. With the rest of them he does not concern himself: * * * For many purposes, however, courts have come to treat the several claims in one patent as if they were separate patents."

And in Celluloid Mfg. Co. v. Zylonite, etc., Co. (C. C.) 27 Fed. 291, 294, it was said:

"Each claim of a patent covers a complete invention, and is, in substance, an independent patent."

And in United Nickel Co. v. California Electrical Works (C. C.) 25 Fed. 475, 479, it was said:

"Each claim is, in effect, a separate and distinct patent; and the right to use one patent does not carry with it the right to use the others without a further license."[1]

But the language above quoted was not meant to apply to a multiplicity of suits on the same patent against the same person for the same alleged infringement. The court is not here required to decide that a patentee may not by appropriate pleadings split up his patent so as to harass a competitor by many suits in the case supposed. Unreasonable as this practice appears, this court has no present need to decide against it. In the first case, the pleadings covered the whole patent, and did not discriminate between its claims. The selection of claims 5 and 9 was informal, and served merely to direct the attention of this court, and of the Circuit Court of Appeals, to the gist of the complainant's argument. The failure to press a point in argument does not invalidate a judgment rendered upon a matter not pressed, although the concession made at the argument be later supposed to have been ill advised.

In order to decide the case at bar, this court is not required to hold that the claims of the Marshall patent other than 5 and 9 are invalid quoad infringements unlike those litigated in the first suit. The fact that this court here holds that a decree against a complainant, without discrimination between claims, establishes that no claim has been infringed by the act complained of, does not logically require this court to hold that a decree for a complainant, without discrimination between claims, establishes the infringement of all of them. This court here decides only that, where a patent of several claims is made the basis of a bill in equity to restrain its infringement, where the bill makes no discrimination between the claims and is dismissed generally upon the merits, then the complainant may not thereafter, by another bill, seek to restrain the same defendant from doing the acts complained of in the first suit, merely by alleging in his later bill an infringement of certain claims not pressed in the argument of the first suit nor mentioned in the opinion of the court. In the case

[1] See, also, Leeds & Catlin v. Victor Talking Mach. Co., 213 U. S. 305, 319, 29 Sup. Ct. 495, 53 L. Ed. ——, decided since Bryant Electric Co. v. Marshall.

at bar this ruling is sufficient to sustain the complainant's contention. As between the parties to the first suit, the question which Marshall sought to raise in the second suit was res judicata. In Penfield v. Potts Co., 126 Fed. 475, 478, 61 C. C. A. 371, 374, the "precise device alleged to be an infringement" was not the same.

2. Was the Bryant Company a party to the first suit? It was a manufacturer which undertook the defense of a suit for infringement brought against one of its customers. Without opposition, the following entry was made in that suit:

"It is further stipulated and agreed, for the purposes of this suit, that the Bryant Electric Company is defending this suit."

These facts bring the case at bar within Washington Gaslight Co. v. District of Columbia, 161 U. S. 316, 329, 16 Sup. Ct. 564, 40 L. Ed. 712; Robbins v. Chicago City, 4 Wall. 657, 18 L. Ed. 427; Miller v. Tobacco Co. (C. C.) 7 Fed. 91; Eagle Mfg. Co. v. Miller (C. C.) 41 Fed. 351, 357; David Bradley Co. v. Eagle Co., 57 Fed. 980, 6 C. C. A. 661; Sacks v. Kupferle (C. C.) 127 Fed. 569; D'Arcy v. Staples & H. Co., 161 Fed. 733, 737, 88 C. C. A. 606.

Hence it follows that, in the first and third suits, the issue and the parties were the same. Therefore Kessler v. Eldred applies. Demurrer to be overruled. Motion for injunction granted.

SMITH v. MOSIER et al.

(Circuit Court, N. D. New York. March 23, 1909.)

1. UNITED STATES (§ 67*)—BONDS OF CONTRACTORS FOR PUBLIC WORK—EXTENT OF LIABILITY.

A bond executed by a contractor for government work, conditioned as required by Act Aug. 13, 1894, c. 280, 28 Stat. 278 (U. S. Comp. St. 1901, p. 2523), that the contractor "shall promptly make payments to all persons supplying him labor and materials in the prosecution of the work," secures payment for labor or materials furnished to a subcontractor and which went into the work, as well as to the principal contractor direct, and in an action thereon based on such a claim it is not a defense that the principal contractor has paid the subcontractor in full.

[Ed. Note.—For other cases, see United States, Dec. Dig. § 67.*]

2. INTERPLEADER (§ 8*)—NATURE AND SCOPE OF REMEDY.

The purpose of an action of interpleader is to permit a party who holds a fund or property, or who owes a debt to which two or more persons make claim, to have it determined between them to which it belongs. It is essential to the maintenance of the action that there be a specific fund or property or debt owing, and that the plaintiff does not dispute his liability to some one therefor; and the action will not lie where the establishment of plaintiff's liability to one claimant will not necessarily defeat his liability to the other, or where there is a controversy between the plaintiff and a defendant as to the amount due.

[Ed. Note.—For other cases, see Interpleader, Cent. Dig. §§ 8, 9, 11; Dec. Dig. § 8.*

For other definitions, see Words and Phrases, vol. 1, pp. 788–790.]

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

8. JUDGMENT (§ 570*)—CAUSES OF ACTION BARRED—SUIT OF INTERPLEADER.
Where a suit of interpleader was dismissed on the ground that plaintiff could not maintain it, the judgment cannot constitute an adjudication of a claim made by a defendant against the plaintiff which will bar a subsequent action thereon, such an issue being immaterial in the suit.
[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1028–1040; Dec. Dig. § 570.*]

4. JUDGMENT (§ 828*)—EFFECT OF JUDGMENT OF STATE COURT IN FEDERAL COURT.
A judgment rendered in a state court is to be given the same force and effect as a bar or an estoppel in a federal court as is given to it in the courts where rendered.
[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 828.*
Conclusiveness as between federal and state courts, see notes to Kansas City, Ft. S. & M. R. Co. v. Morgan, 21 C. C. A. 478; Union & Planters' Bank of Memphis v. City of Memphis, 49 C. C. A. 468.]

5. JUDGMENT (§ 949*)—JUDGMENT AS BAR—PLEADING AND PROOF.
It is incumbent on a defendant setting up a prior judgment as a bar to an action to allege and prove that the particular point or question as to which he claims the estoppel was necessarily in issue and necessarily decided in such prior action.
[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1799; Dec. Dig. § 949.*]

At Law.

Action to recover, in behalf of F. Lewis Smith, the sum of $642.08, with interest from August 1, 1905, under a statute of the United States providing for the giving of a bond by contractors with the United States for the performance of work, etc., containing a provision that the obligors shall and will in all respects duly and fully observe and perform all the covenants, etc., of the contract, and that the obligors will promptly make full payment to all persons supplying them labor or materials in the prosecution of the work provided for in said contract.

F. T. Cahill, for plaintiff.
Thayer, Tuttle & White, for defendants Mosier and another.
Miller & Fincke, for Empire State Surety Co.

RAY, District Judge. On or about the 16th day of November, 1903, Mosier & Summers, a copartnership, entered into a contract with the United States for the construction of 16 brick buildings at Ft. Ontario, in the state of New York, at a price agreed upon—$223,795.87.

Under and pursuant to the statute in such cases made and provided, said Mosier & Summers as principals, and the Empire State Surety Company as surety, on or about the 21st day of November, 1903, duly executed and delivered their bond reciting the contract, and which bond was conditioned in substance and effect that Mosier & Summers "shall and will, in all respects, duly and fully observe and perform all and singular the covenants, conditions, and agreements in and by the said contract agreed and covenanted by said Mosier & Summers to be observed and performed according to the true intent and meaning of the said contract, and as well during any period of extension of said contract that may be granted on the part of the United States as during the original term of the same, and shall promptly make full payments to all persons supplying them labor or materials in the prose-

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

cution of the work provided for in said contract," and in case the said Mosier & Summers complied with and performed the conditions, then the obligation of the said bond was to be void and of no effect; otherwise to remain in full force and virtue.

The time for the performance of the contract was twice extended, and such extensions were agreed to by the surety company. One Max L. Kurchhoff made an oral contract with Mosier & Summers to do the painting of the buildings mentioned and described in the said contract between Mosier & Summers and the United States, and to furnish the paint and materials for painting the said buildings, for which he was to receive from Mosier & Summers the sum of $5,435. Kurchhoff performed the agreement on his part, and supplied materials and did the painting of said buildings. F. Lewis Smith, for whose benefit this suit is brought, furnished the said Kurchhoff with certain paints, oils, and other materials which were used in doing such painting, at Kurchhoff's request, and upon his promise to pay therefor. There is a balance due Smith from Kurchhoff amounting to the sum of $642.08, with interest thereon from August 1, 1905, for such paints, oils, and materials. No part of same has been paid to Smith by any person. In due course the said Charles Mosier and William Summers paid to said Max L. Kurchhoff the full amount which they agreed to pay Kurchhoff for painting said buildings and supplying the paints and other materials for doing the work.

This action is brought upon the theory that F. Lewis Smith supplied Mosier & Summers with paints and materials which were used by them in performing their said contract with the United States. The complaint alleges that to be the fact, and also alleges that Mosier & Summers failed to pay Smith the said balance due him. The complaint also states that the said contract was finally completed and settled November 30, 1905, and that this action was brought within one year after the final settlement and completion of the said contract between Mosier & Summers and the United States. There is, however, an agreed statement of facts to the effect above stated. The condition of the bond is that Mosier & Summers will fully perform the contract according to its true intent and meaning, and that they will promptly make full payments to all persons who supply them with labor or materials in the prosecution of the work provided for in the said contract.

It seems hard to hold that, under this contract and bond with the condition recited, the contractors and their surety, the Empire State Surety Company, are liable to pay all the debts owing by subcontractors of Mosier & Summers to persons who supplied labor and materials, or labor or materials, which actually went into the buildings which Mosier & Summers contracted to build and did build for the United States under the provisions of said contract, when said Mosier & Summers have already paid such subcontractors in full for the work done and materials furnished. I would not so hold were I not forced thereto by the decision of the Supreme Court of the United States in United States, for the Use of Hill, v. American Surety Company, 200 U. S. 197, 26 Sup. Ct. 168, 50 L. Ed. 437, which in effect overrules United States v. Farley et al. (C. C.) 91 Fed. 474, and United States

v. Simon et al., 98 Fed. 73, 38 C. C. A. 659. These cases were cited by the defendant in error before the United States Supreme Court, but not referred to by the court in giving its opinion.

In United States, for the Use of Hill, v. American Surety Company, 200 U. S. 197, 26 Sup. Ct. 168, 50 L. Ed. 437, the New Jersey Foundry & Machine Company entered into a written contract with the United States for the construction of four observation towers, for the agreed compensation of $2,575. The contract contained this provision:

"That the said New Jersey Foundry and Machine Company shall be responsible for and pay all liabilities incurred in the prosecution of the work for labor and material."

This, of course, was a provision for the benefit and protection of the United States, and was not a promise made for the benefit of third persons. This provision in words is not found in the contract between Mosier & Summers and the United States. It is, of course, implied, for when Mosier & Summers agreed to "furnish all labor and material required for the construction proper of" certain buildings, describing them, for the compensation mentioned, it was implied that they would pay therefor.

The bond given by the New Jersey Company, as principal, and the American Surety Company, as surety, was the same as here in its obligations and conditions, except as to parties and penalty.

After the making of the contract and the execution and delivery of the bond, the New Jersey Foundry & Machine Company entered into a contract with the Richard Manufacturing Company for certain portions of the work, and that company entered upon the performance of its contract with the New Jersey Company, and, while so engaged, Hill & Hill, the plaintiffs, at the instance and request of the Richard Manufacturing Company "scraped and painted the four observation towers" agreed to be constructed by said New Jersey Company for the United States, for which the Richard Manufacturing Company agreed to pay Hill & Hill $246.80, of which sum $141.80 remained unpaid when the action was brought.

The Supreme Court placed no stress on the language quoted from the contract, but held that the bonds given by contractors under the statute referred to (Act Aug. 13, 1894, c. 280, 28 Stat. 278 [U. S. Comp. St. 1901, p. 2523], now amended, Act Feb. 24, 1905, c. 778, 33 Stat. 811 [U. S. Comp. St. 1901, p. 709]) are for the protection of and do protect those who do work for and supply materials to subcontractors as well as to those who do work for and supply materials to the contractors themselves, which work is done in and upon the government work or structure contracted to be done, and which material goes into such government works or buildings. The court, per Mr. Justice Day, said:

"In considering the statute and determining the scope of the bond, divergent views have been urged upon the court. Upon the one hand, it is insisted that the bond is to be strictly construed and a recovery limited to those who have furnished material or labor directly to the contractor; and, upon the other, that a more liberal construction be given and a recovery permitted to those who have furnished labor and materials which have been

used in the prosecution of the work, whether furnished under the contract directly to the contractor, or to a subcontractor. * * *

"The courts of this country have generally given to statutes intending to secure to those furnishing labor and supplies for the construction of buildings a liberal interpretation, with a view of effecting their purpose to require payment to those who have contributed by their labor or material to the erection of buildings to be owned and enjoyed by those who profit by the contribution of such labor or materials. Mining Co. v. Cullens, 104 U. S. 176, 177, 26 L. Ed. 704. And the rule which permits a surety to stand upon his strict legal rights, when applicable, does not prevent a construction of the bond with a view to determining the fair scope and meaning of the contract in the light of the language used and the circumstances surrounding the parties. Ulster County Savings Inst. v. Young, 161 N. Y. 23, 30, 55 N. E. 483.

"As against the United States, no lien can be provided upon its public buildings or grounds, and it was the purpose of this act to substitute the obligation of a bond for the security which might otherwise be obtained by attaching a lien to the property of an individual. The purpose of the law is, as its title declares, 'For the protection of persons furnishing materials and labor for the construction of public works.' If literally construed, the obligation of the bond might be limited to secure only persons supplying labor or materials directly to the contractor, for which he would be personally liable. But we must not overlook, in construing this obligation, the manifest purpose of the statute to require that material and labor actually contributed to the construction of the public building shall be paid for, and to provide a security to that end. * * *

"Looking to the terms of this statute in its original form, and as amended in 1905, we find the same congressional purpose to require payment for material and labor which have been furnished for the construction of public works. The affidavit to be filed with the head of the department under the direction of which the work has been prosecuted requires the affidavit to state that labor or materials for the prosecution of such work has been supplied by him, for which payment has not been made and such persons are given a right of action on the bond in the name of the United States. Language could hardly be plainer to evidence the intention of Congress to protect those whose labor or material has contributed to the prosecution of the work. There is no language in the statute nor in the bond which is therein authorized limiting the right of recovery to those who furnish material or labor directly to the contractor, but all persons supplying the contractor with labor or materials in the prosecution of the work provided for in the contact are to be protected. The source of the labor or material is not indicated or circumscribed. It is only required to be 'supplied' to the contractor in the prosecution of the work provided for. How supplied is not stated, and could only be known as the work advanced and the labor and material are furnished.

"If a construction is given to the bond so limiting the obligation incurred as to permit only those to recover who have contracted directly with the principal, it may happen that the material and labor which have contributed to the structure will not be paid for, owing to the default of subcontractors, and the manifest purpose of the statute to require compensation to those who have supplied such labor or material will be defeated. * * *

"In view of the declared purpose of the statute, in the light of which this bond must be read, and considering that the act declares in terms the purpose to protect those who have furnished labor or material in the prosecution of the work, we think it would be giving too narrow a construction to its terms to limit its benefits to those only who supply such labor or materials directly to the contractor. The obligation is 'to make full payments to all persons supplying it with labor or materials in the prosecution of the work provided for in said contract.' This language, read in the light of the statute, looks to the protection of those who supply the labor or materials provided for in the contract, and not to the particular contract or engagement under which the labor or materials were supplied. If the contractor sees fit to let the work to a subcontractor, who employs labor and buys materials which

are used to carry out and fulfill the engagement of the original contract to construct a public building, he is thereby supplied with the materials and labor for the fulfillment of his engagement as effectually as he would have been had he directly hired the labor or bought the materials."

Assuming this to be the correct construction of the statute and of the scope of the obligation of the bond, which I must do, it is no defense that the contractors, Mosier & Summers, paid the subcontractor, Kurchhoff. They and their surety are bound to pay Smith, who furnished the paints and oils that went into these buildings to Kurchhoff, who was employed by Mosier & Summers as a subcontractor. This the bond bound them to do. There is no evidence that Smith ever consented that payment be made to Kurchhoff, or that he acquiesced therein.

The sole remaining question is, Does a certain judgment entered in the clerk's office of the county of Erie, N. Y., in an action in the Supreme Court of the state of New York, wherein Charles Mosier and William Summers, defendants here, were plaintiffs, and Julius L. Kurchhoff, Max L. Kurchhoff, Jr.—the said subcontractor—and said F. Lewis Smith, the person for whose benefit this action is brought, were defendants, estop or bar the said Smith from maintaining this action? The correct solution of that question depends upon the nature of that action, the parties thereto, its purpose, scope, the pleadings, and what questions were at issue and decided, or might and ought to have been put at issue and determined. Smith was a party defendant in that action, but the Empire State Surety Company was not a party thereto. That action was as follows, and based on these additional facts: In addition to the work Max L. Kurchhoff agreed to do for Mosier & Summers in executing said government contract for the compensation of $5,345, he performed certain extra work on such buildings, and furnished certain extra materials which were put into same. At the time such action was brought, January 31, 1906, there was due and unpaid to said Max L. Kurchhoff for work and materials on his contract with Mosier & Summers $264.04, and for such extra work and materials $221.45, or $100, there being a dispute as to the correct sum. While Max L. Kurchhoff was doing the said work on said buildings he employed said Julius L. Kurchhoff to aid and assist him therein, and promised to pay therefor, and said Julius L. Kurchhoff performed services in such employment worth and of the value of $500 and more. Prior to the commencement of such action, Max L. Kurchhoff, by an instrument in writing, sold, assigned, and transferred his said claim against Mosier & Summers to Julius L. Kurchhoff to apply on the amount due and owing from him to Julius. Thereupon, and before the commencement of the action in the Supreme Court, Julius L. Kurchhoff commenced an action in the Municipal Court of the city of Buffalo against said Mosier & Summers to recover said sum of $484.49, the amount he claimed was owing by them to him by virtue of such assignment. Before the commencement of such action in the said Municipal Court, and at the time it was brought, said F. Lewis Smith was claiming and insisting that said Mosier & Summers were liable to and owing him said $642.08 for such work done and materials furnished in and upon the said buildings, by virtue

of and under the said statute of the United States, said contract between the United States and Mosier & Summers, and the bond given by them and said surety company.

Thereupon said Mosier & Summers brought the said action in the Supreme Court against said defendants, not including the said surety company, alleging all the material facts, and also the insolvency of said Max L. Kurchhoff, including the transfer of said claim to Julius L. Kurchhoff and the claim made by Smith as aforesaid, and that on account of such insolvency of Max L. Kurchhoff, should Julius L. be allowed to recover judgment in the Municipal Court and collect same, and should they thereafter be held liable to Smith under said contract and bond and compelled to pay him, irreparable injury would be done them, as they would have no recourse against said Max L. Kurchhoff on account of his insolvency.

Judgment was demanded as follows:

"That the defendants and each of them be restrained by injunction from taking any further proceedings against plaintiffs in relation to the foregoing matters, and that the defendant, Julius L. Kurchhoff, be restrained and enjoined from further prosecution of his said action against these plaintiffs [Mosier & Summers] in the Municipal Court of Buffalo. That the defendants be required to interplead together concerning their claims to said moneys, and that all of the rights of the parties herein be determined, and that the plaintiffs have their costs of this action."

Said Smith, defendant there, and, in fact, the plaintiff here, appeared in that action and put in an answer, in which he set up the contract between Mosier & Summers and the United States; the agreement between them and Max L. Kurchhoff to do certain of the work; the fact that he furnished such material for said Kurchhoff in doing same, and that same went into the buildings; that Mosier & Summers were liable to him for the purchase price of the materials used in the execution of the contract, and that there was due from them to him $642.08 and interest from August 1, 1905; and that he, Smith, was "entitled to the fund in litigation in this action, whatever it may be." He demanded judgment "determining that he is entitled to the sum in litigation in this action, whatever it may be," and for such other and further relief as he might be entitled to.

The situation at that time was this:

(1) Mosier & Summers owed Max L. Kurchhoff a balance of $484.49 according to the terms of their agreement with him.

(2) Max L. Kurchhoff owed Smith $642.08 for material which Smith had delivered to said Kurchhoff to put in the buildings Mosier & Summers had built for the United States, and which Kurchhoff had put therein, and which materials were part of the consideration for the indebtedness of Mosier & Summers to Max L. Kurchhoff.

(3) Mosier & Summers were liable to Smith for the purchase price of the said materials by virtue of the statute of the United States, the contract between Mosier & Summers and the United States, and the said bond executed by them and the said surety company, as was the surety company.

(4) Max L. Kurchhoff owed his brother, Julius L. Kurchhoff, over $500, for work done in painting such buildings—that is, for work,

labor, and services he had performed for the same subcontractor and put into the said buildings—and this was also a part of the consideration for the indebtedness of Mosier & Summers to Max L. Kurchhoff.

(5) Max L. Kurchhoff, the subcontractor, had assigned his claims against Mosier & Summers to Julius L. Kurchhoff to apply in part payment of the amount or sum due him.

(6) Julius L. Kurchhoff sued Mosier & Summers to recover the said amount owing primarily from them to Max L., but, by virtue of the assignment, then owing to Julius L.

(7) Mosier & Summers were liable to both Smith and Julius L. Kurchhoff for the sums due them, respectively, for the work, labor, and materials they, respectively, had furnished Max L. Kurchhoff, and which he had put into said buildings pursuant to his agreement with Mosier & Summers. United States, for Use of Hill, v. American Surety Company, 200 U. S. 197, 26 Sup. Ct. 168, 50 L. Ed. 437.

(8) Max L. Kurchhoff had become insolvent, so that neither Smith nor Julius L. could collect of him, but Julius was secured by the assignment of the claim of Max L. against Mosier & Summers in case he collected it.

(9) If Mosier & Summers had paid Smith his claim, for which they were liable, they could have successfully resisted any claim made by Max L. Kurchhoff for the balance due him, or any claim made by his assignee, Julius L., on that claim. It would have been a defense to show that, while Mosier & Summers owed Max L. under the agreement, a part of the consideration therefor was the materials furnished by Smith to Max L., and that as Max L. had not paid for the materials, and Mosier & Summers had been compelled to do so to protect themselves, it must go in reduction of the claim of Max L. This defense would have been equally available against Julius L. in the suit brought by him on the assigned claim. Had that defense been interposed and Julius L. defeated, he could have proceeded against Mosier & Summers for the work done at the request of the subcontractor, Max L. Neither Max L. nor Julius L., as assignee of Max L., were entitled to recover on the claim of Max L., provided Mosier & Summers paid Smith. Julius L., as assignee of Max L., stood in his shoes.

(10) This defense was not interposed. Mosier & Summers denied their liability to Smith, and did not pay him. They did not deny that they owed Max L. Kurchhoff or his assignee, Julius L., the sum of $263.04 under the agreement between Mosier & Summers and Kurchhoff, and "an additional sum of about $100 on account of extras," making $363.04, but stated in the complaint that they had been sued by Julius L. for the sum of $484.49. It is seen that this raised a dispute between the plaintiffs there, Mosier & Summers, and the defendant, Julius L., as to the amount due and owing by the plaintiffs to said defendant. In other words, the plaintiffs there were not indifferent parties. Instead of paying Smith and then defending against the Kurchhoff claim, they brought the interpleader suit, in which they sought to have it determined whether Smith or Julius L., as assignee of Max L., was entitled to the said sum of $484.49, as claimed by Julius L., and which he claimed was the balance due Max L. in accordance with the

terms of the contract between Mosier & Summers and Max L. for work, labor, and materials furnished by him to them, including extras, but which was subject to an offset in case Mosier & Summers paid Smith. At the same time the plaintiffs there alleged that the amount due on the agreement and for extras was only $363.04. They admitted nothing further.

(11) Mosier & Summers had fully performed their contract with the United States, and had been paid the full contract price. The money received by them was their own. Neither Max L. Kurchhoff, nor Julius L. Kurchhoff, nor Smith had any lien or claim on that money or any part of it. No part of it was a fund in the hands of Mosier & Summers subject to the claims of two different parties, each claiming to be the owner thereof.

(12) Julius L. Kurchhoff, by virtue of the assignment from Max L., claimed the said balance alleged by him to be due to Max L. for work, labor, and services done and material furnished according to the terms of an ordinary agreement to perform work and labor and to furnish materials at a fixed price or compensation to be paid therefor, and that Mosier & Summers were liable therefor on their contract.

(13) Smith claimed that Mosier & Summers, the contractors, were liable to him for the sum of $642.08, the value and purchase price of paints, oils, and other materials used in the construction of the government buildings, furnished by him to Max L. Kurchhoff, a subcontractor, and for which he had agreed to pay him, Smith, but had not paid, and that such liability arose under the contract between Mosier & Summers and the United States, a certain bond given by Mosier & Summers as principals and the Empire State Surety Company to the United States, and a certain statute of the United States, whereby said Mosier & Summers and said surety company had obligated themselves to pay all persons furnishing material to either the contractor or the subcontractors.

(14) It is observed that the sum or amount due Smith or claimed by him was not the same in amount, or for the same services or material, as that claimed by Kurchhoff. Also, that the amount claimed by Kurchhoff was not the same in amount as that admitted by Mosier & Summers. There was no contract or agreement between Smith and Mosier & Summers under which Smith had furnished them or Kurchhoff the said materials. Smith claimed that the liability of Mosier & Summers to him resulted from the government contract, the bond, the statute, and the fact that he had furnished material to the subcontractor, Kurchhoff, which went into the construction of the government buildings in execution of such government contract. Smith was about to bring suit to enforce that liability. This liability was not conceded by Mosier & Summers, but denied. This claim of Smith against Mosier & Summers gave rise to no contention or dispute between Smith and either of the Kurchhoffs.

(15) It is true, however, that Julius L., as assignee of Max L., was seeking to recover a balance due for work, labor, and materials, the value of the materials being more than the balance due, furnished by Max L. to Mosier & Summers as contractors, but which materials had

been furnished to Max L., a subcontractor, by Smith, and for which he, Smith, had not been paid. Max L. owed Smith for the materials, and Mosier & Summers by paying Smith could have defeated the Kurchhoff claim, but this would not have been a dispute between Smith and Kurchhoff.

(16) Julius L. was entitled to his full pay from Mosier & Summers for the work he did for Max L. in and upon the buildings under the bond, etc., referred to. However, he did not make that claim, as he had received his pay by an assignment of the claim of Max L. against Mosier & Summers, but which could have been defeated by them and defended against successfully by paying Smith. He had the right to stand on that and take his chances of Mosier & Summers paying Smith. As matters stood Mosier & Summers had no defense against the claim and demand of Julius L. for work done. Clearly they had no defense against Smith in any suit brought by him on the bond, etc., against them and the surety company.

(17) Could the question of the liability of Mosier & Summers and the surety company to Smith have been tried and determined in the said suit of interpleader in the Supreme Court, above referred to? It is perfectly clear that the court could try and determine the question whether or not Smith had any claim to the money due from Mosier & Summers to Kurchhoff, and that question it did rightly determine. Whether it based its decision on the correct ground or on an incorrect ground is immaterial.

The court held, as matter of law, that, on the facts, the plaintiffs could not maintain their action, and directed that their complaint be dismissed, and dissolved the preliminary injunction against Julius L. The court wrote an opinion to the effect that Smith had no claim against Mosier & Summers under the contract, bond, and statute referred to. If that question was necessarily involved and at issue, and necessarily decided in that action, then the judgment there is res adjudicata here as between these parties; otherwise not. The surety company is not liable to Smith if Mosier & Summers are not.

In that interpleader action Smith filed an answer setting up the facts, and claimed the sum or debt due from Mosier & Summers to Kurchhoff, which sum Kurchhoff also claimed. He did not go beyond that and demand a judgment against Mosier & Summers. The question, and the only question, was, Is Smith entitled to the sum of money Mosier & Summers agreed to pay Kurchhoff for certain work, labor, and materials?

It is perfectly clear that that action of interpleader was properly dismissed; that Mosier & Summers could not maintain it; not, however, for the reason or on the ground that Smith had no claim on the bond and right of action against Mosier & Summers and the surety company. If Mosier & Summers had admitted that they owed a specific or certain sum or debt to either Smith or Kurchhoff, which they did not do; had alleged that both Smith and Kurchhoff claimed that debt or sum, conceded to be due to the one or the other; that they did not know which of the claimants was entitled thereto, but were ready and willing to pay it to either, to the one of the claimants show-

ing title thereto as between themselves, and offered to bring the sum owing into court; and had the defendants, rival claimants to that fund, then set up their respective claims thereto—the court would have been called upon to decide a controversy between the rival claimants, Kurchhoff on the one hand, and Smith on the other, and to decide which of the two was entitled to that sum of money, or that debt conceded by Mosier & Summers to be owing by them to the one or the other, they being unable to decide which. In that case a cause of action would have been made out by Mosier & Summers, and the complaint could not have been dismissed. Crane v. McDonald, 118 N. Y. 648, 23 N. E. 991. It is no defense as against the plaintiffs in an action of interpleader to show that one of the claimants has no title to the money or debt in controversy. That is the very question to be decided, viz., where there is a sum of money or a debt conceded to be due and two persons claim it, which of the two owns or is entitled to it? This form of action necessarily implies that one is and the other is not. The plaintiff makes his case when he shows such a fund or debt, two claimants, and that he cannot safely decide which one is entitled to it. Crane v. McDonald, supra. The issue would have been between Smith and Kurchhoff. If Smith could show that the money or debt was owing to him from Mosier & Summers, and not to Kurchhoff, he would recover a judgment that the money be paid to him. If Kurchhoff could show that the money was due and owing to him from Mosier & Summers by virtue of the assignment, and not to Smith, he would recover a judgment that the money be paid to him. Such a judgment would determine the rights of the claimants to the money or debt, and the duty of the plaintiffs in respect thereto. As Mosier & Summers had not paid Smith for the materials furnished by him, and denied their liability to do so, they could not assert, nor could Smith, that Mosier & Summers did not actually owe to Kurchhoff the balance for the work and labor done and the materials furnished by Kurchhoff to them. Smith had no shadow of claim to any sum that Mosier & Summers owed Kurchhoff. It had not been assigned to him, and the fact that he had furnished the materials to Kurchhoff on credit, the value of which made up that claim, gave him no lien thereon and no right of subrogation. Smith's claim was on the bond and under the statute, and against Mosier & Summers. If the court in that action had found that Smith did have a just and legal claim of $642.08 against Mosier & Summers on the bond, and that they were liable to him thereon in that sum, how would it have helped Smith? The court could not have given judgment therefor; neither could it have declared a lien on the sum due or claimed to be due and owing Kurchhoff; nor could it have directed the money paid to Smith; nor could it, in that action of interpleader, have declared an offset, legal or equitable, and thereby have defeated Kurchhoff. Mosier & Summers were liable to Julius L. Kurchhoff for about $500 for work, etc., done by him for the subcontractor, Max L., in case he was not paid. They were liable to Julius L. in the like sum on the assigned claim of Max L. which he had taken in payment of the demand first mentioned. This demand was liable to be extinguished in case Mosier & Summers

paid Smith $642.08 which Max L. owed Smith, but for this sum Mosier & Summers were liable in any event.

If Mosier & Summers had paid Smith and defeated the recovery of Julius L. on the assigned claim, they would have been liable to Julius L. for his work and labor performed for Max L., some $500, and would have been out the $642.08. If the court had directed the application of the money owing on the Max L. claim to the Smith claim, there would have been the balance due Smith and the claim of Julius L. for work, etc., still due them respectively from Mosier & Summers. It is seen that if the court had attempted to adjust matters by making and enforcing equitable offsets, it would not have bettered matters, but would have "made confusion worse confounded."

It was entirely immaterial to the proper disposition of that case how or what the court held on the question of the liability of Mosier & Summers and the surety company to Smith on the bond. So far as the actual issues in that case were concerned, that was an academic question. That action of interpleader was dismissed, and properly so, on the ground that the plaintiffs could not maintain it. The decree or judgment entered in that case, aside from the recitals, is as follows:

"Ordered and decreed, that the said defendant Julius L. Kurchhoff is entitled to recover from the plaintiffs the amount that may be found due and owing by them by virtue of the contracts made by the plaintiffs with the defendant Max L. Kurchhoff, Jr., and for the extra work and materials performed and furnished by said Max L. Kurchhoff, Jr., for and to the plaintiffs, by virtue of the assignment of said claims from said defendant Max L. Kurchhoff, Jr., to the said defendant Julius L. Kurchhoff, mentioned in the said complaint and answers herein, and that he recover such amount, as aforesaid, to the exclusion of the said defendant F. Lewis Smith, and that the said defendant F. Lewis Smith has no claim upon said amount, or any part thereof, by virtue of the contract and bond of the plaintiffs with the United States government, mentioned in said complaint or answers, or otherwise; and

"It is further ordered and decreed that the plaintiffs are not entitled to maintain this action, and that their complaint must be dismissed, and that the defendant Julius L. Kurchhoff be, and he hereby is, permitted to proceed in his action pending in the Municipal Court of Buffalo against the plaintiffs to recover the amount due and owing him upon his aforesaid claims."

There is no judgment or decree that Smith did not have a just, legal, and enforceable demand against Mosier & Summers, or against Mosier & Summers and the surety company, on the bond under the United States statute for $642.08, the value of the materials furnished by him to the subcontractor, Kurchhoff, and put into the buildings. It is true that the learned judge who decided the case stated in his opinion filed in deciding the case that Smith had no claim on the bond under the statute against Mosier & Summers, and in his conclusions of law held that Smith had no claim on or right to the money due and owing from Mosier & Summers to Kurchhoff. The opinion was clearly wrong under the decision of the Supreme Court of the United States in United States, for the Use of Hill, v. American Surety Company, supra, if it was intended to say that a person who furnishes material to a subcontractor, which goes into a government building, and who has not been paid therefor, has no claim against the contractor and his surety on the bond given pursuant to the statute referred to.

However, the conclusion of law was clearly right. It is also true that the court in dismissing the complaint held as stated, and that an unjustified provision was written into the decree signed by the clerk giving to the defendant Kurchhoff certain relief; but there is nothing in the conclusions of law, or in the judgment or decree entered, to the effect that Smith had and has no right of action or right of recovery on the bond against the defendants here. It is a judgment that he had no right to the money due and owing from Mosier & Summers to Kurchhoff. The decision of that question did not necessarily or properly involve the question at issue here. The question was, Did the fact that Smith had furnished materials to Kurchhoff, the subcontractor, which went into the buildings, entitle him, as against Kurchhoff, or his assignee for value, to have paid to him the sum which Mosier & Summers had agreed to pay Kurchhoff for the labor and materials he put in the buildings, and which included the materials furnished by Smith? The law applicable in actions of interpleader seems to be well settled. They may be divided into two classes, actions of strict interpleader, and actions in the nature of interpleader. The distinction is that in actions of strict interpleader legal rights only are enforced, while in actions in the nature of interpleader equitable relief is sometimes given if a proper case is made. New England Mutual Life Ins. Co. v. Odell, 50 Hun, 279, 280, 2 N. Y. Supp. 873; City Bank v. Bangs, 2 Paige (N. Y.) 570. The purpose of an action of interpleader is to permit a party who holds a fund or property, or who owes a debt, to which two or more persons make claim, and it is uncertain to which claimant the fund or debt belongs, to commence an action against such claimants for the purpose of having it determined between them to which the fund, property, or debt owing belongs, so that it may be paid accordingly, and the holder of the fund, or the debtor, as the case may be, relieved from the danger of a double liability for the same demand. Crane v. McDonald, 118 N. Y. 648, 654, 23 N. E. 991; Bassett v. Leslie, 123 N. Y. 396, 399, 25 N. E. 386; B. & O. R. R. Co. v. Arthur, 90 N. Y. 234, 237; Dorn v. Fox, 61 N. Y. 264; 23 Cyc. 3, 4; Hoggart v. Cutts, Cr. & Ph. 197, 204, 10 L. J. Ch. 314, 18 Eng. Ch. 197; Wing v. Spaulding, 64 Vt. 83, 86, 23 Atl. 615; Wells Fargo & Co. v. Miner et al. (C. C.) 25 Fed. 533, 537; Clark v. Smith, 13 Pet. 203, 10 L. Ed. 123; McWhirter v. Halsted (C. C.) 24 Fed. 828; Louisiana State L. Co. v. Clark (C. C.) 16 Fed. 20.

It is essential to the maintenance of such an action that there be a specific fund or property, or a debt owing, or a duty to be performed, and that the plaintiff in the action of interpleader does not dispute his liability to some one therefor. If it be a fund or a debt owing, the amount thereof as claimed by at least one of the parties must be conceded by the plaintiff (Baltimore & O. R. R. Co. v. Arthur, 90 N. Y. 234); and there must be a reasonable ground of uncertainty as to which claimant is the one entitled thereto, and the plaintiffs, the party owing the debt or holding the fund, must be without adequate remedy at law (Bassett v. Leslie, 123 N. Y. 396, 399, 25 N. E. 386; Morgan v. Fillmore, 18 Abb. Prac. [N. Y.] 217; Trigg v. Hitz, 17 Abb. Prac. [N. Y.] 436; M. & H. R. R. Co. v. Clute, 4 Paige, 384; Crane v. McDonald, 118 N. Y. 648, 23 N. E. 991).

The controversy or dispute must be as to the title or ownership of the particular fund or indebtedness. And an action for interpleader will not lie where the establishment of the plaintiff's liability to the one claimant will not necessarily defeat his liability to the other. Bassett v. Leslie, 57 Hun, 588, 10 N. Y. Supp. 483, affirmed 123 N. Y. 396, 25 N. E. 386. The amount due from the plaintiff cannot be the subject of controversy, and the fact that the sum which the plaintiff is willing to pay is not the sum which the defendants claim is fatal to the action; that is, plaintiff cannot maintain it. City Bank v. Bangs, 2 Paige, 570; New Eng. Mut. Life Ins. Co. v. Odell, 50 Hun, 279, 2 N. Y. Supp. 873; Baltimore & O. R. R. Co. v. Arthur, 90 N. Y. 234.

The plaintiffs in that suit conceded they owed "$263.04 under said contract" with Kurchhoff, "and an additional sum of about $100 on account of extras performed by said Kurchhoff on said buildings" (this is the allegation of the complaint in that suit). This was denied by the defendant Kurchhoff as follows:

"He admits each and every allegation contained in the fourth paragraph thereof, except the allegation therein, viz., 'that there is a balance owing from the plaintiffs to said defendant Max L. Kurchhoff, Jr., * * * of about $100 on account of extras performed by said Kurchhoff on said buildings,' which he denies, and, on the contrary thereof, alleges that, instead of about said last-mentioned sum being owing from said plaintiffs for such extras performed, there is due and owing from them the sum of two hundred and twenty-one dollars and forty-five cents ($221.45) for extra work and materials performed and furnished and used by the said defendant Max L. Kurchhoff, Jr., upon, and in and about, the buildings aforesaid, at the special instance and request of the said plaintiffs, in addition to the sum of two hundred and sixty-three dollars and four cents ($263.04) due and owing under said contract, in said paragraph of said complaint mentioned, and as hereinafter stated."

Here was an issue between the plaintiffs and the defendant Kurchhoff which was fatal to the action and demanded the dismissal thereof. Baltimore & O. R. R. Co. v. Arthur et al., 90 N. Y. 234, 237; Bassett v. Leslie, 123 N. Y. 396, 399, 25 N. E. 386; Crane v. McDonald, 118 N. Y. 648, 654, 23 N. E. 991; New Eng. Mut. Life Ins. Co. v. Odell, 50 Hun, 279, 280, 2 N. Y. Supp. 873; Wells Fargo & Co. v. Miner (C. C.) 25 Fed. 533. In Baltimore & Ohio R. R. Co. v. Arthur et al., supra, the plaintiff brought an action of interpleader, alleging that he bought of the defendant Arthur "merchandise of the value of $2,478.52, less $21.83 to be deducted for freight due for transportation of said merchandise, but were forbidden to pay Arthur by defendant Powers, acting as receiver, who claimed the said purchase price, who threatened to sue therefor, and who did sue for the full amount $2,478.52." The Court of Appeals said:

"But here the sum admitted to be due is not the sum for which Arthur sues. The plaintiff claims to retain from it an alleged indebtedness for freight. The amount due cannot be the subject of controversy in an interpleader suit, and this difference between the debt claimed by the defendant, and the sum which the plaintiff is willing to pay, presents an insuperable objection to its prosecution; for, as to so much, it does not admit title, or right of payment in either claimant. Sto. Eq. Pl. § 295; 2 Sto. Eq. Jur. § 821."

This is the universal rule in New York and in the federal courts, and generally in all the states.

So long as there was a dispute as to the amount due from the plaintiffs Mosier & Summers, suppose they had paid the amount into court, or offered so to do, and which plaintiffs must do (Bassett v. Leslie, 123 N. Y. 396, 399, 25 N. E. 386, and cases there cited), what would the court have adjudged as to the money? It could not have gone on and tried the dispute between plaintiffs Mosier & Summers and Kurchhoff as to the amount due and given judgment for a balance not paid in or offered to be paid in, and it could not have restrained Kurchhoff from prosecuting his action in the Municipal Court of Buffalo for the balance claimed, and it could not have dismissed Kurchhoff with partial payment. As was said in Baltimore & Ohio R. R. Co. v. Arthur, supra:

"A debtor cannot, in this summary manner, discharge a creditor with partial payment, or prevent him from enjoying the fruits of his bargain."

But suppose there had been no dispute as to the amount due and it had been paid into court, what would the court by its judgment have done with the money? Could it have adjusted the equities between Mosier & Summers, the plaintiffs, and the Kurchhoffs, the defendant and his assignor, and said to Kurchhoff, "If you pay Smith what is due him for materials, as your assignor ought to do, and thus relieve Mosier & Summers from liability to Smith, the court will give you this money?" This would have left Julius L. to enforce his claim on the bond for the balance due him, and what would his right of recovery have been? If Julius L. had not paid Smith, and the court had given the sum plaintiffs said was owing, or some other sum, we know not what, to Smith, he would have been compelled to take part payment, thus splitting up his demand, and Julius L. would or could have proceeded under the bond—as could Smith—for the balance due him. In short, the court would have been undertaking to adjust equities between all the parties, and would have done full justice by no one of them. But the court could not undertake to do any of the things suggested. Bassett et al. v. Leslie, supra, and other cases cited. In Bassett v. Leslie, the court said:

"This, under the old chancery practice, would have been called a strict bill of interpleader, and to maintain such an action it is necessary to allege and show that two or more persons have preferred a claim against the plaintiff; that they claim the same thing, whether a debt or a duty; that the plaintiff has no beneficial interest in anything claimed; and that it cannot be determined without hazard to himself to which of the two defendants the money or thing belongs. There must also be an offer to bring the money or thing into court. M. & H. R. R. Co. v. Clute, 4 Paige, 384; Dorn v. Fox, 61 N. Y. 268; B. & O. R. R. Co. v. Arthur, 90 N. Y. 234. Such an action always supposes that the plaintiff is a mere stakeholder for one or the other of the defendants who claim the stake, and the case must be such that he can pay or deposit the money or property into court, and be absolutely discharged from all liability to either of the defendants, and thus pass utterly out of the controversy, leaving that to proceed between the several claimants; and an action of interpleader cannot be sustained where, from the complaint itself, it appears that one of the claimants is clearly entitled to the debt or thing claimed, to the exclusion of the other. M. & H. R. R. Co. v. Clute, supra."

But the court having held that the plaintiffs could not maintain the action, and having adjudged that the complaint be dismissed, and it having been dismissed, there could be no other judgment and no adjudication as between the plaintiffs and Smith that he had no claim against them and the surety company on the bond under the statute for the materials furnished. The right of the plaintiffs to maintain their action of interpleader did not depend on Smith's having or not having a valid claim against them, or even on his having a claim against the fund, but on whether or not he made one under such circumstances as to justify the plaintiffs in coming into court. The court decided the contending claims did not justify their bringing the action.

What was the remedy of Mosier & Summers? They could easily have defeated the demand of Julius L. on the claim assigned to him by Max L. Max L. was a subcontractor of Mosier & Summers, and contracted and agreed to paint the buildings and furnish the materials, and by implication to pay for them. He fully performed in all particulars, except that of paying Smith, who furnished him the materials. By the terms of the statute Mosier & Summers thereupon became liable to Smith for the value of such materials. To save themselves from double payment therefor, once to Smith and once to Kurchhoff under their agreement with him, they must pay Smith and then defend against the Kurchhoff claim on the ground of failure of consideration, or by offsetting or counterclaiming the amount they had paid Smith. When A., having contractual relations with B., by the wrong or default of B. becomes liable to pay, and to save himself is compelled to pay, a debt owing by B. to a third person arising out of such contractual relations, B. becomes indebted to A. for the sum so paid. A request from B. to A. to pay is not necessary. The law in such case implies a promise and undertaking on the part of B. to repay A. 27 Cyc. 834, and cases cited; Irvine v. Angus, 93 Fed. 629, 633, 35 C. C. A. 501. In 27 Cyc. 834, the general rule is stated thus:

"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."

In Irvine v. Angus, supra, the court said:

"But neither a previous request to pay nor a subsequent promise to reimburse need be proved to warrant a recovery in an action like this, when it is shown that the plaintiff was, for the protection of his own property, or the preservation of a lien held by him on property, compelled to pay what the defendant himself ought to have paid. The payment under such circumstances will not be deemed to have been officiously made, nor will the plaintiff be looked upon as a mere volunteer or intermeddler in matters in which he has no interest or concern."

The dismissal of the complaint was an adjudication by the court that the plaintiffs had no cause of action, not that the defendant Smith did not have one on the bond under the statute.

Coming to the question of former or prior adjudication, the following propositions are settled law:

1. The former adjudication must have been between the same parties or their privies. Williams v. Barkley, 165 N. Y. 48, 54.

2. The prior action must have been for the same cause, or for a cause which necessarily involved the trial and determination of the same question at issue in the second action, and the prior action must have been heard and decided on the merits. It must also appear that the former decision could not have been made without deciding the particular matter in controversy in the second action. Williams v. Barkley, 165 N. Y. 48, 54, 58 N. E. 765; Earle v. Earle, 173 N. Y. 480, 487, 66 N. E. 398; Shaw v. Broadbent, 129 N. Y. 114, 123, 29 N. E. 238; Converse v. Sickles, 146 N. Y. 200, 208, 40 N. E. 777, 48 Am. St. Rep. 790; Genet v. Del. & H. C. Co., 163 N. Y. 173, 57 N. E. 297; Same v. Same, 170 N. Y. 278, 63 N. E. 350.

3. However, if the judgment or decree in express terms purports to affirm a particular fact or rule or conclusion of law, yet if such fact, or rule, or conclusion of law was immaterial to the issue and the controversy did not turn upon it, such judgment or decree will not conclude the parties to it. Stokes v. Foote, 172 N. Y. 327, 341, 65 N. E. 176; People ex rel. Reilly v. Johnson, 38 N. Y. 63, 97 Am. Dec. 770; Rudd v. Cornell, 171 N. Y. 115, 128, 63 N. E. 828; House v. Lockwood, 137 N. Y. 259, 268, 33 N. E. 595; Stannard v. Hubbell, 123 N. Y. 520, 25 N. E. 1084.

4. It is also conclusive of the matters necessarily comprehended and involved in the prior action, although not litigated, provided the main issue was litigated. Pray v. Hegeman, 98 N. Y. 351; Honsinger v. Union Carriage & Gear Co., 175 N. Y. 229, 230, 67 N. E. 436. What this means and includes, see Earle v. Earle, 173 N. Y. 487, 66 N. E. 398. But if the matter in dispute was different, then this rule has no application. Last Chance M. Co. v. Tyler M. Co., 157 U. S. 683, 15 Sup. Ct. 733, 39 L. Ed. 859; Nesbitt v. Ind. Dist., 144 U. S. 610, 12 Sup. Ct. 746, 36 L. Ed. 562.

5. But a counterclaim, or an offset, even when pleaded in a former action, but no evidence is given to sustain it and it is not tried and adjudicated, is not barred or concluded by such former action. In short, the prior judgment does not determine or preclude a subsequent action on an affirmative cause of action existing in favor of the defendant against the plaintiff recovering judgment in the prior action. Honsinger v. Union Carriage & Gear Co., 175 N. Y. 229, 230, 67 N. E. 436.

6. A prior judgment is not binding or conclusive in a subsequent action as to matters of fact or questions of law which were immaterial or unessential to the determination of the real issue in the prior action, even if put in issue, tried, and decided in such prior action. Their determination must have been pertinent and necessary to the determination of the real issue in such prior action. House v. Lockwood, 137 N. Y. 259, 268, 33 N. E. 595; Stannard v. Hubbell, 123 N. Y. 520, 25 N. E. 1084—cited and approved in Rudd v. Cornell, 171 N. Y. 128, 63 N. E. 823.

7. The judgment rendered in the state court is to be given the same force and effect as a bar or an estoppel in the United States courts as

is given to it in the courts of the state where rendered, no more and no less. Covington v. Covington First Nat. Bank, 198 U. S. 100, 25 Sup. Ct. 562, 49 L. Ed. 963; Union & P. Bank v. Memphis, 189 U. S. 71, 23 Sup. Ct. 604, 47 L. Ed. 712; Chase v. Curtis, 113 U. S. 452, 5 Sup. Ct. 554, 28 L. Ed. 1038; Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565. This is so even if a different rule as to res adjudicata would be applied in the federal courts as to prior judgment rendered therein. Covington v. Covington First Nat. Bank, supra. In other words, the decisions of the highest court of the state in which the judgment was rendered control. It follows that the cases cited, decided by the highest court of the state of New York, apply here and are decisive.

8. It was incumbent on the defendants here in setting up the prior judgment as a bar to this action to allege and prove that the particular point or question as to which they claim the estoppel was necessarily in issue and necessarily decided in such prior action, and was necessarily involved and decided in determining the real issue in such prior action. Russell v. Place, 94 U. S. 606, 608, 24 L. Ed. 214; Soderberg v. Armstrong (C. C.) 116 Fed. 711, and cases cited; 23 Cyc. 1536, 1537, and numerous cases there cited. This has not been done.

In Rudd v. Cornell, 171 N. Y. 128, 63 N. E. 828, the court said:

"A judgment is conclusive upon the parties only in respect to the grounds covered by it and the facts necessary to uphold it; and although a decree, in express terms, professes to affirm a particular fact, yet, if that fact was immaterial to the issue and the controversy did not turn upon it, the decree will not conclude the parties in reference to such fact. People ex rel. Reilly v. Johnson, 38 N. Y. 63, 97 Am. Dec. 770. A judgment does not operate as an estoppel in a subsequent action between the parties as to immaterial and unessential facts, even though put in issue by the pleadings and directly decided. It is final only as to such facts as are litigated and decided, which have such a relation to the issue that their determination was necessary to the determination of that issue. House v. Lockwood, 137 N. Y. 259, 268, 33 N. E. 595; Stannard v. Hubbell, 123 N. Y. 520, 25 N. E. 1084. 'In order that a judgment should have the effect claimed, it is not enough that the party produce a record showing a judicial determination of the same question litigated in his favor, but it must also appear that it was rendered upon the merits, upon a material point, and substantially upon the same facts presented in the subsequent case.' Shaw v. Broadbent, 129 N. Y. 114, 123, 29 N. E. 238; Converse v. Sickles, 146 N. Y. 200, 208, 40 N. E. 777, 48 Am. St. Rep. 790; Genet v. Del. & Hud. Canal Co., 163 N. Y. 173, 57 N. E. 297; Same v. Same, 170 N. Y. 278, 63 N. E. 350."

Turning to the answer of the defendants Mosier & Summers in this action, we find the following as the former adjudication relied on: In the first defense they allege that while Max L. Kurchhoff was doing the work and furnishing the materials on the buildings referred to, and which was the basis of his claim assigned to Julius L., the plaintiff furnished certain materials to said Kurchhoff at his request and without the authorization of the defendants, the amount being to the defendants unknown. Then, as a second defense, they allege the entry of the prior judgment, and say "wherein and whereby, among other things, it was found" that Julius L. Kurchhoff, as assignee of Max L.—

"was entitled to recover from the plaintiffs in that action, who are these defendants, Mosier & Summers, the amount that might be found due and owing by them by virtue of the contract made between Mosier & Summers and

the defendant Max L. Kurchhoff, Jr., as above stated, and for extra work and materials furnished by said Max L. Kurchhoff, Jr., to the exclusion of F. Lewis Smith, one of the defendants in that action, and that said Smith had no claim thereon nor any part thereof by virtue of the contract, bond, and statute referred to in the plaintiff's complaint herein."

This is the only prior adjudication set up or pleaded, and it is seen that it is not alleged or claimed that the question of the liability of Mosier & Summers to Smith for the value of such materials furnished by him to Kurchhoff, under said bond and statute, was necessarily involved or decided in that prior action, as indeed it was not. I give the answer no broader effect as a prior adjudication than is claimed for it in the answer. It is not in fact entitled to that, as the complaint was dismissed. Turning to the judgment roll in that action, we find that the question at issue was, as before stated, not the liability of Mosier & Summers to Smith on the bond for the $642.08, but the right of Smith to the money due on a debt owing by Mosier & Summers to Kurchhoff for work and materials, for the reason Smith had furnished Kurchhoff the materials that in part made up that claim. The judgment correctly declares that Smith was not entitled thereto, although the complaint was dismissed on the ground that as Julius L. claimed an amount in excess of what the plaintiffs admitted to be due, so that the plaintiffs could not drop out of the controversy, the action could not be maintained. The court said, when it came to decide the case and announce the ground of its decision:

"'Such an action,' say the court in Bassett v. Leslie, 123 N. Y. 396, 399, 25 N. E. 386, 'always supposes that the plaintiff is a mere stakeholder for one or the other of the defendants who claim the stake, and the case must be such that he can pay or deposit the money or property into court, and be absolutely discharged from all liability to either of the defendants, and thus pass utterly out of the controversy, leaving that to proceed between the several claimants; and an action of interpleader cannot be sustained where, from the complaint itself, it appears that one of the claimants is clearly entitled to the debt or thing claimed to the exclusion of the other.'

"In the case now before us the defendant Julius L. Kurchhoff claims an amount in excess of that which the plaintiffs admit to be due, so that they cannot drop out of the controversy, except as to an amount which they name, and it is clear from the complaint that the plaintiffs owe to Kurchhoff the amount which they admit to be due, to the exclusion of the defendant Smith, who has no legal claim against the plaintiffs. Under such circumstances an action in interpleader would operate to do an injustice to the defendant Kurchhoff, and it should not be permitted.

"The complaint should be dismissed, with costs, and the Municipal Court action should be permitted to proceed."

This was the decision of the court and the ground of its decision, as the judgment roll and opinion conclusively show. True, the judge had discussed other propositions, and in his opinion in such discussion, unconsciously of course, disagreed with and overruled the Supreme Court of the United States in United States, for the Use of Hill, v. American Surety Company, 200 U. S. 197, 26 Sup. Ct. 168, 50 L. Ed. 437, decided January 2, 1906, about a year prior to the judgment in the action pleaded as a bar here, and before it was brought, but did not decide the case on any such ground, or direct or authorize judgment other than a dismissal. Said the Court of Appeals in Stokes v. Foote, 172 N. Y. 327, 341, 342, 65 N. E. 176, 181:

"It is well settled, however, that 'although a decree in express terms purports to affirm a particular fact, or rule of law, yet if such fact or rule of law was immaterial to the issue, and the controversy did not turn upon it, the decree will not conclude the parties thereto.' Woodgate v. Fleet, 44 N. Y. 1, 13; Stannard v. Hubbell, 123 N. Y. 520, 25 N. E. 1084; House v. Lockwood, 137 N. Y. 259, 33 N. E. 595; Reynolds v. Stockton, 140 U. S. 254, 11 Sup. Ct. 773, 35 L. Ed. 464; Packet Co. v. Sickels, 5 Wall. 592, 18 L. Ed. 550; Jackson v. Wood, 3 Wend. (N. Y.) 37, and Wood v. Jackson, 8 Wend. 10, 22 Am. Dec. 603; Sweet v. Tuttle, 14 N. Y. 465; Campbell v. Consalus, 25 N. Y. 613; People ex rel. Reilly v. Johnson, 38 N. Y. 63, 97 Am. Dec. 770; Hymes v. Estey, 116 N. Y. 501, 509, 22 N. E. 1087, 15 Am. St. Rep. 421; Lorillard v. Clyde, 122 N. Y. 41, 25 N. E. 292, 19 Am. St. Rep. 470; Bigelow on Estoppel, 152; Duchess of Kingston's Case, Everest & Strode, 410. Lord Chief Justice De Gray said in the case last cited: 'That neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within the jurisdiction, or of any matter incidentally cognizable, or of any matter to be inferred by argument from the judgment.'"

It is clear that the plaintiff's attorneys in that case, in view of the decision referred to, and without authority of law, attempted to inject into the judgment entered something that would operate as a bar to Smith's recovery in a proper action, but in this, giving full effect to all that is found therein, they failed. It is settled that when the complaint is dismissed there can be no adjudication between the defendants. "So where the plaintiff fails to sustain his complaint, the court cannot grant relief as between codefendants." 3 New York Practice, Nichols, 2761; Martin v. Wagener, 1 Thomp. & C. (N. Y.) 509; Hall v. Ditson, 5 Abb. N. C. (N. Y.) 198; Dusenbury v. Fisher, 47 N. Y. Super. Ct. (15 Jones & S.) 482. The whole record in that case is to be looked to in determining what was necessarily at issue and decided by the court, and the opinion is in evidence with the judgment roll, as is the contract between Mosier & Summers and the United States, the renewals thereof, and the bond, all certified and furnished by the United States pursuant to the statute.

It follows that the plaintiff, F. Lewis Smith, is entitled to recover of the defendants the sum of $642.08, with interest thereon from August 1, 1905, with costs. There will be a judgment accordingly.

UNITED STATES v. HASKELL et al.

(District Court, E. D. Oklahoma. April 10, 1909.)

No. 284

1. INDICTMENT AND INFORMATION (§ 137*)—MOTION TO QUASH—REGULARITY OF PROCEEDINGS BEFORE GRAND JURY.

The mere introduction of incompetent testimony before a grand jury is not ground for quashing an indictment returned in the matter to which such evidence related.

[Ed. Note.—For other cases, see Indictment and Information, Dec. Dig. § 137.*]

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

2. GRAND JURY (§ 34*)—MOTION TO QUASH INDICTMENT—REGULARITY OF PROCEEDINGS BEFORE GRAND JURY.

An inadvertent misstatement of the law by a prosecuting officer to a grand jury is not misconduct which will affect the validity of an indictment found.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. § 73; Dec. Dig. § 34.*]

3. GRAND JURY (§ 34*)—MOTION TO QUASH INDICTMENT—REGULARITY OF PROCEEDINGS BEFORE GRAND JURY.

Under Act June 30, 1906, c. 3935, 34 Stat. 816 (U. S. Comp. St. Supp. 1907, p. 44), authorizing any attorney specially appointed and designated by the Attorney General to conduct any legal proceeding which may be conducted by a district attorney, it is competent for two or more such attorneys to be present together in a grand jury room and to conduct the proceedings making such division of the labor as they deem best, and the fact that one acts only as a stenographer does not vitiate indictments found.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. § 73; Dec. Dig. § 34.*]

4. GRAND JURY (§ 3*)—NUMBER OF JURORS—FEDERAL STATUTE.

Rev. St. § 808 (U. S. Comp. St. 1901, p. 626), relating to grand juries and fixing the number, is expressly limited to the District and Circuit Courts of the United States, and does not apply to any courts in the territories.

[Ed. Note.—For other cases, see Grand Jury, Dec. Dig. § 3.*]

5. GRAND JURY (§ 3*)—MOTION TO QUASH INDICTMENT—CONSTITUTION OF GRAND JURY.

Prior to the admission of the state of Oklahoma the statutes of Arkansas were in force therein by congressional enactment, including Mansf. Dig. § 3991, which provides that a grand jury shall consist of 16 persons. Prior to the extension of such statutes into the territory, the Supreme Court of Arkansas had construed such section, and held that a grand jury consisting of more than 16 was illegal, and an indictment returned by it invalid. *Held*, that an indictment returned in the District Court of the United States for the Eastern District of the State of Oklahoma after its admission for an offense committed within the Indian Territory before admission was invalid where it was found by a grand jury consisting of 21 members since the change, although one of procedure was one which substantially affected the rights of the accused to their disadvantage.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. §§ 3–6; Dec. Dig. § 3;* Indictment and Information, Cent. Dig. § 481.]

6. INDICTMENT AND INFORMATION (§ 139*)—MOTION TO QUASH—TIME FOR MAKING.

An objection to an indictment on the ground that the grand jury was illegally constituted when substantial, and not merely technical, may be taken at any time before arraignment.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 473; Dec. Dig. § 139.*]

On Motion to Quash Indictment.

Sylvester R. Rush, Sp. Asst. Atty. Gen., Oliver E. Pagan, Sp. Asst. Atty. Gen., and William J. Gregg, U. S. Atty.

Henry E. Asp, Chas. B. Stuart, A. C. Cruce, James H. Huckleberry, and Thomas H. Owen, for defendants.

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

MARSHALL, District Judge. In the case of the United States v. Haskell et al. a motion has been interposed to quash the indictment, and by agreement of counsel, as I understand, this motion is also to be considered to apply to two other indictments found by the same grand jury at the same time and charging substantially the same offense. The grounds of the motion, so far as it is necessary to state them, are:

(1) Misconduct of the prosecuting officers of the government before the grand jury while the causes were being investigated by that body and before the finding of an indictment.

(2) The presence of an unauthorized person in the grand jury room during such investigation.

(3) The fact that the grand jury which returned the indictments consisted of 21 grand jurors instead of 16, the number claimed to have been prescribed by law at the date of the offenses charged.

These objections will be briefly considered in the order stated. So far as there is any evidence of the claimed misconduct of the prosecuting officers, it amounts to this: Certain secret service officers testified before the grand jury. Each of them produced affidavits of witnesses procured by him. Some of these were read by the witness producing them to the jury. Most of the affiants were subsequently called as witnesses and testified. In a few instances, however, the officer producing the affidavit stated that the witness by reason of sickness or infirmity could not attend, and these affidavits were read. Further, at the close of the first case, the attorney for the government, at the instance of the grand jury, stated the law claimed by him to be applicable to the crime being investigated, and, it is contended, stated it inaccurately in some particulars. The circumstances attending the investigation make it entirely probable that the affidavits read were incompetent, and not such evidence as would have been received in a court, but there is no showing that they were at all prejudicial to the defendants, and, indeed, no such showing could have been made within the limits of this investigation as prescribed by the court. But the question is whether the introduction of incompetent testimony is of itself such misconduct on the part of the counsel for the Government that the indictments must be quashed. If so, but few indictments would be immune to attack. So long as courts differ as to the competency of evidence, mistakes will be made, but on this motion the court is not sitting as a court of error to review the proceedings before the grand jury, and the mere introducing of incompetent testimony before that tribunal, which may well have been entirely harmless, is no reason for the quashing of the indictments. The authorities on this question are substantially uniform in the support of this conclusion. I am not satisfied that the attorney for the government in advising the grand jury as to the law pertinent to the investigation misstated it. It is not to be expected that any grand juror after the lapse of several months would be able to accurately repeat the propositions of law so stated with all of their qualifying phrases. But, if we are to assume an inadvertent error, this cannot be magnified into misconduct. The motions cannot be sustained on this ground.

2. The claimed unauthorized person whose presence in the grand jury room during the giving of testimony, it is claimed, vitiated the indictments, was an attorney appointed by the Attorney General of the United States as a special assistant district attorney for this investigation, and specially directed to assist therein. This attorney was also a stenographer, and the only function performed by him in the grand jury room was as a stenographer, and it was doubtless for the purpose of obtaining a transcript of the proceedings that he was appointed. It is claimed that, while an attorney so appointed and specifically directed may conduct grand jury proceedings by virtue of the provisions of Act June 30, 1906, c. 3935, 34 Stat. 816 (U. S. Comp. St. Supp. 1907, p. 44), he cannot be present for the only purpose of taking shorthand notes of the testimony. I think this is too narrow an interpretation of the statute. It is entirely competent for two or more of such attorneys to be present and to make such a division of the labor incident to the conducting of the proceedings as to them may seem best. The fact that one conducted the examination of the witnesses and the other stenographically reported the testimony did not infringe any rights of the defendants.

3. The third objection, going to the validity of the grand jury, is of more weight. The crimes charged are alleged to have been committed in the Indian Territory; that is to say, the several indictments are found under section 5440 of the Revised Statutes (U. S. Comp. St. 1901, p. 3676), and each charge a conspiracy continuing to the date of the indictment, but the last overt act alleged to affect the object of the conspiracy is of a date prior to the termination of the territorial government. The crime was then complete, and the defendants then became, if at all, liable to the penalty. At that time Congress had established United States courts in the Indian Territory, and had extended over and put in force there certain laws of the state of Arkansas, including section 3991 of Mansfield's Digest of the laws of Arkansas, which reads:

"A grand jury of sixteen persons shall be selected from those designated as grand jurors, but if any shall be absent, incompetent to serve, or excused, the deficit shall be made up by taking a sufficient number of competent alternates present in the order in which their names appear upon the list."

This was the only statute regulating the number of grand jurors in the constitution of a grand jury which was in force in the Indian Territory at the date of the alleged crimes, unless section 808 of the Revised Statutes (U. S. Comp. St. 1901, p. 626) of the United States was applicable therein, a matter to be presently considered. Before the statutes of the state of Arkansas had been extended over the Indian Territory, it had been the subject of construction by the Supreme Court of that state in the case of Harding v. State, 22 Ark. 210, and it was there held that no grand jury consisting of more than 16 persons complied with its provisions, and that an indictment returned by a grand jury of 17 persons must be quashed. This construction of the statute must be assumed to have been known to the Congress of the United States, and it accompanied the statute when extended. The indictments here in question were each found by a grand jury consisting of

21 persons. After the commission of the offense and before any prosecution therefor, the Indian Territory had, together with the Territory of Oklahoma, been admitted to the Union as the state of Oklahoma. United States Circuit and District Courts had been organized therein, and had been given jurisdiction of offenses theretofore committed in the respective territories so far as the same would have been within the jurisdiction of such courts if committed within a state. The indictments were thereafter found in the United States District Court for the Eastern District of Oklahoma, and it is claimed that the grand jury in question was legally constituted under the provisions of section 808 of the Revised Statutes of the United States. That section provides, among other things, that every grand jury impaneled before any District or Circuit Court shall consist of not less than 16 nor more than 23 persons. It becomes important then to consider whether that section of the statute was applicable to the United States courts of the Indian Territory when the offenses were committed; or, if not, the effect as to the defendants of the subsequent legislation which transferred jurisdiction of the offenses charged to the United States District Court of the Eastern District of Oklahoma.

Section 808 of the Revised Statutes was expressly limited to grand juries impaneled in a United States District or Circuit Court. The courts of the Indian Territory were courts of the United States, but not District or Circuit Courts of the United States within section 808. The dual jurisdiction exercised by the United States courts of the IndianTerritory is besides the question. They did not fall within the description of the courts named in section 808, and that section had no application within any territory of the United States. This was settled by the Supreme Court of the United States in Reynolds v. United States, 98 U. S. 145, 25 L. Ed. 244, and needs no elaboration. But, when these indictments were found, section 808 of the Revised Statutes applied by reason of legislation which took effect after the commission of the offenses charged. It authorized a grand jury consisting of not less than 16 nor more than 23 persons, and the grand jury in question was within the maximum limit prescribed. Was the subsequent legislation which for the first time made this provision of the statutes applicable to the prosecution of the defendants ex post facto as to them, and forbidden by section 9 of article 1 of the Constitution of the United States, so far as it authorized a grand jury consisting of more than 16 persons? It is evident that the change was of importance to the defendants. Neither before nor after statehood could they be held to answer the crime charged unless on a presentment or indictment of a grand jury; but, if sought to be indicted before statehood, five dissenting grand jurors of the entire number could have precluded the finding of an indictment, while after statehood, and as the grand jury was in fact constituted, it required not less than ten dissenting jurors to have the same effect. That the situation was altered to the disadvantage of the defendants is apparent.

But it is argued that this is mere matter of procedure, and that one accused of crime has no vested right in being prosecuted in accordance with the methods of procedure in force at the date of the offense.

That must be granted as a general proposition; but it is so because a change of procedure ordinarily imposes no hardship on the accused, nor seriously alters his position to his disadvantage. In his Constitutional Limitations, p. 272, Judge Cooley says:

"The Legislature may abolish courts and create new ones, and it may prescribe altogether different modes of procedure in its discretion, though it cannot lawfully, we think, in so doing, dispense with any of those substantial protections with which the existing law surrounds the person accused of crime."

The following cases announce and illustrate the principle: Kring v. Mo., 107 U. S. 221, 2 Sup. Ct. 443, 27 L. Ed. 506; Duncan v. Mo., 152 U. S. 377, 14 Sup. Ct. 570, 38 L. Ed. 485; Thompson v. Utah, 170 U. S. 352, 18 Sup. Ct. 620, 42 L. Ed. 1061; Utah v. Rock, 20 Utah, 38, 57 Pac. 532. Here, though the change was one of procedure, I am of the opinion that a substantial protection designed by the law for the benefit of the accused was subsequent to the commission of the offenses if not dispensed with so impaired as to injuriously affect the rights of the accused, and alter the situation to their disadvantage, so that as to them it must be held to be ex post facto.

It is further contended in opposition to the motions to quash that the objection was made too late. The accused do not appear from the record to have been arrested for the offense charged prior to the finding of the indictment, nor to have had any notice that their cases would be examined by the grand jury. The indictments were returned February 3, 1909. The present motions were filed March 15, 1909, and before arraignment. That this was in time when the objection to the grand jury as constituted is substantial and not purely technical must be taken as settled by Carter v. Texas, 177 U. S. 442, 20 Sup. Ct. 687, 44 L. Ed. 839. In that case Carter, a negro, was indicted for murder at the November term of a criminal court of the state of Texas, the indictment being returned on November 26, 1897. At the March term, 1898, when the case was called for trial, but before his arraignment, the defendant presented a motion to quash the indictment on the ground that citizens of African descent had been wrongfully excluded from the grand jury because of their race and color. This motion was held by the Supreme Court to have been interposed in time, and the action of the trial court in denying it error. Many decisions of the state courts to the same effect are collated in Crowley v. United States, 194 U. S. 461, 24 Sup. Ct. 731, 48 L. Ed. 1075. In the case last cited, in reply to a suggestion that a defect in the constitution of a grand jury is a defect or imperfection in matter of form only, and hence cured by section 1025 of the Revised Statutes (U. S. Comp. St. 1901, p. 720), a position also taken in the cases at bar, it was said:

"That section can have no bearing in the present case, for the disqualification of a grand juror is prescribed by statute, and cannot be regarded as a mere defect or imperfection in form. It is matter of substance which cannot be disregarded without prejudice to an accused."

It follows that the indictments will be quashed, but as a grand jury can be empaneled in this court, consisting of 16 persons, and yet com-

plying with the requirements of section 808 of the Revised Statutes, the cases, if counsel for the government so desire, will be ordered to be submitted to another grand jury, and the defendants held to await the action of such grand jury.

THE CAPT. JACK.

(District Court, D. Connecticut. April 6, 1909.)

No. 1,560.

1. SHIPPING (§ 205*)—LIMITATION OF LIABILITY—PERSONS ENTITLED TO BENEFIT OF LIMITATION.

Where a judgment was recovered in a state court against a corporation for the death of a person killed on a derrick scow owned by the defendant by the breaking of a part of the derrick, the court finding that the part was obviously defective on inspection, but that no inspection or repair was made, that the derrick was being used at the time in the raising of a sunken vessel under the personal direction of the defendant's president, who was on board, and that the defendant was chargeable with negligence causing or contributing to the death, the corporation cannot maintain a petition for limitation of liability against such judgment on the ground that the injury was occasioned without its privity or knowledge, through the fault or negligence of the master of the scow.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 205.*

Limitation of owner's liability, see note to 45 C. C. A. 387.]

2. SHIPPING (§ 209*)—LIMITATION OF LIABILITY—CONDITIONS PRECEDENT.

Where a contractor for raising a sunken vessel employed in the work an outfit which it owned, consisting of a scow on which was mounted a derrick, and a tug to supply motive power, in order to maintain a petition for limitation of liability for the killing of a person by the breaking of a part of the derrick during the work, the contractor was required to surrender the entire outfit, including the tug.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 209.*]

In Admiralty. Petition for limitation of liability.

See, also, 162 Fed. 808.

C. S. Hamilton and C. A. Morse, for claimant.

Samuel Park, for petitioner.

PLATT, District Judge. The petitioner herein is the T. A. Scott Company, a corporation located at New London, Conn. Said company alleges: That on or about February 7, 1905, it was the owner of a derrick scow or lighter called the Capt. Jack, which, with its equipment, was used to raise sunken vessels and other work of like character. That on said day, while engaged in raising a sunken vessel in New Haven Harbor, one of the bolts which held the strap at the end of the boom broke, and the strap and bolts, in falling to the deck, struck Andrew J. Perkins, a marine engineer, who was standing on the deck of the lighter, and killed him. That said damage and injury was not caused by or through any fault or negligence on the part of said scow or lighter Capt. Jack or the petitioner, but was caused whol-

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

ly through the fault and negligence of the master and crew of said scow. That said damage and injury was done and occasioned without the privity or knowledge of the petitioner. That the administratrix of the estate of said Perkins brought an action against the petitioner in the superior court for New London county, and on June 19, 1906, obtained a judgment thereon for $5,000 damages and costs. That the amount of said judgment exceeds the value of the petitioner's interest in the Capt. Jack and her equipment, and her freight and voyage moneys, respectively, pending at the time of the disaster. That no other claim exists against her. The petitioner therefore offers up the Capt. Jack, her equipment and pending freight, and seeks the benefit of the limited liability act of Congress to be now found in sections 4283 to 4285 of the Revised Statutes (U. S. Comp. St. 1901, pp. 2943, 2944), and the various statutes supplemental thereto and amendatory thereof.

The petition which is above outlined in its essential parts, was filed on October 28, 1907, and thereupon the usual proceedings in such cases followed. The lighter, with her equipment, which was found to include the hoisting apparatus, was surrendered, and with the aid of the commissioner was found by the court to have been worth in the condition in which she was after the accident, with pending freight, $3,625. The only claim presented was that of the administratrix of said Perkins, deceased, and the petition was heard on the merits at New Haven on March 15, and, by continuance, at Hartford on March 29, 1909.

Counsel for both petitioner and claimant have presented all the testimony which they deemed relevant, have been listened to with patience, and have filed briefs to their full satisfaction. The time at the court's disposal will not permit an exhaustive treatment, either of the facts or of the law which governs the facts, and it is hoped that the parties in interest will appreciate that, although this opinion may seem meager, the case itself has received long and careful examination.

The oral testimony presented in court is quite brief, and both parties depend largely upon the proceedings in the state court. Both claim that the state court judgment must be treated by this court as res adjudicata, but they differ diametrically and persistently upon the question of what has been decided by the state court.

The petitioner says that the state court has decided that Perkins was killed because of a defective strap on the boom of the hoisting apparatus on the Capt. Jack. To that extent he is willing to accept the judgment as res adjudicata. I trust that I am not putting it too strongly when I say that to that extent he courts it and welcomes it with open arms. With that kind of a judgment held up before the court, his argument proceeds smoothly, faultlessly, and logically to the final conclusion. Here is his line of reasoning, briefly stated:

The state court finds (he says) that the accident was caused directly by a defective strap on the boom of the derrick. The petitioner had placed an exceedingly competent man in charge of the Capt. Jack, and had kept him on that boat for over two years. To this competent man (Capt. Nixon) he delegated the duty of inspecting the Capt. Jack and keeping her in proper condition to carry out the work of

raising sunken vessels. He knew nothing about the defective strap, and had discharged his full duty under the law when he put such matters in the hands of such a competent man. It is too bad, we are sorry (I can hear him saying), but to encourage the investment of money in water craft it would never do to refuse us the benefits which Congress had in mind when they passed the limited liability statutes.

But, the claimant says, your president, Mr. Thomas Scott, Jr., was present in New Haven Harbor on the lighter and directing the work. That makes no difference (the petitioner replies); the state court has found that the defective strap was the cause of the death, and neither he nor I knew about the defect in the strap. We had not examined the appliances, and we had a right to rely upon the master of the Capt. Jack, who had the matter in charge. It is admitted that, if Mr. Scott knew, the corporation knew. It is insisted, however, as the case stands, that Mr. Scott neither knew, nor ought to have known, that the strap was defective. Ergo, the petitioner had no privity or knowledge of the cause of the accident.

That is the petitioner's case on the question of privity or knowledge. Before looking at the other side of the picture, let me say a word on the matter of the delegation of the duty of inspection to Capt. Nixon. The exaggerated grossness of his neglect in failing to condemn the bolt which broke and caused the damage, when he had it right before his eyes a short time before the accident, renders it incumbent upon the petitioner to clear its skirts in a most careful manner from the charge of having neglected its duty when it delegated the power of inspection to him and maintained about that subject an ominously rigid silence forever after. The claimant, as above suggested, looks at the situation from another angle, and consequently sees different things. She says that the state court has decided very much more than that the direct cause of the accident was a defective strap. She thinks that this court, in order to ascertain whether that is so or not, ought to go further than to examine the brief memorandum which the trial judge filed with the judgment.

It seems that later the petitioner here, who was defendant there, having visions of possible relief in the higher state court, demanded, as it had a right to do, a more comprehensive finding of facts from the trial judge. Such a finding is of record in the state court. It contains a more comprehensive statement of the facts upon which the trial judge based the order of judgment, and reaches nunc pro tunc back of the judgment. The claimant thinks that this court should venture to glance at that finding in order to learn what was actually decided in the state court. She thinks correctly, and for that reason claimant's Exhibit 1 is admitted.

It is quite possible to decide the case at bar without the aid of this exhibit, because important portions of the complaint in the state court were admitted to be true under the peculiar form of practice in vogue at that time, but the matter decided is much plainer after reading the finding of facts. We will find there a very different situation from the one relied upon by the petitioner, although, as has been suggested, it is not clear that the situation which he relies upon is supported by the

proofs he offers. The finding emphasizes a fact which the pleadings admitted, viz., that Thomas Scott, Jr., president of the defendant corporation, was in full charge of raising the sunken boat, and was giving all the necessary orders and directions for that purpose, and was watching the operation of the work. It is found that the boom in use on the derrick was bought secondhand about a year before the accident, and was not inspected; that after a few months' use one of the bolts on the leading band had broken and a new one was put in, but the other bolt, which was in very bad condition, was not inspected, although a very casual inspection would have revealed its weakness. It is found that the day was cold, and that the leading band and bolts were subjected to a severe strain, and that such use of them on such a day imposed upon Mr. Scott, the president, in charge of the work, the duty of requiring a careful inspection of the appliance just before the time of the accident, and that none was made. The conclusion is reached that the facts established by the evidence did not show that the defendant was not negligent, substantially as charged in the complaint, which is our Connecticut way of saying that the defendant was negligent, substantially as charged.

The defendant at the state trial took issue on the allegations of paragraphs 10, 11, 12, 13, and 17. Much of the claimed negligence is set forth in paragraph 17. It is there charged, among other things, that the defendant was negligent in so anchoring the lighter that the boom had to be used at right angles; that the becket end of the guy rope was fastened to the leading band, instead of to the guy band; that the power of the engine was greater than the appliances could stand; that a strain was allowed to come upon said leading band from both the standing part and the guy rope at the same time. These facts are found by the trial court to be substantially true, although not specifically mentioned in the finding. Paragraph 14 had been admitted, and it is therein alleged that after the defendant had raised the sunken boat a little from the bottom the chain around her slipped and caused a jerk of the boom, which put too great a strain on the leading band, and by force of the strain the band was caused to break and a piece to fall and hit the deceased, which blow caused his death.

We are now prepared to discover what was litigated in the state court and what was decided. There is much more in the case than the mere fact that there happened to be on the Capt. Jack a defective bolt on the leading band, which ought to have been found long before by the captain of the lighter, who was a capable man and ought to have found it. The petitioner itself was there in charge of the work, and the state court has found that the petitioner was negligent in the execution of that work, and by its negligence caused the death of Perkins. It is not necessary to decide that the petitioner's neglectful conduct was the sole inducing cause of the damage. It is enough, if what he did contributed essentially thereto; in other words, it is enough, if it is found that the defective strap would have been harmless if he had not done what he did do. How the petitioner can say now to this court, with a straight face, that it was without privity or knowledge of the cause of the accident, is beyond my comprehension. I am compelled

to find that he has not sustained that necessary allegation of his petition.

If it were necessary to the decision, I should also be compelled to find that the petitioner ought to have offered up the tug Harriet, as well as the lighter, in order to obtain the benefits of the limited liability act. When the petition was filed the idea was to surrender the Capt. Jack alone, without the hoisting apparatus for use in raising sunken vessels, which was movable and could be transferred from one lighter to another. At the hearing on value before the commissioner, however, he was constrained to submit to a valuation of the hoisting apparatus, but insisted that the tug was outside the issues. We valued what he gave up, but I could not see then, and cannot see now, why the logic which induced him to surrender the hoisting apparatus does not force him to surrender the tug. His argument is that he is only constrained by the limited liability act to surrender the offending thing. At first he considered the offending thing to be the scow Capt. Jack, which was made over from an old railroad car float, minus the derrick, engine, etc., used in hoisting. Later, it evidently struck him that, as Perkins was killed by a piece of the strap band which came off the boom of the derrick, it might be well enough to include the hoisting apparatus in that imaginary construction called the offending thing. Now it appears that the lighter and hoisting apparatus and tug were the component parts of a wrecking outfit which the petitioner used to raise the sunken Zouave in New Haven Harbor. The lighter had no propulsive power of her own, and so the outfit was necessarily the one stated. The Harriet did not bring the lighter over to New Haven, leave her at the proper anchorage, and then go about her own business. She stayed and helped out. She was fastened to the Capt. Jack, using her own engine to exhaust upon the sunken boat, and was, with the lighter, under the control and direction of the petitioner, taking a hand in at the work when the accident occurred. No case which I have read, and I believe I have absorbed them all, offers any state of facts or any line of reasoning upon such facts which would warrant the petitioner in expecting that upon the facts before this court he would be able to obtain the benefits which he seeks without first surrendering the entire wrecking outfit which was sent over from New London to raise the sunken vessel.

Therefore, upon both grounds above hastily discussed, the petition must be dismissed, with costs.

UNION PAC. RY. CO. v. KARGES et al

(Circuit Court, D. Nebraska, Omaha Division. May 4, 1909.)

1. PUBLIC LANDS (§ 51*)—GRANTS—NEBRASKA ORGANIZATION ACT.
Act Cong. May 30, 1854, c. 59, § 16, 10 Stat. 283, organizing the territory of Nebraska, and providing that sections 16 and 36 in each township in the territory shall be and are reserved to be applied to schools in the territory and the states and territories to be erected out of the same, was a mere reservation of the sections for the purpose specified;

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

no grant of such sections being made until by Enabling Act April 19, 1864, c. 59, § 7, 13 Stat. 49, declaring that such sections in each township not otherwise disposed of, or other equivalent lands, were granted to the state for school purposes.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 138; Dec. Dig. § 51.*]

2. PUBLIC LANDS (§ 7*)—SCHOOL LANDS—RIGHTS OF STATE—VESTED RIGHTS.
Prior to Act Cong. April 19, 1864, c. 59. 13 Stat. 47, organizing the state of Nebraska, that state acquired no vested right in sections 16 and 36 in each township granted by the act for school purposes, and hence, prior to such act, Congress had full power to dispose of such sections as it saw fit.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 7; Dec. Dig. § 7.*]

3. PUBLIC LANDS (§ 6*)—STATUTORY PROVISIONS—CONSTRUCTION.
The rule that the words "public lands" mean such land as is subject to sale or further disposition under general laws, and not such as is reserved by competent authority for any purpose, or in any manner, although no exception thereof is made, does not conflict with the doctrine that, where it clearly appears from the statute that the term is intended to include lands theretofore reserved for a specific purpose, such intention will prevail, under the rule that a legislative act is to be interpreted according to the plain intention of the Legislature.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 6.*

For other definitions, see Words and Phrases, vol. 6, pp. 5793–5795; vol. 8, p. 7772.]

4. PUBLIC LANDS (§ 71*)—GRANTS TO RAILROADS—CONSTRUCTION—VESTING TITLE IN COMPANY.
Act July 1, 1862, c. 120, § 2, 12 Stat. 491, granted to the Union Pacific Railroad the right to take from the public lands adjacent to its line a right of way 400 feet wide, where the railway passes over the public lands, and that the United States should extinguish as rapidly as possible Indian titles to all lands falling under the operation of the act and required for such right of way. *Held*, that such act granted to the railroad company a right of way across land reserved for school purposes in Nebraska prior to the state acquiring a vested right therein by virtue of Enabling Act (Act Cong. April 19, 1864, c. 59, 13 Stat. 49) § 7.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 232; Dec. Dig. § 71.*]

5. ADVERSE POSSESSION (§ 8*)—PROPERTY SUBJECT—PUBLIC LANDS—RAILROAD RIGHT OF WAY.
The right of way over public land, granted by Congress to the Union Pacific Railway Company by Act July 1, 1862, c. 120, § 2, 12 Stat. 489, could not be lost to the railroad company by adverse possession; such right of way being regarded as a public highway, and essential to the performance by the railroad company of public duties assumed on its acceptance of the grant.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 43; Dec. Dig. § 8.*

Acquisition or loss of right to railroad right of way by prescription, see note to Louisville & N. R. Co. v. Smith, 63 C. C. A. 7.]

N. H. Loomis and Edson Rich, for complainant.
A. M. Post, for respondents.

Before W. H. MUNGER and T. C. MUNGER, District Judges.

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

W. H. MUNGER, District Judge. The pleadings in this case present two issues of law simply: First, whether the act of Congress, granting a right of way to the Union Pacific Railway Company, granted such right of way across sections 16 and 36 that had theretofore been set apart for school purposes; and, second, whether or not respondents have acquired any right to a portion of such right of way by adverse possession.

The several provisions of the statutes applicable to a consideration of this case are hereinafter quoted. Section 16 of the congressional enactment of May 30, 1854, organizing the territory of Nebraska, is as follows:

"And be it further enacted, that, when the lands in said territory shall be surveyed under the direction of the government of the United States, preparatory to bringing the same into market, sections number sixteen and thirty-six in each township in said territory shall be, and the same are hereby, reserved for the purpose of being applied to schools in said territory and in the states and territories hereafter to be erected out of the same." Chapter 59, 10 Stat. 277.

By this section no grant of the lands was made. It simply constituted a reservation of the sections for the purpose specified. No grant of these sections was made to the territory or state until the enabling act of April 19, 1864 (chapter 59, 13 Stat. 47), section 7 of which reads as follows:

"And be it further enacted, that sections number sixteen and thirty-six in every township, and when such sections have been sold or otherwise disposed of by any act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one quarter section, and as contiguous as may be, shall be, and are hereby, granted to said state for the support of common schools."

This is the first enactment containing a grant of these sections, and upon the acceptance by the state of the enabling act, and the state's admission into the Union, a vested right to these sections was first acquired. Nebraska was organized as a state in February, 1867, and accepted the provisions of the enabling act. By such acceptance on the part of the state, it acquired a vested right to sections 16 and 36 in each township which had not, at the time, been in any manner disposed of by the United States. Until such vested right was acquired, Congress had full power and authority to make such disposition of these sections, or portions thereof, as it saw fit. State of Minn. v. Batchelder, 1 Wall. 109, 17 L. Ed. 551; Frisbie v. Whitney, 9 Wall. 187, 19 L. Ed. 668; Emblen v. Lincoln Land Co., 184 U. S. 660, 22 Sup. Ct. 523, 46 L. Ed. 736.

In July, 1862, after the lands in question had been surveyed under authority of the government of the United States, but before any vested right to them had been acquired, Congress granted to the Union Pacific Railway Company a charter with power to construct a railroad from a point on the Missouri river westward, and granted to such railroad company a right of way over the public lands; the provisions of the act granting the right of way being as follows:

"And be it further enacted, that the right of way through the public lands be, and the same is hereby, granted to said company for the construction of

said railroad and telegraph line; and the right, power and authority is hereby given to said company to take from the public lands adjacent to the line of said road, earth, stone, timber, and other materials for the construction thereof; said right of way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass over the public lands, including all necessary grounds for stations, buildings, workshops, and depots, machine shops, switches, side-tracks, turn-tables, and water stations. The United States shall extinguish as rapidly as may be the Indian titles to all lands, falling under the operation of this act and required for the said right of way and grants hereinafter made." Chapter 120, § 2, 12 Stat. 489.

This section granted the right of way over the public lands, and, as sections 16 and 36 had theretofore been reserved for school purposes, the contention is that said sections did not, at the time of the passage of this act, fall within the designation of public lands. and hence that the railroad company did not acquire a right of way over those sections.

The true rule respecting the term "public lands" was stated by Judge Van Devanter, sitting in the Court of Appeals, in Northern Lumber Co. v. O'Brien, 139 Fed. 614–616, 71 C. C. A. 598, 600, in the following language:

"The words 'public land' have long had a settled meaning in the legislation of Congress, and, when a different intention is not clearly expressed, are used to designate such land as is subject to sale or other disposal under general laws, but not such as is reserved by competent authority for any purpose or in any manner, although no exception of it is made. Bardon v. Northern Pacific R. R. Co., 145 U. S. 535, 12 Sup. Ct. 856, 36 L. Ed. 806; Wilcox v. McConnel, 13 Pet. 498, 513, 10 L. Ed. 264; Leavenworth, etc., R. R. Co. v. United States, 92 U. S. 733, 741, 745, 23 L. Ed. 634; Newhall v. Sanger, 92 U. S. 761, 23 L. Ed. 769; Doolan v. Carr, 125 U. S. 618, 630, 8 Sup. Ct. 1228, 31 L. Ed. 844; Cameron v. United States, 148 U. S. 301, 309, 13 Sup. Ct. 595, 37 L. Ed. 459; Mann v. Tacoma Land Co., 153 U. S. 273, 284. 14 Sup. Ct. 820, 38 L. Ed. 714; Barker v. Harvey, 181 U. S. 481, 490, 21 Sup. Ct. 690, 45 L. Ed. 963; Scott v. Carew, 196 U. S. 100, 109, 25 Sup. Ct. 193, 49 L. Ed. 403."

These decisions do not conflict with the settled doctrine that, where it clearly appears from the statute that the term "public lands" is intended to include lands which have theretofore been reserved by Congress for a specific purpose, such intention will prevail, as it is a fundamental rule of construction that a legislative act is to be interpreted according to the plain intention of the legislative body.

As said by the Supreme Court, in Winona & St. Peter R. R. Co. v. Barney, 113 U. S. 618–625, 5 Sup. Ct. 606, 609, 28 L. Ed. 1109, speaking with respect to acts of Congress making grants of certain lands:

"They are to receive such a construction as will carry out the intent of Congress, however difficult it might be to give full effect to the language used if the grants were by instruments of private conveyance. To ascertain that intent we must look to the condition of the country when the acts were passed, as well as to the purpose declared on their face, and read all parts of them together."

To the same effect are Wilkinson v. Leland, 2 Pet. 627, 7 L. Ed. 542; Priesman v. U. S.. 4 Dall. 28, 1 L. Ed. 727; U. S. v. Wiltberger, 5 Wheat. 76, 5 L. Ed. 37; Platt v. Union Pacific R. R. Co., 99 U. S. 48, 25 L. Ed. 424.

As to what was the intent of Congress, in granting this right of way to the Union Pacific Railway Company, it is proper to inquire what were the conditions existing at the time. and what was the aim and purpose of Congress in passing the enactment. This was fully expressed in United States v. U. P. R. R. Co., 91 U. S. 72–79, 23 L. Ed. 224, as follows:

"Many of the provisions in the original act of 1862 are outside of the usual course of legislative action concerning grants to railroads, and cannot be properly construed without reference to the circumstances which existed when it was passed. The War of the Rebellion was in progress; and, owing to complications with England, the country had become alarmed for the safety of our Pacific possessions. The loss of them was feared in case those complications should result in an open rupture; but, even if this fear were groundless, it was quite apparent that we were unable to furnish that degree of protection to the people occupying them which every government owes to its citizens. It is true, the threatened danger was happily averted; but wisdom pointed out the necessity of making suitable provision for the future. This could be done in no better way than by the construction of a railroad across the continent. Such a road would bind together the widely separated parts of our common country, and furnish a cheap and expeditious mode for the transportation of troops and supplies. If it did nothing more than afford the required protection to the Pacific States, it was felt that the government, in the performance of an imperative duty, could not justly withhold the aid necessary to build it; and so strong and pervading was this opinion that it is by no means certain that the people would not have justified Congress if it had departed from the then settled policy of the country regarding works of internal improvement, and charged the government itself with the direct execution of the enterprise.

"This enterprise was viewed as a national undertaking for national purposes, and the public mind was directed to the end in view, rather than to the particular means of securing it. Although this road was a military necessity, there were other reasons active at the time in producing an opinion for its completion besides the protection of an exposed frontier. There was a vast unpeopled territory lying between the Missouri and Sacramento rivers which was practically worthless without the facilities afforded by a railroad for the transportation of persons and property. With its construction, the agricultural and mineral resources of this territory could be developed, settlements made where settlements were possible, and thereby the wealth and power of the United States largely increased. And there was also the pressing want, in time of peace even, of an improved and cheaper method for the transportation of the mails, and of supplies for the army and the Indians. It was in the presence of these facts that Congress undertook to deal with the subject of this railroad. The difficulties in the way of building it were great, and by many intelligent persons considered insurmountable. * * *

"Congress acted with reference to a state of things believed at the time to exist, and, in interpreting its legislation, no aid can be derived from subsequent events. The project of building the road was not conceived for private ends, and the prevalent opinion was that it could not be worked out by private capital alone. It was a national work, originating in national necessities, and requiring national assistance. * * * That there should, however, be no doubt of the national character of the contemplated work, the body of the act contains these significant words: 'And the better to accomplish the object of this act—namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the government at all times (but particularly in time of war) the use and benefits of the same for postal, military, and other purposes—Congress may at any time, having due regard for the rights of said companies named herein, add to, alter, amend, or repeal this act.' 12 Stat. 497. Indeed, the whole act contains unmistakable evidence that, if

Congress was put to the necessity of carrying on a great public enterprise by the instrumentality of private corporations, it took care that there should be no misunderstanding about the objects to be attained, or the motives which influenced its action. * * *

"Confessedly, the undertaking was beyond the ability of unaided private capital. Only by the helping hand of Congress could the problem, difficult of solution under the most favorable circumstances, be worked out. Local business, as a source of profit, could not be expected while the road was in course of construction, on account of the character of the country it traversed; and whether, when completed, it would prove valuable as an investment, was a question for time to determine. *But vast as was the work, limited as were the private resources to build it, the growing wants as well as the existing and future military necessities of the country demanded that it be completed. Under the stimulus of these considerations Congress acted, not for the benefit of private persons, nor in their interest, but for an object deemed essential to the security as well as to the prosperity of the nation.*" (Italics my own.)

Thus it will be seen that the object and purpose which Congress had in view was to secure, at an early date, the actual construction and operation of a railroad from the Missouri river to the Pacific Coast, not for private purposes, but for the national welfare, and it cannot be supposed that Congress intended that such national object should be thwarted by the inability of the company to construct this road across lands belonging to the United States, but which had been reserved for other purposes. This view is, I think, made plain also by comparing the language of section 2, granting the right of way, with the language of section 3, which gave to the railroad company, to aid in its construction, every alternate section of public land designated by odd numbers, to the amount of five alternate sections per mile on each side of said road, "not sold, reserved, or otherwise disposed of by the United States and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed." By section 2 the grant of the right of way was in presenti, and contained no reservations; whereas, by the terms of section 3, granting the fee to the respective sections, to aid in the construction of the road, the grant was afloat until the line of the road was definitely fixed, and specifically excepted from its operations lands which, at the time the line of the road was definitely fixed, had been sold, reserved, or otherwise disposed of.

Construing the act as a whole, Congress having made reservation in the third section of the act relative to the aid lands, and made no reservation in the section granting the right of way, and further considering the national necessities for the construction of the road, it appears clear that it was the intention of Congress to grant such right of way over the lands the title of which was in the United States, and to which no other party had acquired a vested right.

The Supreme Court, in Railroad Co. v. Baldwin, 103 U. S. 426–429, 26 L. Ed. 578, after considering the provisions of an act granting certain sections to aid in the construction of a railroad, which contained reservations similar to those of the act in question, referring to the provision of the act granting the right of way, said:

"But the grant of the right of way by the sixth section contains no reservations or exceptions. It is a present absolute grant, subject to no conditions

except those necessarily implied, such as that the road shall be constructed and used for the purposes designed. Nor is there anything in the policy of the government with respect to the public lands which would call for any qualification of the terms. Those lands would not be the less valuable for settlement by a road running through them. On the contrary, their value would be greatly enhanced thereby. The right of way for the whole distance of the proposed route was a very important part of the aid given. If the company could be compelled to purchase its way over any section that might be occupied in advance of its location, very serious obstacles would be often imposed to the progress of the road. For any loss of lands by settlement or reservation, other lands are given; but, for the loss of the right of way by these means, no compensation is provided, nor could any be given by the substitution of another route. *The uncertainty as to the ultimate location of the line of the road is recognized throughout the act, and where any qualification is intended in the operation of the grant of lands, from this circumstance, it is designated. Had a similar qualification upon the absolute grant of the right of way been intended, it can hardly be doubted that it would have been expressed. The fact that none is expressed is conclusive that none exists.*" (Italics my own.)

In Kindred et al. v. Union Pacific Railway Co., 168 Fed. 648, the Court of Appeals of this circuit, in an opinion filed February 12th last, discussing sections 2 and 3 of the act in question, say:

"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."

Other cases in point are: U. S. v. Bisel, 8 Mont. 20, 19 Pac. 251; Barkley v. U. S., 3 Wash. T. 522, 19 Pac. 36; U. S. v. Elliot, 12 Utah, 119, 41 Pac. 720; Coleman v. St. Paul, M. & N. Ry. Co., 38 Minn. 260, 36 N. W. 638; Peterson v. Baker, 39 Wash. 275, 81 Pac. 681; Riverside Township v. Newton, 11 S. D. 120, 75 N. W. 899; Union Pacific Railway Co. v. Douglas County (C. C.) 31 Fed. 540.

The claim of adverse possession was disposed of by the Court of Appeals in Kindred v. U. P. R. R. Co., supra, wherein it is said:

"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. 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."

For these reasons I think the demurrer to the cross-bill should be sustained, and that complainant is entitled to a decree upon the bill and answer.

T. C. MUNGER. I concur.

CENTRAL TRUST CO. OF NEW YORK v. CINCINNATI, H. & D. RY. CO.

(Circuit Court, S. D. Ohio, W. D. March 23, 1908.)

No 6,133.

1. RAILROADS (§ 186*)—SUIT TO FORECLOSE MORTGAGES—INTERVENTION—CONTROVERSIES BETWEEN BONDHOLDERS.

In a suit by the trustee in a railroad mortgage securing bonds to foreclose the same, where a decree pro confesso had been entered and a reference made to a master to ascertain the property covered, and the amount of the bonds outstanding and the interest due thereon are mere matters of computation, leave will not be granted to certain bondholders to intervene for the purpose of litigating the validity of notes to which others of the bonds are held as collateral in advance of the entry of a decree of sale, and especially where the insolvency of the mortgagor is conceded, the property is being operated by receivers at a loss, and the notes attacked are negotiable and in the hands of unknown holders who are not parties.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 616; Dec. Dig. § 186.*]

2. RAILROADS (§ 190*)—SUIT TO FORECLOSE MORTGAGES—PROCEDURE—CONTROVERSIES BETWEEN BONDHOLDERS.

In a suit to foreclose a railroad mortgage securing bonds, the court has power to order a sale before the final determination of the validity and amount of bonds held by each holder, and it is a recognized practice in such cases to postpone the final determination of all such questions until after the sale.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 623; Dec. Dig. § 190.*]

3. RAILROADS (§ 186*)—PLEDGE OF BONDS IN TRUST—REPRESENTATION OF CREDITORS BY TRUSTEE.

A trustee appointed by a railroad company to hold mortgage bonds pledged as security for negotiable notes issued by the company is the agent of the company only, and not of the holders of the notes, and notice to the trustee of defenses against the notes is not notice to bona fide holders or purchasers; nor does the fact that the trustee is a party to a suit to foreclose the mortgage in a different capacity make the note holders parties by representation, and no action can be taken in such suit respecting the validity of the notes unless such holders are brought in as parties.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 615; Dec. Dig. § 186.*]

4. EQUITY (§ 115*)—PARTIES—BRINGING IN PARTIES BY CROSS-BILL.

It is not proper practice to permit one who is not a party to the original suit to be brought in by a cross-bill.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 280; Dec. Dig. § 115.*]

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

5. RAILROADS (§ 180*)—MORTGAGES—DUTY OF TRUSTEE.

A trustee under a railroad mortgage is bound to recognize the rights of the holders of all bonds which are prima facie valid, and to act on their request to foreclose when made by the requisite number.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 609; Dec. Dig. § 180.*]

6. RAILROADS (§ 186*)—SUIT TO FORECLOSE MORTGAGE—REPRESENTATION OF BONDHOLDERS BY TRUSTEE.

A trustee in a railroad mortgage in bringing a suit to foreclose acts for the benefit of every bondholder who may show his right to share in the proceeds of sale, and the fact that it may in a different capacity represent certain of the bondholders does not incapacitate it from acting for the others in bringing and maintaining the suit, although there may be controversy between them as to distribution of the proceeds.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 615; Dec. Dig. § 186.*]

In Equity. On application for leave to intervene.

White & Chase and Edward P. Moulinier, for Brooklyn Trust Co. and others.

Arthur H. Van Brunt, J. W. Warrington, and T. B. Paxton, Jr., for Central Trust Co.

LURTON, Circuit Judge. This cause is now heard upon an application of the Brooklyn Trust Company and other corporations for leave to intervene and become defendants herein and to file an answer and cross-bill. For the purpose of obtaining admission as defendants, the proposed answer and cross-bill is presented, and leave to file same is sought. The Central Trust Company has objected, and counsel for the proposed interveners and that company have been heard orally and by brief.

The proceeding in which the interveners want to intervene is a simple mortgage foreclosure suit in which the Central Trust Company, as trustee, seeks to foreclose a certain mortgage executed January 27, 1905, by the railway company, which is the sole defendant. The mortgage is known as the "consolidated mortgage," and provides for the security of bonds to be issued not to exceed $50,000,000, par value. In default of an answer this bill was taken for confessed, July 15, 1908. Subsequently a special master was directed to take proof and report the property covered by the mortgage, and the cause stood in this situation, awaiting this report, when this application was made for leave to intervene.

This petition shows that the petitioners hold of the outstanding issue of the consolidated mortgage bonds an amount aggregating in par value $2,000,000, as collateral security for certain promissory notes of the railway company, dated in September and October, 1905. It is then averred that of the outstanding issue of $17,500,000 under said mortgage $15,000,000 are held by the Central Trust Company under a trust created by the railway company March 1, 1905, to secure promissory notes made and sold by the railway company aggregating $15,000,000, said series of notes being known as "collateral trust notes." The present owners and holders of said "collateral trust

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

notes" are not parties to the pending suit, nor is it made to appear who are now such owners or holders. The object of this intervention is to prevent the participation of the bonds so held by the Central Trust Company in the benefits of the mortgage of January 27, 1905. The grounds upon which this relief is sought is not that the mortgage has not been duly executed, nor that its execution is ultra vires or fraudulent, for the petitioners are themselves holders of bonds issued under the same mortgage which, they say, are valid obligations, but because, as they aver, the "collateral trust notes" which are secured by the bonds so held by the Central Trust Company in its character as trustee under the trust created March 1, 1905, were issued for certain alleged illegal purposes and used for objects beyond the powers of the railway company, and that the bonds so held should not, therefore, be recognized as valid securities under the mortgage being foreclosed.

I shall not go into the sufficiency of the averments challenging the validity of the debts for which such outstanding bonds are collateral, but confine myself to the single question as to whether petitioners should be allowed at this stage of the proceeding to intervene for the purpose of having this question determined before a decree for sale under the pending bill. If I assume that a prima facie case is made against the bonds pledged to secure the "collateral trust notes," is it essential that the whole foreclosure proceeding shall stop until every holder of a bond issued under the "consolidated mortgage" shall have established his right to share in the proceeds of the mortgage sale? It is not necessary before a decree for sale under such a railway mortgage that the validity or ownership of every bond secured by it shall be first determined. The bill avers that bonds aggregating $17,500,000 were issued and are outstanding, and that there has been default in interest maturing on and after July 1, 1905. The mortgagor company makes no defense, and a decree pro confesso has been taken long since. The amount due is therefore a simple matter of calculation, which does not necessitate a reference. There is no intimation that the railway company has suffered a collusive default. There exists, then, all that is necessary for a decree nisi. It is undoubtedly proper practice, if not always essential, that such a decree nisi shall definitely disclose the nature of the default and the amount of principal and interest due as a consequence. This is to fix the amount which the mortgagor must pay in to prevent a sale, for it is necessary that a reasonable time be allowed for such redemption, for otherwise a valuable right of the mortgagor may be destroyed. But in order to declare and determine the amount of bonds due and outstanding and the amount of interest due and unpaid, it is not essential that the bonds and coupons shall be produced and proved. The necessary declaration of the amount to be paid in order that the mortgagor may redeem is not regarded as final or conclusive upon the point of the amount of the debt, for it is well settled that any holder of such bonds who presents them for a dividend out of the proceeds of sale may challenge the claim of any other when the allowance will diminish his own share in the fund. Galveston Railroad Co. v. Cowdrey, 11 Wall. 459, 479, 20 L. Ed. 199; Story's Eq. Juris.

§§ 548, 549; Whitaker v. Wright, 2 Hare, R. 310; Owens v. Dickinson, 1 Craig & Phill. 48, 56. Indeed, it is proper in any such decree to require that all holders of bonds shall present them to a special master, and that all persons claiming a right to share in the proceeds of sale shall have the right to challenge the right of any one presenting a bond to the special master for such purpose.

A court has the power to order a sale before the final determination of the validity and amount of bonds held by each holder, and the practice in railroad mortgage bond cases is to postpone the final determination of all such questions. First National Bank v. Shedd, 121 U. S. 85, 87, 7 Sup. Ct. 807, 30 L. Ed. 877; Guaranty Company v. Railroad Co., 139 U. S. 150, 11 Sup. Ct. 512, 35 L. Ed. 116; Dickerman v. Northern Trust Co., 176 U. S. 181, 194, 20 Sup. Ct. 311, 44 L. Ed. 423; Penn. R. Co. v. Allegheny Valley R. Co. (C. C.) 42 Fed. 82, 85; Northern Trust Co. v. Columbia Straw Paper Co. (C. C.) 75 Fed. 936; Toler v. East Tenn. & Virginia R. Co. (C. C.) 67 Fed. 168; Short on Railroad Bonds, § 755.

In Toler v. East Tenn. & Virginia R. Co., cited above, a case which on this point was favorably cited in Dickerman v. Northern Trust Co., 176 U. S. 181, 184, 20 Sup. Ct. 311, 44 L. Ed. 423, I adopted this course, and said:

"It is not necessary that each claimant of a bond or of unpaid interest should, at this stage of a foreclosure case, identify himself as the owner of bonds or unpaid coupons. It is not necessary that the bonds with coupons should be produced before a nisi foreclosure decree. It is only necessary that it shall, at this stage of the cause, appear that there has been a default, and the amount of that default. This showing has been made. Should a decree of sale be made absolute, the holders of bonds can then be required to produce their bonds and coupons before a master, and all questions connected with the amount due each, and of ownership, can then be determined. Guaranty Trust & Safe Deposit Co. v. Green Cove Springs & M. R. Co., 139 U. S. 150, 151, 11 Sup. Ct. 512, 35 L. Ed. 116. Such a decree is not to be regarded as final as to the debts entitled to share in the distribution, for any other creditor may challenge the debt when the claims are produced in the master's office for ascertainment and classification. The decree for a foreclosure only establishes that there has been a default in the payment of the three last installments of interest. It does not establish that that interest is due to any particular person."

These "collateral trust notes" themselves are commercial negotiable obligations, and their present holders would be necessary parties to any proceeding which seeks to defeat their right to share in the proceeds of the mortgage under which the bonds pledged for their benefit were issued. Neither would notice to the Central Trust Company of equities be notice to bona fide holders of such "collateral trust notes." The Central Trust Company is not charged to have been the agent of such holders, and it is plain that a trustee appointed by the pledgor or creator of a trust is only the agent of the principal creating the trust. To hold that notice to a trustee in a railroad mortgage to secure negotiable bonds is notice to every purchaser of such bonds of defenses against them would be to cast a cloud upon the millions of such securities outstanding. Curtis v. Leavitt, 15 N. Y. 9; Commissioners of Johnson County v. Thayer, 94 U. S. 631, 24 L. Ed. 133; National Waterworks Co. v. Kansas City (C. C.) 78 Fed. 428. Nor does the

fact that the Central Trust Company is the trustee under both trusts, that of January 27, 1905, and that of March 1, 1905, make the beneficiaries in the latter parties by representation here, nor is notice to it in one character notice to the beneficiaries under another and distinct trust. Compton v. Jesup et al., 68 Fed. 265, 15 C. C. A. 397. It is plain, therefore, that there could be no effective decree affecting the rights of such collateral trust note holders without bringing them before the court. The defenses which the petitioners wish to present involve the validity of certain obligations issued under a prior mortgage known as the "refunding mortgage." It is averred that $8,250,000 of bonds issued under that mortgage were issued to acquire shares of stock in the Pere Marquette Railroad Company, and that such use was in excess of the powers of the railway company. This question would necessitate the bringing in of the trustee in the "refunding mortgage," as well as the holders of the bonds which it is said were used for an illegal purpose. One of the purposes of this intervention is to have that "refunding mortgage" scrutinized and the amount of valid outstanding bonds determined before any decree of sale under the later consolidated mortgage, and for this purpose the proposed cross-bill seeks to bring in the "refunding mortgage" in case the court does not compel the Central Trust Company to dismiss the present bill.

That a junior mortgagee may sell for the satisfaction of the mortgage subject to a prior mortgage is plain. It is, therefore, unnecessary to make senior mortgagees parties to such a bill. Nor is it proper practice to permit one who is not a party to the original suit to be brought in by a cross-bill. Shields v. Barrow, 17 How. 130, 144, 15 L. Ed. 158; Wright v. Frank, 61 Miss. 32; Toler v. East Tenn. & Virginia Ry. Co. (C. C.) 67 Fed. 173. Aside from the difficulties in respect of new parties, great delay and inconvenience must result if the petitioners are allowed to now come and litigate the questions they desire. The property of the railway company has now been in the hands of a receiver appointed by this court under the Horn bill, and later under that bill and the bill of the Central Trust Company, for more than two years. The bonded debt has been constantly accumulating. The receiver's debt has been increasing. There is, besides, a large debt due to persons claiming preferences over all mortgages as operating expense claims, as well as a large unsecured class of creditors. The plain legal right of the trustees under the "consolidated mortgage" is to sell subject to all prior liens or mortgages. The purchaser at such sale may, if he will, contest all such unforeclosed liens or mortgages. These considerations apply more directly to the proposal to bring in one of the mortgages senior to that under foreclosure. If the junior mortgagee does not want to have the amount due upon senior mortgages settled, he need not. They also apply to the effort to have determined the equities which the petitioners may have if the property does not bring enough to pay all the outstanding issue of bonds against the rights of some of the bondholders to share in the insufficient proceeds.

That a court may in its discretion decline to allow an unnecessary party to come in and be made a defendant is elementary. That the

court has the power in its discretion to postpone until after a sale all questions as between creditors over the distribution of the proceeds of sale cannot be seriously questioned. But it is said that the petitioners should be admitted as defendants and allowed to file the proposed cross-bill for the determination of the questions affecting the right of the outstanding $15,000,000 of bonds assailed, because the Central Trust Company should not be allowed to conduct this suit as such trustee: First, because the declaration of maturity was made by it without authority; second, because the suit has been filed without authority; and, third, because the trustee occupies antagonistic fiduciary capacities which conflict with its fitness to stand as a representation of petitioners as holders of "consolidated bonds." The first two objections rest upon the claim that the only outstanding bonds which are entitled to the benefits of the mortgage are the $2,000,000 which the petitioners hold as collateral to the promissory notes of the railway company, and $5,000,000 which the Central Trust Company holds as collateral for a $3,000,000 promissory note made by the railway company. Obviously the Central Trust Company in its character as trustee under this mortgage was compelled to respect the prima facie rights of the remaining $15,000,000 of bonds, and at their request declare maturity for default in interest and file this bill for foreclosure. That course was its legal duty, whether the demand was made upon it by itself in its character as trustee under the subsequent trust of March 1, 1905, or by the unknown beneficiaries of the later trust.

The assumption that interveners, as holders of 80 per cent. of the bonds which they assert are the only valid bonds, and that their views should have controlled the trustee against the other $15,000,000, is too tenuous for serious consideration. The action of the trustee in declaring a maturity and in later filing this bill is no way so antagonistic to any substantial legal or equitable right of petitioners as to justify the claim that it thereby antagonizes their interests in such way as to make proper their admission as parties.

The third objection, that the Central Trust Company occupies opposing fiduciary relations, and should not, therefore, be allowed to stand for and represent petitioners, is equally unfounded. In bringing to a sale the mortgaged property it acts for the benefit of every bondholder who may show his right to share in the proceeds of sale. The question of where the proceeds of the sale shall go is not a question which concerns the Central Trust Company, as complainant in this cause, or as trustee under the mortgage under foreclosure. In the settlement of that question every one presenting bonds for allowance stands for himself, and may, if he chooses, stand against every other creditor if the fund be insufficient. In that proceeding before the master the Central Trust Company may, if it will, file for allowance bonds which it holds as owner or as trustee under another trust, without placing itself in any position antagonistic to its duty as trustee under the foreclosed mortgage.

Finally, it is said that, if all questions as to validity and amount of obligations provable against the fund to arise from a sale is settled be-

fore the sale, petitioners will be in a better situation to protect themselves at the bidding. The same reason would apply in determining absolutely all prior liens against the mortgaged property before sale. Such a course will involve a frightful delay. Already this foreclosure has been pending for more than two years, and the property has been in the hands of a receiver for more than three years. About the utter insolvency of the railway company there can be no serious doubt. I have already stated that the receiver's debt is growing, and interest charges steadily accumulating. After delay of nearly two years in making this application—for the facts were accessable at any time after the appointment of the receiver—I am not disposed to assent to any such delay as must ensue before a sale if the questions mooted are to be settled before one can be made.

The conclusion I reach is that the petitioners must be denied the right to intervene at this stage, though they may do so before the master at the proper time.

THE CITTA DI MESSINA.

(District Court, S. D. New York. April 13, 1909.)

1. SHIPPING (§ 125*)—CARRIAGE OF GOODS—LOSS OR INJURY—DEVIATION FROM VOYAGE.

Deviation is a term of art, belonging in the main to the law of marine insurance and to be interpreted by that law; but the rule as to deviation is applicable to a shipper as well as to an insurer, and any deviation from the course of navigation which experience and usage have prescribed as the safest and most expeditious mode of proceeding from one voyage terminus to the other will cast subsequent loss of, or injury to, either ship or cargo on the shipowner, without any reference to the question whether it had any bearing on the particular loss complained of.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 459; Dec. Dig. § 125.*]

2. SHIPPING (§ 125*)—CARRIAGE OF GOODS—DEVIATION.

Delay of a vessel, even upon the route prescribed by a policy or bill of lading, may amount to deviation.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 459; Dec. Dig. § 125.*]

3. SHIPPING (§ 125*)—CARRIAGE OF GOODS—DEVIATION.

Under bills of lading which recited that the vessel was bound for New York, "but with liberty to the steamer either before or after proceeding towards that port to proceed to and stay at any port or places whatsoever, although in a contrary direction to or out of or beyond the route to the said port of discharge once or oftener in any order, backwards or forwards for loading or discharging cargo or passengers or for any purpose whatsoever," the stopping of the vessel at the next port of call for 13 days awaiting cargo of which she obtained but a small part did not constitute a deviation.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 459; Dec. Dig. § 125.*]

4. SHIPPING (§ 132*)—ACTION FOR DAMAGE TO CARGO—BURDEN OF PROOF.

Where damage to cargo was prima facie within the exceptions in the bills of lading, the burden is on the shipper to establish that the goods

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

are removed from the operation of such exceptions because of the carrier's negligence.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 481; Dec. Dig. § 132.*]

5. SHIPPING (§ 125*)—CARRIAGE OF GOODS—INJURY TO CARGO—LIABILITY OF VESSEL.

An Italian vessel on a voyage from Mediterranean ports to New York, in accordance with a common custom of such vessels at that season, stopped at Spanish ports for onions, grapes, and other local products. At one of such ports she loaded onions consigned to libelants in New York, the bills of lading giving her liberty to stop and stay at other ports and also exempting her from liability for decay or for loss or damage to fruit or other perishable goods through delay or loss of time in obtaining and loading other goods at that or other ports to complete her cargo. She proceeded to another port where she expected to obtain a large consignment of grapes, and remained there 13 days, but obtained but a small part of the expected cargo. When she arrived at New York a large part of her onion cargo was lost and damaged through decay. *Held*, that under the terms of the bills of lading she was not liable for the loss, in the absence of proof that her stay in the loading ports was a departure from general usage, that it was so unreasonable as to constitute negligence, and that it was the cause of the damage.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 459; Dec. Dig. § 125.*]

In Admiralty. Libels for cargo damage.

The Messina is an Italian cargo steamer of 2,564 gross and 1,556 net tons, and was in the year 1908 plying between Mediterranean ports and New York in what was known as the "Creole Line."

From July to October vessels in this trade bound for the United States frequently stop at the Spanish ports of Gandia and Denia for onions, and during the same months, or some of them, stop also at Almeria and Malaga for grapes and other local products. The "onion ports" are but 15 miles apart, and at them between August 31 and September 2, 1908, the Messina received a large number of onions consigned to libelants and others in New York.

On September 3d she left Denia (the last onion port), and arrived at Almeria on the morning of September 4th. She went there pursuant to owners' orders, advising the master that he would "probably get 12,000 barrels of grapes." I find that this expectation was the result of information given or promises made to the owners by one Canet, who was at once the ship's agent in Almeria, and largely engaged in the business of collecting and exporting grapes on behalf of producers in the vicinity.

The Messina remained in Almeria until the evening of September 16th, and during that time she received, instead of the large quantity of grapes expected, no more than 651 barrels, and none at all came on board from the 4th to the 8th of September. The 651 barrels could have been laden in half a day.

While the Messina was lying at Almeria other vessels, thought to be faster or otherwise more desirable, came into port and took away whatever grapes were ready for shipment. Canet had no grapes legally engaged, grape owners were entirely at liberty to ship by any vessel they pleased, and they preferred vessels other than the Messina. Being advised of a partial cargo awaiting him in Malaga, the Messina's master finally telegraphed his owners for permission to leave Almeria, and was at once authorized so to do.

At Malaga the Messina had good dispatch and made her usual trip across the Atlantic. On arrival in New York on October 5th the onion cargo was found to be extensively decayed; 1,028 cases of the total of 25,203 were seized and destroyed by the department of health, and the merchantable quality of the rest was much impaired by decaying onions producing stains on the crates and contaminating the sound contents.

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

The bills of lading under which the shipments were made recited that the Messina was bound for New York, "but with liberty to the steamer either before or after proceeding towards that port to proceed to and stay at any ports or places whatsoever, although in a contrary direction to or out of or beyond the route to the said port of discharge, once or oftener, in any order backwards or forwards, for loading or discharging cargo or passengers or for any purpose whatsoever; and all such ports, places and sailings shall be deemed included within the intended voyage." It was further agreed in and by the bills that the steamer was "not answerable for * * * decay * * * or inherent deterioration," and also that "steamer not to be responsible for any loss or damage which may arise to fruit or other perishable goods on board, through delay, or loss of time in obtaining and loading other goods to complete the cargo at this or other ports at which she may hereafter call."

Under favorable conditions onions of the kind under consideration will last without rotting for between three and four months after arrival in the United States. Such conditions require storage in a place with a temperature of not over 60 degrees. While lying in Almeria the master of the Messina declares that he had "good weather same as spring," it "was cool," as in "that part of Spain the heat is never felt"; although another witness testifies that the sun temperature at Almeria in September may be 100° Fahrenheit. I do not find the two statements inconsistent, and believe the weather to have been comfortably cool, but higher than was favorable for keeping onions sound.

There is little ventilation in the hold of a ship at anchor, even though hatches be kept open and ventilators up, and this was the Messina's condition at Almeria. Onions, grapes, almonds, and raisins (called in the evidence "Spanish products") are shipped to the United States only during three or four months of the year, beginning in July. The business is not sufficient to furnish full cargoes for west-bound vessels, and it has for years been attended to by steamers like the Messina, which started partly laden from an Italian port.

Visiting four Spanish ports en route is not uncommon, and is expected in the trade. It is also well known that tramp steamers do not usually have as quick dispatch as swifter passenger vessels, because cargo will be diverted by the shippers to the most desirable vessel in any given port at any time. It was therefore not surprising that the Messina did not get her hoped-for Almeria cargo, but 13 days for loading and waiting in one Spanish port is not expected by the trade. Nor does the evidence show any instance of such long delay at one port. In my opinion 15 days for four Spanish ports is thought a long time, and 20 days excessive. The Messina spent August 31st to September 18th (18½ days) between Gandia and Malaga (both inclusive).

The onions laden at Gandia seemed to the master to have been recently harvested. He doubted whether they were ripe, and they had to be packed in crates after his ship arrived at the port; a little more than half his cargo was obtained there. There is no evidence as to the time of harvesting the Denia onions.

The libels allege that damage to the onions was due to the negligence of the Messina "in remaining in the port of Almeria from the 3d to the 16th September, 1908, which was entirely unnecessary and constituted a deviation."

Mr. Burlingham, for libelants.
Mr. Kirlin, for claimants.

HOUGH, District Judge (after stating facts as above). It is obviously advantageous, if not essential, to libelants' case, to show that the facts found constitute deviation. That "deviation" is a term of art, belonging in the main to the law of marine insurance, and to be interpreted by that law, seems to me to have been overlooked in argument; and this belief on my part must excuse some review of the subject.

If an insured shipowner fails to pursue that course of navigation which experience and usage have prescribed as the safest and most expeditious mode of proceeding from one voyage terminus to the other, he violates a tacit but universally implied condition of the contract between himself and his underwriter, who is therefore freed from liability for loss subsequent to deviation because the assured has enhanced or varied the risks insured against. 2 Arnould, Mar. Ins. (8th Ed.) § 376; 1 Phil. Ins. § 977.

If the assured cargo owner have his cargo on a vessel which deviates, he for the same reason may lose (though by no fault of his own) all remedy for subsequent loss against his underwriter, but may proceed against the wrongdoing ship for his damages. It is not, of course, necessary that a cargo owner, in order to recover against his carrier for losses subsequent to deviation, should have himself lost insurance protection by reason thereof. The voyage is the same, whether viewed from the standpoint of insurer or shipper, and any deviation therefrom will cast subsequent loss of or injury to either ship or cargo on the shipowner. The reason also is the same, viz., that the carrier by deviating from a voyage described alike in insurance policy and bill of lading, has broken the warranty not to deviate, thereby terminated his own insurance, and given the shipper a right either to rescind the contract of shipment and treat the goods as converted by the deviator, or to accept the goods, holding the ship responsible for damage subsequent to warranty broken, without any reference to the question whether the deviation had any bearing on the particular loss complained of. Thorley v. Orchis S. S. Co., 1 K. B. (1907) 660; Thatcher v. McCulloh, Olcott, 365, Fed. Cas. No. 13,862.

In effect the deviator loses his own insurance, and becomes the insurer of his cargo from the date of deviation. If, therefore, the Messina was guilty of a deviation, it is wholly immaterial whether her stay at Almeria had or had not any causal connection with the rotten onions found on board in New York. If they were sound when the deviation occurred, the ship must answer for their subsequent damage. That delay, even upon the route prescribed by policy and or bill of lading, may amount to deviation, has been often held (Company of African Merchants v. Ins. Co., L. R. 8 Exch. 154; Coles v. Marine Ins. Co., 3 Wash. C. C. 159, Fed. Cas. No. 2,988; Audenried v. Mer. Mut. Ins. Co., 60 N. Y. 482, 19 Am. Rep. 204), though the recent British marine insurance act (1906) has excluded delay from the definition of deviation (section 46), while giving the insurer (by section 48) the same release from liability "from the time when the delay becomes unreasonable."

It being, however, still the law of the United States that a deviation (eo nomine) occurs the moment a delay even upon the prescribed route becomes unreasonable, the libelants here insist that the Messina's reasonable stay in Almeria expired in at most four days, yet they have endeavored to show further that her actual stay in the then conditions of weather was injurious to their onions; a labor quite needless if the delay produced deviation.

It seems to me that in some cases where shippers have proved that the ship had injured their goods by reason of delay in ports of call, or calls in port unreasonable in respect of cargo already laden, the courts, while rightly awarding damages for breach of contract, i. e., for negligence, have spoken loosely of deviation as if that were the ground of decision. Glyn v. Margetson, A. C. (1893) 351, and cases cited. In Swift v. Furness (D. C.) 87 Fed. 345, the carrier of perishable cargo was authorized by his bill of lading to "make deviation," and accordingly did so to the injury of his cargo, yet was held responsible. And see The Bordentown (D. C.) 40 Fed. 689, where the doctrine of deviation was invoked to fix liability on a tug which negligently took her tow beyond its destination, thereby exposing it to storm and causing loss. These were not cases of deviation in any proper sense; that word implies a voluntary departure from the usual course of the voyage "in reference to the terms of a policy of marine insurance" (Hostetter v. Park, 137 U. S. 40, 11 Sup. Ct. 1, 34 L. Ed. 568), and if (for example) the vessels concerned in the Glyn and Swift Cases (supra) had done what they did when insured under voyage policies describing the voyages, as in the bills of lading on which the cases were actually defended, it would have been impossible to contend that a deviation had occurred. So, in this case, the voyage described in the bills of lading is quite elastic enough to prevent even a longer delay than that in Almeria harbor from producing deviation, "in reference to the terms of a policy of marine insurance" setting forth the same voyage in the same language. C. F. Phillips v. Irving, 7 M. & G. 325; Columbian Ins. Co. v. Catlett, 12 Wheat. 383, 6 L. Ed. 664, for striking instances of delay without deviation.

Libelants cannot, therefore, recover on the ground just considered; and it remains to inquire whether claimants were guilty of negligence, and are therefore deprived of the protection of the exceptions in their bills of lading.

The question of the burden of proof in actions such as this has been set at rest by The Folmina, 212 U. S. 362, 29 Sup. Ct. 363, 53 L. Ed. ——, the nature of the injury shows this damage to be prima facie within the exceptions of the bills, and the burden is on the shipper to establish that the goods are removed from their operation because of the carrier's negligence. The only negligence assigned is delay in Almeria, and what transforms delays permitted by bills of lading, such as those in suit, into negligence, will always depend upon what voyage was agreed upon in a business sense,—the agreement need not have been for the quickest or most direct mode of transportation. Evans v. Cunard S. S. Co., 18 T. L. R. 374, citing and explaining Glyn v. Margetson, supra. So, in this case, libelants did not agree for a quick or direct method of conveyance; they did agree that the Messina could do just what she did, provided she did not take unreasonable advantage of the bargain. But that bargain is to be interpreted according to the general usages of the trade, even though not known to any particular shipper. Hostetter v. Parks, supra; for the facts in which case, see fuller report in Hostetter v. Gray (D. C.) 11 Fed. 179.

It follows, in my judgment, that the libelants must show, in order to recover, that the ship's stay in Almeria was a departure from general usage, that it was unreasonable in respect of the cargo already laden, and that it was the cause of the damage complained of. The evidence falls short of these requirements. These libelants have made no better case than those in The Hindoustan, 67 Fed. 794, 14 C. C. A. 650, and not nearly so good a one as in The St. Quentin (C. C. A.) 162 Fed. 883.

Libel dismissed, with costs.

CORRIGAN v. BROWN et al.

(Circuit Court, W. D. Washington, N. D. November 6, 1907.)

No. 1,093.

1. NAVIGABLE WATERS (§ 36*)—LAND UNDER WATER—OWNERSHIP.

The state of Washington on coming into the Union acquired ownership of the shores and bed of all navigable waters up to the line which in the surveys of the public lands of the United States constituted the boundary between land and water; which survey fixed prima facie the limits of the public land which might be disposed of by the United States, and outside of which only could the state claim ownership of the shores and beds of navigable water.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. § 184; Dec. Dig. § 36.*]

2. NAVIGABLE WATERS (§ 36*)—LANDS OF STATE—OVERFLOWED LANDS.

Surveyed lands within the government line separating land from navigable water, covered by marsh grass and not overflowed by ordinary high tide, belonged to the United States and not to the state, as a part of the shore of navigable water.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. § 186; Dec. Dig. § 36.*]

3. INDIANS (§ 12*)—INDIAN LANDS—RESERVATIONS—DISCLAIMER BY STATE.

Const. Wash., providing that the people disclaimed all title to the unappropriated public lands of the state, and to all lands lying within its limits owned or held by any Indian or Indian tribes, applied to all lands within the boundaries of Indian reservations within the state to which the primary right of occupancy of the Indians had not been extinguished.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 27; Dec. Dig. § 12.*]

4. INDIANS (§ 12*)—INDIAN LANDS—OWNERSHIP.

The state of Washington by its Constitution disclaimed all right to unappropriated public lands within its boundaries owned or held by any Indian or Indian tribes, jurisdiction over which was conceded to remain in the United States. By an Indian treaty in 1885, land was reserved for the exclusive use of the tribe of Indians to which defendants belonged, and by the President's order in 1873 the boundaries of the reservation were precisely established, including the land in controversy extending to low-water mark. *Held*, that such land lying above low-water mark, though sometimes inundated by high tide, was within the power of disposal by the United States to Indians residing on the reservation, and did not pass by a conveyance by the state as land comprising the shore of navigable water.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 27; Dec. Dig. § 12.*]

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

5. PUBLIC LANDS (§ 185*)—LANDS OF STATE—SHORE LINES.
The state of Washington has power to sell its tide and shore lands.
[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 598; Dec. Dig. § 185.*]

On the Merits.

James B. Howe, C. F. Munday, and C. H. Farrell, for complainant.
Potter Charles Sullivan and Jesse A. Frye, for defendants.

HANFORD, District Judge. The object of this suit is to settle a controversy respecting ownership of a tract of land described as lot 3, section 14, township 34 north, range 2 east of the Willamette meridian, in Skagit county, state of Washington. The complainant contends that the state of Washington holds the legal title, and bases his claim upon a contract to purchase it from the state. The defendants are Indians, and they claim the tract by virtue of a patent from the United States to them as allottees of Indian reservation lands.

The court finds as a fact, established by the evidence, that the tract is tide-marsh land, which is periodically inundated by salt water when the flood tides are highest, but it is sufficiently elevated above sea level to admit of a growth of salt-marsh grass, and has some value for pasturage in its unimproved condition. Thousands of acres of similar land in the vicinity have been reclaimed by being inclosed within dikes and made productive.

The following is a statement of undisputed facts:

That, at the time of the admission of the territory of Washington into the Union of the United States, said lot 3 had never been patented by the United States to any one. That on the 28th day of October, 1901, the state of Washington, for a valuable consideration to it paid by the complainant, made, executed, and delivered to complainant a contract, whereby said state of Washington agreed to convey to complainant, upon the receipt of the purchase price mentioned in said contract, the said lot 3 and other property. That, at the time of filing the amended bill of complaint in this cause, said lot 3 was not in the possession of any one, but was vacant land on which there were no improvements, and that it was wholly unoccupied, and was covered by the waters of Puget Sound at times of high tide. That at the time this suit was removed to this court, and at the time of the filing the amended bill of complaint herein, said lot 3 exceeded in value the sum of $2,000, exclusive of interest and costs. That by a treaty made and entered into between the United States of America, on the one part, and the Dwamish, Swinomish, and other allied and subordinate tribes and bands of Indians, then occupying certain lands, situated in the then territory of Washington, at Muckl-te-oh, or Point Elliott, on the 22d day of January, 1855, there was reserved for the use and occupation of said bands and tribes of Indians the peninsula at the southeastern end of Perry's Island called "Shais-Quihl." That said treaty provided, among other things, that all of said tract of land should be set apart, and, so far as necessary, surveyed and marked out for the exclusive use of said Indians, and that no white man should

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

be permitted to reside upon the same without the permission of said Indians or the superintendent or agent. That on the 9th of September, 1873, the President of the United States, by executive order, ordered that the northern boundary of the said Swinomish reservation should be as follows, to wit: Beginning at low-water mark on the shore of Similk Bay, at a point where the same is intersected by the north and south line bounding the east side of the surveyed fraction of 9.30 acres, or lot No. 1, in the northwest corner of section 10, in township 34 north, range 2 east; thence north on said line to a point where the same intersects the section line between sections 3 and 10 in said township and range; thence east on said section line to the southeast corner of said section 3; thence north on east line of said section 3 to a point where the same intersects low-water mark on the western shore of Padilla Bay. That by the enabling act passed by the Congress of the United States on the 22d day of February, 1889 (25 Stat. 676, c. 180), providing, among other things, for the admission of Washington Territory into the Union of the United States, it was provided, among other things, as follows:

"That the people inhabiting said proposed states do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes, and that until the title thereto shall have been extinguished by the United States, said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States."

That, in the pursuance of said enabling act, the people of the state of Washington, in the Constitution of the state of Washington adopted by them, entered into a compact with the United States, providing, among other things, as follows:

"That the people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries of this state, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain under the absolute jurisdiction and control of the Congress of the United States * * *."

That by article 7 of said treaty of January 22, 1855, it was provided, among other things, that the President of the United States might in his discretion cause the whole or any portion of the lands reserved by said treaty to be surveyed into lots, and that he might assign said lots to such individuals or families of Indians as were willing to avail themselves of the privilege, and who would locate on the same and make it their permanent home. That, in pursuance of said provision of said treaty, said reservation was thereafter, to wit, on the 17th day of January, 1874, surveyed into lots; and that thereafter, to wit, on the 17th day of June, 1897, there was deposited in the General Land Office of the United States an order of the Secretary of the Interior, accompanied by a return from the Office of Indian Affairs, a list, approved June 15, 1897, by the President of the United States, showing the names of the Indians who had made selection of land in accordance with the provisions of said treaty. And that thereafter, and in pursuance of said treaty, there was assigned

and allotted to the defendant John Brown and his heirs, together with other lands, lot 3, in section 14, township 34 north, range 2 east, Willamette meridian, being the land involved in this suit. That on the 15th day of September, 1897, in pursuance of said treaty, the said defendant John Brown having complied with the terms and conditions of said treaty, there was issued to the defendant John Brown by the United States a patent giving and granting unto the said defendant John Brown and his heirs said lot 3, subject to the restriction, however, that the same should not be alienated or leased except as provided in said treaty. That said lot 3 hereinabove, and in the bill of complaint herein described, so surveyed, allotted, assigned, and patented to the defendant John Brown and his heirs is now, and since the establishment of said Swinomish Indian reservation has been, within the boundaries and an integral part of said Swinomish Indian reservation so set apart and established by said treaty and by said executive order.

The state of Washington, upon coming into the Union on terms of equality with the original states constituting this nation, asserted ownership of the shores and beds of all navigable waters up to a certain line; that is, the line of ordinary high water. That line is generally understood to be the line which in the surveys of the public lands of the United States constitutes the boundary between land and water. Therefore, the survey made under national authority fixes, prima facie, the limits of the public land which may be disposed of by the United States government, and outside that limit only can the state claim ownership of the shores and beds of navigable water. Mann v. Tacoma Land Co. (C. C.) 44 Fed. 27, affirmed by the Supreme Court of the United States, 153 U. S. 273, 14 Sup. Ct. 820, 38 L. Ed. 714.

The tract in question being surveyed land, there is a necessary presumption that it is not state land. If the accuracy of the survey with respect of the line between land and water can be disputed, it must certainly require convincing evidence to justify any court in rendering a decree establishing a different boundary. In this case there is contradictory evidence as to the frequency of the tides which overflow this tract. It is an undisputable fact, however, that the land is covered with a growth of marsh grass, which would not be there if the ordinary high tides overflowed it, and it is the decision of the court that the complainant has failed to produce evidence sufficient to impeach the survey.

The complainant has failed in his contention for another reason, viz: The disclaimer of the state contained in the Constitution adopted by the people applies to all lands within the boundaries of Indian reservations to which the primary right of occupancy of the Indians has not been extinguished. By the treaty made with the Indians in 1855, land was reserved for the exclusive use of the tribe or band of Indians to which the defendants belong, and by the President's order made in 1873 the boundaries of the reservation were precisely established, so that the reservation includes all the land above the line of low water. Therefore, beyond any question, this tract of land is entirely within the boundaries of a reservation to which the rights of the Indians have never been extinguished, and it is comprehended by

the disclaimer in the state Constitution. In the argument the validity of the disclaimer is questioned on the assumed ground that the state cannot abdicate its sovereign powers. This argument is itself suggestive of a very satisfactory answer; that is, if the title of the state is inalienable, so that a grant or disclaimer of ownership is ultra vires, then the state could not sell this land to the complainant, and he has no standing in court to assert any rights with respect to this tract.

I do not rest my decision, however, upon a denial of the authority of the state to sell its tide and shore lands; on the contrary, I concur with the Supreme Court of the state in its decision rendered in the case (Jones v. Callvert, 32 Wash. 612, 73 Pac. 701), giving full effect to the disclaimer according to the manifest intent of the people by whom the Constitution was adopted.

I direct that a decree be entered that the complainant take nothing, and that the defendants recover their taxable costs.

In re JUNCK & BALTHAZARD et al.

(District Court, E. D. Wisconsin. April 22, 1909.)

1. BANKRUPTCY (§ 149*)—PERSONS SUBJECT TO JURISDICTION—PARTNERSHIP—PROCEEDINGS AGAINST PARTNERS.

Bankr. Act July 1, 1898, c. 541, § 5h, 30 Stat. 548 (U. S. Comp. St. 1901, p. 3424), which provides that "in the event of one or more, but not all, of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy unless by consent of the partner or partners not adjudged bankrupt," contemplates a case where one or more, but not all, of the members of a partnership are adjudged bankrupt, while the partnership as such is not before the court.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 149.*

What persons are subject to bankruptcy laws, see note to Mattoon Nat. Bank v. First Nat. Bank, 42 C. C. A. 4.]

2. BANKRUPTCY (§ 42*)—PARTNERSHIP—PROCEEDINGS BY PARTNER.

A partner may file a petition in voluntary bankruptcy on behalf of himself and of the partnership, and in such case the proceedings are voluntary as to both himself and the partnership and their respective creditors, and no act of bankruptcy on the part of the partnership need be shown; but as to a nonassenting partner the proceedings are involuntary, and he may under general order 8 (32 C. C. A. xi, 89 Fed. vi), on being served with notice, appear and make proof, if he can, that the partnership is not insolvent or had not committed an act of bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 42.*]

3. BANKRUPTCY (§ 51*) — ADJUDICATION AGAINST PARTNERSHIP — RIGHTS OF NONASSENTING PARTNER.

Where a voluntary petition is filed by a partner on behalf of himself and the partnership, on which the partnership is adjudged bankrupt, a nonassenting partner cannot be adjudicated a bankrupt, and, if solvent, has the right to take upon himself the settlement of the partnership business, reporting to the court the residuum of assets remaining to be distributed by the court among the partnership creditors; but in any event he is required under general order 8 (32 C. C. A. xi, 89 Fed. v') to file a schedule of his debts and an inventory of his property, since the surplus of his property over his debts is an asset of the firm to be applied by the court, if necessary, to the payment of the partnership debts.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 51.*]

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

In Bankruptcy.

Rowan & Kalaher, for petitioner.
J. G. Davalaar, for creditor Saveland.
H. L. Kellogg, for John Balthazard.

QUARLES, District Judge. John H. Junck filed a voluntary petition on behalf of himself individually and of the firm of Junck & Balthazard, of which he is a member. Such petition is in the usual form, accompanied by schedules of assets and liabilities of himself and of the firm, praying for the adjudication of himself and the partnership. Balthazard, the other partner, declines to be adjudicated, and has raised an issue by his answer, in which he sets up the solvency of the firm and of each of the partners. Saveland, one of the creditors of the firm, has interposed an answer denying the insolvency of the partnership, and further setting up that such firm was dissolved long before the petition was filed. Thereupon due notice was served upon Balthazard as required by the practice in involuntary cases. When such issue came on to be heard, Balthazard made appearance by counsel, but did not appear personally. He offered no proofs to establish the solvency either of the partnership or of the members thereof. Neither did he as a solvent partner ask leave to settle the partnership affairs. The testimony offered upon said hearing tended to show that neither Junck nor the firm had sufficient assets to discharge their respective obligations.

From these facts it sufficiently appears:

First, that an adjudication must pass as to the petitioner Junck individually. For this purpose the petition and proofs are entirely sufficient, and no creditor can intervene in such case.

The next question that arises is whether in this condition of affairs the partnership may be adjudicated. The authorities all seem to concur in the view that for some purposes at least the partnership is to be considered a person and a separate entity that owns property and owes debts. The marked difference in the phraseology of the act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422]) from all former acts can lead to no other conclusion. The arguments have been stated and the authorities grouped in Re Bertenshaw, 157 Fed. 363, 85 C. C. A. 61, 17 L. R. A. (N. S.) 886, and in Re Perley & Hays (D. C.) 138 Fed. 927, so that it seems unnecessary to review them again. Section 5a, by language too plain for construction, allows a partnership as such to be adjudged a bankrupt. Subdivision "b" confers upon the creditors of the partnership the appointment of the trustee. Subdivision "c" provides for a case where the court has by the petition jurisdiction of the partners, and provides that the court may draw to itself the jurisdiction of the other partners and the administration of both the partnership and individual property. Subdivisions "e," "f," and "g" adopt the familiar equitable principles of marshaling assets. I am persuaded that subdivision "h" contemplates a case where one or more, but not all, of the members of a partnership are adjudged bankrupt, while the partnership as such is not before the court. In my opinion the conclusion drawn by Judge

Hook in the dissenting opinion in Re Bertenshaw, 157 Fed. 380, 85 C. C. A. 61, 17 L. R. A. (N. S.) 886, as to the proper construction of subdivision "h," is logical, and tends to harmonize the several provisions of the law. The same view has been adopted in Re Mercur (D. C.) 116 Fed. 655, affirmed in 122 Fed. 384, 58 C. C. A. 472.

Here we have the partnership and one partner before the court, while the other partner declines to be adjudicated. Certain it is that this situation was contemplated by Congress when section 4 was enacted. General order No. 8 (32 C. C. A. xi, 89 Fed. vi) contemplates the very situation we have in hand. Applying it to the present case, it allows Balthazard to resist the prayer of the petition after service upon him of notice as required in the case of a debtor petitioned against. It recognizes his right to appear at the hearing and make proof, if he can, that the partnership is not insolvent, or has not committed an act of bankruptcy; and if he fails so to do, and an adjudication passes upon the petition, then he must be required to file a schedule of his individual debts and an inventory of his property as though an adjudication had passed against him.

It thus appears that for certain purposes at least the petition, so far as Balthazard is concerned, is to be regarded as involuntary. Metzker v. Bonebrake, 108 U. S. 66, 2 Sup. Ct. 351, 27 L. Ed. 654. This decision was under the former act, and applies only by analogy to the present law. See, also, In re Murray (D. C.) 96 Fed. 600. In the case of a nonassenting partner, the procedure as to him is the same as in an involuntary case; but as to creditors the petition is voluntary, and there is no room for the issue which the creditor Saveland attempts to raise by his intervention, and his answer may be stricken from the files. In re Carleton (D. C.) 115 Fed. 246, 249.

This disposes of the objection, which was much argued at the bar, that the petition was so far involuntary that it was defective without an averment showing that the firm had committed an act of bankruptcy. The better rule seems to be that in such case the ordinary averment that the firm has not sufficient assets to pay its obligations, and is willing to submit its property for distribution, is sufficient, and the filing of such a petition by one of the partners is of itself considered the equivalent of an act of bankruptcy. Hanover Bank v. Moyses, 186 U. S. 181, 190, 22 Sup. Ct. 857, 46 L. Ed. 1113; In re Forbes (D. C.) 128 Fed. 137. This conclusion was doubted by Judge Lanning in Re Ceballos & Co. (D. C.) 161 Fed. 445, because under the act of 1867 (Act March 2, 1867, c. 176, 14 Stat. 517), it was explicitly provided that the filing of such a petition should constitute an act of bankruptcy, and because no such provision occurs in the present act.

The real question, after all, seems to hinge upon the sufficiency of the petition without any averment of a technical act of bankruptcy. For the purposes of this controversy, the petition must be considered as voluntary, and section 4 clearly extends the benefits of the act to every person owing debts, and this includes a partnership. To hold that every voluntary petition must set up a technical act of bankruptcy would emasculate the act. No proof having been offered at the hearing to controvert the averments of the petition as to the in-

solvency of the firm, it follows that an adjudication must pass against the firm.

The next question presented in natural order is what disposition ought to be made of the objecting partner Balthazard. This question has been much discussed and variously decided. It seems to me that the following conclusions are sustained by a fair construction of the bankruptcy act of 1898:

First. That the objecting partner cannot be adjudicated against his will.

Second. That such nonconsenting partner does not hold a veto on the jurisdiction of the court over the partnership as an entity. If this concession were made, the objecting partner might bar the way to any discharge from partnership debts, and thus neutralize section 4a of the act, which expressly confers "the benefits of this act" to any person who owes debts.

Third. That the inherent right of a solvent partner to close up the affairs of the firm must be recognized by the court of bankruptcy. This right was not conferred by the bankruptcy act, neither can it be abridged or taken away by it. Balthazard, the surviving partner, might defeat the jurisdiction of the bankruptcy court in two ways: First, by proving the solvency of the firm; second, by showing himself solvent and agreeing to take upon himself the settlement of the partnership business, reporting to the court according to the equitable rule the residuum of assets remaining to be distributed by the court among the partnership creditors. As Judge Archbald remarks in Re Mercur (D. C.) 116 Fed. 655:

"It merely preserves to an existing solvent partner the right to administer the affairs of the partnership, if he wants to, and it is not to be carried further by mere implication."

Failing, as Balthazard has done, to take either course, there remains only one course to be pursued: He must file his schedules of individual property and individual debts as provided by general order No. 8. This is not an arbitrary regulation, but is inherent in the very nature of the case. Neither is it new. General order No. 18, under the act of 1867, was substantially the same. If Balthazard has a surplus of assets after the discharge of his individual liabilities, such surplus must be devoted to the payment of the firm liabilities if the firm assets are insufficient for that purpose. In other words, such surplus must be considered an asset of the firm, and no settlement can be complete without the information sought to be derived from the individual schedules contemplated by general order No. 8.

The objecting partner may prevent his own adjudication, but he cannot escape an accounting which is necessary to facilitate the jurisdiction of the court over the partnership case. On this proposition In re Ceballos & Co. (D. C.) 161 Fed. 451, is exactly in point.

Therefore the order must be that John Balthazard do forthwith file with the clerk of this court schedules of his individual property and liabilities in manner and form as required of one who has been adjudicated, and the order will provide for the adjudication of Junck personally, and of the partnership.

In re McCRARY BROS.

(District Court, S. D. Alabama. April 7, 1909.)

No. 659.

1. BANKRUPTCY (§ 228*)—REFEREES—REVIEW OF PROCEEDINGS BY JUDGE.
The weight to be given to a finding by a referee in bankruptcy, on review by the judge, depends on the character of the evidence; it being entitled to less weight, if a deduction from established facts, than if based on conflicting evidence.
[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 228.*]

2. COURTS (§ 366*) — BANKRUPTCY COURTS — CLAIM AND ALLOWANCE OF EXEMPTIONS—STATE LAWS AS RULES OF DECISION.
The bankruptcy court has exclusive jurisdiction to determine all claims of the bankrupt to exemptions, but will follow the state statutes as interpreted by the highest court of the state.
[Ed. Note.—For other cases, see Courts, Dec. Dig. § 366.*
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. BANKRUPTCY (§ 397*)—HOMESTEAD EXEMPTION—PARTNERSHIP PROPERTY.
Under Code Ala. 1907, § 4166, which provides that "no property, real or personal, held or owned by partners as partnership property, or purchased with partnership funds for partnership purposes, shall be subject of homestead or other exemption as against copartners or partnership creditors," bankrupt partners are not entitled to homesteads from real estate bought with partnership funds and conveyed to the partners jointly, and thereafter used in part as a partnership store and in part as a dwelling by one of the partners, where no claim of homestead was made prior to the bankruptcy, nor in the voluntary petition in bankruptcy filed by them, and in the absence of any evidence to rebut the presumption that the property was bought and held for partnership purposes.
[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 397.*]

In Bankruptcy. On petition for rehearing by the bankrupt.

F. G. Bromberg, for petitioner.
Fitts & Leigh, for creditors.

TOULMIN, District Judge. It is true, as contended by counsel for the petitioner, that the weight to be given by the judge on a review of the finding of a referee depends upon the character of the finding. As said by Judge Lurton, in Ohio Valley Bank Co. v. Mack (C. C. A.) 163 Fed. 155:

"If it be a deduction from established facts, the finding would not carry any great weight; for the judge, having the same facts, may as well draw inferences or deduce a conclusion as the referee."

That able judge also said, in the same case:

"No arbitrary rule can be laid down for determining the weight which should be attached to a finding of fact by a bankruptcy referee." 163 Fed. 155.

It is also true that there is no conflicting evidence in this case. The only testimony in the case is that of the bankrupts themselves. It establishes certain facts as far as it goes. The question is: Does it

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

establish such facts, or sufficient facts to entitle the petitioner to a homestead exemption in the property involved in this controversy?

The counsel states that:

"The bankrupts themselves distinctly testified to the fact that these premises had been occupied by them, with their wives and children, as homesteads, since January, 1905."

I think the counsel greatly misapprehends the testimony. I find no testimony of Felix L. McCrary to that effect, or on that subject. Wilson T. McCrary testified that:

He "had lived on the land claimed as exempt as a homestead, with his family, since January, 1905, and that he was a married man, with wife and children."

The evidence was that Felix L. McCrary at first stayed at the corner of Spring Hill avenue and Ann street, and afterwards moved to Prichard. There was no evidence that Felix L. McCrary ever occupied said property, except as a store kept by the firm of McCrary Bros., of which firm he was a member. The evidence, further, was that neither of the bankrupts claimed a homestead exemption at the time of filing their schedules in bankruptcy, and had made no such claim until the 21st November, 1908, some 10 or 11 days after their petition and schedules were filed in the bankruptcy court, and that they had recorded no such claim in the probate court prior to that time.

The bankruptcy court has exclusive jurisdiction to determine all claims of the bankrupt to exemptions. McGahan v. Anderson, 7 Am. Bankr. Rep. 641, 113 Fed. 115, 51 C. C. A. 92; Powers Dry Goods Co. v. Nelson, 7 Am. Bankr. Rep. 506, 10 N. D. 580, 88 N. W. 703, 58 L. R. A. 770. In determining what exemptions a person is entitled to, the United States court will follow the rule as laid down by the state statutes and as interpreted by the Supreme Court of the state. In re Camp (D. C.) 1 Am. Bankr. Rep. 165, 91 Fed. 745. The statute of this state provides that:

"No property, real or personal, held or owned by partners as partnership property, or purchased with partnership funds for partnership purposes, shall be subject of homestead or other exemption, as against copartners or partnership creditors." Code Ala. 1907, § 4166.

The evidence was that the bankrupt, as partners, were carrying on a mercantile business under a lease on the property now claimed as exempt by Wilson T. McCrary; that while so occupying the property they purchased it, paying for it with partnership funds and other partnership assets; and that they continued to occupy the property as a partnership store. Said Wilson T. McCrary at the same time lived on the land with his family from January, 1905. The deed of conveyance was made to said Wilson T. McCrary and Felix L. McCrary jointly; each owning an undivided half interest in the property. It was subsequently occupied and used in part as a store, carried on by said joint owners under the partnership name of McCrary Bros. Wilson T. McCrary also occupied a part of the property as a dwelling for himself and family. If it was his individual property, the fact that he used a part of it as a store would not deprive

him of his right to claim it as a homestead, and to have it exempt to him as such. But the property was purchased with partnership funds so far as the same has been paid for. It is owned and held by Felix L. and Wilson T. McCrary, who are partners carrying on business as such on a part of it. There is no evidence that said Felix, an undivided half owner of the property and a partner, has ever consented to the exemption claimed by said Wilson. Moreover, no such claim was made by filing the same in the probate court prior to the filing of the petition in bankruptcy, and none was made in the petition in bankruptcy. In re Stevenson (D. C.) 2 Am. Bankr. Rep. 231, 93 Fed. 789; In re Grimes (D. C.) 2 Am. Bankr. Rep. 160, 96 Fed. 529.

It has been held that, when an application is made at a proper time and in the proper way for a homestead exemption out of partnership property, it should be strictly construed as against such application. In re Jennings & Co. (D. C.) 166 Fed. 639; In re Camp (D. C.) 91 Fed. 745. Now the property in controversy was purchased with partnership funds and was owned by partners, and the question is: Was it purchased for partnership purposes, or was it owned or held as partnership property? In view of the evidence, direct and circumstantial, and drawing all reasonable and just inferences therefrom, it cannot, in my opinion, be said that the referee erred in his conclusions and that there has been a miscarriage of justice therein.

Not being satisfied there was error in the finding of the referee, I affirmed his decree; and, seeing no reason now to change my opinion, the petition for a rehearing is denied.

THE MAUD.

(District Court, S. D. Alabama. April 8, 1909.)

No. 1,193.

SHIPPING (§ 84*)—LIABILITY OF VESSEL FOR INJURY TO STEVEDORE'S EMPLOYÉ —NEGLIGENCE OF WINCHMAN.

A ship, under agreement to furnish to stevedores a winch and winchman to be used in loading, which furnished a winch in good order and a competent winchman, is not responsible for an act of negligence on the part of the winchman in loading, by which a stevedore's employe was injured.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 342, 349–351; Dec. Dig. § 84.*]

In Admiralty. Suit for personal injuries.

Roach & Chamberlain, for libelant.
Pillans, Hanaw & Pillans, for claimant.

TOULMIN, District Judge. Libelant was employed by and working for a stevedore, who was loading the steamship Maud with lumber. A member of the crew of the ship was at the winch. The ship furnished the winch, the winchman, and the power to run it. The

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

lumber was being loaded from the wharf. In hoisting a "sling of lumber" onto the ship, the lumber came down on libelant, who was on deck in the performance of his duty in stowing the lumber, threw him against the rail, and severely injured him. The libel alleges that said injuries were due wholly to the negligence and want of proper care on the part of the said winchman. The libel further alleges that said winchman was incompetent for the discharge of the duties devolving upon him as a winchman, and that the master of the ship knew of such incompetence; and it charges that the ship is liable for the injuries complained of for the negligence of the master in selecting such incompetent winchman to operate the winch. Respondent denies, among other things, that said winchman was incompetent for the duties devolving upon him as such; also denies that the master of the ship knew of any such incompetency, or that there were any circumstances from which he ought to have known it; and denies that the ship is in any wise liable for the injury complained of.

The evidence in the case fails to show that the said winchman was incompetent as alleged. If he was in fact incompetent, it fails to show that the master of the ship had any knowledge of it, or of any circumstances that would charge him with such knowledge. On the contrary, the evidence tends to show that said winchman was fully competent to perform the services for which he was selected, and that the master of the ship had every reason to believe him to be competent. Said winchman's long service as a seaman on the ship, his services and experience as a winchman on her, and the master's observation and knowledge of such services, which are shown to have been entirely satisfactory, all tend to show that the master had no knowledge of said seaman's incompetency as a winchman, and no reason to suspect his incompetency. I find no evidence to show that the master of the ship did not use due precaution and care in selecting said seaman for the work of a winchman.

The court, in the case of The Elton, 142 Fed. 367, 73 C. C. A. 467, held:

"That, if ordinary care was exercised by the master of the vessel to furnish a competent winchman, the vessel was not liable for an injury to a stevedore resulting from a negligent act of the winchman."

That was a case where the ship agreed to, and did, furnish a winchman, in which the court said:

"If it furnished a competent winchman to do the work for the charterers, or stevedores employed by them, the ship is not responsible for an act of negligence, if any, on the part of the winchman during the loading, whether he should be deemed a fellow servant of the libelant or not."

In that case, however, the court said:

"We think that the true test of fellow servant is whether both are at the precise time of the accident working in a common employment under the same general control and direction,"

—and held that the libelant and the winchman were fellow servants. The court further said:

"The ship being under obligation or agreement to furnish to the stevedores winches and a winchman to be used in loading the ship, its whole duty was

performed when it furnished properly constructed winches in good order and a winchman employed with due and reasonable care as to his skill and competency." The Elton, 142 Fed. 367, 73 C. C. A. 467.

The court, in The Elton, say that there is a want of harmony in the cases as to the general question whether men in the position of the libelant and winchman are fellow servants. But they think reason and the weight of authority support their view. If it were necessary for this court to determine that question in the case at bar, it would follow the ruling of the court in The Elton, as I think, as said by that court, that "reason and the weight of authority support their view."

My view of this case, however, renders it unnecessary to pass on the question of fellow servant raised in it. There is no evidence here under what sort of contract or arrangement, or by whose employment, the stevedores were loading the ship. The ship furnished the winch and the winchman to operate it. Whether they were hired or loaned to the stevedores we are not informed. But, in my opinion, that makes no difference, so far as the liability of the ship is concerned. If it furnished a winch in good order (as to which there is no question), and a competent winchman to do the work for the charterers or the stevedores, the ship's whole duty was performed, and it is not responsible for an act of negligence, if any, on the part of the winchman during the loading.

In the case of The Joseph John, 86 Fed. 471, 30 C. C. A. 199, the Circuit Court of Appeals of this circuit, Judge Pardee speaking for the court, said:

"If the seaman in charge of the ship's winch was negligent in managing and operating the winch, still as there was no evidence to show that the master of the ship did not use due precaution and care in selecting him for the work, and as he was for the time being in the service of and under the control of the stevedores, the master cannot be held responsible for his negligence. As a matter of fact, all the persons employed in taking aboard and stowing cargo were in the direct service of the stevedores, no matter by whom eventually their wages were paid."

The court further said:

"If it should be considered that the loading was being carried on for and in the interest and service of the ship, then all the employés engaged in such loading were indirectly the servants of the ship, engaged in a common employment, using the master's appliances at the same time and under such circumstances that the negligence of one might result in injury to another; and in that view of the case, if the libelant was injured by the negligence of the winchman, it is perfectly clear that the winchman was a fellow servant, and for that reason the libelant could not recover."

In any aspect of this case, as presented on the evidence, my opinion is that the libelant is not entitled to recover against the ship.

The libel is therefore dismissed.

UNITED STATES v. PALMIERI.

(Circuit Court, S. D. New York. February 1, 1909.)

1. INDICTMENT AND INFORMATION (§ 150*)—DEMURRER—USE OF POST OFFICE ESTABLISHMENT TO DEFRAUD.

Where an indictment in several counts purported to charge in each a separate and different scheme to defraud by selling stocks on false representations, by using the post office in the mailing of a particular letter in executing each scheme, whether the scheme would prove to be one and the same for the different offenses, on which more than one of the counts were based, could not be considered on demurrer.

[Ed. Note.—For other cases, see Indictment and Information, Dec. Dig. § 150.*]

2. POST OFFICE (§ 48*)—SCHEME TO DEFRAUD—INDICTMENT—VALUE OF PROPERTY SOLD.

Where an indictment charged defendant with devising a scheme to defraud, by inducing others to purchase stock on false representations of fact, and alleged that the scheme was to be effected by correspondence through the post office, and that a letter was actually mailed in furtherance thereof, the indictment was not demurrable for failure to charge that the stock was lacking in value to such an extent as to defraud those who paid the price asked therefor.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 72; Dec. Dig. § 48.*]

3. POST OFFICE (§ 48*)—USE OF MAILS TO DEFRAUD—INDICTMENT.

An indictment for devising a scheme to defraud, to be furthered by use of the post office establishment, was not demurrable for failure to allege the particulars in which the representations charged were false, as such defect could be cured by furnishing a bill of particulars.

[Ed. Note.—For other cases, see Post Office, Dec. Dig. § 48.*]

Henry L. Stimson, U. S. Atty.
Wm. Michael Byrne, for defendant.

CHATFIELD, District Judge. This indictment is brought under section 5480, Rev. St. (U. S. Comp. St. 1901, p. 3696), and purports to charge the defendant (in nine counts) with nine schemes to defraud by selling different stocks for money, on false representations, and by using the post office in the mailing of a particular letter in executing each scheme.

Objection in the form of a demurrer is made to the sufficiency of the indictment on two grounds. The first is that more than three of the counts charge offenses on dates within a period of six months. This question is stated at length in the case of U. S. v. McVickar (C. C.) 164 Fed. 894, and it is only necessary to say that the present indictment purports to charge a separate and different scheme in each count, and on demurrer the question whether the scheme will prove to be one and the same for the different offenses, upon which more than one of the counts are based, cannot be considered. The dismissal of any count for such a reason, the quashing of any portion of the indictment, or the limitation of a sentence to three offenses within six months, cannot be determined upon the form of this indictment.

A second and more serious objection presented is that the indict-

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

ment charges the defendant with having devised a scheme to defraud an individual, by obtaining payment for shares of stock upon false representations of fact, which scheme was to be effected by opening correspondence through the post office, and in pursuance of which the defendant did mail a letter for delivery. None of the counts of the indictment show any definite charge that the stock was valueless, or lacking in value to such an extent as to defraud those who paid the price asked therefor, nor does any count of the indictment charge that the defendant planned to obtain payment for the stock sold and to keep the payment without delivering to the purchaser what was offered for sale. The fraud charged consists entirely in making sales through the post office department upon false representations of fact, whether or not the purchaser might ultimately benefit or receive full value from the transaction.

It has been held by the Circuit Court of Appeals for this circuit, in the case of Kellogg v. U. S., 126 Fed. 323, 61 C. C. A. 229, that an indictment charging certain defendants with having devised a scheme to defraud, by inducing other persons to send to them money for investment by means of false statements, with the further allegations that the scheme was to be effected by correspondence through the post office department, and that a letter was actually mailed, described a sufficient offense under the present statute. Again, the attention of the court has been called to the case of U. S. v. Rothschild and Kahn (no opinion filed), in which a demurrer to the indictment was overruled at the July term, 1908 of the Circuit Court for this circuit, in which the form of the charge was exactly like the allegations of the indictment under consideration. Under these circumstances the question is settled.

It is also claimed that certain of the counts are indefinite, and the third and sixth counts would seem to be open to this objection. But the respects in which these counts are indefinite, namely, that the particularities in which the representations were false are not set forth, can be cured by the furnishing of a bill of particulars, and the defendant will not thereby be prejudiced.

The demurrer, therefore, will be overruled, and the defendant required to plead.

BERWIND-WHITE COAL MINING CO. v. METROPOLITAN S. S. CO.

AMERICAN TRUST CO. v. SAME.

(Circuit Court, D. Maine. March 10, 1909.)

No. 625.

MARITIME LIENS (§ 19*)—STATUTORY LIENS—LAW GOVERNING—FURNISHING MATERIAL.

Material and supplies having been bought for the purpose of being incorporated into a vessel, delivered by the seller to the vessel in a state the laws of which entitled him to a lien, and so incorporated, the right

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

to the statutory lien therefor is not affected by the fact that the contract of purchase was made in another state.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 25; Dec. Dig. § 19.*

Created by state laws, see note to The Electron, 21 C. C. A. 21.]

In Equity. On petition of John Wanamaker to intervene.

See, also, 169 Fed. 493.

Brandeis, Dunbar & Nutter, J. B. Studley, and Wm. M. Bradley, for petitioner.

Elmer P. Howe, Wm. A. Sargent, and Avery F. Cushman, for American Trust Co.

Alfred H. Strickland, for Berwind-White Coal Mining Co.

Coolidge & Hight, for receivers.

PUTNAM, Circuit Judge. Except as is stated herein, this petition involves the same questions as were involved in the petition of the Fletcher Company in the same case disposed of according to our opinion passed down on December 26, 1908 (166 Fed. 782), and therefore, except as otherwise stated herein, the same judgment will be entered.

A portion of the material and supplies furnished by this petitioner was delivered to the vessel in New Jersey and incorporated into it, but they were contracted for in New York. As the incorporation of supplies and materials into a vessel is the pith and substance of the equity underlying a lien, the locus of the making of the contract is immaterial, if they were incorporated into the vessel, especially if it was the intention and expectation of the parties, when the contract was made, that they would be so incorporated, and especially if the party furnishing the material and supplies delivered them aboard the vessel, or as near thereto as convenience required. All these conditions were satisfied in this instance, so that the petitioner's lien extends to all these materials and supplies, although contracted for in New York.

Other materials and supplies were contracted for in New York and delivered there while the vessel was in those waters and subject to the jurisdiction of the state of New York. So far as they are concerned, there is not enough alleged in the petition to bring the case within the statutes of that state.

As the court is informed that the proceeding on the petition of the Fletcher Company will be appealed, it seems useless and unwise to put the parties to the expense of proceeding before a master at the present time.

Therefore the only order at present will be as follows:

Ordered, that on application of petitioner, to be made at such future time as seems suitable therefor, there will be an interlocutory judgment sustaining the petition in part, in accordance with the opinion passed down this 10th day of March, 1909, and for a master accordingly.

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

BERWIND-WHITE COAL MINING CO. v. METROPOLITAN S. S. CO.

AMERICAN TRUST CO. v. SAME.

(Circuit Court, D. Maine. March 30, 1909.)

No. 625.

MARITIME LIENS (§ 25*) — STATUTORY LIENS — CONSTRUCTION OF STATUTE — SCOPE.

Under Act N. J. March 20, 1857 (P. L. p. 382), as amended by Act April 24, 1884 (P. L. p. 248), giving a lien for any debt which "shall be contracted by the master, owner, agent or consignee of any ship or vessel within this state * * * on account of any work done or materials or articles furnished in this state for or towards the building, repairing, fitting, furnishing or equipping such ship or vessel," one who contracted to furnish and install the machinery for a new steamship at cost, with a certain per cent. added, is found to be entitled to include in his lien, as a part of the cost of the machinery, an amount paid to the owner of a patent on certain of the machinery which was essential to the proper equipment of steamships of that class.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. §§ 20–35; Dec. Dig. § 25.*

Created by state laws, see note to The Electron, 21 C. C. A. 21.]

In Equity. On petition of W. & A. Fletcher Company to intervene. In matter of special master's report and exceptions thereto.

See, also, 166 Fed. 782; 169 Fed. 491.

Harrington Putnam and Edward S. Dodge, for co-petitioner.

William A. Sargent and Avery F. Cushman, for American Trust Co.

Alfred H. Strickland, for Berwind-White Coal Mining Co.

Coolidge & Hight, for receivers.

PUTNAM, Circuit Judge. In this case there was an interlocutory decree establishing the petitioner's lien and sending the case to a master. The master has now reported, allowing the entire claim of the petitioner as presented by it. Two exceptions only to his report are brought to the attention of the court, those exceptions relating to the items of $10,000 and $2,500 paid by the petitioner to the owners of two several patents. Those patents related to the engines and boilers, were fundamental in their nature, and the improvements covered by them were essential to steamships of the class involved here. It is claimed that these payments are not protected by the lien statute of New Jersey under which we are proceeding. The court plainly perceives that the question involved is a very important one, and a very nice one, and would prefer to hold the matter under advisement; but, as the case will be appealed in any event, the court concludes that the interests of the parties will be promoted by its disposing at once of the question now raised, even though its views may be crude.

The statute of New Jersey evidently has received a liberal interpretation by the courts of that state, so that, so far as its construction is concerned, this court has a guide which binds it. There is a like statute in New Jersey giving a lien on buildings; that is, houses, etc. This stat-

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

ute was under consideration in Mutual Benefit Life Insurance Company v. Rowand, 26 N. J. Eq. 389, 397. Under that statute, a lien was maintained for the services of an architect. The language of the statute is given at page 397; and the law here is somewhat broader and more liberal, in view of the fact that the statute in question contains the words "for or toward." Nevertheless the court recognizes the almost universal rule of construction which prevails that lien statutes ordinarily cover only material or labor actually worked into the vessel or building involved, so that, notwithstanding the liberal construction given by the New Jersey courts to the statute providing liens on buildings, we would not be of the opinion that the holder of either of these patents could maintain a lien for the price of a license given directly by him to the Metropolitan Steamship Company. That would be going beyond what the court thinks sound judicial construction of this class of statutes has gone. Such, however, is not the case here. This can be illustrated by a supposed application of the rules announced by this court in American Surety Company v. Lawrenceville Cement Company (C. C.) 110 Fed. 717. The rules adopted by this court in that case were followed by the Circuit Court of Appeals in this circuit. There this court distinguished between the claims of an ordinary teamster carting supplies to the fortification, in question in that case, and the owner of a vessel carrying as freight under a bill of lading the material used in the work. A lien for the freight was denied on the ground that it was not a direct contribution to the structure. Now, if the contractor who was doing the work had paid the freight to the vessel in question, and had added that to the prime cost of the material he supplied, the case would have been like the one at bar in substance and in principle; and, under those circumstances, we are of the belief that this court would have allowed the lien for the entire cost of the material, including the freight.

The contract here was peculiar, in that it gave the petitioner the cost of the work, plus a percentage, or an allowance in the nature of a percentage. In other words, the contract work was done on the basis of cost, and Fletcher & Co., under the contract, were expressly compelled to pay for the licenses; and what they paid for the licenses became, so far as we are concerned, a part of the cost of the engines and boilers. The court is unable to distinguish the amount thus paid for the licenses from payments made by Fletcher & Co. to persons of whom they purchased materials for the vessels, involving profits to such persons, or anything else beyond the mere primal cost. Indeed, we are unable to distinguish the amount paid by Fletcher & Co., or agreed to be paid, whichever it may be—and it is all the same—for these licenses from any other incidental matter which they may have been required to pay to persons from whom they obtained materials that went into the vessels. Therefore, regarding these licenses as only incidental with reference to the cost of the engines and boilers installed in these steamships by Fletcher & Co., we are unable to find that the report of the master was not correct.

The court wishes to say, however, that it is very glad the question is going before a higher tribunal for revision; in fact, it is very glad

that such is the truth with reference to all the questions that have arisen under this petition, which have been very difficult, with a solution very doubtful. There is no court short of the Supreme Court that can settle with any degree of satisfaction the important issues involved in this litigation.

The report of the master is accepted and confirmed.

BERTHOLD et al. v. BURTON.

(Circuit Court, S. D. New York. February 1, 1909.)

1. COSTS (§ 254*)—"COSTS OF THE APPEAL"—TAXATION.
   Fees paid to the clerk of the Circuit Court for a citation, writ of error, and for certifying the transcript of record are none the less "costs of the appeal," and taxable as such, because they are taxable in the Circuit Court after the determination of the appeal.
   [Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 962–966, 974–977; Dec. Dig. § 254.*]

2. COSTS (§ 204*)—PAYMENT—TIME.
   The costs of trials at circuit abide the event, so that the party who ultimately prevails may tax costs of all the trials, including disbursements and witnesses' fees, in his final bill.
   [Ed. Note.—For other cases, see Costs, Dec. Dig. § 204.*]

3. COSTS (§ 264*)—COSTS OF APPEAL.
   Where a judgment was reversed on a writ of error, "with costs of this appeal," the Circuit Court, in carrying out such mandate, could not direct that certain of such costs should abide the event.
   [Ed. Note.—For other cases, see Costs, Dec. Dig. § 264.*]

On Settlement of Order on Mandate.

Hyland & Zabriskie, for plaintiffs.
Appell & Taylor, for defendant.

LACOMBE, Circuit Judge. Plaintiffs obtained a judgment against defendant in the Circuit Court, a writ of error was taken out, and the judgment was reversed, "with costs of this appeal." Part of the costs of the appeal were taxed by the clerk of the Circuit Court of Appeals at $415.85. This sum, however, did not include the fees paid to clerk of the Circuit Court for citation, writ of error, and for certifying the transcript of record. It has been the practice not to tax these items before the clerk of the Circuit Court of Appeals, but in the Circuit Court. This was in conformity with a rule founded on an old rule of the Supreme Court, which was adopted presumably because its jurisdiction is so extensive that it seemed better to leave the details of these local disbursements, often in a distant court, to be adjusted at the place where they were incurred. They are nevertheless as much "costs of the appeal" as are the fees of the clerk of the appellate court, and should be taxed as such.

It is now suggested that, although taxed, they should not be awarded to the party who prevailed on the appeal, but be reserved to "abide the event of the trial." All the costs of trial at circuit, of course,

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"abide the event," and the party who ultimately prevails will tax costs of all the trials, including disbursements for witness fees, etc., with his final bill of costs. But the "costs of appeal" are a different matter. The Circuit Court of Appeals did not direct that they should abide the event, but awarded them to the prevailing party. It seems to the writer that such was a proper disposition to make of them; but, however that may be, the Circuit Court has not the power, in carrying out this mandate, to overrule the appellate court and direct that some part of the costs of appeal shall abide the event.

It is suggested that, if plaintiff pays the costs of this appeal now, he can tax the amount as a part of his disbursements in case he ultimately succeeds. No such question is here now. It can be decided only when it arises. Reference to orders on mandate made in other cases, where no objection was made by one side to a form of order proposed by the other, are not persuasive.

BOARDMAN v. McKINNON.

(Circuit Court, S. D. New York. February 9, 1909.)

NEW TRIAL (§ 108*)—NEWLY DISCOVERED EVIDENCE.

Newly discovered evidence *held* insufficient to justify the granting of a new trial of an action tried before the court, which, if introduced, would have been insufficient to have required different findings.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 226, 227; Dec. Dig. § 108.*]

On Motion for New Trial.

Parker, Hatch & Sheehan, for plaintiff.
Underwood, Van Vorst & Hoyt, for defendant.

LACOMBE, Circuit Judge. It will not be necessary to discuss the interesting question presented on the argument, viz., whether or not the court has power to order a new trial months after the term has elapsed, and after a writ of error has taken the cause to the appellate court.

If the document and the book entries, which are now submitted as "newly discovered" evidence, had been introduced upon the trial, which was had before the court without a jury, they would not have been persuasive to any different findings of fact than those which were found upon a consideration of all the evidence.

The motion is denied.

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

NOWELL et al. v. INTERNATIONAL TRUST CO. et al. (GILLESPIE, et al., Interveners).

(Circuit Court of Appeals, Ninth Circuit. April 5, 1909.)

No. 1,641.

1. RECEIVERS (§ 21*)—SUIT AGAINST CORPORATION—RIGHT TO APPOINTMENT OF RECEIVER.

A complaint in an action by a simple contract creditor for a few hundred dollars against mining companies, owning large properties and having a mortgage indebtedness of $500,000, which did not allege the insolvency of defendants, but only that their recent operations had not been profitable, that creditors were threatening suits, and that their assets if sold at forced sale would not pay their indebtedness, did not present a case which entitled plaintiff to the appointment of a receiver.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 29; Dec. Dig. § 21.*]

2. RECEIVERS (§ 196*)—COMPENSATION FOR SERVICES—RIGHT TO ALLOWANCE.

Where a receiver has unnecessarily prolonged a receivership, when justice required that he be discharged and the receivership ended, or where a receiver has been guilty of misconduct in the management of the property committed to his charge, the court may, if the circumstances warrant, deny him compensation.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 387; Dec. Dig. § 196.*]

3. RECEIVERS (§ 128*)—RECEIVERS' CERTIFICATES—LIEN AND PRIORITIES.

In a suit by a small creditor against four mining corporations in Alaska, all of whose property was subject to a mortgage executed to a trustee in Boston to secure an issue of $500,000 of bonds which had been sold in the open market, a receiver was appointed who was subsequently succeeded by a second receiver. The latter before his appointment, acting on behalf of the defendants, had paid off the complainant's claim in full. He had also been furnished with money to pay off all of the defendant's indebtedness, except the mortgage debt, but instead of doing so used the money in carrying on their business and developing their property, and in addition on leave of court, granted on his application and without notice to the mortgagee or bondholders, who were not parties, he issued receivers' certificates from time to time to the amount of over $200,000, the proceeds of which were used for the same purpose. He continued the business for nearly eight years at a financial loss, when the mortgage trustee was made a party, and also commenced an independent suit to foreclose. *Held*, that as there was no controversy before the court which warranted the appointment of such receiver, or his continuance in service, the expense of his administration, if allowed at all, was chargeable to defendants only, subject to the receivers' certificates, and that neither could be given priority as liens over the mortgage in the absence of tangible and certain proof of assent or estoppel on the part of the trustee or bondholders.

[Ed. Note.—For other cases, see Receivers, Dec. Dig. § 128.*

Nature of certificates, see note to Postal Tel. Cable Co. v. Vane, 26 C. C. A. 350.]

4. CORPORATIONS (§ 482*)—FORECLOSURE OF MORTGAGE—BRINGING IN NEW PARTIES.

Where the pleadings in a suit by a mortgage trustee to foreclose a corporation mortgage securing bonds, including a cross-bill and petitions of intervention, presented the issue generally as to the right of priority between the mortgage and receiver's certificates; but no issue as to any individual bondholder, it was not the duty of the court to require any bond-

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holder to be made a party, nor an abuse of discretion to refuse to open the decree two months after its entry to permit such parties to be brought in and new issues joined and litigated.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 482.*]

5. APPEAL AND ERROR (§ 873*) — REVIEW — ON APPEAL FROM FINAL DECREE — SUBSEQUENT ORDERS.

Where an appeal is from the final decree only, an order subsequently made denying a motion to set the decree aside cannot be reviewed by the appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3460, 3522; Dec. Dig. § 873.*]

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

On July 1, 1896, the Berners Bay Mining & Milling Company executed its mortgage to the International Trust Company to secure the payment of 500 bonds, each for the sum of $1,000. The property mortgaged consisted of mining claims patented and unpatented, mill sites, and other property situate in the Harris mining district, Alaska. In September, 1897, the stockholders of that corporation organized the Ophir Gold Mining Company, the Seward Gold Mining Company, and the Northern Belle Gold Mining Company, and distributed the property of the original company among the three new companies, in consideration of which the latter assumed the bonded indebtedness of the former. On December 15, 1897, Decker Bros. instituted a suit against all of these four corporations, and alleged in their complaint an indebtedness from the defendant corporations to the plaintiffs therein of $154.65 for goods sold and delivered. They further alleged that the plaintiffs had outstanding checks of the defendants which they had cashed, and which would be protested for nonpayment; that the defendants were indebted to others in the sum of $500,000, which they were unable to pay; that their assets were insufficient, if sold at forced sale, to pay their debts, and that a large number of creditors were threatening suits, whereby the assets would be wasted. The complaint prayed for the appointment of a receiver to take charge of the property and business of the defendants, and out of the same to pay their debts. On the day on which that complaint was filed, E. F. Cassel was appointed receiver. Two weeks later he filed a petition setting forth that large sums were due employés of the defendants for work and labor in developing their mines, and asking that the same be adjudged preferred claims, and that he be authorized to pay them, and that he be authorized to operate the plant. On the same day the petition was allowed. On February 7, 1898, a number of the creditors of the defendant companies joined in a petition to the court to dissolve and set aside the appointment of E. S. Cassel as receiver and restore the property to its owners, and, in case the receivership could not be set aside, that F. D. Nowell be appointed receiver. Among the signatures to the petition is found the following: Bondholders, Eastern creditors as per telegram, and F. D., W. E., and Nowell Bros., $332,500. The telegram is not in the record, nor is there any signature of any one claiming to represent the bondholders and Eastern creditors. Petitions of William Endicott, Henry Endicott, Aaron Hobart, Wallace Hackett, and C. H. Sawyer joining in the request are found in the record, but they bear no file mark, and it is admitted that they never were filed. The attorney for the defendant companies testified, however, that, although they were not filed, they were submitted to the judge. On February 12, 1898, Frederick D. Nowell was appointed receiver. From that date until December 9, 1905, about eight years after the commencement of the suit, there were no further pleadings between the parties to the suit, but a number of receiver's reports and petitions were filed, and ex parte orders were made. On December 9, 1905, the Berners Bay Mining & Milling Company answered the complaint of Decker Bros., alleging that the indebtedness to Decker Bros. had been fully paid and discharged; that the mortgage of the company to the International Trust Company was

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

unpaid, and that the bonds had been sold in the open market and were outstanding debts of the corporations; that the Ophir, the Seward, and the Northern Belle Mining Companies purchased a portion of the properties covered by the mortgage and subject to the mortgage; that the receiver, acting at the instance of the holders of said bonds, had obtained orders of the court under which he had borrowed large sums of money on receiver's certificates, and otherwise incurred indebtedness in the administration of the property and the operation of the same, which indebtedness, "under the orders of the court authorizing the same and in equity, is a primary lien against said properties for the payment of the same superior and prior to the bonded indebtedness." The answer prayed that the International Trust Company, one of the appellees here, be made a party defendant to the suit, and that the properties mortgaged be decreed to be sold for the payment of said indebtedness according to the rank and priority of the respective claims. On December 11, 1905, the court ordered that the International Trust Company be made a party to the suit. On March 5, 1906, the trust company answered admitting that the claim of Decker Bros. had been paid in full, denying the priority of the receiver's indebtedness, and alleging that at no time had the mortgagee consented to or acquiesced in or approved or ratified any action of the receiver in borrowing money or incurring such indebtedness, and set up the mortgage, which was a deed of trust, and prayed that the same be adjudged a valid and subsisting first lien on the properties. The trust company, being of the opinion that the court had lost jurisdiction of the proceedings in the Decker Bros.' suit upon the payment of their claim in full, sought and obtained leave to commence an independent suit for the foreclosure of its mortgage as a prior lien, and on March 13, 1906, commenced such suit. On April 11, 1907, the court ordered that the two suits be consolidated. To this consolidated cause there were added as parties defendant Thomas S. Nowell, Willis E. Nowell, Frederick D. Nowell, Frederick D. Nowell as receiver, the Nowell Mining & Milling Company, and the Alaska Nowell Gold Mining Company. On March 13, 1906, an order of sale was entered upon the application of the receiver, F. D. Nowell, and the defendant companies, acting through Thomas S. Nowell, the father of the receiver. From that order an appeal was taken to this court, and thereupon the order was reversed. International Trust Co. v. Decker Bros., 152 Fed. 78, 81 C. C. A. 302, 11 L. R. A. (N. S.) 162. On September 27, 1906, upon the application of the trust company, F. D. Nowell was removed as receiver, the order reciting that the trust company would contest any finding as to the honest administration of the receivership of F. D. Nowell. On October 2, 1906, John C. McBride was appointed receiver. On April 11, 1907, the said receiver filed his answer to the pleadings of the trust company, raising the issue as to the priority of the mortgage lien over that of the receiver's certificates and his claim to compensation. The issue so raised is the same as that of the defendant companies, and is substantially that the bondholders, with the knowledge and consent of the trust company, induced the receiver to petition the court for leave to borrow on receiver's certificates, etc., and that the bondholders purchased a large amount of such certificates, and in all respects ratified, confirmed, and acquiesced in said orders. On April 11, 1907, George M. Nowell and Gilmer Clapp, appellants herein, having intervened by leave of the court, as holders of receiver's certificates, filed an amended petition of intervention. They alleged that they were the owners of certificates known as the "third issue," amounting to $33,627.24, and of certain certificates of the second issue, $9,648, and owners of certificates of the first issue, amounting to $18,178, and that they were owners by assignment from F. D. Nowell of the latter's claim for salary and services of $48,511.49, of the claim of J. H. Cobb for services as attorney for Nowell as receiver, $4,500, of the claim of Willis E. Nowell for services in the sum of $3,000, and other claims of receiver's expenses amounting to $2,059.65; that, with the knowledge, consent, and assistance of the bondholders, the receiver had issued and marketed such certificates, and that on or about June 13, 1904, Wallace Hackett executed and delivered a consent and ratification on behalf of all the bondholders, waiving all objection to the orders of the court theretofore made authorizing the issuance of receiver's certificates. They prayed that the expenses of the receiver and the administration of the

receivership be declared a first lien upon the property, and that the indebtedness of the receiver in borrowing money for the purpose of developing and improving the property be declared a second lien, and that thereafter the bonds be paid. The cause went to trial on April 11, 1907. On April 27th, the court filed an opinion on the merits of the controversy, and on July 2d filed findings of fact and of law, and a decree thereupon was entered.

Among the findings of fact made by the trial court are the following: That the bonds described in the mortgage deed of trust were issued and sold in the open market for the benefit of the Berners Bay Mining & Milling Company, which company received the proceeds thereof; that on February 11, 1898, Frederick D. Nowell, for and on behalf of the defendants in the action brought by the Decker Bros., paid the Decker Bros.' claim in full; that upon the appointment of said Frederick D. Nowell as receiver he took charge of the property of the four corporations and commenced mining operations thereon, and the development and exploitation thereof, and that all of his operation of said property was, is, and has been at all times a financial failure, and that said properties were at all times operated at a loss, and that the applications of said Frederick D. Nowell, as receiver, for leave to issue receiver's certificates, were for the purpose of enabling him as such receiver to continue the business of mining, developing, and prospecting undeveloped veins on said properties; that leave for the issuance of all of said receiver's certificates was given upon ex parte applications of said receiver, and without any notice to, or appearance in court by, the International Trust Company or any other parties in interest; that all such receiver's certificates issued prior to October 29, 1901, were absorbed, retired, and canceled by the issuance of the certificates designated in the record as the "first issue certificates," issued on October 29, 1901, to the amount of $190,000; that prior to that date, and prior to the creation or existence of any of the debts now represented by receiver's certificates, Thomas S. Nowell, the original organizer of the Berners Bay Mining & Milling Company, and president thereof, collected from sources not disclosed by the evidence a sufficient sum of money to pay all the indebtedness of the four corporations, excepting the mortgage debt of July 1, 1896, and transmitted the same to said receiver at Juneau with instructions to pay off all the indebtedness against said corporations; that said Frederick D. Nowell, receiver, instead of so applying said money, entered into an agreement with the then unpaid creditors of the said corporations at Juneau, whereby it was agreed that he should use the funds so received, and apply the same to the continuation of the receivership and the operation and development of said mining claims; that on October 29, 1901, said receiver was authorized by an order of court to borrow $190,000, and to issue receiver's certificates therefor to pay the present indebtedness of the receiver, and to make up any temporary deficiency that might arise in developing and operating the Kensington mine and mill over the gross earnings from such operation; and the order provided: "That said certificates be and are a first lien upon the mines, mining claims, mill, water rights, railroad and properties of every kind and description of said companies now under control of the court, and shall be prior to and paramount to any and all mortgages, trust deeds, and indebtedness whatsoever existing against said companies;" that the order further provided for the payment and retirement of all previous issues of receiver's certificates, and the same were also paid and retired; that all of said certificates are outstanding and unpaid, and are known and designated in the record as the "first issue of certificates"; that said order was procured upon the application of the receiver ex parte, without notice to the International Trust Company or any other parties interested in said property; that on November 21, 1902, the proceeds of the first issue of certificates having been exhausted, the receiver applied for authority to issue additional certificates for $60,000, for the purpose of aiding development work on the mining properties in his charge, and an order was made authorizing the issuance of certificates as applied for, and providing that they should be a first lien on the properties, paramount to the mortgage indebtedness, and that they should be equal in right to the first issue of certificates; that $34,173.59 of said issue of certificates are outstanding and unpaid; that the order was obtained by the receiver ex parte, and without notice to or appearance by the

trust company or any other parties interested; that on May 13, 1904, F. D. Nowell, as attorney in fact for the companies defendant in the action, and as receiver, entered into a contract with one Joseph McDonald, giving him an option to purchase the mining properties, which contract provided that McDonald should do certain work in the mines for the actual cost of which the receiver was to issue him certificates, and that, if McDonald should elect to purchase the properties, he should pay (1) all of the indebtedness of the receiver F. D. Nowell, (2) the sum of $50,000 to F. D. Nowell personally, and (3) that he should erect a plant upon the properties of a certain specified capacity, whereupon he should be entitled to a 50/100 interest in a corporation then to be organized to hold all of the said mining properties. On the same day the court entered an order approving the contract, which order was procured ex parte and without notice to or appearance by the trust company or any other party in interest; that McDonald entered upon the prosecution of the contract, but failed to do all the work which he had agreed to do; that, in aid of the performance of the contract, the holders of 498 of the bonds under the mortgage deed of trust deposited their bonds with the trust company, and gave security for the two remaining bonds undeposited, and at their request the trust company placed in escrow with the First National Bank of Juneau a release of the mortgage, with instructions to deliver the same only upon the purchase of the properties by McDonald in accordance with his contract; that on January 1, 1905, McDonald refused to purchase the properties and surrendered his option, and the release of the mortgage was returned to the trust company and was canceled, and the bonds were returned to the owners thereof; that on February 26, 1903, an agreement was made between Wallace Hackeft of Portsmouth, N. H., as trustee, Thomas S. Nowell and Frederick D. Nowell and Willis E. Nowell, his sons, which began as follows: "Memoranda of an agreement entered into between the holders of first mortgage bonds of the Berners Bay Mining & Milling Company, organized under the laws of the state of Maine, herein designated as party of the first part, and Wallace Hackett of Portsmouth, New Hampshire, trustee, herein designated as party of the second part, Thomas S. Nowell, Frederick D. Nowell and Willis E. Nowell, all of Juneau, Alaska, parties hereto of the third part;" that the agreement recites that the Berners Bay Mining & Milling Company is subject to a mortgage of $500,000, on which interest is in default; that the property is now in the care and custody of a receiver; that the receiver has issued receiver's certificates from time to time, which aggregate more than $200,000; that there is unsecured indebtedness of the corporation, and that it is for the best interests of all creditors to dispose of their rights and claims to outside parties for a consideration, and that whereas the Nowells, the parties of the third part, have entered into negotiations with certain parties with this end in view, it was therefore agreed: First, that the bondholders should deposit their bonds with Wallace Hackett, the trustee, who would issue his receipts therefor, the acceptance whereof by the bondholders should be considered assent to the contract; that, second, the parties of the third part should provide for the prompt payment of the receiver's certificates or indebtedness and interest, and obtain the discharge of the corporation from the receivership; that, third, the parties of the third part should preserve the integrity of the property, and allow none thereof to be separated or estranged from the main body of the corporation, and that the said properties, together with a group of mines contiguous thereto, known as the "Johnson group," belonging to the party of the third part, should be added to the properties of the Berners Bay Company; that, fourth, a new corporation should be formed and all the properties conveyed to it; that, fifth, of the stock of such new corporation, the parties of the third part should receive 50 per cent., of which one-half was to be placed in the hands of the party of the second part, as trustee for the benefit of the creditors of the Berners Bay Company; that, after all such payments had been made by the parties of the third part, they were to issue, on or about December 31, 1910, to the bondholders pro rata for their holdings 10 per cent. of 50 per cent. of the entire capital stock, and that the trustee was to hold said 25 per cent. of the capital stock of the corporation as collateral security for the payment of the bonds and other indebtedness; that on payment of all the indebtedness the

remaining portion of said 25 per cent. of the capital stock should become the property of the parties of the third part; that, sixth, the trustee was vested with full authority to proceed with the foreclosure of the mortgage if such step should prove necessary. On June 13, 1904, Wallace Hackett received from F. D. Nowell a paper prepared at Juneau by his attorneys, which recites as follows: "Whereas the holders of the bonds of the defendant companies in the above suit, viz.: the Berners Bay Mining & Milling Company, the Northern Belle Mining Company, the Seward Gold Mining Company, and the Ophir Gold Mining Company did consent to the issuance of the receiver's certificates in this cause, and the orders of the court allowing and giving such certificates priority over the mortgage bonds of said companies, but such consent never formally entered of record herein: Now, for the purpose of making such consent a matter of record, I, Wallace Hackett for myself and as trustee and holder of said bonds shown in the list hereto attached, do hereby consent to and waive any and all objections to the orders of the court herein authorizing said certificates and future issues thereof, and giving the same priority over said bonds;" that on the receipt of this paper, on June 13, 1904, Wallace Hackett, without advising the bondholders who had deposited their bonds with him as trustee, and without any other further or other authority than that contained in the contract of February 26, 1903, signed the same and returned it to Frederick D. Nowell, together with the following statement: "In the matter of the bonds of the Berners Bay Mining & Milling Company deposited with the undersigned trustee, I will state that the entire issue of bonds amounted to $500,000, consisting of 500 bonds of the face value of $1,000, each numbered from 1 to 500 inclusive, issued under a mortgage to the International Trust Company of Boston. That owing to the peculiar situation of the property, the bonds being widely scattered, the interest on the bonds having been defaulted, the property in Alaska having passed into the hands of a receiver appointed under authority of the U. S. Court, and receiver's certificates of more than $200,000 having issued, all of which placed the bonds in great jeopardy. Acting under the request of the holders of a majority of the bonds, I addressed to all of the bondholders a letter setting forth the above facts in February, 1903, asking their consent to represent them in negotiations looking to a sale of the property, whereby there was a chance of the bonds being paid, etc., and asking for full authority in the premises, stating in the letter that by depositing their bonds with me, they would assent to the terms of the letter and the contract existing between myself and the other owners of the property under which we sought to liquidate the sale. In response to this letter I received on deposit 498 of the 500 bonds issued. Every bond whose existence we could trace was deposited with me. Two bonds having been lost, #406 and 407, for these I deposited security with the International Trust Company, and that company then issued a release of the mortgage at my request." [Then follows the list of the owners of the bonds, and the amounts held by them]. That neither the said McDonald nor any of the persons who purchased or received such receiver's certificates of the first, second, and third issues, as in the findings of fact described, purchased or received any of the said certificates, nor were they induced to purchase or receive any thereof in reliance upon any act or acts of the International Trust Company or the bondholders under the said mortgage deed of trust, or of the said Wallace Hackett, but all of such certificates were issued and sold and received by the holders thereof with full notice and knowledge of the existence of the said mortgage deed of trust of July 1, 1896, and with notice and knowledge that the same had not been canceled or released or paid.

The conclusions of law were that from February 11, 1908, until the appearance of the International Trust Company in the litigation on March 5, 1906, there was no valid and subsisting cause of action before the court, and that the court had no jurisdiction to hear, try, or determine any matter in said cause or to authorize the issuance of any receiver's certificates, and that all receiver's certificates and indebtedness incurred prior to the last-named date are invalid, except as to the corporations defendant in the suit which was brought by the Decker Bros.; that there was due and owing on the mortgage $881,716, and that the mortgage was a prior, valid, and subsisting lien on the whole property in the hands of the receiver, and that the property be

sold and the proceeds applied: First, to the payment of the costs and expenses of the sale; second, to the payment of the account of J. C. McBride, receiver, and to the accounts of F. D. Nowell incurred after the appearance of the trust company, and to the accounts of the special master, the total whereof was $11,429.36; third, to the payment of the principal and interest due on the mortgage; fourth, to the payment of the receiver's certificates of the first issue, $190,000, with interest; fifth, to the payment of the receiver's certificates of the second issue, $34,173.59 with interest; sixth, to the payment of the receiver's certificates of the third issue, $33,627.24 with interest; and, seventh, to the payment of the claim of F. D. Nowell, receiver, for compensation and expenses not theretofore allowed. In accordance with the findings of fact and conclusions of law, a decree was entered. From the decree the appeal is taken by George M. Nowell and Gilmer Clapp, as assignees of $18,178 of the first issue of certificates, of $9,648 of the second issue, and of $33,627 of the third issue of certificates, and as assignees of the claim of F. D. Nowell, receiver, for compensation and disbursements from the time of his appointment on February 12, 1898, to February 21, 1906, amounting to $71,793.58.

George M. Nowell and Malony & Cobb, for appellants.

Winn & Burton, for appellees Gillespie and others.

L. P. Shackleford, T. R. Lyons, John J. Boyce, E. S. Pillsbury, and Alfred Sutro, for appellee International Trust Co.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). The questions involved on the appeal are: First, did the court err in postponing the payment of the compensation and disbursements of the receiver from February 12, 1898, to February 21, 1906, to the lien of the mortgage indebtedness, and to the payment of the receiver's certificates? Second, did the court err in postponing the payment of the receiver's certificates to the lien of the mortgage indebtedness? And, third, did the court err in denying the motion of the appellants Nowell and Clapp to set aside the decree and reopen the litigation for the purpose of making certain specified bondholders parties to the suit?

We find no difficulty in the way of sustaining the conclusion of law which is reached by the court below—that the complaint in the suit of Decker Bros. presented no case for the appointment of a receiver. The plaintiffs in that action were simple contract creditors of the Berners Bay Mining & Milling Company. The purpose of the suit was to obtain the payment of a money demand of $154.65 for goods sold and delivered, and to protect the plaintiffs against liability on certain checks or drafts. The property of the defendants in the suit did not constitute a special fund to which the plaintiffs had the right to resort. The complaint contained no allegation that the defendants were insolvent, or that their property was in danger of loss from mismanagement. The only allegations it contained by the way of showing the propriety of the appointment of a receiver were that the output of the mines for the six months prior to the commencement of the suit was insufficient to meet current expenses, that creditors were threatening suit, that the property of the defendant companies was in danger of being wasted and exhausted, that they were in danger of becoming insolvent, and that if their property was sold

at forced sale there would not be realized a sum sufficient to pay their indebtedness. Not only was the showing so made in the complaint insufficient to authorize the appointment of a receiver in the first instance, but at the time when F. D. Nowell was substituted as receiver the claims of Decker Bros. had been paid in full, and Nowell himself had made the payments. There was then no controversy between the parties to the suit. It was the plain duty of the receiver to report to the court the fact that Decker Bros. had been paid in full, and to obtain the dismissal of the suit and his own discharge as receiver. During the whole of the time from his appointment as receiver until the appearance of the International Trust Company in the suit, a period of nearly eight years, there was no controversy before the court. If the corporations defendant to that suit chose to submit to the situation and to conduct their mining operations all those years through the medium of a receiver, they should be held responsible for the expenses of the receivership. There is no ground in equity for charging those expenses to the mortgagee, or making them paramount to the mortgage lien, or to the expenses represented by the receiver's certificates. Not only was the claim of Decker Bros. paid, but at the time when F. D. Nowell was appointed receiver he had in his hands money sufficient to pay all the debts of the corporations except the mortgage debt, money which had been furnished him expressly for that purpose. By a collusive arrangement with his brother and other relatives, the money was diverted from the purpose for which it was furnished and was devoted to the exploitation of the mines. The operations of the receiver were financially unsuccessful. He incurred debts for which receiver's certificates were issued, and are outstanding, to the amount of $228,700, exclusive of interest. He refused to bring a suit to acquire for the corporations whose property he controlled the group of mines known as the "Johnson group," and thereby aided his father, Thomas S. Nowell, to withhold from the corporations valuable mining claims, which, as this court has held in the case of Nowell et al. v. McBride, Receiver (C. C. A.) 162 Fed. 432, were in equity the property of the defendant corporations. Again, there were irregularities in the issuance of certain of the receiver's certificates such as to invite the severest criticism. One among several of such certificates was that issued to Wallace Hackett for $5,500. It is not denied that this was issued, not for the benefit of Hackett, but for Thomas S. Nowell, to whom it was indorsed by Hackett. It was issued to repay Thomas S. Nowell his expenses incurred in assisting the receiver to secure moneys for his use and in the promotion of plans for the reorganization of the companies. On March 26, 1903, Judge Brown, then the judge of the lower court, denied Thomas S. Nowell's petition for an order that the receiver issue a certificate in recognition of the claim. According to the testimony of F. D. Nowell, Judge Brown subsequently verbally gave him authority to issue the certificate. There is no such order in the record. There can be no question that the claim was not a proper charge upon the properties in the hands of the receiver, as the receiver must have known. In addition to this, the receiver unlawfully issued a number of certificates to himself and to his brother

for debts of the Berners Bay Company incurred prior to the commencement of the action in which the receiver was appointed. In short, the whole of the management of the properties by F. D. Nowell as receiver appears to have been for speculative purposes, and a large majority of the certificates issued by him were for the expense of exploration and development of the mining properties, evidently in the hope of making rich discoveries, in which event the Nowells and the corporations defendant would profit, and with the understanding that in case of failure to make such discoveries the expenses would be charged to the properties, to the postponement and possibly the exclusion of the mortgage bonds.

Where a receiver has unnecessarily prolonged a receivership when justice required that he be discharged and the receivership ended, or where a receiver has been guilty of misconduct in the management of the property committed to his charge, the court may, if the circumstances warrant, deny him compensation. Forrester & MacGinnis v. B. & M. Co., 30 Mont. 181, 76 Pac. 2; Receivership Sheets Lumber Co., 52 La. Ann. 1337, 27 South. 809; McAnrow v. Martin, 183 Ill. 467, 56 N. E. 168; Harrison v. Boydell, 6 Sim. 211; Willis v. Sharp, 58 Hun, 608, 12 N. Y. Supp. 120; High on Receivers (2d Ed.) § 796. Upon the facts disclosed in this case, it would seem that the court below would have been justified in denying the receiver any compensation whatever for his services from the time of his appointment until the appearance of the trust company in the suit. But, however that may be, we are convinced that there was no error in deferring the payment of his compensation for services during that period to the payment of the mortgage and the receiver's certificates, and thereby imposing the burden thereof upon the corporations by whose consent and connivance the receivership was unnecessarily maintained and prolonged.

The principal question on the appeal is whether the mortgage lien is prior and superior to the receiver's certificates. Counsel for the appellants do not contend that the mere order of the court decreeing the receiver's certificates to be a first lien on the property could, without the consent of the mortgagee, have the effect to make them so. It was decided otherwise by this court on the former appeal in this case. International Trust Co. v. Decker Bros., 152 Fed. 78, 81 C. C. 302, 11 L. R. A. (N. S.) 152. But counsel point to various facts in the record which they contend show that the bondholders consented that the lien of the certificates should be prior. One of these facts is that all of the original bondholders save three were stockholders in the Berners Bay Company; but this, if true, would in no way tend to show a waiver of the priority of the mortgage lien. Again, it is said that no interest has ever been paid on any of the bonds. This fact may have been sufficient to cause the bondholders to inquire what was being done with the mortgaged property, but we do not see that the inference is to be drawn therefrom that the mortgage lien was waived. Nor can that inference be drawn from the fact that the companies consented to the appointment of the receiver. But it is said that Endicott, Hackett, Hobart, and Sawyer, who were holders of 78 of the 500 bonds, joined in a request for the appointment of

F. D. Nowell as receiver. No such request appears in the record, but, assuming that it was made, it could have no effect upon the question of the priority of one class of liens to another. It is said, also, that the certificates of $35,000, issued in 1898, afterwards retired by the first issue certificates of $190,000, were taken "by the bondholders in Boston"; but the evidence is that those certificates were issued to Thomas S. Nowell, and were by him assigned to Henry Endicott, a bondholder holding but 13 of the bonds. It is further said that $45,000 in case was advanced by "the bondholders" in anticipation of the first issue certificates of $190,000; but the evidence is that $20,000 of those certificates were sold to Thomas Stokes, who held 10 bonds, $10,000 thereof were sold to David L. Webster, who held 35 bonds, $5,000 to E. Hobart, who held 8 bonds, and $10,000 to Henry Endicott, who held 13 bonds. In other words, four of 30 bondholders, holding 66 of 500 bonds, received $45,000 of the first issue certificates. Assuming that these four bondholders, in view of the terms of the order of the court which made the certificates a first lien on the property, believed that the order was valid, and that in taking the certificates they acquired a lien on the property prior to that of the mortgage, their belief could have no effect upon the law of the case, nor can it be construed into assent upon their part that the mortgage should be displaced as a first lien. Much less could it have that effect upon the trustee, which held the bonds for the great majority of the bondholders.

It is said that the second issue of certificates was ordered, and the issue made, pursuant to a contract between the bondholders and the Mines Securities Company, which points to the fact that the contract must have been known and assented to by the International Trust Company, since that company was to hold the papers in escrow, and was the agent through which payments were to be made. The record shows, however, that the certificates issued under the Mines Securities contract were not of the second issue, but of the first and there is no evidence that the trust company was a party to the agreement or had notice or knowledge thereof, or that any papers were ever placed with it, or that any payments on the contract were ever made through it. The contract was never carried out, and none of the certificates issued under it are held by the appellants in this case.

It is said, also, that of the second issue, certificate No. 2, for $15,996.29, was issued to Wallace Hackett for money payable to the International Trust Company on foreclosure of its mortgage against the American Gold Mining Company, and that in purchasing the certificate Hackett acted as agent for the trust company, and that the latter has never disavowed his act. But there is no proof in the record that Hackett acted under authority from the trust company, or that the trust company had anyhing to do with that certificate, or that the certificate, is among those which are held by the appellants.

The appellants insist that by virtue of the document signed by Wallace Hackett on June 13, 1904, which they designate a "waiver," the bondholders and the trust company are estopped to deny the priority of the receiver's certificates. At the time when Hackett signed that instrument, the first and second series of the issues of receiver's cer-

tificates had been issued and sold, and the waiver could not affect the rights of the holders thereof. If there was an estoppel by virtue of that instrument, it related to the certificates of the third issue only. The waiver recites that Wallace Hackett, for himself and as trustee for the bonds deposited with him, amounting in all to 498, consented to and waived all objection to the orders of the court giving the receiver's certificates priority to the mortgage bonds. The record shows, however, that Hackett, in making that waiver acted without authority from the bondholders other than that which was given him in the contract of February 26, 1903. That contract by its terms gave him no power to waive the priority of a bondholder's lien. On the contrary, its reasonable construction is that it imposed upon him the duty to protect the bonds. His authority was "to do and perform all things necessary for the purpose of carrying out this contract, so far as it devolves upon him," and that authority appears in a contract which elsewhere provides that the Nowells, who were parties thereto, should provide for the prompt payment of the receiver's certificates. Hackett in his deposition testified that he had no recollection of having consulted with any of the bondholders prior to executing the waiver of June 13, 1904. He deposed that he did not at the time investigate the question whether the terms of the contract of February 26, 1903, authorized him to sign the waiver, and that without consulting the bondholders, or giving the matter much thought, he signed the waiver at the request of the receiver's attorneys, and without due consideration, and at a time when it seemed unimportant whether or not there was any priority in the securities; that he never intended to jeopardize the rights of the bondholders, and had no authority to do so; and that he regarded the signing of the instrument a harmless gratification of a request of the receiver, inasmuch as it was based upon the payment of all of the certificates by the Nowells before the bonds were considered in reorganization. In fact, the waiver was signed to carry out a scheme to sell the mining properties to outside people to obtain money wherewith to pay the receiver's certificates and to increase the capital stock, leaving the property subject to the lien of the mortgage. It is intimated by counsel for the appellants that Hackett had a motive for coloring his testimony in favor of the appellees. But whether this is true or not is not important. His testimony is but an admission of what otherwise appears in the record, that he had no authority from the bondholders or from the trust company to sign the waiver. Allusion is made to the circular letter of Hackett to the bondholders of March 31, 1903, as furnishing evidence that the bondholders assented to the waiver which Hackett subsequently signed. That letter, it is true, expresses the opinion of the writer that the bonds are worthless, and that the bondholders are menaced with the danger that the receiver may sell the property, "thus cutting them off entirely." This was but the expression of the writer's view of the rank of the liens, and the fact that in response thereto the bondholders sent him their bonds in order to consummate the contract of February 26, 1903, cannot be deemed an assent to any of such statements so made in the letter.

Before an estoppel can arise, it must appear that the person invoking it has been influenced by and has relied upon the acts or conduct of him who is sought to be estopped, and that those acts and conduct were sufficient to warrant reliance and action thereon. In the present case there is entire absence of proof that the appellants purchased or received any of their certificates in reliance upon any act or conduct of the trust company or of the bondholders, or that they were in any way misled or influenced thereby. The fact that the trust company delayed the foreclosure of its mortgage so many years cannot operate to displace its prior lien. In order to subordinate the receiver's certificates to the vested lien of a mortgage, the proof of the assent of the trustee, or of the bondholders thereto, must be tangible and certain. Farmers' Loan & Trust Co. v. Centralia & C. R. Co., 96 Fed. 636, 37 C. C. A. 528; Belknap Sav. Bank v. Lamar Land & Canal Co., 28 Colo. 326; 64 Pac. 212.

It is assigned as error that the court did not of its own motion require certain of the bondholders to be made parties to the suit, and that the court overruled the motion of the appellants to set aside the decree and make said bondholders parties so that complete justice might be done between the certificate holders and the said bondholders. The motion was made four months after the opinion of the court below was filed, and two months after the findings and decree had been entered, and long after the time for moving for a new trial had expired. The answer of F. D. Nowell, the cross-complaint of the Berners Bay Company, the answer of McBride, receiver, and the petition of intervention of Nowell and Clapp, raised the issue as to the priority of the receiver's certificates over the mortgage. In none of the pleadings was any issue presented as to any specific bonds or any individual bondholder. These pleadings were filed about a year and a half before the decree was rendered. The appellants had ample opportunity to make timely application to bring in additional parties, and no excuse is suggested for their delay. Under the circumstances, we are clearly of the opinion that the trial court committed no error in not, of its own motion, bringing in new parties, and that it was no abuse of the discretion vested in the trial court to deny the application to set aside the decree.

It is said that it appears that the court below reached the conclusion that Thomas Stokes, D. L. Webster, Henry Endicott, Wallace Hackett, F. D. Slade, F. S. Landon, and George K. McLeod, bondholders, waived the priority of their bonds to the receiver's certificates, but this is not sustained by the record. In the opinion the court alluded to the effort to prove estoppel against said bondholders, because of the fact that they had purchased certificates and thereby waived the priority of their bond lien, and said:

"The answer to that is that none of these persons are made parties to this suit. No issues are presented in the pleadings upon which they were required to come before the court. They have not individually had their day in court, and no judgment ought to go against them without notice."

From this language of the opinion, we are not warranted in drawing the conclusion that the court found in the facts disclosed by the evidence proof whereon to hold those particular bondholders estopped.

The motion for leave to bring in additional parties was based upon two grounds: First, that the said bondholders procured and consented to the issuance of receiver's certificates; and, second, that they consented to the orders of the court adjudging those certificates superior liens to the mortgage. Even if the motion below had been presented in apt time, before we would be justified in saying that it was error to deny it, we must find in the record some ground for holding that, if it had been allowed, a different decree might have been rendered. The appellants, in making their motion, offered no suggestion of new proof to be taken to substantiate the defense of estoppel. It was a motion to set aside the decree and to bring in new parties, so that, upon the evidence submitted, the court might render appropriate relief. On that evidence, as we find it upon a careful examination, there is no sufficient proof that the bondholders so named consented that the receiver's certificates should displace the mortgage lien. But the question whether the court erred in denying the application is not properly before us. Where the appeal is from the final decree only, an order subsequently made denying a motion to set the decree aside cannot be reviewed by an appellate court. 3 Cyc. 229; Second Natl. Bank of St. Paul v. Larson, 80 Wis. 469, 50 N. W. 499; Leary v. Leary and Wife, 68 Wis. 662, 32 N. W. 623; L. S. & M. S. Ry. et al. v. C. & W. I. R. R., 100 Ill. 21; Pennsylvania Co. v. Gresco, 79 Ill. App. 127; Kellogg v. Hamilton, 43 Mich. 269, 5 N. W. 315; Aultman Miller Co. v. Becker, 10 S. D. 58, 71 N. W. 753.

The decree is affirmed.

GRIESA et al. v. MUTUAL LIFE INS. CO. OF NEW YORK.

(Circuit Court of Appeals, Eighth Circuit. April 5, 1909.)

No. 2,922.

1. APPEAL AND ERROR (§ 843*)—MATTERS REVIEWABLE—ACADEMIC QUESTIONS.
The power of a federal court to grant an order for the disinterment of the body of assured, in order that an autopsy might be held thereon for purposes of discovery, would not be reviewed after such disinterment and autopsy; the question being then largely academic.
[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 843.*]

2. DISCOVERY (§ 20*)—BILL FOR RELIEF.
Where a bill asks both for relief and discovery, the right to discovery is dependent on the right to relief, and, if the bill is insufficient for relief, it cannot be sustained as to discovery.
[Ed. Note.—For other cases, see Discovery, Cent. Dig. § 27; Dec. Dig. § 20.*]

3. INSURANCE (§ 249*)—CANCELLATION OF POLICY—REMEDIES—EQUITY.
After the death of assured, a suit in equity will not lie for the surrender and cancellation of the policy because obtained by fraud; the insurer having a plain, speedy, and adequate remedy by interposing the fraud as a defense to an action at law on the policy.
[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 537; Dec. Dig. § 249.*]

4. SPECIFIC PERFORMANCE (§ 4*)—SUBJECTS OF RELIEF—INSURANCE POLICY.
A bill will not lie for the specific enforcement of an insurance policy, providing for the delivery of bonds instead of the payment of money on

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

insured's death, since, on the insurer's refusal to perform, the beneficiary may recover as damages the money value of the bonds.

[Ed. Note.—For other cases, see Specific Performance, Dec. Dig. § 4.*]

5. INSURANCE (§ 611*)—POLICY—BREACH.

The filing of a bill by insurer for the cancellation of a policy, providing for the delivery of bonds on insured's death, after such event, alleging that the policy had been obtained by fraud, constituted a repudiation by insurer of its obligations, rendering it liable to an action at law for damages.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 611.*]

6. INSURANCE (§ 249*)—CANCELLATION OF POLICY.

Since a beneficiary under a policy payable in bonds could not on assured's death maintain a suit in equity for specific performance by the delivery of the bonds, that feature of the policy presented no circumstance to support a suit in equity by the insurer for the surrender and cancellation of the policy for fraud.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 249.*]

7. EQUITY (§ 44*)—REMEDIES SUBJECT TO ELECTION—ACTION AT LAW OR SUIT IN EQUITY.

Under Rev. St. § 723 (U. S. Comp. St. 1901, p. 583), providing that suits in equity shall not be sustained in either of the courts of the United States in a case where a plain, adequate, and complete remedy may be had at law, where a defendant has such a remedy for fraud, there is no concurrent remedy in equity therefor within the rule that plaintiff may elect which remedy he will choose, if the remedies at law and in equity are concurrent.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 141–145; Dec. Dig. § 44;* Courts, Cent. Dig. § 1230.]

8. DISCOVERY (§ 17*)—PARTIES.

Since any person interested in an action at law and having possession of evidence sought by discovery may properly be made a defendant to a bill for discovery, a widow, who was the owner of a cemetery lot in which her husband's body was interred and was the legal custodian thereof, was a proper party to a discovery proceeding to have the body disinterred, that an autopsy might be made which was expected to furnish evidence to be used in an action at law on a policy on the husband's life, though the widow was not a party to such action.

[Ed. Note.—For other cases, see Discovery, Cent. Dig. § 18; Dec. Dig. § 17.*]

9. DISCOVERY (§ 27*)—USE OF EVIDENCE.

Where insurer, after insured's death, brought a suit in equity to cancel a policy to which relief it was not entitled, and in that suit obtained by motion for discovery the disinterment of insured's body and an autopsy thereon, it was complainant's duty thereafter to take the discovery as evidence into the action at law, instead of drawing such action into the suit in equity.

[Ed. Note.—For other cases, see Discovery, Cent. Dig. § 39; Dec. Dig. § 27.*]

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

For opinion below, see 156 Fed. 398. See, also, 165 Fed. 48.

George J. Barker, Samuel A. Riggs, and Charles F. Hutchings, for appellants.

John S. Dean, Ferry & Doran, and Bishop & Mitchell, for appellee.

Before ADAMS, Circuit Judge, and RINER and AMIDON, District Judges.

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

AMIDON, District Judge. Lucius H. Perkins, in his lifetime, procured policies of insurance upon his life to be issued, aggregating more than $500,000. Among others, the Mutual Life Insurance Company, complainant below, and appellee here, issued such a policy in his favor for $100,000. In less than a year after obtaining this large amount of insurance, he fell from his house and shortly after died. The complainant brought this suit in equity in the United States Circuit Court for the District of Kansas, against the executors of the last will and testament of said Perkins, and his widow and sons, who were the beneficiaries under the policy, alleging in its bill: That Perkins had taken out the insurance fraudulently with the deliberate purpose on his part to commit suicide; that he had purchased a fatal poison on the morning of his death, at a drug store in the town where he lived, gone upon the roof of his house, and there taken the poison with suicidal purpose, and, losing consciousness from its effect, had fallen from the house, resulting in his death. It is further alleged in the bill that it would be impossible to ascertain whether in fact he had taken the poison unless an immediate autopsy was had, because by delay the poison would become so absorbed into the tissues of the body that its presence could not be scientifically discovered. On the other hand, if a prompt autopsy could be had, it was asserted that it would be possible to scientifically discover the presence of the poison, and thus demonstrate that Perkins had come to his death by suicide. The bill further alleged: That, promptly upon receiving notice of Perkins' death, complainant had instituted an investigation to ascertain its cause, and had thereby discovered evidence tending strongly to show that he had committed suicide in the manner above described; that it thereupon promptly applied to his widow, the defendant Clara Luella Morris Perkins, who was the owner of the lot where he was buried, and the legal custodian of his body, asking that an autopsy might be held for the purpose of ascertaining the cause of his death. The widow declined to accede to this request. Thereupon complainants applied to the coroner of the county where Perkins was buried, asking that an inquest be held; but the coroner, exercising the legal discretion with which he is vested, declined to hold an inquest. From the bill it also appears that the policy of the complainant provides, not for the payment of cash, but for the issuance of 100 bonds for $1,000 each, payable in 20 years. Perkins left a last will and testament, in which he bequeathed to each of his three sons 20 of these bonds. The remaining 40 of them are set apart as a special fund; the income therefrom to be paid to his widow, but the capital upon her death to go to his sons.

This bill was filed July 19, 1907. The only relief prayed for therein is the surrender and cancellation of the policy upon the ground that it had been obtained by fraud. On the same day on which the bill was filed, a motion was also filed in the cause, in which an order of the court was asked authorizing the complainant to exhume the body and hold an autopsy thereon.

August 5, 1907, the executors brought an action at law on the policy against the insurance company as defendant, in the same court in which the bill was pending.

August 14, 1907, the executors and the widow filed a plea in the equity suit, setting forth the pendency of the action at law, and alleging that the complainant might by answer in that action plead as a defense all the matters contained in the bill, and further also pleading that it appeared upon the face of the bill that the complainant had a plain, adequate, and complete remedy at law. On the same day the other defendants filed a demurrer in the equity cause, challenging the jurisdiction of the court and the equity of the bill.

August 19th the complainant in the equity suit, as defendant in the action at law, filed in that action a motion for the disinterment of the body and an autopsy, identical with the motion then pending in the equity suit.

After some preliminary hearings, which are not now material, the cause came on before the court on the 4th day of September, 1907, for the purpose of disposing of the matters raised by the plea and demurrer, and by the motions. The trial judge stated, without much regard for chancery practice, that he would treat the suit in equity and the action at law as "consolidated" for the purpose of dealing with all the matters thus presented. Oral evidence was adduced by the parties, and the hearing continued from time to time until September 14, 1907, when the court entered an order in the equity suit directing the marshal of the court to exhume the body, and allow three persons named by the court to hold an autopsy thereon. This order was promptly executed, the autopsy held, and the persons making the same have filed their report, which is embodied in the record.

This left the suit in equity pending on the plea and demurrer. April 14, 1908, while this issue was still undecided, the complainant filed in the equity suit a motion for an injunction restraining the further prosecution of the action at law, assigning as a reason that:

"This court of equity having rightfully acquired jurisdiction of the parties and the subject matter of the controversy, for the purpose of granting certain necessary and indispensable equitable relief, will retain such jurisdiction to do complete justice between the parties and grant full relief."

This motion, and the issue raised by the plea and demurrer, were heard together, and on June 25, 1908, the court entered an order overruling the plea and demurrer and restraining the further prosecution of the action at law. The present appeal is brought to review that order, and error is assigned upon both its branches, viz.: (1) The overruling of the plea and demurrer; and (2) the restraining of the action at law.

We are first invited by counsel for appellant to pass upon the power of the court and its practice in granting the order for the disinterment of the body and the holding of an autopsy thereon. This order, however, has been fully executed. It is beyond the power of this court to grant any relief in respect of it. Any discussion of the subject upon which we might enter would be in a large measure academic. We therefore abstain from expressing any opinion upon those matters; but, lest our thus passing these questions by may be misconstrued, we expressly add that such action ought not to be interpreted

as even an implied approval by us either of the power exercised or the practice pursued by the trial court.

We pass then to the other matters. In dealing with them we shall be obliged to separate matters that were blended by the trial court and have been confused in the argument here. First, can the bill in equity be sustained even when combined with the discovery which was granted on the motion to exhume the body? This bill is not a bill of discovery, but a bill of relief. Such a bill, to be sure, is always also a bill of discovery. The answer for which it calls is evidence in behalf of the complainant, and, if the charges of the bill are not sufficient to elicit all the evidence which he deems his right, he may attach interrogatories to the bill, and elicit further evidence in that way; but, when a bill asks both relief and discovery, the right to the discovery is dependent upon the right to relief. If the bill is insufficient as to its relief, it presents no controversy in which the evidence sought by the discovery could be used. It may be that the framer of the present bill was aware of this rule, and therefore abstained from asking for the exhumation of the body in the prayer of the bill, but sought his discovery in the unusual method of a separate motion. It is the settled law of this circuit, and of the Supreme Court, that after the death of assured a suit in equity will not lie for the surrender and cancellation of the policy upon the ground that it was obtained by fraud, for the reason that the company has a plain, speedy, and adequate remedy by interposing the fraud as a defense to an action at law upon the policy. Insurance Co. v. Bailey, 13 Wall. 616, 20 L. Ed. 501; Cable v. United States Life Ins. Co., 191 U. S. 288, 24 Sup. Ct. 74, 48 L. Ed. 188; Riggs v. Union Life Ins. Co., 129 Fed. 207, 63 C. C. A. 365. In the absence of some peculiar circumstances therefore, the present bill is without equity, and its failure upon that ground would take away any basis for discovery.

Appellee contends that there are "peculiar circumstances" which exempt this case from the rule declared in the decisions above referred to. What are those circumstances?

1. It is first suggested that the policy of insurance provides for the delivery of bonds, instead of the payment of money, and therefore could only be enforced in equity. This feature is wholly without merit for two reasons: (1) A bill in equity will not lie for the specific enforcement of such a contract. On the contrary, as soon as it is violated, the company becomes liable to an action at law in which the plaintiff is entitled to recover as damages the money value of what would have been obtained from the company by a performance on its part. The filing of the bill itself shows that the company has repudiated its obligations under the policy and has therefore become liable to an action at law. Roehm v. Horst, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953; Hyer v. Richmond Traction Co., 168 U. S. 471, 18 Sup. Ct. 114, 42 L. Ed. 547. (2) If the beneficiary under the policy could not maintain a suit in equity for its specific performance by the delivery of the bonds, surely that feature of the policy presents no circumstance that would support a suit in equity by the company for the surrender and cancellation of the policy.

2. The second circumstance urged is that courts of equity have concurrent jurisdiction with courts of law as to matters of fraud, accident, and mistake, and, having taken jurisdiction of a cause involving either of these elements for the purpose of discovery, will retain jurisdiction to grant full relief. This is simply to bring into the conclusion matters which have already been rejected from the premise. Under section 723 of the Revised Statutes (U. S. Comp. St. 1901, p. 583), as construed by the federal courts, when the remedy at law is plain, speedy, and adequate as to fraud, there is no concurrent remedy in equity. If the remedies at law and in equity are concurrent, the plaintiff may choose which he will pursue. The decisions of the Supreme Court, and of this court, already cited, show that no such right of election exists in the federal courts as to such matters of fraud as are here involved. The basis therefore of this second "circumstance" is destroyed. The concurrent jurisdiction upon which it rests does not exist. Having once conceded that the fraud complained of constitutes no ground for equitable relief, we ought not to bring it forward as a "circumstance" which, when combined with discovery, will draw the entire controversy into equity. In the federal courts the basis for the rule discussed in section 225 of Pomeroy's Equity Jurisprudence does not exist, because the concurrent jurisdiction does not exist when the remedy at law is plain, speedy, and adequate, as the Supreme Court and this court have held it to be, in the present case.

3. As a third circumstance, it is said that a bill of discovery would not lie against Mrs. Perkins because she is not a party to the action at law; whereas, she would be an indispensable party to the bill of discovery because she was the owner of the cemetery lot and was the legal custodian of her husband's body. Bills of discovery, however, are not confined to the parties to the action at law. Any person interested in the action at law and having possession of the evidence sought by the discovery may properly be made defendant to such a bill. Mrs. Perkins comes clearly within this class. Agents have been made parties to bills for discovery to obtain evidence for use in an action at law against their principal.

In Orr v. Diaper, 4 Ch. Div. 92, the plaintiffs were manufacturers of sewing cotton and thread, and the defendants were shipowners who had carried to foreign markets thread purchased by other persons, and packed in the same manner as plaintiff's thread, and bearing counterfeit tickets. The object of the bill was to compel the shipowners to discover the names of the persons who were thus using the plaintiff's trade-mark. The bill did not allege any intention to sue the defendants therein, but sought the name of the unknown persons who had invaded the rights of the plaintiffs, to the end that they might be sued. The bill was held good. The vice chancellor said:

"It has been submitted that the defendants are mere witnesses, but their position is different from that of mere witnesses."

In Hoppock's Executors, v. Canal Co., 27 N. J. Eq. 286, a similar bill was sustained for the purpose of discovering the parties who had violated plaintiff's rights in order that they might be sued in an action at law. See, also, Hurricane Telegraph Co. v. Mohler, 51 W. Va. 1,

41 S. E. 421; Post v. Railroad Co., 144 Mass. 341, 11 N. E. 540, 59 Am. Rep. 86, where the authorities are fully reviewed. See, also, Pomeroy's Equity Jurisprudence, § 199.

If therefore the discovery sought could be legally granted (as to which we express no opinion), the circumstance that Mrs. Perkins was not a party to the action at law presented no obstacle to the filing of a proper bill of discovery against her, asking the relief which was here obtained upon the motion.

These are all the circumstances pressed upon our attention by counsel for appellee, and they are not sufficient to sustain the action of the trial court in drawing this entire controversy into equity. The bill in equity fails as a bill for relief, and as to that ground the plea and demurrer should have been sustained, and the bill dismissed.

We must deal with this case, however, to some extent as it was dealt with by the trial court. Taking into consideration the motions, bill in equity, and the complaint in the action at law, all of which were before the court, they embodied all the elements essential to a pure bill of discovery. The trial court treated them as having that force, and, acting upon that theory, made its order directing the exhumation of the body and the holding of the autopsy. We shall so regard them. We are well aware that the relief granted differs from that which is usually granted by bills of discovery. What the complainant desired, however, was evidence to aid it in maintaining its defense to the action at law in case the suit in equity failed. It was evidence which was sought. The circumstances which distinguish the relief granted from that which is usually obtained by bills of discovery relate rather to the power of the court than to the nature of the relief itself. In determining the effect of the relief granted upon the action at law, it must be regarded as in the nature of discovery. It certainly can confer no greater rights upon the complainant with respect to the action at law than would have resulted if the discovery sought had been such as equity has been accustomed to grant. Having obtained the desired discovery, it was the duty of the complainant to take that discovery as evidence into the action at law, instead of reversing the process by drawing the action at law into the suit in equity. Pomeroy's Equity Jurisprudence, §§ 223–228.

It necessarily follows that the court erred in restraining the action at law, and its order should be vacated and set aside. The bill in equity is also insufficient to entitle the complainant to any relief. It may, however, be allowed to stand as one of the elements which were before the trial court going to make up what should have been embraced in a proper bill of discovery.

BLOCK et al. v. MAYOR, ETC., OF CITY OF MERIDIAN, MISSISSIPPI.

(Circuit Court of Appeals, Fifth Circuit. May 10, 1909.)

No. 1,879.

1. PRINCIPAL AND AGENT (§ 183*)—CONTRACT MADE BY AGENT—ACTION BY UNDISCLOSED PRINCIPAL.
Where a contract is made by an agent for an undisclosed principal, the latter may sue thereon in his own name.
[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 692; Dec. Dig. § 183.*]

2. EVIDENCE (§ 459*)—PAROL EVIDENCE—PARTIES—UNDISCLOSED PRINCIPAL.
Parol evidence that a party to a contract was an agent acting for plaintiffs as an undisclosed principal is admissible to explain the transaction, and is not objectionable as contradicting the writing.
[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2112; Dec. Dig. § 459.*]

3. MUNICIPAL CORPORATIONS (§ 254*)—CONTRACTS—RESCISSION.
Defendant corporation having entered into a formal contract for street and city lighting with plaintiffs for five years, before the time arrived for performance, passed a resolution that the negotiations (referring to the contract) were canceled and annulled and held for naught. *Held*, that such resolution was a renunciation of the contract by the city, entitling plaintiffs to sue thereon at once, plaintiffs being entitled to the maintenance of the contractual relation, and not merely to a performance when the time for performance arrived.
[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 696; Dec. Dig. § 254.*]

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

Smith, Hirsh & Landau and G. Q. Hall, Hall & Jacobson, for plaintiffs in error.

Williamson & Gilbert, W. H. Armbrecht, and Baskin & Wilbourn, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. This is an action at law to recover $200,000 damages for breach of contract. The defendant demurred to the amended declaration; the Circuit Court sustained the demurrer and dismissed the case; and the plaintiffs, by writ of error, appeal to this court. Two alleged defects in the declaration are assigned by the numerous grounds of demurrer, and are insisted on in this court: (1) That there is a misjoinder of parties plaintiff; that is, that the declaration does not show a right of action in all three plaintiffs; and (2) that the declaration does not show a breach of the contract sued on.

The declaration is very elaborate in the statement of the cause of action, but it will only be necessary here to summarize its statements, giving in full the parts relating to the points of attack. The action is brought by I. D. Block, Louis Bry, and Emil Weil, who will hereafter be called "the plaintiffs," against the mayor and boards of councilmen and aldermen of the city of Meridian, who will be referred to as "the defendant." The jurisdiction of the Circuit Court is shown

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

by allegations of diverse citizenship. It appears from the declaration that the defendant on May 5, 1905, granted to I. W. Ullman and his associates the right to light by electricity the city of Meridian for a term of five years from May 1, 1906. The contract was made pursuant to a published notice soliciting bids, the notice specifying the extent of the services to be rendered, and prescribing that each bid should be accompanied by a certified check for $1,000, and that the successful bidder should, within 60 days after the contract was awarded to him, execute bond for $10,000. The notice provided that, in addition to the city lighting, the bids should cover the matter of rates to private consumers. In addition to the right to light the city for five years, the successful bidder was to have a franchise for a period of 45 years; that is, the right to use the streets and avenues for planting poles and stringing wires and operating a lighting plant for that period. The notice contained the further stipulation that the successful bidder would not be permitted to sell out to any competing company, on penalty of forfeiting the franchise and $10,000. Two bids were made. The Ullman bid was the best, and it was duly accepted, and the contract was awarded to him and "his associates," the contract being evidenced by an ordinance of the defendant, duly executed, spread on the minutes, and published as required by the city charter of the defendant. Ullman was the agent and representative of the plaintiffs, and the plaintiffs were the "associates" referred to in the ordinance. Having stated these preliminary facts, the declaration sets out the ordinance contract, which is copied in the margin.[1]

[1] "Section 1. Be it ordained by the mayor and boards of councilmen and aldermen of the city of Meridian, state of Mississippi, hereinafter called the grantor, that I. W. Ullman, his associates, successors and assigns, hereinafter called the grantee, in consideration of the contract and provisions contained herein, is hereby granted a non-exclusive franchise for a period of forty-five years from May 1st, 1906, to May 1st, 1951, subject only to the conditions herein contained, all of which are made a part of this contract; the grantee is given the right to build, construct, own, acquire, lease, maintain and operate lines, poles, conduits, man-holes, and all other equipments that may be necessary for the transmission of electrical energy for supplying heat, light, power and other purposes, and to occupy with their poles, lines and equipments the streets, alleys, lands, squares, and public places in the city of Meridian, but no building or power plant shall be erected on the public ground of the said city.

"Sec. 2. The grantee agrees not to sell its property to the Meridian Light & Railway Company without the consent of the city first being obtained therefor, and the further payment of $10,000.00.

"Sec. 3. The poles for said electric lights shall be cedar, cypress, chestnut or juniper, and set or erected under the supervision of the street commission and the street committees, and if the said grantee shall, in placing or repairing the said poles, wires or other appliances, damage the streets of said city, they shall immediately repair the same, at their own expense.

"Sec. 4. The said grantee is authorized and empowered to trim such trees along the streets and alleys as may be necessary, under the supervision of the street commissioner, and the said grantor shall have the privilege of using the poles erected by the said grantee for the purpose of maintaining an electric fire and patrol system, so long as the said fire alarm or patrol system does not interfere with the electric light and power plant of grantee.

"Sec. 5. In consideration of the payments to be made, and the covenants to be kept and performed by the city, and hereinafter mentioned, the said grantee

The declaration then proceeds to show that:

"The said I. W. Ullman, acting for himself and plaintiffs, filed with said defendant a bond for $10,000, in accordance with the terms of the ordinance contract, said bond being signed by the National Surety Company of New York, and being strictly conditioned in accordance with the terms of said contract."

Having alleged the contract and the plaintiffs' ability, readiness, and willingness to perform, the declaration makes the following averments as to its breach:

"Plaintiffs further aver that it was the deliberate design and purpose of defendant, influenced by improper motives, and especially influenced and controlled by the defeated competitor for said contract ordinance, the Meridian Light & Railway Company, to arbitrarily and illegally deprive said plaintiffs of said contract ordinance and their rights thereunder, and defendant resorted to any expedient, however unscrupulous or reprehensible it might have been, to avoid its obligations under its said contract ordinance, and, therefore, notwithstanding the said contract ordinance was in all respects binding and obligatory and in full force and effect, the said defendant, in order to avoid

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shall furnish the said city of Meridian, for the period of five years from May 1st, 1906, to May 1st, 1911, 200 or more alternating current enclosed arc lamps, operating in series, said lamps to be $^{66}/_{10}$ amperes, potential of not less than 72 volts between terminals of each arc lamp, and apparent wattage for 475 watts for each lamp—a maximum of forty lamps on the circuit known as the 'City Circuit,' or 'Business Section of the City,' within the fire limits, to burn all night, and all other lamps to run on the moon-light schedule. The city contracts to pay the grantee for the 200 or more arc lamps, as mentioned above $69.50 per annum, per lamp, to be paid in equal monthly instalments, on the 10th day of each month for the previous month supplied, said lights to be located by the lighting committee, and a plan of location furnished not later than thirty days after passage of this ordinance to said grantee, said lamps to be hung over the intersection of the streets at not less than 16 feet, and not more than 25 above the surface thereof, said grantee shall keep the lamps in good repair and condition.

"If after the lamps are once lighted the said lamps should cease to burn from any cause whatever, except when occasioned by the city authorities and the provisions of the schedule, then such time shall be deducted, pro rata, to be made by said city, as hereinafter mentioned.

"And it is further provided, that if said city shall desire to change the location of said lights, or any of them, from the place or places where the same may be first located, then the city shall pay the actual expenses of such removal, and change.

"The grantee further agrees to furnish without cost to the grantor, from their incandescent circuit light to the amount of five hundred dollars per annum, and 11¢. rate per thousand watts, amount to be determined by meter or meters, from May 1st, 1906, to May 1st, 1911.

"Sec. 6. If the said city, the grantor herein, shall desire any lights in addition to those herein provided for, the same shall be placed in position for the said grantors by said grantees, at such places within the corporate limits of the said city, as the said grantor shall elect, provided said lights are to be placed not more than 1,500 feet from the points where other street lights are placed under the contract, and said grantors shall pay for the same at the rate of $69.50 per annum per lamp, and lamps to be of the same type as hereinbefore mentioned, provided that no lamps shall be installed later than January 1st, 1908.

"Sec. 7. Said grantee agrees to indemnify and save the said city of Meridian harmless from any and all damages growing out of the construction and operation of said lighting system.

"Sec. 8. The franchise and contract embodied in this ordinance shall be in full force and effect and binding and obligatory on the grantor and grantee,

its own obligation and prevent the said ordinance contract having full scope and effect and operation, pretended to regard its solemn ordinance as a mere negotiation, and hence, in its repudiation resolution hereinafter referred to, adopted the abnormal and misleading phraseology therein contained, that the 'negotiations were canceled and annulled.'

"Plaintiffs further aver that there were no 'negotiations' to be canceled and annulled, but only a valid and solemn contract, and that defendant, in utter disregard of the rights of plaintiffs, and its own solemn promises and covenants, on August 3, 1905, deliberately canceled and rescinded said contract ordinance, and then and there adopted the following:

" 'The following preamble and resolution cancelling the negotiations for lighting the city by I. W. Ullman, was read, considered, and unanimously adopted:

" 'Whereas, on the 5th day of May, 1905, certain negotiations were entered into between the mayor and boards of councilmen and aldermen of the city of Meridian, of the one part, and I. W. Ullman, his successors and assigns, of the other part, said negotiations looking to the lighting of the streets by the said Ullman, his successors and assigns, from the 1st day of May, 1906, and for five years thereafter; and,

" 'Whereas, the said I. W. Ullman, his successors and assigns, have failed and refused to consummate or carry out said negotiations,

" 'Now, therefore, be it resolved that the negotiations above referred to between the said mayor and boards of councilmen and aldermen with the said Ullman are hereby canceled and annulled and held for naught.

" 'Approved. J. H. Rivers, Mayor.'

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from and after its approval and publication. The grantee shall be required to furnish a bond for $10,000.00 that it will begin furnishing service by May 1st, 1906; failing to do this, said bond shall be declared forfeited.

"Sec. 9. The said grantor shall pass such ordinances as may be necessary for the due and complete legal protection of said grantee in the enjoyment of all rights and privileges conveyed to them by said ordinances, and attached to such an ordinance penalties or fines, and imprisonment for interfering with, or injury or damage to, the electrical property of said grantee.

"Sec. 10. In consideration of the benefits to be derived by the city from this ordinance and contract, the said grantee, his associates, or successors, and assigns, and said electric light and power plant, and its business and property, upon the payment of $25.00 per annum privilege tax, the same being the privilege tax now levied by law, shall be exempt from the payment of any privilege tax in excess of said sum for the period of ten years from and after the 1st day of May, 1906.

"Sec. 11. Any delays caused by acts of Providence, orders of court, strikes and lockouts, or unavoidable accidents, shall work an extension of the time herein granted equal to the number of days delayed, but upon any delay being occasioned by the grantee, (he) shall notify the mayor in writing, stating the cause of delay.

"Sec. 12. Said grantee shall not be required to put any of their wires underground.

"Sec. 13. The grantee is given the right to sell, assign, or encumber any or all their rights and privileges under this ordinance, but always subject to the provisions and limitations of this contract.

"Sec. 14. Should the grantee fail to comply with any of the provisions of this contract, it shall work a forfeiture of all privileges herein contained, except as are specially otherwise provided for, and further, provided that the grantor shall give the grantee sixty days' written notice, during which time the grantee shall have the right to remedy any failure in the fulfillment of his contract.

"Sec. 15. The grantee shall install in all plants operated by them smoke consuming devices of the most improved type.

"Sec. 16. This ordinance, in accordance with law, shall take effect and be in force from and after its passage, approval and publication in 'The Evening Star,' a newspaper published in the city of Meridian, Mississippi."

"Approved May 6th, 1905."

"Plaintiffs aver that by the adoption of said resolution it was the purpose and intention of defendant to rescind and cancel said contract ordinance and deprive plaintiffs of any rights thereunder, and that by the adoption of said resolution their said purpose was effectually accomplished, and that thereafter said plaintiff had no right to, and could not use, the streets of defendant for the erection of their poles and wires and erect the necessary machinery and plant to furnish light and power under said contract ordinance.

"Plaintiffs further aver that said defendant, not content with the rescission and cancellation of said contract ordinance, and thereby divesting plaintiffs of any rights thereunder, in pursuance of its determination to injure plaintiff and benefit its competitor, the said Meridian Light & Railway Company, it, the defendant, on the same date, granted said five years' lighting contract to the said Meridian Light & Railway Company, the latter company already using the streets of said city under former ordinances in the erection of its poles and wires."

The following allegations are made to show the right of the plaintiffs to sue on the contract in their own names:

"Plaintiffs show that the said Ullman, in writing, on the 30th day of July, 1906, transferred and set over to one of their number all his right, title, and interest to said ordinance contract and franchise, and all his claims and damages of every kind and description for damages accruing or arising to him by virtue of the said defendants failing to carry out said contract ordinance, and authorizing the said I. D. Block in his name, and associates, to institute and prosecute for his own use and benefit, and at his own expense, any and every suit and proceeding that he might deem proper for the enjoyment and enforcement of said ordinance contract, or any right growing out of or based upon the same, or of any claim or demand or right whatsoever by him assigned. A copy of that part of said instrument showing said assignment is filed with the original declaration herein, marked 'Exhibit 7,' and made a part hereof.

"Plaintiffs show that said contract was made by said Ullman as their agent and representative after careful investigation into local conditions, and after satisfying himself as to the desirability and profitableness of such a contract, coupled with the 45-year privileges and franchises offered in defendant's said published solicitation for bids; and while the said Ullman alone was specifically named in the said contract, yet it further appears that it was made on behalf of others as well, and such others are referred to therein as 'his associates,' and plaintiffs are the undisclosed principals referred to therein as his 'associates,' and the said assignment above was taken to divest him, the said Ullman, of any apparent ownership or interest therein or in the damages resulting from the breach thereof."

Upon this statement of the case, the question for decision is, whether or not the court erred in sustaining the demurrer to the declaration and dismissing the suit.

1. Was there a fatal defect in the declaration by reason of a misjoinder of parties plaintiff?

The theory of the defendant is that the ordinance contract was made with Ullman, no one else being specifically named; that he transferred his interest to I. D. Block, one of the plaintiffs; that the other two plaintiffs, Bry and Weil, have no interest in the contract, and that, therefore, they are misjoined as plaintiffs. If this position were correct, the declaration could be amended by striking out the misjoined plaintiffs, and the case could proceed with Block as sole plaintiff. But, on the averments of the declaration, there is no misjoinder. The contract was made with Ullman and his associates. It is alleged that Ullman was the agent of the plaintiffs, and that the contract was, in fact, made for the plaintiffs as principals. The three plaintiffs were

so interested in the contract from the first; they were the bidders, the givers of the bond, and the undisclosed principals of the entire negotiation and agreement. The transfer made by Ullman to Block was a mere formality to show that, in fact, he had no substantial interest, although he was named in the ordinance. If we assume, as we must for the purposes of this decision, that the allegations are true, the transfer was a meaningless formality, inasmuch as Ullman had no real interest. We have an action, then, by three undisclosed principals suing on a written contract made in the name of their agent. Can such action be brought, and is evidence admissible to show that, although the contract is made in the name of Ullman, he was merely the agent for the unnamed principals?

It is a well-established rule of law, both in England and in this country, that, where a contract is made by an agent, the principal whom he represents may maintain an action on it in his own name, although the name of the principal was not disclosed at the time of the making of the contract; and, when the contract is in writing, parol evidence is admissible to show that the agent was acting for his principal. Such evidence does not contradict the writing; it only explains the transaction. The English and American cases so holding are cited by the Supreme Court in New Jersey Steam Navigation Co. v. Merchants' Bank, 6 How. 344, 380, 12 L. Ed. 465, and in Ford v. Williams, 21 How. 287, 16 L. Ed. 36, the principle was again announced, and Ford was allowed to sue at law on a written contract made for him by his agent, Bell, without disclosing Ford's name or interest. The only question in the case was, assuming the contract to have been made for the benefit of the plaintiff without any disclosure to the defendant of his interest, was the plaintiff competent to maintain a suit thereon in his own name? The Supreme Court decided that he was. That case is conclusive of this case on the point we are discussing. If the allegations of the declaration are true, Block, Bry, and Weil can sue in their own names for the breach of the contract.

2. The remaining question is, does the declaration allege a breach of the contract?

The declaration shows that, before the time for performance, the defendant, by formal resolution, renounced the contract. The determination of the defendant not to comply with the contract could not be more clearly shown than by a resolution "that the negotiations * * * [referring to the contract] are hereby cancelled and annulled and held for naught." It is true that one party to a contract cannot cancel it, but his attempted cancellation may show his renunciation of it—may show that he does not intend to abide by it or to perform his part of it. This clearly appears to have been the defendant's intention. This renunciation of the agreement having been made by the defendant, it seems well settled that the plaintiffs had the right to treat the contract as broken and ended, and to sue for its breach at once. The parties to an executory contract have a right to something more than its performance when the time for performance arrives. They have a right to the maintenance of the contractual relation. It follows that the renunciation of the contract by one of the parties, be-

fore the time for performance has come, entitles the other, if he chooses, to regard the contract as ended, and to sue at once for the breach. Clark on Contracts, § 270, p. 645; Lawson on Contracts, § 440. In Roehm v. Horst, 178 U. S. 1, 11, 20 Sup. Ct. 780, 44 L. Ed. 953, the cases are cited and approved which hold that, if one party to an executory contract repudiates it before the time for performance arrives, it is a breach, and the other party may sue at once.

The judgment of the Circuit Court is reversed, and the cause remanded with instructions to overrule the demurrer and for further proceedings.

WEBER et al. v. GRAND LODGE OF KENTUCKY, F. & A. M.

(Circuit Court of Appeals, Sixth Circuit. May 13, 1909.)

No. 1,901.

1. LANDLORD AND TENANT (§ 288*)—FORCIBLE DETAINER—ISSUES.
The only issue involved in a landlord's forcible detainer suit is whether the relation of landlord and tenant existed and whether the tenant's term had expired.
[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 1205; Dec. Dig. § 288.*]

2. LANDLORD AND TENANT (§ 291*)—FORCIBLE DETAINER—JUDGMENT.
Under Civ. Code Prac. Ky. § 460, providing for a landlord's action of forcible detainer, the judgment, if for plaintiff, is only for restitution and costs.
[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 1253; Dec. Dig. § 291.*]

3. JUDGMENT (§ 554*)—CONCLUSIVENESS—FORCIBLE DETAINER.
Under Civ. Code Prac. Ky. § 460, defining forcible entry and detainer, and providing a remedy, no question of title being involved, the judgment is not a bar to ejectment to recover the property by either party.
[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1058; Dec. Dig. § 554.*]

4. LANDLORD AND TENANT (§ 291*)—FORCIBLE DETAINER—STATUTES.
Civ. Code Prac. Ky. § 460, defining forcible entry and detainer, and providing a remedy, does not apply where actual notice cannot be given the defendant.
[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 291.*]

5. LANDLORD AND TENANT (§ 289*)—REPEAL BY IMPLICATION—FORCIBLE DETAINER—SERVICE.
Ky. St. 1903, § 2294, providing for substituted service in forcible detainer, when the defendant cannot be found on the premises, and there is no member of defendant's family thereon over 16 years of age with whom notice can be left by posting, etc., was not repealed by implication by Act March 29, 1902, p. 272, c. 122, regulating proceedings in civil actions in circuit courts, and repealing all provisions of the Code of Practice in conflict with the act, on the theory that such act re-enacted Civ. Code Prac. Ky. § 455, declaring that the officer having a warrant in forcible detainer shall give notice to the defendant according to the directions in the warrant.
[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 289.*]

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

6. CONSTITUTIONAL LAW (§ 309*)—DUE PROCESS OF LAW—FORCIBLE DETAINER—SUBSTITUTED SERVICE.

Ky. St. 1903, § 2294, authorizing substituted service of notice in forcible detainer, does not violate Const. U. S. Amend. 14, on the theory that such notice is not due process of law as applied to defendants, who are not citizens of the state, in so far as the court by means of such service is given jurisdiction to determine the right to possession of property within the state.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 929, 930; Dec. Dig. § 309.*]

7. LANDLORD AND TENANT (§ 86*)—LEASE—RENEWAL—TERMINATION OF TENANCY.

Defendants held a lease giving them an option to renew for five years, provided they agreed and covenanted to pay the highest rent which could be secured by or should be offered to the lessor by any responsible party. The lease expired on August 23, 1908, and on October 21, 1907, the lessees gave notice of their intention to exercise the option in conformity with the lease. On May 5, 1908, the lessees were shown a bona fide offer by a responsible prospective lessee to pay a higher rent, which the lessees refused to meet. *Held* that, though the lessees had until August 23d to meet such offer, the lessor was entitled to treat their refusal to do so on May 5th as a definite refusal to avail themselves of the option and to regard the same as abandoned.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 271; Dec. Dig. § 86.*]

8. LANDLORD AND TENANT (§ 86*)—RENEWAL OF LEASE—OPTION—ABANDONMENT.

The lessees not having covenanted and agreed before August 23, 1908, to meet such offer, they could not take any advantage of the lessors' immediate renting of the property and refusing to reopen negotiations after the lessees' definite refusal on May 5th.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 271; Dec. Dig. § 86.*]

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

This was an action of unlawful detainer started before a Kentucky justice of the peace and removed, upon diversity of citizenship, into the court below. The defendants in the suit were citizens of Illinois, the plaintiffs a corporation under the laws of the state of Kentucky. The writ was sued out to recover possession of a property known as the "Masonic Theatre," and its appurtenances, fixtures, etc., situated in Louisville, Ky., and owned by the Grand Lodge. The theatre was leased on August 23, 1903, to the plaintiffs in error, Max and David B. Weber, brothers and partners under the style of Weber Bros., for a term of five years. Upon the expiration of the lease, the tenants refusing to surrender the premises, a writ of forcible detainer was sued out on August 24, 1908, by which the plaintiffs in error were notified to appear on August 29, 1908. The return to this writ was in these words and figures:

"Came to hand August 24, 1908, at 5:30 o'clock p. m.

"Executed the within warrant of forcible detainer upon the defendants, David B. Weber and Max Weber, partners as Weber Brothers, at 5:35 o'clock p. m., August 24, 1908, by delivering a true copy thereof to A. Weber, a brother of said David B. Weber and Max Weber, the said A. Weber then and there being over sixteen years of age and in possession of the premises described in the within warrant, holding the same for said David B. Weber and Max Weber, partners as Weber Brothers.

"Further executed the within warrant of forcible detainer upon the defendants David B. Weber and Max Weber, partners as Weber Brothers, by

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

posting a copy of the within warrant, and notice of the time and place of the meeting of the court in which the hearing is to take place, in a conspicuous place on the premises described in the warrant, to wit, on the front double doors to the entrance to the Masonic Theatre proper and in the lobby to said theatre which were then locked; the same being the most conspicuous and frequented place on or about the leased premises, at 5:50 p. m., August 24, 1908, at which time there was no member of the family either of David B. Weber or Max Weber over sixteen years of age on or about the leased premises with whom notice could be left, the said A. Weber having left the leased premises immediately after being served with a copy of the within warrant as above stated.

"The defendants David B. Weber and Max Weber are nonresidents of Kentucky and absent from said state, and said David B. Weber and Max Weber not found in my county.

"Witness my hand this twenty-fifth day of August, 1908."

On August 26th the defendants therein filed a petition for the removal of the said case into the court below. On August 29th an order of removal was duly made, and the transcript filed in the Circuit Court. Thereupon the said defendants appeared in the court below, for the sole purpose of quashing "the notice or writ of forcible detainer," and did then and there move to quash the return on said notice or writ of forcible detainer. This motion was in writing, and was as follows:

"The defendants and each of them entering their appearances, and that of each of them specially and for the sole and special purpose of this motion, respectfully move the court to quash the notice or writ of forcible detainer herein issued by Ed. Meglemry, justice of the peace of Jefferson county, Kentucky, on August 24, 1908, and also to quash the return on said notice or writ of forcible detainer on August 25, 1908, by Chas. L. Scholl, sheriff of Jefferson county, Kentucky, by John W. Ullrich, deputy sheriff, upon the following grounds:

"Section 2,294, Ky. St. 1903, and section 454, Civ. Code Prac. Ky., are and each of them is, as applied to these defendants and each of them, each of whom is a nonresident of the state of Kentucky and absent therefrom, and each of whom is a citizen of the state of Illinois, residing in the city of Chicago, in said state, unconstitutional, because said sections and each of them deprive these defendants and each of them of liberty and property without due process of law, and deprive these defendants and each of them of privileges and immunities as citizens of the United States, contrary to the provisions of the fourteenth amendment to the Constitution of the United States."

This motion was overruled, and due exception taken. Thereupon a stipulation was filed submitting the issues of fact and law to the determination of the court, and waiving a jury.

Upon the testimony, the court made a finding of fact, quite specific and special, and upon this finding a conclusion of law that the lessors were entitled to be restored to the possession of the premises. The learned judge also filed an opinion, which has been properly made a part of the transcript.

From the judgment, the plaintiffs in error have sued out this writ and assigned errors.

George Du Relle and W. H. Field, for plaintiffs in error.

A. P. Humphrey and C. H. Fisk, for defendant in error.

Before LURTON, SEVERENS, and WARRINGTON, Circuit Judges.

LURTON, Circuit Judge (after stating the facts as above). The jurisdiction over the persons of the plaintiffs in error has been challenged at every step of the litigation, and their appearance has been at all times limited to an appearance solely for the purpose of denying the validity of the notice requiring them to answer to the writ of forcible detainer. This question must be disposed of before the merits of

the case can be properly considered. The point, shortly stated, is that the constructive notice, by posting a copy of the warrant and notice upon the premises and leaving a copy with a person over 16 years of age found in possession holding the premises for the plaintiffs in error, is not due process.

By section 452 of the Kentucky Civil Code of Practice (Carroll, 1906), a forcible detainer is defined as including "the refusal of a tenant to give possession to his landlord after the expiration of his term." By section 454 of the same Code the form of the warrant is prescribed, which includes a requirement that "at least three days' notice of the time and place of trial shall be given the defendant named in the warrant." Section 455 provides that the officer having the warrant shall give the notice according to the direction of the warrant.

The only issue involved under a forcible detainer suit, such as that at bar, was whether the relation of landlord and tenant had existed, and whether the term of the tenant had expired. Powers v. Sutherland, 1 Duv. (Ky.) 151; Taylor v. Monohan, 8 Bush (Ky.) 238; Mason v. Basconi, 3 B. Mon. (Ky.) 272; Beynroth v. Mandeville, 5 Bush (Ky.) 584. The judgment of the justice in such an action, if for the plaintiff, is only for a restitution of the premises and costs. Section 460, Code Civ. Prac. Ky. No question of title is involved, and the judgment is not a bar to an action of ejectment to recover the property by either party. Swanson v. Smith, 117 Ky. 117, 77 S. W. 700. Section 460 is part of a chapter which defines forcible entry and detainer and provides a remedy. But it does not deal with a case where actual notice cannot be given to the defendant. The Statutes of Kentucky, which for the most part constitute the substantive law of the state as distinguished from the Kentucky Code, which deals with questions of practice and procedure, expressly cover this matter in a chapter which defines the relation and rights of landlords and tenants. Section 2294 provides as follows:

"Forcible Detainer—how writ to be served.

"If the officer cannot find the defendant, in a writ of forcible entry or detainer, on the premises mentioned in the same, and there shall be no member of the defendant's family thereon over sixteen years of age with whom notice can be left, posting a copy of the notice of the time and place of the meeting of the court in a conspicuous place on the premises shall be deemed an execution of the notice; explaining and leaving a copy of it with a member of the defendant's family over sixteen years of age, if on the premises, shall also be a good service of the notice."

It is very plain that this provides for constructive notice whenever the defendant cannot be found on the premises, whether a resident or nonresident, citizen or noncitizen, of the state. In Swanson v. Smith, 117 Ky. 117, 77 S. W. 700, cited above, constructive notice, by leaving a copy of the warrant and notice with the wife of the defendant, was held a good service, although the defendant was only temporarily absent from the county.

But it is said that this section of the Kentucky Statutes is not now in force, having been repealed by Act March 29, 1902, p. 272, c. 122, being an act entitled "An act to regulate proceedings in civil actions in circuit courts." The repealing clause is the thirteenth section,

and reads, "All provisions of the Code of Practice in conflict with this act are hereby repealed, so far as in conflict." Obviously, there is no express intention to repeal section 2294 of that body of substantive law known as the "Kentucky Statutes," and neither section 2294, nor any other provision of the Kentucky Statutes, is repealed, unless there is such a conflict as that the two cannot stand together. But for section 2294, the provisions of sections 454 and 455 of the Code of Civil Practice, providing only for notice to the defendant in a warrant of unlawful detainer, would be applicable. But section 2294 of the Kentucky Statutes is a later provision, applying directly to writs of forcible detainer, and supplies a mode of service in circumstances not covered by any provision of the older Code of Civil Practice.

But the argument, if we understand counsel, is that the repealing clause of this act of 1902 is equivalent to a re-enactment of every clause of the Code of Practice not in conflict, and that by such re-enactment, through recognition, section 455 became the later law, and, by implication, repeals section 2294 of the Statutes of Kentucky. The argument is not convincing. Repeals by implication are not favored, and must result from an evident intention based upon the impossibility of two statutes standing together. Passing by the effect of the later act of February 29, 1904 (Laws 1904, p. 26, c. 4), re-enacting specifically every section of Carroll's 1903 edition of the Kentucky Statutes, which included section 2294, we are content to rest our judgment upon the proposition that the act of 1902 did not by necessary implication repeal that important provision in the chapter upon "Landlord and Tenant." This conclusion finds support in the fact that the Kentucky Court of Appeals recognized it as in force, holding that a service by leaving a copy of the warrant and notice with the wife of the defendant, being a member of his family, was a valid service. This recognition of the act as valid and applicable was in December, 1903, more than one year after its supposed repeal by implication. Swanson v. Smith, 117 Ky. 117, 120, 77 S. W. 700.

It is next said that section 2294 violates the fourteenth amendment of the federal Constitution, in that such constructive notice as there provided for is not due process, as applied to defendants who are not citizens or residents of the state. Prior to that provision, as we have before said, there was no method for obtaining jurisdiction under the special remedy of forcible detainer where the defendant could not be served in person. Lewis v. Outten, 32 Ky. 92. Section 455 of the Civil Code of Practice directs that the defendants in forcible entry and detainer shall be given notice. Section 2294 provides how such notice shall be given where the defendant is not found upon the premises. It substitutes constructive notice for actual notice.

The remedy of forcible detainer is a special, speedy, and almost summary one. Donelan v. Draddy, 107 Ky. 339, 343, 53 S. W. 1038. It is, in its widest sense, a statute of peace, and is intended to prevent resort to force. The defense is not guilty. The only judgment is restitution. No title or right is in issue. The single question is whether or not the defendant forcibly detains the premises from

the plaintiff. The matter involved is real estate situated within the state. If the tenant does not reside upon the premises, or cannot be found there because he resides out of the state, why may not the state provide how the notice in a proceeding against such a tenant shall be served? That it is within the power of a state to provide for giving constructive notice to nonresidents through publication, and thereby obtain jurisdiction to determine the right and interest of any such nonresident in real estate situated within the boundaries of the state, is now too well settled by repeated decisions of the Supreme Court. Such a method is essential to the determination of titles and constitutes due process, if the publication pursues the statute and the notice is of a character which presumptively gives knowledge of the proceeding and affords reasonable time to appear and defend. Arndt v. Griggs, 134 U. S. 316, 323, 10 Sup. Ct. 557, 33 L. Ed. 918; Connor v. Tenn. Cent. Ry. Co., 109 Fed. 931, 48 C. C. A. 730, 54 L. R. A. 687; Huling v. Kaw Valley Rd. Co., 130 U. S. 559, 9 Sup. Ct. 603, 32 L. Ed. 1045; Ballard v. Hunter, 204 U. S. 241, 262, 27 Sup. Ct. 261, 51 L. Ed. 461; Longyear v. Toolan, 209 U. S. 414, 28 Sup. Ct. 506, 52 L. Ed. 859.

Inasmuch as a proceeding in forcible detainer involves only the immediate right of possession of a particular parcel of real property, it is in the nature of a proceeding in rem. But whether technically so or not, the question we have to deal with is whether a statute of the state which authorizes such a proceeding upon constructive notice, when the defendant is not found upon the premises, is due process. In Arndt v. Griggs, cited above, a statute of Iowa authorized a suit in equity for the purpose of removing clouds from titles of lands within the state, and that nonresidents claiming any interest in the lands involved might be given notice by publication, etc. It was objected to a decree against a nonresident, by which title to land in the state had been cleared by such a proceeding to which he was a party only by constructive notice, that such a proceeding was one in personam, and therefore void without actual service of process. To this, Mr. Justice Brewer said:

"While these propositions are doubtless correct as statements of the general rules respecting bills to quiet title, and proceedings in courts of equity, they are not applicable or controlling here. The question is not what a court of equity, by virtue of its general powers and in the absence of a statute, might do, but it is, what jurisdiction has a state over titles to real estate within its limits, and what jurisdiction may it give by statute to its own courts, to determine the validity and extent of the claims of nonresidents to such real estate? If a state has no power to bring a nonresident into its courts for any purposes by publication, it is impotent to perfect the titles to real estate within its limits held by its own citizens; and a cloud cast upon such title by a claim of a nonresident will remain for all time a cloud, unless such nonresident shall voluntarily come into its courts for the purpose of having it adjudicated. But no such imperfections attend the sovereignty of the state. It has control over property within its limits; and the condition of ownership of real estate therein, whether the owner be stranger or citizen, is subjection to its rules concerning the holding, the transfer, liability to obligations, private or public, and the modes of establishing titles thereto. It cannot bring the person of a nonresident within its limits—its processes go not out beyond its borders—but it may determine the extent of his title

to real estate within its limits, and for the purpose of such determination may provide any reasonable methods of imparting notice. The well-being of every community requires that the title of real estate therein shall be secure, and that there be convenient and certain methods of determining any unsettled questions respecting it. The duty of accomplishing this is local in its nature; it is not a matter of national concern or vested in the general government; it remains with the state; and, as this duty is one of the state, the manner of discharging it must be determined by the state, and no proceeding which it provides can be declared invalid, unless in conflict with some special inhibitions of the Constitution, or against natural justice. So it has been held repeatedly that the procedure established by the state, in this respect, is binding upon the federal courts."

The bringing of nonresidents before the courts of equity by the constructive service of publication has been the constant practice in Kentucky. Newcomb's Ex. v. Newcomb, 76 Ky. 565, 26 Am. Rep. 222. The purpose of notice is to give the defendant an opportunity to appear and be heard with respect to his property. The manner in which it is to be given and the time within which he may appear are subject to the discretion of the Legislature, provided always that it be of such character as to raise a reasonable presumption that the defendant, if he exercises that degree of care about his property which ordinary men do exercise, will learn of the proceeding and as to where and when he may defend. If the legislative provision have reasonable regard to the character of the proceeding and the probabilities that the owner of the property will be advised, it is due process. But if either the time or the kind of notice are so unreasonable, having regard to the proceeding and the reasonable necessities of the case, as not to create a presumption that the defendant will be warned in time to defend, it will not be due process. To declare a state statute, providing for constructive notice against nonresidents in respect to real estate within the state, void, as not being due process, either by reason of the kind or time of notice, must require a very clear case. Bellingham B. & Rd. Co. v. New Whatcom, 172 U. S. 314, 19 Sup. Ct. 205, 43 L. Ed. 460; Ballard v. Hunter, 204 U. S. 241, 262, 27 Sup. Ct. 261, 51 L. Ed. 461; Boyd v. Ellis, 11 Iowa, 97. The particular case we have before us, that of a tenant holding over after expiration of his term, seems to present no serious question as to the reasonableness of the manner of giving notice or the time for an appearance. There is nothing unreasonable in presuming that such a tenant would receive information by a notice posted on the doors of the premises in dispute within the time he was required to appear. That they did so in ample time is a fact which, if of no other significance, is indicative of the reasonable character of the notice. Men, whether residents or nonresidents, are presumed to make contracts with reference to the laws of the state in which the subject-matter of the contract, if real estate, is situated.

In the case of Broderick's Will, 21 Wall. 503, 519, 22 L. Ed. 599, Mr. Justice Bradley, in considering the basis upon which proceedings in rem are binding, said:

"Those who claim an interest in persons or things must be charged with knowledge of their status and condition."

In Ballard v. Hunter, 204 U. S. 241, 262, 27 Sup. Ct. 261, 269, 51 L. Ed. 461, the court, in considering the dominion of the state over land within its borders and the necessity of recognizing proceedings which affect the rights of nonresidents through constructive service, said:

"It should be kept in mind that the laws of a state come under the prohibition of the fourteenth amendment only when they infringe fundamental rights. A law must be framed and judged of in consideration of the practical affairs of man. The law cannot give personal notice of its provisions or proceedings to every one. It charges every one with knowledge of its provisions; of its proceedings it must, at times, adopt some form of indirect notice, and indirect notice is usually efficient notice when the proceedings affect real estate. Of what concerns or may concern their real estate men usually keep informed, and on that probability the law may frame its proceedings; indeed, must frame them, and assume the care of property to be universal, if it would give efficiency to many of its exercises. This was pointed out in Huling v. Kaw Valley Railway & Improvement Company, 130 U. S. 559, 9 Sup. Ct. 603, 32 L. Ed. 1045, where it was declared to be the 'duty of the owner of real estate, who is a nonresident, to take measures that in some way he shall be represented when his property is called into requisition; and, if he fails to get notice by the ordinary publications which have been usually required in such cases, it is his misfortune, and he must abide the consequences.' It makes no difference, therefore, that plaintiffs in error did not have personal notice of the suit to collect the taxes on their lands, or that taxes had been levied, or knowledge of the law under which the taxes had been levied."

In view of the character and purpose of a proceeding for forcible detainer under the Statutes of Kentucky, we conclude that section 2294 is not void as not affording due process.

We now come to the merits. This aspect of the case turns upon an extension clause in the lease, which was in these words:

"It is further understood and agreed by and between lessor and lessees that at any time, not less than six months before the termination of this lease, if all stipulations, covenants and agreements herein entered into by lessees shall have been fully carried out, performed and executed by them, the lessees shall have the option to extend the terms of this lease for an additional period and term of five (5) years, provided said lessees will agree and covenant to pay for said leased premises the highest amount of rent which can be secured by and which shall be offered to lessor therefor by any responsible party."

The obvious meaning of this is that the lessees have the option for an extension of five years, provided they should exercise it not less than six months before the lease expired by agreeing and covenanting to pay a rent equal to the highest offer which the lessors might secure from a responsible lessee before the expiration of the lease. This covenant or agreement as to the rental of the extended term is not that they will pay the highest responsible offer which the lessor may then have, but the highest that "can be secured," the highest which "shall be offered" before the new term shall begin. The indefinite rental is to be made definite, if no agreement has been come to, by the amount of the best responsible offer made to the lessor before the old lease shall terminate. This is the construction which the court below put upon the extension clause, and is the construction which the parties themselves put upon it, as shown by their letters and conduct.

The fourth finding of fact made by Judge Evans is in these words:

"That on October 21, 1907, the lessees, Weber Bros., wrote and delivered to the Grand Lodge of Kentucky (F. & A. M.), the lessor, a communication in the following language, namely:

" 'Louisville, Ky., October 21, 1907. To the Masonic Grand Lodge of Kentucky, F. & A. M.: Notice is hereby given under lease made by the Masonic Grand Lodge, party of the first part, and David B. and Max Weber, party of the second part, wherein under said lease notice must be given six months prior to the expiration of the five years, of the intention of renewal of the lease. We hereby avail ourselves of the option and the herein notice is hereby given in conforming with said lease. " 'Weber Bros.'

"But the court finds that the lessees did not at any time otherwise 'agree or covenant' to pay the highest amount of rent offered the lessor for the premises, nor, otherwise than as may be shown in said communication in writing, tender any agreement or covenant to do so."

The fifth and sixth findings of fact deal with what was done, and include the correspondence. They are as follows:

"(5) That nothing more in respect to the matter was done by either party to the contract until February 22, 1908, on which date a communication in writing was sent by the lessor to, and on the next day it was received by, the lessees, and which communication was as follows, viz.:

" 'Louisville, Ky., February 22, 1908. Messrs. Weber Bros., Chicago, Ill. Gentlemen: We beg to acknowledge receipt of your letter of recent date, notifying this board that you desire to avail yourselves of the opinion contained in your lease with the Grand Lodge of Kentucky F. & A. M., for the Masonic Theatre in this city. We beg to advise you that we have had an offer for a considerable higher rent than called for in the terms of the present lease. We shall be very glad to take up this matter with you either in person or with your representative, at any time in the near future that is agreeable to yourself. We await with interest your further advices.'

"Nothing further was ever heard of or done with the 'offer' referred to in this communication. It was never otherwise mentioned to the lessees, nor was any claim otherwise ever based upon it by the lessor. Said offer was afterwards always ignored and disregarded by both lessor and lessees, and it was not made by a 'responsible party.'

"(6) That thereafter the following communications in writing passed between the parties on the respective dates named in them, to wit: The lessees sent to lessor the following letter:

" 'Chicago, Ill., February 25, 1908. In answer to yours of the 22nd inst. I have this day sent letter to Mr. Samuel A. Lederman, with the firm of Kohn, Baird & Spindle, attorneys at law. Kindly take up our negotiations for extension of Masonic Theatre lease with him.'

"To which the lessor replied as follows:

" 'February 26, 1908. We are in receipt of your favor of the 25th inst., requesting that we take up negotiations for the extensions of the Masonic Theatre lease with Mr. Samuel Lederman. We are writing to Mr. Lederman to-day and hope to be able to have a conference with him in regard to this lease in the very near future.'

"The lessees then wrote as follows:

" 'Chicago, February 29, 1908. Received yours of February 26th, also a letter from Mr. Lederman making it impossible for Mr. Lederman to act for us. As there is yet more than six months prior to the expiration of our lease, there is plenty of time for a conference over same and also when the lease provides for the five years extension, of which we have already availed ourselves. I shall be in Louisville sometime in May or June, which will be in plenty time to confer in the matter. Anything on the subject of importance, kindly advise us.'

"Later the lessor wrote as follows:

" 'Louisville, Ky., April 7, 1908. Messrs. Weber Bros., Chicago, Ill. Gentlemen: It is the desire of this board to close the matter of a new lease for

the Masonic Temple Theatre at the very earliest possible moment, and since you have expressed your desire to avail yourselves of the option embodied in the present lease, we beg to inform you that we would like to close this matter up this week, and hope that you can make arrangements to be in Louisville in person.

" 'We might mention that we have had a bona fide proposition of an annual rental of $10,000.00 payable monthly in advance, and which includes the expenditure of not less than $10,000.00 for improvements in decorating and putting the theatre in first-class condition. This proposition also provides that we shall be paid one-half of the net receipts for the year, provided it amounts to more than $10,000.00.

" 'We have also had another proposition which is a verbal one of an annual rental of $15,000.00 a year; and still a third one which will be submitted to us, we think, in the next day or so.

" 'Kindly let the writer hear from you by wire promptly upon receipt hereof, exactly when we may expect you in Louisville.'

"The lessees replied as follows:

" 'Chicago, April 9, 1908. Dear Sir: In answer to yours of April 7th. There is a great deal more to consider than a bona fide offer. If you will look at our lease you will find the responsibility and other conditions will determine how much we are to pay. We must have the names and addresses of all bona fide bidders, so that we may have an opportunity to look up their standing. A verbal proposition is no proposition at all, a proposition based upon the receipts is no proposition for us to consider. Under our lease we have until August 24th to negotiate and to determine how much we are to pay the next five years. I expect to be in Louisville within ten days or two weeks. I shall let you know the day before I arrive in Louisville. My business here will not allow me to leave at this time. A stock house will increase your rates of insurance.'

"And also as follows:

" 'Chicago, April 21, 1908. Dear Sir: I wish to notify you and through you the board of trustees and others that may wish to know, that I will be in Louisville the morning of May 5th to consult as to the future policy of the Masonic Theatre for which we hold lease. At 11 a. m., of May 5th, I shall call upon the Grand Secretary, Bro. Grant, when you shall be able to find me.' "

The seventh and eighth findings relate to an offer made by the Boston Amusement Company, its incorporation, and the details of its proposal for the property.

The ninth finding was as follows:

"That the lessees, Weber Bros., on May 5, 1908, upon being shown the same, refused to meet the offer so made by the Boston Amusement Company, and have never agreed or covenanted, or offered to agree or covenant, to pay the higher amount of rent offered to be paid for the premises either by the Boston Amusement Company or by any other person, unless such agreement and covenant is contained in the letter of October 21, 1907. As shown, however, in finding 3, the lessees, in the way and for the purpose therein stated, did on August 5, 1908, tender $300 to the lessor, which was refused."

The tenth finding is that on May 19, 1908, the lessor entered into a contract with the Boston Amusement Company upon the terms of the proposal made by it, the stipulated rental being for a much larger sum than the rental which the Weber Bros. had theretofore paid.

The eleventh and fourteenth findings are in effect that the Boston Amusement Company was "a responsible party," and the bond executed by them as a guaranty of performance of contract sufficient.

The twelfth and thirteenth findings were as follows:

"(12) That no offer was ever made by any named or responsible person to pay a higher rent for the premises than that offered by the Boston Amuse-

ment Company, nor was any offer other than that ever made by any named responsible person other than Weber Bros., who subsequently, under certain conditions, to wit, that they be allowed to have performances on Sundays and on the nights of the three days the premises would be occupied by the Grand Lodge, did offer to pay a higher rental, to wit, $10,000, but the lessor refused to rent the premises at all for Sunday performances, or for the three nights referred to. Who the other persons were, if any, referred to in the lessor's letter of April 7, 1908, as making higher offers, was not disclosed by the testimony, nor did the lessor ever insist upon the lessees meeting such other offers.

"(13) That after May 6, 1908, the lessor declined and refused to have further negotiations with Weber Bros., though the latter frequently requested it and insisted that they had a right to another term; but when so doing they did not agree or covenant nor offer to agree or covenant to pay any higher rent than they were already paying, except as stated in finding 12; nor did they ever retract their refusal to meet the offer of the Boston Amusement Company mentioned in finding No. 9."

Upon the facts thus found, the findings of law and conclusion of the court was that Weber Bros. were guilty of the forcible detainer complained of, and that the Grand Lodge was entitled to a judgment for the restitution of the premises and costs.

The communication of October 21, 1907, set out above, was not, in itself, an agreement and covenant, within the meaning of the extension clause of the lease. This notification was four months before the expiration of the right to exercise the option, and was regarded, as shown by subsequent conduct of both parties, as an expression of a purpose to obtain an extension. Strictly construed, the time within which the lessees might "agree and covenant," as provided by the lease, expired on February 23d. But the defendants in error seem to have regarded the question of an agreement as to such future rental as extending to time of expiration of the lease, and we shall assume that to be the situation. On February 22d, the lessor advised the lessees that it had an offer of a higher rent than called for by the existing lease. No specific information was given as to what the offer was or whether made by "a responsible party." Nothing more appears about the offer referred to, but the lessees did not then or at any later date "agree and covenant" to meet that offer if from a responsible party. On February 25th the lessees replied, saying that the negotiations would be taken up for them by one Mr. Lederman, acting for them. Nothing came of this, as Mr. Lederman could not or would not act. The letter of February 29th, set out above, shows that the lessees claimed that there was yet six months within which the rental might be fixed. The claim therein advanced is coupled with the insistence that they had "already availed themselves" of the option extended by the lease, referring to their letter of October 21st. When informed on April 7th of the proposals referred to in the letter of that date, they replied under date of April 9th, asserting "that they have until August 24th to negotiate and determine how much we are to pay the next five years." On May 5th the court found that when shown the detailed offer of the Boston Amusement Company they then refused to meet that offer, and that they never thereafter agreed to pay the higher rent so offered by that company, it being the offer of a responsible person.

Now, whether the right of the lessees to "agree and covenant" to pay for the extended term the higher rent which might be secured before expiration of the lease terminated on February 23d, when the option terminated, or extended to August 23d, they did not at any time so agree or covenant, if the letter of October 21st was not such covenant. But it is said that the lessor prematurely rented the property to the Boston Amusement Company, and that they refused to reopen negotiations after May 6th, when they refused to meet the offer of the Boston Amusement Company. Assuming that the lessees had until August 23d to meet the offer of that company, the lessor had a right to treat the refusal to meet that offer on May 5th as a definite refusal to avail themselves of the option and to act accordingly.

When in anticipation of the time of performance one definitely and specifically refuses to do something which he is obligated to do, so that it amounts to a refusal to go on with the contract, it may be treated as a breach by anticipation, and the other party may, at his election, treat the contract as abandoned, and act accordingly. The principle is well settled and applied in many cases. Hockster v. De la Tour, 2 Ed. & Bl. 678; Roehm v. Horst, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953; Cherry Valley Iron Wks. v. Florence River Co., 64 Fed. 569, 12 C. C. A. 306; Michigan Yacht Co. v. Busch, 143 Fed. 929, 75 C. C. A. 109; McBath v. Jones Cotton Co., 149 Fed. 383, 79 C. C. A. 203.

But whether the refusal to accept the offer of the Boston Company might be treated as an abandonment of the contract before the time of performance or not, the matter is of no advantage to the plaintiffs in error, because they did not after that refusal, and before August 23d, agree or covenant to meet that rent. Only by so doing could they put themselves in a position of advantage in consequence of the premature renting of the property by the lessor, or in refusing to reopen negotiations.

There was no error in the judgment of the court below, and it is accordingly affirmed.

NOTE.—The following is the opinion of Evans, District Judge, in the court below:

EVANS, District Judge. The writ of forcible detainer in this case was issued by a justice of the peace. The lessees, Weber Bros., filed a petition and bond and removed the proceedings to this court, and the lessor's motion to remand it was overruled, upon the authority of Madisonville Traction Company v. St. Bernard Mining Company, 196 U. S. 239, 25 Sup. Ct. 251, 49 L. Ed. 462, which affirmed the same case in 130 Fed. 789.

Under the practice act (section 914, Rev. St. U. S. [U. S. Comp. St. 1901, p. 684]) we must endeavor to make the practice here conform as near as may be to the practice in the state courts in such cases as prescribed by sections 452–469 of the Civil Code of Practice. The practice in such cases, in the court of a justice of the peace at the outset, and in the traverse of the inquisition whereby the case could be removed to the circuit court of the state, is necessarily very different in detail from the practice here, where only one court of the first instance can have the case before it. However, no trouble seems to have come out of this circumstance, and the parties entered into and filed a stipulation in writing, waiving a jury and consenting to a trial by the court. The evidence was heard and the case argued at length, and in response to

the request of counsel the court has made separate findings of fact and conclusions of law, which will be filed and made part of the record.

The case has not been free from doubts as to the rights of the respective parties—doubts growing out of the obscurity of the clause in the lease upon which the controversy turns, especially as a similar characteristic is prominent in the letter or notice of October 21, 1907, written to the lessor by the lessees. The important clause in the lease is as follows: "It is further understood and agreed by and between lessor and lessees that at any time, not less than six months before the termination of this lease, if all stipulations, covenants, and agreements herein entered into by lessees shall have been fully carried out, performed, and executed by them, the lessees shall have the option to extend the terms of this lease for an additional period and term of five (5) years, provided said lessees will agree and covenant to pay for said leased premises the highest amount of rent which can be secured by and which shall be offered to lessor therefor by any responsible party."

It was clear enough that the lessees must exercise the option thus given them on or before the close of February 23, 1908 (that being the beginning of the six-months period) which time, from the standpoint of the lessor of the theater property, was evidently fixed for reasons which are obvious, inasmuch as such property can only be rented to a limited class of tenants, and time is needed to reach them. It is equally obvious that the lessees had the right to withhold action upon the option until the last moment of the last day preceding the beginning of the six months period. But whether the offer of the higher rent must also be obtained and communicated by the lessor to the lessees, and whether the lessees must finally act thereon before the beginning of the six-months period, are matters which are not in terms set forth in the lease. If they had been, it is probable that this controversy might have been avoided. If a proper interpretation of the contract requires the landlord to obtain offers in advance of the beginning of the six-months period, so as to be always ready to communicate them to the lessees as soon as the latter declared his purpose to take advantage of the option, then obviously there must be a judgment in favor of lessees, because no communication of a higher offer was made before February 24, 1908; it being entirely clear that the letter of the lessor, dated February 22, 1908, was insufficient, not so much in its indefiniteness in not naming the amount of the offer and the person who made it, as because the lessor never afterwards insisted upon that offer, and in fact it was always afterwards ignored and disregarded—a course of conduct which demonstrates that no reliance was ever placed upon it by the lessor as a factor in the questions to be solved, nor as the offer of a "responsible party." Furthermore, if the interpretation referred to is the correct one, the lessees were not bound to agree or covenant to pay any higher rent because none was offered by a responsible party prior to February 24, 1908, nor would they have been bound to meet the offer of the Boston Amusement Company, presently to be mentioned, inasmuch as that offer was not made until long after February 23, 1908, namely, on March 27, 1908.

But can that interpretation be the proper one? The notice that the lessees intended to exercise the option was given October 21, 1907; but that accidental circumstance as to date cannot itself fix the rule for determining what the contract means, in view of the fact, already referred to, that the lessees had the right to wait until February 23, 1908, before exercising their option at all. The rights (as distinguished from the opportunities) of the parties must be the same under the contract, whether the purpose to avail themselves of the option was manifested by the lessees upon any one day or another within the prescribed limit. It was frankly conceded by the learned counsel for the lessees that, if the notice that the option would be exercised had been given on February 23, 1908, the lessor would have had a reasonable time after that date to obtain offers of a higher rent, and that after notice of such offers was communicated to the lessees the latter would have had a reasonable time within which to investigate the responsibility of the parties making the offers, to determine whether to meet those offers, or any of them, by agreeing and covenanting to pay as much rent as the highest offer called for. No reasonable time clause, however, is found in the contract, and it must be put there by construction, if it gets in at all. The same may also be said as to giving "no-

tice." Giving notice would no doubt be a practical mode of procedure; but the contract says nothing about it. Notice, therefore, has probably been given more importance in the discussion than it was entitled to, thus minimizing the actual stipulations upon which the right to another five-year term was made to depend. The option and the right to exercise it were on the side of the lessees. They alone could say whether they would take the premises for another term, either at the old or at a higher rental. If they said they wanted a further term, they were entitled to it, not upon giving notice merely, but only upon the express and most important condition that they should "agree and covenant to pay for the leased premises the highest amount of rent which can be secured by and which shall be offered to lessor therefor by any responsible party."

No express language confines the operation of this clause in the contract to any particular time prior to August 23, 1908, and after a most careful consideration of the subject the court has reached the conclusion that it has no power under the facts of this case to do so by construction. We are, indeed, satisfied that the parties themselves did not so intend. We think the offer of March 27, 1908, was within time, and that the lessees were bound to meet it if they desired to continue their term another five years, unless the Boston Amusement Company was not a responsible party. The contract, as we have seen, gave the lessees the right to continue the term, provided they should "agree and covenant to pay" higher rent, etc. This proviso was the substantial element in the contract, without compliance with which the lessees could not entitle themselves to an extension of their term. It also seems to the court that their letter, or notice, dated October 21, 1907, does not of itself agree or covenant to do anything in the matter of paying a higher rent, and, as we have found the fact to be, they never otherwise at any time agreed or covenanted, or offered to agree or covenant, or tendered any agreement or covenant, to do that particular thing, although their right to an extension of their term depended upon it. That letter was as follows:

"Louisville, Ky., October 21, 1907.

"To the Masonic Grand Lodge of Kentucky, F. & A. M.: Notice is hereby given under lease made by the Masonic Grand Lodge, party of the first part, and David B. and Max Weber, party of the second part, wherein under said lease notice must be given six months prior to the expiration of the five years, of the intention of renewal of the lease. We hereby avail ourselves of the option, and the herein notice is hereby given in conforming with said lease.

"Weber Bros."

Though in express terms this writing is a "notice" that the lessees wanted to avail themselves of the right to extend the term, the contention of the lessees now is that it expressed, or should be construed as expressing, an agreement and covenant such as the lease calls for. While that might be true if no higher rent were offered, we do not think the contract admits of a construction which would so easily extend the term for five years longer, where a higher rent had been offered; and we are constrained to the conclusion that the letter does not agree or covenant to pay any higher rent, and that it was never intended so to agree nor covenant. This conclusion appears inevitable from the letter itself, and it is abundantly fortified by the correspondence and by the lessees' refusal to meet the offer of the Boston Amusement Company.

In cases where the meaning of a contract is doubtful or obscure, the court, in construing it, is at liberty to receive aid from the construction which the parties themselves have put upon it; and it is clear from the lessees' letters of February 29, 1908, and April 9, 1908, that they understood the contract to give the lessor until August 23, 1908, to do the things which their counsel now contends should have been done prior to February 24, 1908, or, at all events, prior to May 6, 1908. Instead of meeting the offer of the Boston Amusement Company, the lessees on May 5, 1908, explicitly refused to do so. After their refusal the lessor accepted the offer of that company. We by no means think that this act upon the part of the lessor, when viewed by itself, excluded or affected the right of the lessees at any time prior to August 24, 1908, to extend their term by agreeing and covenanting to pay the highest rent offered by any responsible person; but, although the lessees may have had the locus penitentiæ, even as to the offer of the Boston Amusement Company, until that

offer was accepted by the lessor, the lessees may possibly have been estopped, as between them and the Boston Amusement Company, at least, by their refusal on May 5th to meet that offer.

However these propositions may be in the abstract, the view we take is that the lessees never agreed and covenanted, nor offered to agree and covenant, to pay the higher rent offered by anybody except themselves. On the contrary, they seem studiously to have avoided making any such agreement or covenant at any time. This appears to be all the more significant when we recall that the contract did not require them to give any surety upon such agreement or covenant. It was to be made entirely upon their own credit and responsibility. We think they never made such agreement in any form, and by reason of their failure to do so never performed the essential condition precedent upon which their right to extend their term depended. With that offer outstanding they had no right to the premises for another term at $9,000 a year, while refusing or failing to meet a much higher offer made to the lessor. The lessees were only entitled to the leased property upon undertakings in a binding way to pay the higher rent offered. This undertaking they failed to make or offer to make.

We had some doubts about the responsibility of the Boston Amusement Company; but when we reflected that this litigation, per se, proved the very considerable earning capacity of the theater, that the capital stock and the guaranty bond largely supplemented that capacity, and that the lessor was satisfied with the security for the rent of its own property, we concluded that the lessor had the advantage upon this question under all the circumstances of a case where a higher offer had been made which the lessees had not only expressly refused to meet, but had entirely failed to agree and covenant to meet, although doing so was the express condition upon compliance with which alone they could become entitled to another term of five years. Under the terms of the lease for one five years the lessor was entitled to get for the next five years the highest rent any responsible party offered, and it would be neither just nor according to that contract to hold that the lessees should get the property without paying the increased rental.

Saying and giving notice that they intended to exercise the option was a very insignificant and easy task for the lessees, compared to the other provisions and conditions in the contract as to agreeing and covenanting to pay the higher rent. They did the easy thing of giving notice; but, as we have repeatedly said, they failed to do the altogether essential thing of agreeing to pay the highest rent.

Upon the whole case, we think the judgment should be that the lessor should have restitution of the premises and costs of the action.

UNITED STATES COAL CO. v. PINKERTON et al.

(Circuit Court of Appeals, Sixth Circuit. May 8, 1909.)

No. 1,869.

1. TRIAL (§ 280*)—EXCEPTIONS—INSTRUCTIONS—ASSUMED FACTS.

An exception to so much of a paragraph of the charge as assumed a certain state of facts was defective as too broad, where it did not except to any particular fact but to a collection of facts, and failed to call attention to any explanation or additional fact.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 691, 692; Dec. Dig. § 280.*]

2. TRIAL (§ 192*)—INSTRUCTIONS—ASSUMED FACTS.

A federal court in its charge may assume facts which have been well established.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 432; Dec. Dig. § 192.*]

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

3. MASTER AND SERVANT (§ 80*)—CONTRACT OF EMPLOYMENT—EVIDENCE.
Evidence *held* to warrant a finding that plaintiff understood that its services were being rendered for and on the credit of defendant company, and not for an indefinite committee of coal operators who were each to contribute a proportionate share.
[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 118; Dec. Dig. § 80.*]

4. MASTER AND SERVANT (§ 7*)—CONTRACT OF EMPLOYMENT—MODIFICATION—MEETING OF MINDS.
Where plaintiff originally contracted for the rendition of services and the making of disbursements for defendant company, there could be no subsequent modification of such contract, substituting for complainant a committee of coal operators who had agreed to contribute pro rata to the expense of plaintiff's employment, without a meeting of minds.
[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 7; Dec. Dig. § 7.*]

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

F. A. Quail, for plaintiff in error.
W. B. Sanders, for defendants in error.

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

LURTON, Circuit Judge. This was an action to recover a balance of $10,038.87, claimed to be due to the defendants in error, who did business as the Pinkerton National Detective Agency, by the United States Coal Company, a coal mining corporation of the state of Ohio, for services rendered and money advanced at its instance and request. The defense was that the coal company was not the debtor, but that the Pinkerton Agency advanced the money and rendered the services mentioned at the instance of a committee composed of representatives of a number of coal mining companies, and that the coal company sued did not assume or promise to pay the expenses incurred under that employment.

That the issue may be better understood, it is essential to state certain facts: In the spring of 1906, there was a strike among the union coal miners employed in the Ohio coal fields, and as a consequence nearly all of the Ohio mines were compelled to suspend operations. To break this strike was deemed necessary, and for this purpose a large number of coal operators arranged for concerted action through a committee of representatives. There was evidence tending to show that this committee was authorized to select some one mine and operate it at the common expense, through the aid of nonunion miners procured and protected by the detective agency operated by the Pinkertons. One of the mines owned by the United States Coal Company, known as the "Plum Run Mine," was selected as best situated for the experiment, and there was evidence tending to show that the general manager of that coal company was requested and authorized to arrange with the Pinkerton Agency for the men and the guards necessary to operate that mine. The general manager of that company was one H. E. Willard, who had long been acting in that capacity.

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

That the services of the Pinkerton Agency were secured by Mr. Willard, and that all of such services and advances were directly in connection with the operation of the Plum Run mine owned by the United States Coal Company, and at the sole instance and request of Mr. Willard, was shown beyond dispute. Day by day reports were made to Mr. Willard, and all accounts for services and expenditures were rendered to the United States Coal Company. Upon an account so rendered to that company, a payment was made by its own check of $6,000, though it is shown that this was made out of money supplied to it by the associated operators.

The claim of the plaintiffs below was that they rendered these services to the United States Coal Company and upon the property of that company, and at the instance and request of its general manager. The insistence of the defendant below was that, although such services and advances were apparently made upon and about its coal mine, and at the instance of Mr. Willard, its general manager, in truth and fact Mr. Willard was not in that matter acting as its general manager, but under the direction and authority of the committee of co-operating mining companies, and that, although the services and expenditures were apparently rendered to it and upon its property, in fact its said mine was being operated at the expense of the co-operating companies, each of whom expected to benefit by the moral effect of a successful operation of that mine by nonunion strike breakers, under the protection of the Pinkerton Detective Agency. That the men hired by the Pinkertons were carried on the payroll of that company exclusively is not disputed. But it is said that the expense of procuring them and of guarding them against the attack of the strikers was an expense which was to be borne pro rata by the co-operating companies.

The question is whether there was any agreement that the defendants in error should look to these co-operating companies for their bill as joint contractors, or whether they may look to the United States Coal Company as paymaster, without regard to any arrangement by which other companies might divide the expenses between them. As the case turns upon this, we set out the more material part of the evidence of H. E. Willard, the general manager of the business of the United States Coal Company, and the witness upon whose evidence the plaintiff in error must rely to escape liability.

After referring to the very extensive strike of coal miners, affecting nearly every mine in Ohio, he tells of several interviews with Mr. Frank J. Heine, the superintendent of the Pinkerton Detective Agency. After stating his relations to the plaintiff in error, he says that about May 8th he sent for Mr. Heine and had a conference with him in the office of the United States Coal Company in Cleveland. In this first interview he testifies that he told Heine:

"'I would like to get his prices and terms for the employment of the members of their agency, and to consult with him relative to the opening a mine for the operators of Ohio, and his terms and prices.'

"There wasn't much discussion of details. He gave me the price at which we could hire his operatives," etc.

Asked what he said of the coal miners' strike and its extent, he replied:

"I said to him in a general way that the operators of Ohio were giving the matter consideration to operate mines or a mine, and that they had instructed me to interview different people relative to bringing about a state of affairs of that kind."

He also told him that he had just returned from a meeting of operators at Columbus, and was to have another on May 11th, but "did not say much to him, except that there had been a meeting at Columbus."

Referring to a later meeting, which he says occurred on the 11th of May, he says he told him that he "had submitted his terms and price to the committee of fourteen and other gentlemen who were interested in this project, and they had authorized me to employ the Pinkerton Agency," and that arrangements had been so far concluded at that meeting that we would go ahead with the project.

Other evidence shows that on the 12th he again saw Heine. What passed between them, he does not say, further than that Heine said:

"He would open an office over here at 236 Superior street for the employment of guards, and would get their men in various parts of the country looking out to get men that might be available to act as miners, and to get them transported."

In accordance with the arrangements thus concluded, not later than the 12th of May, the defendants in error's services were at the command of Willard, and men and guards began, as a result of the activity of the agency, to arrive at the mines of the plaintiff in error on the 16th of May. Up to this time there had been nothing to indicate to Heine that he was to look to any other principal than the company whose mine was to be opened and operated through the service of his agency. Certainly there had been no indication of the names of any other principals, no definite statement that any other companies were to bear or share in the expense of operating a mine which was the exclusive property of the plaintiff in error. From other, but uncontradicted, evidence, it is shown that Heine was then directed to report daily to Willard and to send the bills to the plaintiff in error.

Willard's evidence of the occurrence prior to May 18th, aside from the conflicting evidence of Heine and others who testified about these negotiations, shows contract, made under circumstances which in law imply the promise of the United States Coal Company to pay the expense which the defendants in error were induced to incur, at the request of its general manager, upon and about its exclusive property. If there was any modification of this implied obligation, any substitution of an agreement to look to the "coal operators of Ohio," or to any unnamed committee representing that numerous body of independent companies, partnerships, and individuals, it must have occurred after defendants in error had rendered much service and incurred much expense under the original agreement shown by the evidence to which we have already referred. The first disclosure to the agent of the defendants in error of even the names of this mysterious committee of 14, or of any plan of that committee for sharing in the expense of operating the private mine of the plaintiff in error, occurs in the evidence of Willard and of Heine as to a meeting which occurred either on May 17th or 18th. As to that meeting Willard tes-

tified that he told Heine that there had been on that day a meeting of the operators' committee, and that the plans suggested by him, Heine, had been approved, as well as the contract which they had agreed upon at the earlier interview. He then says that Mr. Heine said that the expense was going to be very heavy, and that he wished to know, "who is in this thing"? He continues as follows:

"I told him that the state of Ohio, and the United States Coal Company included with the rest. When I speak of the state of Ohio, I mean the operators owning mines in the state of Ohio. And that they had held a meeting at Columbus, and had appointed a committee of fourteen; the committee of fourteen had authorized me to act as their agent, and to operate for them our Plum Run mine; that I had made such arrangements with the committee of fourteen and other gentlemen as completely satisfied me that the money would be forthcoming, and that I would see that he got his money.

"Q. Were those arrangements made at the meeting you have mentioned? A. Yes, sir. Q. And you told him what on the subject of money being raised? A. That all of the operators who had entered into this agreement would pay pro rata amount on the amount of coal produced in their mines; that a levy had been made at this meeting; and that the United States Coal Company would pay its pro rata share with the rest. Q. What did he say about that? A. Mr. Heine said at that time that his bill would probably, before we got through with it, amount to considerable money; that he did not believe that the optimistic views that the operators had of getting through with it in two or three weeks would be realized; he thought it would take longer; and he wanted to know what men of large ability were behind the thing, so that when the bills come due they would be paid. Q. What did you say on that subject to him? A. I named to him men that were interested in the project. Q. What names did you mention? A. I told him Mr. Winder, and named to him all the members of the committee of fourteen, and, in addition to that, some local coal operators. Q. Give the names you gave him? A. I told him Mr. Winder, Mr. Chapman, Mr. Cunningham, Mr. Zerbe, Mr. Hornicle, Mr. Osborn, Mr. Roby, Mr. Newell. Q. Do you recall all the names that you did give him? A. No; I had them all fresh in my mind at that time. There were other gentlemen who were members of the committee of fourteen that have escaped my mind; I know their residence and the mines they operate, but I don't just recall their names at this minute. Q. Did you know them then? A. Yes, sir. Q. When you gave him those names, what did he say? A. I don't remember just what he said—just the words he replied in. Q. Not the words; the substance of it? A. The substance was that apparently—I supposed—that he thought it was all right. (Objection.) He seemed satisfied. (Objection by counsel for plaintiffs.) The Court: Tell what he said, or the substance of it. Q. Did he say anything at that time, or did you say anything, about the United States Coal Company paying all this expense? Did you say that the United States Coal Company would bear all the expense and pay all their bills? A. No. Q. Did you say that at the earlier talk? A. No. Q. Did he say that he wanted them to? A. No. Q. Did he say that at any time? A. Not that I remember of."

We do not find any substantial evidence that Heine was informed prior to this interview of any arrangement between the numerous coal operating companies, supposed to be represented by a committee, by which these companies were to share upon some pro rata basis the expense of operating the Plum Run mine of the plaintiff in error. But assuming that something was said, or that such a sharing might be inferred, that knowledge would not release the plaintiff in error from their implied obligation to defendants in error, in the absence of an agreement that they would look to such other principals for their bills, and not look to the United States Coal Company except as one of the contributors.

Upon this subject, the court rightly said to the jury:

"If it should be a fact, as shown by the testimony, that other persons or companies were to divide among themselves pro rata the expense of operating the defendant's mine, and if it be a fact that the plaintiffs' manager here knew that, that would not change the contract relations between the parties, nor would it release the defendant from its own direct responsibility to the plaintiffs for the amount of their claim, unless the plaintiffs agreed to look to those other parties, whoever they might be, and not look to the defendant."

Pursuing the same idea, he further said:

"The arrangement for these services was made with the defendant's general manager. The work was done upon and the money expended about, and in relation to, the property of the defendant and in connection with the work that was to be prosecuted on the defendant's property. The negotiations were conducted with the defendant's general manager and at the defendant's office, and the bills were rendered to the defendant. Now, these circumstances I have marshaled for the purpose of laying down a general rule of law which is applicable to them, and that is this: That if, under all the circumstances of this case, as they appear to you in the evidence, you cannot find that there was a meeting of the minds of the parties who made this contract as to the particular persons or individuals who were to be liable; that is, if it should be your opinion that the plaintiffs in good faith thought, when the employment was entered into that the coal company was primarily liable, while on the other hand, Mr. Willard thought and intended that the operators together were to be primarily liable, and that the defendant was to be liable only for its pro rata share of the expense—then I say to you that since these services were thus performed and these moneys paid out at the prime instance of the defendant, and under the circumstances which I have stated at the beginning of this particular observation, then I say to you that the plaintiffs are entitled to recover."

The plaintiffs in error excepted to so much of the paragraph last set out as assumes a certain state of fact, and have assigned error upon it. This exception was not to any particular fact, but to the collection of facts. Neither was attention called to any explanation or additional fact. The assignment is bad as too broad. There is no dispute but that many of the facts which the court assumed to be the facts of the case were properly so assumed. Indeed, we do not think it assumed any fact which was not well established.

There was no error in the rule of law applied to the facts assumed. Indeed, the court might have told the jury that on May 11th or 12th the parties to this suit had come to an agreement for the service of the defendants in error, and that there was nothing in the contract under which the employment of the defendants in error began from which it might be inferred that the defendants in error agreed then to look to any principal for their payment other than the United States Coal Company. Undoubtedly, it was competent for the parties to thereafter substitute for the implied obligation of the plaintiff in error another agreement by which the defendants in error should look to other principals. If such modification of the original implied obligation of plaintiffs in error occurred at all, it must have occurred on May 17th or 18th, when Willard says he disclosed to Heine the names of the men comprising the co-operating coal mining companies' committee. The evidence upon which a change of obligors must be predicated is that above set out. From that evidence, considered apart from the contradicting testimony, it could not be reasonably said that the defendants in error assented to any arrangement by which they were to look to

the plaintiff in error for only a pro rata of the expense and to this committee of the operators for the rest. Everything said by Willard to Heine, both before and after May 17th, is consistent with the idea that the co-operating coal companies were, as between themselves, to share the cost of operating the mine, but that the United States Coal Company was to pay the Pinkerton bills and reimburse itself according to its arrangement with its backers. But it is enough to say that there is no sufficient evidence of a meeting of minds by which the liability of a large committee was to be substituted for the liability of the company requiring the service and directly receiving the benefit. A meeting of minds to change or modify a contract or introduce a new term is as essential as it is to the completion of the original agreement. It is not enough to show that one party in good faith understood that a different arrangement was made from that which by implication of fact and law existed. It must be shown that the other party assented to the same subject-matter. As there can be no contract without the assent of both parties, so there can be no modification or substitution of a new arrangement for the original without such mutuality of assent. Utley v. Donaldson, 94 U. S. 29, 45, 47, 49, 24 L. Ed. 54; Mildleberger v. Baldwin, 2 Hall, 196; Darnley v. The Proprietors, 2 L. R. H. L. 43, 60, N. G. S. C.; Burton v. Rosemary Mfg. Co., 132 N. C. 17, 43 S. E. 480; Russell v. Clough, 71 N. H. 177, 51 Atl. 632, 93 Am. St. Rep. 507; Turner v. Webster, 24 Kan. 38, 36 Am. Rep. 251.

The case of Mildleberger v. Baldwin, cited above, is cited with approval by Justice Swayne in Utley v. Donaldson, cited above; the facts and the rule applied being thus epitomized by the court:

"The defendant bought merchandise of the plaintiff, and it was agreed that it should be paid for by the note of a third person payable to the defendant, to be by him indorsed to the plaintiff. After the goods were delivered the note was tendered, indorsed without recourse. The plaintiff refused to receive it, insisting that the agreement was that the note should be indorsed without this qualification, and thereupon brought the suit. The court left it to the jury to find whether there was a misunderstanding between the parties as to the manner of the indorsement. The jury so found; and it was held that the plaintiff was entitled to recover as if there had been nothing said about the note, there being no assent of the two minds as was necessary to make a contract in relation to it."

It has been assigned as error that the court treated the whole claim as depending upon the same question. There was evidence tending to show that some of the operators settled their strike some time in June and withdrew from the arrangement under which they were to share the expense of operating the Plum Run mine, and that other operators then entered into the plan for continuing the operation of that mine, the expense to be shared by the new combination. There was evidence that defendants in error were told of this change and asked to separate their account, so as to distinguish between the expense before and after June 20th. But there is no shadow of evidence that the defendants in error ever were asked or agreed to look to these new operators as their principal, or to any change in the original implied agreement of the plaintiff in error to meet their bills. The case for an agreed modification on June 20th is even weaker than that for a new arrangement on May 17th or 18th. The court was not asked to

give any special charge relating to this change in the operating committee, and there was no error in treating the claim as a unit. The court would not have erred by a peremptory instruction for the defendants in error.

The assignments are overruled, and the judgment affirmed.

CHESAPEAKE TRANSIT CO. v. MOTT.

(Circuit Court of Appeals, Third Circuit. February 15, 1909. On Rehearing, May 28, 1909.)

No. 18.

1. TRIAL (§ 169*)—DIRECTION OF VERDICT—INSUFFICIENCY OF EVIDENCE.
Where, in an action for breach of a contract to construct a railroad, by nonperformance, the plaintiff's evidence was of such an indefinite and unsatisfactory character that neither a jury to which it was submitted nor the court was able to determine therefrom the amount of damages, if any, sustained by plaintiff, it was not error for the court, after the jury had been unable to reach a verdict, to direct a verdict for the defendant.
[Ed. Note.—For other cases, see Trial, Dec. Dig. § 169.*]

2. TRIAL (§ 251*)—INSTRUCTIONS—ISSUES.
Where the declaration, in an action for failure to perform a contract for building a railroad, alleged as the only ground of recovery that plaintiff was obliged to procure the work done at an increased cost above the contract price, and the case was tried on that theory, the failure of the court to submit to the jury other grounds of recovery is not error for which the judgment will be reversed, especially where no request for such instructions was made and no objection or exception taken to the omission.
[Ed. Note.—For other cases, see Trial, Dec. Dig. § 251.*]

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

For opinion below, see 158 Fed. 850.

Wm. A. Glasgow, Jr., for plaintiff in error.

V. Gilpin Robinson, for defendant in error.

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

BUFFINGTON, Circuit Judge. In the court below, the Chesapeake Transit Company, hereafter called the plaintiff, brought an action of assumpsit, for use of A. M. Kerr and J. Edward Cole, against Abram C. Mott, hereafter called the defendant. The action was to recover damages from Mott, a surety, for nonperformance by his principals, Isaac A. Walker & Son, of a contract with the plaintiff to build a steam railroad from Norfolk, Va., to Cape Henry. In pursuance of the Pennsylvania practice act of May 25, 1887, which requires the plaintiff to file "a concise statement of the plaintiff's demand," and which shall be replied to by affidavit, plaintiff filed a declaration wherein it set forth the written contract between the parties, the failure of the Walkers to perform, and the rescission thereof by plaintiff. The declaration then alleged:

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

"By reason of the failure and neglect and refusal of the said Isaac A. Walker & Son to comply with and perform the stipulations aforesaid, and to prosecute said work in accordance therewith, the plaintiff, Chesapeake Transit Company, was obliged to and did procure the completion of said work by other parties at a cost exceeding by more than $20,000 the cost provided in the aforesaid contract for said work between the plaintiff, Chesapeake Transit Company, and the defendants, Isaac A. Walker & Son."

To this the defendant replied by affidavit denying the completion of the contract as alleged above. On the trial of the cause, the plaintiff, instead of pursuing the usual course of proving the alleged performance of the contracted work by those who did it, called no such witnesses, but called an engineer who took the contract which plaintiff had afterwards entered into with other parties for building an electric road (which would also be operated by steam, and in which there was a terminal change), and assumed the cost of this electric road built under the second contract was a proper standard of cost for the exclusively steam road, which Walker & Son were to build under their contract. The engineer then figured out what part and cost of the work done under the second or electric road contract should be charged to the first, or steam road contract. This testimony was received under objection, and submitted to the jury. They were unable to reach a verdict, whereupon the court, on this being reported, gave binding instructions to find for the defendant. On motion for a new trial the court said:

"But there is a further reason for denying the plaintiff's right to recover, namely, that the evidence offered in support of the right was not definite enough to enable the damage to be ascertained. The plaintiff was well aware that the two contracts, each taken as a whole, were not capable of comparison, and, accordingly, recovery was sought for the increased cost of one item only —an item that was necessarily common to both contracts, namely, the cost of the permanent way, including, in that phrase, grading, ties, rails, bridges, and the like. But no effort was made to prove the difference by the best and most direct method; that is, by proving for what price Walker & Son had agreed to do this work, if such price could be satisfactorily discovered, and then by proving what the work actually cost, as it was done upon the ground by the National Construction Company. The method adopted was to take the contract price under the second agreement, attempt to reduce it to a cash basis, deduct therefrom the estimate of certain witnesses concerning the fair value (but not the actual cost, so far as appears) of the work and materials that were peculiar to the second contract, and assume the remainder to be the actual cost of the permanent way. This remainder was then compared with the engineer's estimate of what the same cost would probably have been under the Walker contract, and the difference was put forward as the plaintiff's actual loss. Many complications and uncertainties of detail, which I shall not take time to specify, are involved in this method of calculation, but, even as just stated, I think it is manifest that the method is largely conjectural, and could not safely be relied upon to produce a result even approximately correct. And when, to the difficulties thus appearing, are added the difficulties arising from the numerous changes in detail between the two contracts, it becomes impossible, I think, to reach a conclusion that is even fairly satisfactory. If I may judge by my own experience, no one can read the evidence without being bewildered by the effort to make the frequent allowances and assumptions that must be made in order to follow the plaintiff's calculation, and without believing that this difficulty furnishes the probable reason why no agreement upon a verdict could be reached. If the case were now before me without a jury, I should find it impossible to reach a conclusion that I could defend by specifying the particular pages of the testimony upon which I relied."

A new trial having been refused, and judgment entered for defendant on this verdict, the plaintiff sued out this writ, and assigned for error:

"(1) The court erred in directing the jury to return a verdict for the defendant in this cause. (2) The court erred in entering the judgment in favor of the defendant against the plaintiff in this cause."

The main question here involved is the action of the court in giving binding instructions for the defendant. Now, the burden rested on the plaintiff to furnish such proofs as warranted a verdict in its favor. But the proofs here furnished were such that the jury was unable to find a verdict; the trial judge has called attention to the unusual and unsatisfactory character of the evidence as quoted above, and has said if a jury was waived he would be unable to reach a verdict; and we are free to confess that after a perusal of the whole testimony we have reached the same conclusion. Such being the case, and the proof being of such an unsatisfactory character that a judge trained in the marshaling and analysis of facts is unable to find a verdict, were the case tried by him without a jury, was it error to say the plaintiff had not met the duty resting upon it of producing evidence of such character as to warrant a verdict in its favor? It was simply a case of furnishing insufficient evidence. After a careful consideration of the proofs, we cannot say as matter of law the court was guilty of error in giving binding instructions to the jury. What else could it do if the evidence was such that neither court nor jury could find a verdict? The plaintiff simply failed to meet the burden of proof the law cast upon it. The two assignments of error are therefore not sustained.

It is, however, contended that under the assignments of error we should convict the court of error because, as stated in plaintiff's brief, the court—

"overlooked certain items of actual damage which are in evidence in the case and undisputed, which arise directly from the abandonment of the written contract, and are in no way connected with the new contract or what was done thereunder."

The rule of this court (court rule 11, 79 C. C. A. xxvii, 150 Fed. xxvii) provides that an assignment of error "shall set out separately and particularly each error asserted and intended to be argued." This has not been done, and, even if the case was one where we were inclined to relax the rule, there is no place in the record where the court below was called to pass on this question and where its action or omission was made the subject of objection or exception. The most that can be said is that it was "overlooked" by the judge. But in the way this case was tried we do not think it was even overlooked by the court. In the first place, the pleadings, as we have seen, placed the plaintiff's right to recover expressly on the ground that it procured—

"the completion of said work by other parties at a cost exceeding by more than $20,000 the cost provided in the aforesaid contract; * * * wherefore the sum of twenty thousand dollars ($20,000), with interest as aforesaid, is justly due and owing by the said defendants to the said plaintiffs, to recover which this suit has been brought."

It will be noted that no allegation was made of anything done, or expenditure made, by the plaintiff in pursuance of the first contract, and of which it lost the benefit. But not only was no such claim mentioned or sued for, but the case was not tried on the theory that any such claim was in issue. The court, without objection or point so requesting, made no mention of such claim in its charge. Its attention was not called to the alleged omission as ground for new trial; it was not discussed in the court's full opinion refusing a new trial; and, finally, it is not specially assigned for error, or was any ruling made upon it or exception taken on which an assignment could be based. Manifestly it is an afterthought, and if, as stated in plaintiff's brief, it was an oversight of the court, the court's attention should have been called to it. That not having been done, and the case having been tried on the ground of recovery expressly declared upon, it would be unfair to reverse the case on grounds upon which the trial court never ruled and therefore could have committed no error.

The judgment below will be affirmed.

On Rehearing.

PER CURIAM. Rehearing denied.

ARCHBALD, District Judge. I concur in the affirmance of the judgment and the refusal of a reargument, and I agree with what has been said as to the work done under the second or substitute contract affording no evidence of the damage for failure to perform the first one. Not that it might not have done so, perhaps, but that it did not, because of the way that it was sought to make use of it. I would not, however, rest the decision there, but would go further, and hold, with the court below, that there was an abandonment of the first contract, which released the surety; a pronouncement upon this point being called for, in my judgment, in order to meet some things which are urged as ground for a reargument. As is there pointed out, claim was also made at the trial, as an element of damage, for the amount expended for the new issue of bonds, $845, made necessary, as it is charged, by the default on the first contract, as well as for the additional amount, some $600, required to be paid to secure a right of way over the Babcock property, condemnation proceedings having to be resorted to, where it could have been had for nothing, if the condition of the deed which was at first given for it—to begin the road within 6 months and complete it within 12 months—had been complied with. Not only was evidence as to each of these introduced and insisted on over the objection of counsel, but, as it now appears, they were pressed upon the court on the motion for a new trial, the same as they are here, as reasons why a verdict should not have been directed, and are not now brought forward for the first time, as assumed in the former opinion. Both of these items, however, are effectually disposed of, if the original contract was in fact abandoned. It may not be accurate to speak of this as an alteration, or to altogether deal with it on that basis, although it may amount to that. The better position is that the second contract was such a departure

from that for the performance of which the defendant was surety that he could not in justice be held for it, and it was so in effect treated by the court below, as is shown by the opinion refusing a new trial, where a comparison between the two is made, and the differences pointed out, which, reference being had to the full discussion which there appears, does not need to be repeated. 158 Fed. 850. It is true that the second contract was not entered into until after there had been a default on the first one, by which the defendant became liable to the extent that the plaintiff was thereby damaged. But the damage was merely nominal at first, and it by no means followed that there would be anything beyond that, which could only be told by the sequel. Nor did the fact that liability had attached prevent the discharge of the surety, as argued, if anything was done to his prejudice afterwards. John A. Tolman Co. v. Hunter, 113 Mo. App. 671, 88 S. W. 636. No doubt the plaintiff could not be expected to rest with the situation, and was entitled to go ahead and get some one to build the road, as it had been projected. And it may be that, in order to do so, some changes were necessary, without which it would have been impossible. But that did not justify a radical variance, amounting to an altogether new and different contract, such as was entered into. The defendant stood sponsor for the performance of the original, and for that only; and, if he was to be held, the substance of it had to be adhered to. And when a new one was entered into, with terms and conditions essentially different, he was no longer liable. Unquestionably he would be released, if the changes were introduced after the contract had been entered upon, and it is no different in principle where they were embodied in a substitute. If the latter expressed what was wanted, or was even compelled by a change in the circumstances, the plaintiff in adopting it must abide the consequences. It is a complete answer, to any attempt to charge the defendant with it, that it was not the one for which he undertook to be responsible. American Bonding Company v. U. S. (C. C. A.) 167 Fed. 910.

It is said, however, that, as the direct result of the default of the contractor, and in no way involved in the change in the contract, the defendant was at least liable for the two items of damage mentioned above—the expense of printing the original issue of bonds, which were made useless, and the extra amount which the plaintiff had to pay for a right of way over the Babcock property—which were disregarded. It appears, with regard to the former, that $1,700 was put in the hands of the contractor, who paid out $855 to have the trust mortgage prepared, and the bonds engraved and printed; the rest of the money—$600 trustee's fees, and $245 revenue taxes—being appropriated by him to his own purposes. Of course, the defendant, as surety, was in no way liable for the money which was so misappropriated. Neither was he, in my judgment, for the expenditures which were rendered useless by the change in the bond issue. It was not made clear to me at the argument why he should be; nor, upon looking into the matter, am I any better persuaded of it. This expenditure was not lost because of the default of the contractor, apart from the change which was made in the contract, but solely

because, by the terms of the new contract, the road was lengthened, and its character modified from an exclusively steam road to one of combined steam and electricity, which compelled a rewriting of the mortgage. The defendant being released, as we have seen, from whatever was incident to the change, is relieved from this item along with the others. Had the original contract been adhered to, we should have heard nothing of this matter, and that effectually disposes of it.

Nor does the claim for the extra amount paid for the Babcock right of way stand much differently. No doubt the plaintiff got a deed for this in the beginning without having to pay anything, and had subsequently to condemn the land and pay $600; the condition on which the deed was given, that the road should be completed within 12 months, not having been complied with. But that is not all that is to be said of it. Not only is it a question how far the plaintiff is chargeable with the delay by which the deed was invalidated, but by the further provision of the deed, and as a part consideration for it, the company covenanted to construct a ditch on each side of its track, and to keep open all the drains necessary to relieve the farm traversed, and also to furnish certain wire fencing and posts for the erection of a fence along one side of the right of way. All of this was got rid of when condemnation proceedings were resorted to, which more than offsets, in all probability, the $600 which was paid as the outcome; or, even if the saving was not complete, it was considerable, and, not having been definitely shown, the actual damage is so uncertain and problematical that nothing can be predicated on it.

There is no force to the suggestion that, the contract having been broken, the plaintiff was at least entitled to nominal damages. There might be something in this if there was a right to establish, or costs were involved, neither of which is the case. That there was a right to maintain, to which the recovery of judgment was material, will not, of course, be pretended. And, the jurisdiction of the court being dependent on the diverse citizenship of the parties, the plaintiff, by the express provision of the statute, in order to get costs, was required to recover a judgment of at least $500. Rev. St. 968 (U. S. Comp. St. 1901, p. 702). As to this the Pennsylvania practice, which is relied on, is not controlling. It is true that nominal damages might save the plaintiff from having to pay the defendant's costs, except as it was expressly adjudged to do so. McCarthy v. American Thread Co. (C. C.) 143 Fed. 678. But the original contract having been abandoned, and the plaintiff, outside of that, having shown nothing substantial, there is no reason why the defendant should be put to the cost and expense of defending the suit, where the right of the plaintiff to maintain it was merely nominal.

Neither is there anything in the further suggestion that, damages exceeding the penalty of the bond having been shown, it does not matter as to anything above that. This begs the whole question. The method of proof resorted to at the trial was such that nothing reliable could be deduced from it, in the face of which it is by no means to be conceded that damages exceeding the face of the bond were in fact established.

While, then, the petition for a rehearing is not without substance, for the reasons given, I see no occasion for disturbing the judgment of affirmance, which has been entered.

CINCINNATI TRACTION CO. v. LEACH.

(Circuit Court of Appeals, Sixth Circuit. April 19, 1909.)

No. 1,884.

1. APPEAL AND ERROR (§ 216*)—EXCEPTIONS—NECESSITY OF SPECIFIC EXCEPTIONS TO INSTRUCTIONS.

A general exception to the charge of a court on the ground that it did not instruct more fully upon a subject is unavailing, unless counsel specifically states such further instruction as is desired, and requests that the same be given.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 216;* Trial, Cent. Dig. § 628.]

2. CARRIERS (§ 331*)—INJURY TO PASSENGER—CONTRIBUTORY NEGLIGENCE.

Where it was the custom of a street railroad company to permit passengers to stand on the rear platform of its cars which were closed with gates apparently securely closed and fastened, it was not the duty of a passenger so riding to critically examine the fastenings, but only to exercise reasonable care to protect himself from injury, and where he was thrown off and injured by reason of the giving way of the gates he is not chargeable with contributory negligence because he did not take the additional precaution to see and use a handhold.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1378, 1379; Dec. Dig. § 331.*]

3. CARRIERS (§ 344*)—ACTION FOR INJURY TO PASSENGER—ISSUES AND PROOF.

Where, in an action by a passenger against a street railroad company to recover for a personal injury, plaintiff shows that while a passenger he was injured, the burden shifts to the defendant to satisfy the jury by a preponderance of the evidence that it was guilty of no negligence that proximately contributed to the injury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1399; Dec. Dig. § 344.*

Burden of proof of negligence where passengers have been injured, see note to Southern Ry. Co. v. Myers, 32 C. C. A. 23.]

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

Jos. Wilby, for plaintiff in error.

Edward Colston and S. M. Johnson, for defendant in error.

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

McCALL, District Judge. The plaintiff in error, the Cincinnati Traction Company is a corporation engaged in operating a street railway in Cincinnati, Ohio. On March 10, 1906, the appellee, Harry Leach, was a passenger aboard one of appellant's cars. He was standing on the rear platform of the car, and while it was in motion he fell or was thrown from the platform of the car into the street and was injured. Suit was instituted by the defendant in error to

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

recover damages for the injuries sustained. The case was tried before the court and jury, resulting in a verdict for the defendant in error in the sum of $5,000. A motion for a new trial was made and disallowed. Thereupon errors were assigned, and an appeal taken to this court.

There are 25 assigned errors. After a careful examination of the record, we are unable to find any reversible error. It is strongly insisted that the question of contributory negligence on the part of the appellee was not submitted to the jury by the trial judge, and that the testimony introduced on the trial made such a case as required the submission of this question to the jury. Assuming, but not deciding, that the charge as to contributory negligence was not as full as it might have been, there was no specific request for any different or additional charge on this question. While the court was instructing the jury, the following colloquy took place between the court and counsel for appellant:

"Mr. Wilby: And as to the other point, about contributory negligence, I did not hear your honor charge as to that?

"The Court: * * * Have you written out a charge covering your request, Mr. Wilby?

"Mr. Wilby: No, your honor. I just wanted your honor to deal with the subject of contributory negligence. * * *

"The Court: Well, it would depend upon the necessity for doing anything to secure his safety. If the gate was of such structure and strong and high enough to justify him in relying upon it, then I do not think it would be negligence upon his part if he failed to see and use a handle bar, or do something else additional, to promote his safety."

If the appellant had wished different or additional instructions to the jury, such instructions should have been specifically stated, coupled with the request that the same be given in charge to the jury. This was not done, but appellant contented itself by reserving an exception to the charge, because the court did not charge more fully upon the subject of contributory negligence. The court below cannot be put in error on an exception so indefinite and general. Anthony v. L. & N. R. R. Co., 132 U. S. 172, 10 Sup. Ct. 53, 33 L. Ed. 301; Railway Co. v. Jurey, 111 U. S. 584, 4 Sup. Ct. 566, 28 L. Ed. 527; Columbus Const. Co. v. Crane Co., 98 Fed. 946, 40 C. C. A. 34; Yates et al. v. U. S., 90 Fed. 57, 32 C. C. A. 507; Shelp et al. v. U. S., 81 Fed. 694, 26 C. C. A. 570; Price v. Pankhurst et al., 53 Fed. 312, 3 C. C. A. 551; Coney Island Co. v. Dennan, 149 Fed. 687, 79 C. C. A. 375.

Moreover, an attentive examination of the testimony set out in the record leads us to the conclusion that the trial judge would have been warranted in omitting any reference in his charge to the subject of contributory negligence. It is admitted that appellant's custom was to permit its passengers to occupy the rear platform of its cars, and therefore appellee was not guilty of negligence, in so far as this case is concerned, by riding on the rear platform. He was smoking when he went aboard the car, and was in the place required by the company of those passengers so indulging. He was standing with his feet firmly placed on the platform, with his back against the rear end of the car. Just to his right was an iron scissors gate, about as high as

his hips, and, to all appearances, securely closed and fastened. It was not his duty to make a close examination of the gate to determine its structure or strength, to save himself from the charge of negligence, but only to exercise reasonable care to save himself from injury. On the other hand, it was the duty of the appellant, as a common carrier of passengers, to exercise the highest degree of care and caution in and about the construction and strength and fastenings of the gate and other appliances of the car necessary to transport its passengers safely.

In the case at bar there is no testimony tending to show that the passenger was not in the exercise of due care. The burden rests upon the carrier to show that its whole duty was performed, and that the injury was unavoidable by human foresight. Gleeson v. Virginia Midland Railroad Co., 140 U. S. 443, 11 Sup. Ct. 859, 35 L. Ed. 458, and cases there cited. The defendant in error having shown to the jury that he was a passenger aboard appellant's car, and that while such passenger he was injured, the burden of proof shifted to the appellant (defendant below) to satisfy the jury by a preponderance of the evidence in the case that it was guilty of no negligence that proximately contributed to the accident. This question, under proper instructions, was submitted to the jury, and the issue found against appellant. Stokes v. Saltonstall, 13 Pet. 181, 10 L. Ed. 115; Railroad Co. v. Pollard, 22 Wall. 341, 22 L. Ed. 877; Gleeson v. Virginia Midland Railroad Co., supra; Secord v. St. Paul, M. & M. Ry. Co. (C. C.) 18 Fed. 221; Sprague et ux. v. Southern Ry. Co., 92 Fed. 59, 34 C. C. A. 207. As has been stated, the court said to the jury that:

"If the gate was of such structure and strong and high enough to justify him (the passenger) in relying upon it, then I do not think it would be negligence upon his part if he failed to see and use a handle bar, or do something else additional, to promote his safety."

The jury evidently found that the gate appeared to be of the character described in the charge, when in point of fact it was not, and that the appellee was not guilty of contributory negligence in failing to see and use a handle bar, or do something in addition to what he did, to promote his safety.

The case is affirmed.

NOTE.—The following is the opinion of Thompson, District Judge, in the court below:

THOMPSON, District Judge. Leach stood on the rear platform, between the entrance door to the car and the gate, with his back towards or against the body of the car. The gate was 30 inches high. The platform was 4 feet 6 inches long from the door to the center of the dash board in the rear, and 5 feet wide from side to side, but narrowed a little between the steps leading to it from each side. At the time of the accident from six to eight passengers were standing on the platform. Through some ordinary movement of the car Leach lost his balance and was thrown against the gate, which gave way, precipitating him into the street and causing severe bodily injuries, and in his petition he claims that the giving way of the gate and the consequent injuries which he suffered were due to the negligence of the traction company in permitting the gate "to become dangerous, insecure, and an insufficient protection to passengers," specifying in detail the elements of insecurity and danger. The traction company, answering, denies specifically the allegations of the petition charging it with negligence. It denies that the gate "was

intended to be or was placed upon said car as a protection to passengers, other than to prevent passengers from entering upon or leaving the rear platform of said car from the blind or left side thereof," and denies that "said gate became or was dangerous, insecure, or an insufficient protection to passengers." And it alleges that, "if the plaintiff was injured to any extent at the time and place that said second amended petition alleges, his injury, if any, was caused by his own act in carelessly and negligently standing upon the rear platform of said car, without taking any precaution of maintaining himself upon said rear platform, and in carelessly and negligently failing to use ordinary care in standing upon said rear platform while said car was in motion, and in carelessly or negligently falling or permitting himself to fall with force and violence over, upon, and against the gate upon said rear platform, and in carelessly and negligently failing to observe the nature and construction of said gate as aforesaid."

It will be observed that the answer does not allege that the gate was insufficient to afford protection to passengers, but, on the contrary, denies that it "was an insufficient protection to passengers." It is not alleged in the answer, nor shown by the evidence, in what respect Leach was negligent in standing upon the platform and in falling against the gate; but it is shown by his testimony that he relied upon the gate for protection, that he came to Cincinnati on business four or five times a year for more than fourteen years, staying from five days to two weeks each time, and using street cars every business day, and observed that the gate was used as a safeguard to platform passengers, and had often seen people leaning against the same style of gate without objection by any employé of the company, and invariably, when he got on some of these cars with the scissors gates, he had seen men standing and leaning against the gate. The answer does not set up the defense of contributory negligence, but alleges that the plaintiff's "injury if any, was caused by his own act in carelessly and negligently standing upon the rear platform of said car," etc., and "that his injury, if any, was due to his own want of care, not to any negligence of any kind whatever on the part of the defendant." Beach, Contributory Negligence (2d Ed.) § 64; Birsch v. Citizens' Electric Company, 36 Mont. 574, 93 Pac. 940; Clark v. Canadian Pac. Ry. Co. (C. C.) 69 Fed. 544. Nor does the defendant in its answer specify any act of negligence on the part of Leach which caused his injury, but relies on his admission on the witness stand that he had not hold of anything that might have prevented him from being thrown against the gate. In the crowded condition of the platform it is doubtful whether there was anything that he could have taken hold of, and, moreover, as he testified, he depended upon the gate for protection, without knowledge of its defective condition. The defective gate, and not the loss of balance, was the proximate cause of his injury; for, as is said in Stappers v. Interurban, 56 Misc. Rep. 337, 106 N. Y. Supp. 854: "This case is not based upon negligent operation, but upon negligent maintenance of an appliance, to which a different rule must be applied."

Counsel for the defendant, in offering his exceptions to the charge of the court, stated that the court instructed the jury that the gate was intended as a protection to passengers, thereby assuming the province of the jury. In this counsel was mistaken. What the court did say was this: "The gate was put there for the purpose of preventing passengers from entering from that side of the car, or alighting from that side of the car; but the claim is that the passengers on the platform, passengers who were permitted to stand upon the platform, did not know the use and purpose and design of the gate, but that they looked upon it as a means of protection against being thrown to the street, and that it was of such a condition and character as that they had a right to rely upon it as a means of protection, and that they did rely upon it, but that it failed, because of the inefficiency of these means which should have properly held it in place. Now, if passengers were justified in relying upon this gate as a means of protection, and if it was not in proper condition, but was in the condition described in the petition, and because of it being in this condition, brought about by the alleged negligence of the defendant, the plaintiff was thrown into the street by the lurching of the car, and thereby denied the protection which this gate should have afforded him if it had been in proper condition and repair, if it was of such a character as that the passengers

had a right to rely upon it, then the defendant is to blame. If the gate was of such a construction, strength, and kind as to warrant the platform passengers in relying upon it as a means of protection, and if the plaintiff did rely upon it, and it failed to furnish him the protection which he had a right to rely upon, because of its being in a condition of nonrepair, such as I have already pointed out, and if his injuries were due to the negligence of the defendant in failing to keep it in a proper state of repair, then the plaintiff would be entitled to recover from the defendant such damages as would make him whole for the loss sustained by the reason of the injuries which he has suffered." The issues presented to the jury were whether the gate was of such construction, strength and kind as to warrant the platform passengers in relying upon it as a means of protection and whether the traction company negligently permitted it to become dangerous, insecure, and an insufficient protection to passengers, and upon these issues the jury found for the plaintiff.

The motion for a new trial, therefore, will be overruled.

THOMPSON v. JUDY, Bourbon County Jailer.

(Circuit Court of Appeals, Sixth Circuit. April 19, 1909.)

No. 1,891.

BANKRUPTCY (§ 424*)—DISCHARGE—"LIABILITIES" DISCHARGED.

The change made in Bankr. Act July 1, 1898, c. 541, § 17a(2), 30 Stat. 550 (U. S. Comp. St. 1901, p. 3428), which as originally enacted provided that a discharge should release a bankrupt from all of his provable debts except such as "are judgments in actions * * * for willful and malicious injuries to the person or property of another," and which was amended Feb. 5, 1903, c. 487, § 5, 32 Stat. 798 (U. S. Comp. St. Supp. 1907, p. 1026), by substituting for the words "judgments in actions" the word "liabilities," did not have the effect of removing judgments for such causes from the excepted class, but of including such liability, whether judgment has been rendered upon it or not.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 424.*
For other definitions, see Words and Phrases, vol. 5, pp. 4111–4116.]

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

H. Myers and E. Dickson, for appellant.

A. C. Cassatt, for appellee.

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

SEVERENS, Circuit Judge. On March 30, 1907, J. D. McClintock obtained a judgment in the circuit court of Bourbon county, Ky., against Wyatt A. Thompson for $1,500, damages for a false and malicious libel published in a newspaper by the defendant and others in April, 1906. On June 24, 1907, Thompson filed his voluntary petition in bankruptcy in the United States District Court for the Eastern District of Kentucky, and listed the said claim of J. D. McClintock as one of his liabilities. McClintock afterwards proved his claim in the case. On October 8, 1907, Thompson received his discharge in bankruptcy. On October 14, 1907, a writ of capias ad satisfaciendum was issued from the Bourbon circuit court, and was executed

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

on October 22, 1907, by the arrest of said Thompson, who was delivered into the custody of George W. Judy, jailer of Bourbon county. On October 23, 1907, Thompson filed his petition in the United States Circuit Court for the Eastern District of Kentucky for a writ of habeas corpus on the ground that the indebtedness upon which the capias was issued, namely, the judgment for damages for libel, had been discharged in bankruptcy. The writ was issued against Judy, the jailer of Bourbon county, and the petitioner was admitted to bail. Thereafter Judy filed his response, setting forth the proceedings in the circuit court of Bourbon county, and on final hearing Judge Cochran, who was presiding in the court below, held that the judgment in question was not discharged by proceedings in bankruptcy, and ordered that the petition for habeas corpus be dismissed and the petitioner be remanded to the state custody. From that order this appeal is taken.

The sole question in the case is whether the proceedings in bankruptcy operated to discharge the liability of the petitioner, which was the foundation of the judgment of the Bourbon circuit court, and the solution of it depends upon the construction of section 17 of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428]), which is as follows:

"Sec. 17. A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as (1) are due as a tax levied by the United States, the state, county, district, or municipality in which he resides; (2) are liabilities for obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another; (or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for criminal conversation); (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity."

The foregoing is section 17 of the act as amended by Act Feb. 5, 1903, c. 487, § 5, 32 Stat. 798 (U. S. Comp. St. Supp. 1907, p. 1026). That part of clause 2 which excepts from the operation of the discharge "liabilities" for willful and malicious injuries to the person or property of another is the provision here involved. That clause in the original act was the same, except that instead of the word "liabilities" the word "judgments" was employed. And the matter in dispute is, What was the consequence of the amendment which substituted "liabilities" for "judgments"?

Before the amendment, a liability for such a cause was not excepted unless it had been reduced to judgment. By the amendment it is excepted without being reduced to judgment. The contention of the appellant is that when a judgment has been obtained the liability is merged therein, and the claim no longer adheres to the liability, but is transmuted into another species of right, which was excepted by the original act, but, since the amendment, is no longer excepted. But not withstanding the ingenuity of the argument by which this contention is sought to be maintained, we are of opinion that the intention of Congress was to declare that such liability should be excepted whether a judgment had been rendered upon it or not. The general doctrine of

merger of the cause of action by judgment cannot, of course, be disputed. No suit or proceeding can thereafter be brought upon the original liability, but only for the enforcement of the judgment. The power of the court cannot be again invoked to adjudicate the question of liability. It is for the interest of the public that litigation shall come to an end, and the inconvenience of preserving the original liability as a continuing cause of action would be great. The pursuit must proceed along the line adopted, and the satisfaction of the claim must be sought through the judgment. But this rule of law prevails only to the extent that the reason for it exists. It does not prevent the recognition in the judgment of the attributes of the original cause of action. For the purposes of relief, the judgment embodies those attributes and gives ground for their enforcement. The rights of the parties are established, and are in no wise diminished thereby. So, when the judgment is general in form, it is often necessary to go behind it and see upon what liability it is founded, to the end that the characteristics of the cause of action may be impressed upon it. Such instances will recur to the mind of every lawyer. Indeed, Congress required this in this identical act when it excepted judgments for the particular causes of action mentioned in clause 2 of section 17. Now, we cannot resist the impression that Congress in making this amendment was looking to the substantial nature of the liability, and regarded the question as to whether a judgment had been rendered upon it as immaterial, that its intrinsic nature had not been altered and was in reality the cause of action intended by the original exception, and that Congress meant to protect that from the discharge. Apparently the requirement in the original act that the claim should have been reduced to judgment was intended to obviate the delay which a proceeding in the bankruptcy court for the liquidation of the damages would involve. And, finally, it would seem that in plain English a judgment on such a cause of action is a "liability" therefor.

But the appellant raises another question, which is whether a willful and malicious libel is an injury "to the person or property of another," and argues that by this language is meant a physical injury to his person, and not merely an injury to a right which the law attaches to the person. The question is therefore one of construction. It is true that in modern parlance the words "personal injury" are often used to designate a physical injury to the party. But usually, when there is any attempt to put the matter into legal phraseology, these and equivalent words are understood to import the meaning in which they have long been used by recognized authorities, whether in legal text-books and commentaries or precise definition by courts, in classifying the rights of individuals. In 1 Blackstone's Com. 129 et seq., the author classifies and distinguishes those rights which are annexed to the person, jura personarum, and acquired rights in external objects, jura rerum; and in the former he includes personal security, which consists "in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation." And he makes the corresponding classification of remedies. The idea expressed is that a man's reputation is a part of himself, as his body and his limbs

are, and that detraction of it is an injury to his personality, and Chancellor Kent in his twenty-fourth lecture shows that the same classification of rights was expressed in our colonial legislation and has always been observed, and on page *16 of the second volume of his Commentaries, he says:

"As a part of the rights of personal security, the preservation of every person's good name from the vile arts of detraction is justly included. The laws of the ancients, no less than those of modern nations, made private reputation one of the objects of their protection."

The reasonable presumption is that Congress, being engaged in framing a statute so much requiring precision of terms, expected its language to be interpreted by long-settled usage in legal nomenclature. We shall not particularly refer to the many decisions of courts where this subject has been considered, but will limit our references to cases where this particular language of the bankruptcy act and its construction were involved. McDonald v. Brown, 23 R. I. 546, 51 Atl. 213, 58 L. R. A. 768, 91 Am. St. Rep. 659; Sanderson v. Hunt, 116 Ky. 435, 76 S. W. 179; McChristal v. Clisbee, 190 Mass. 120, 76 N. E. 511, 3 L. R. A. (N. S.) 702.

We are not aware of any decision of the federal courts upon this precise question, but there are several which seem to point to the conclusion that the injuries contemplated in section 17 of the bankrupt act are not restricted to those which are inflicted upon the physical person of the party, but extend to those inherent rights of the person, which stand in the same class as his right to security from violence done to his body. Tinker v. Colwell, 193 U. S. 473, 24 Sup. Ct. 505, 48 L. Ed. 754; In re Freche (D. C.) 109 Fed. 620; In re Maples (D. C.) 105 Fed. 919. And see Leicester v. Hoadley, 66 Kan. 172, 71 Pac. 318, 65 L. R. A. 523.

The order of the Circuit Court must be affirmed, with costs.

NOTE.—The following is the opinion of Cochran, District Judge, in the court below:

COCHRAN, District Judge. These several proceedings are to secure the release of the petitioners from state custody under judgment against them respectively for libel. The grounds upon which their release is sought is that said judgments have been discharged by proceedings in bankruptcy instituted by them, respectively. The question depends upon whether said judgments can be said to be for a willful and malicious injury to the person of the plaintiff therein, within the meaning of section 17 (2) of the bankrupt act. Act July 1, 1898, c. 541, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3428). It has been expressly held that such a judgment is not within said section as it stood prior to the amendment of 1903 (Act Feb. 5, 1903, c. 487, § 5, 32 Stat. 798 [U. S. Comp. St. Supp. 1907, p. 1026]) in the cases of McDonald v. Brown, 23 R. I. 546, 51 Atl. 213, 58 L. R. A. 768, 91 Am. St. Rep. 659, and Sanderson v. Hunt, 116 Ky. 435, 76 S. W. 179.

The reasoning of these cases seems sound to me. It is argued, however, that they are erroneous, because elementary writers generally, in classifying wrongs, do not include injuries to the reputation in that to the person, but make a separate class of them. But the meaning of the words "injuries to the person," as used in the bankrupt act, must be taken as gathered from those words as there used, and not as used in elementary writers. Their meaning as there used is affected by the spirit and purpose of the bankrupt act. In the case of McDonald v. Brown, supra, Judge Tillinghast referred to this spirit and purpose in these words: "The policy of the bankrupt law is not to relieve

an insolvent debtor from liabilities arising out of his fraud or other wrongdoing, but to relieve him from his debts and obligations which were honestly contracted and incurred, but which, because of misfortune of some sort, he has become unable to meet. To hold otherwise, as it seems to us, would be to make the law an instrument of wrong and oppression." However, the learned judges who delivered the opinions in these cases undertake to show that an injury to the reputation is an injury to the person within the meaning of certain elementary writers. In the case of McChristal v. Clisbee, 190 Mass. 120, 76 N. E. 511, 3 L. R. A. (N. S.) 702, it was held that a malicious prosecution was an injury to the person, and therefore that a judgment therefor may not be released by a discharge in bankruptcy.

But it is claimed that the matter is affected by the amendment of 1903 in expressly excepting liabilities for seduction of unmarried females or for criminal conversation, which before the amendment were held to be within the exception under the words "injuries to the person." Tinker v. Colwell, 193 U. S. 473, 24 Sup. Ct. 505, 48 L. Ed. 754. The argument is that, because Congress saw fit to expressly except certain injuries to the person, it intended that such injuries to the person as we have here should not be within the exception. We fail to see how such an intent can be worked out. All that the express mention of said injuries to the person reveals as to the intent of Congress is that it thought proper that such injuries should be expressly excepted. In so far the amendment declared the law as it existed without the amendment. This it did also as to liabilities for alimony. Wetmore v. Markoe, 196 U. S. 68, 25 Sup. Ct. 172, 49 L. Ed. 390. As to the purpose of expressly excepting such liabilities Mr. Justice Day in that case said: "The amendment may also have been passed with a view to settling the law upon this subject, and to put at rest the controversies which had arisen from the conflicting decisions of the courts, both state and federal, upon this question. Indeed, in view of the construction of the act by the court in Audubon v. Shufeldt, 181 U. S. 575, 21 Sup. Ct. 735, 45 L. Ed. 1009, supra, it may be said to be merely declaratory of the true meaning and sense of the statute." So as to liabilities for seduction and criminal conversation the statute may be said to be declaratory that they are within the true meaning and sense of the statute; and this is the sole effect that can be given to their express mention. The exception is as broad as it ever was.

An order shall be entered dismissing the suits and remanding the petitioners to the state custody.

SOUTHERN RY. CO. v. LYONS.

(Circuit Court of Appeals, Fifth Circuit. April 19, 1909.)

No. 1,826.

1. MASTER AND SERVANT (§ 210*)—INJURIES TO SERVANT—ASSUMED RISK.

Plaintiff, an experienced railroad fireman 24 years old, and who had been in defendant's service for 11 months, was directed to accompany a wrecked engine to the shops and keep it oiled. In order to make the engine safe, the cab had been entirely removed, and with it the handholds usually attached thereto. Plaintiff, after oiling the engine at an intermediate station, attempted to mount it, and, reaching for the handhold which was absent, lost his balance, fell, and was injured. He testified that he thought the handholds had been replaced, though there was nothing on the engine to which they could have been attached. *Held*, that plaintiff assumed the risk of injury by the absence of such handholds.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 554; Dec. Dig. § 210.*

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

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

2. MASTER AND SERVANT (§ 111*)—INJURIES TO SERVANT—DEFECTIVE RAILROAD CARS.

The rule requiring the master to furnish reasonably safe and suitable machinery, tools, appliances, premises, etc., does not apply to defective cars and engines being removed to repair shops for repairs.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 215–217; Dec. Dig. § 111.*]

3. MASTER AND SERVANT (§ 217*)—INJURIES TO SERVANT—ASSUMED RISK.

A servant in general takes on himself the risk of dangers which ordinarily attend or are incident to the business in which he voluntarily engages, so that, if he handles defective appliances, the defects of which are known to or plainly observable to him without complaint to his employer, he assumes the risk of injury resulting therefrom.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574–600; Dec. Dig. § 217.*]

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

D. P. Bestor and B. B. Boone, for plaintiff in error.

Gregory L. Smith and Harry T. Smith, for defendant in error.

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

BURNS, District Judge. This suit, commenced in a state court, was removed to the Circuit Court of the United States for the Southern District of Alabama. The action was to recover damages for a personal injury suffered by the plaintiff whilst attempting to mount a defective and crippled engine, known as a "dead engine," then being hauled from Mobile to the Selma shops for the purpose of undergoing necessary repairs.

The case was submitted to the jury upon the fifth count of the complaint, which charges, in substance: That plaintiff was in the employ of the Southern Railway Company, charged with the duty of keeping an engine oiled while the same was being pulled by another engine in a train of cars from Mobile to Selma; that at the time of the injury complained of he was acting within the line of his duty under said employment; and that said injury resulted from the defective condition, which condition had not been remedied owing to the negligence of the person in the service of the defendant intrusted by it with the duty of seeing that the same was in a proper condition. The defendant answered by plea of not guilty, contributory negligence, and assumption of risk upon the part of the plaintiff. The trial resulted in verdict and judgment for $5,000. The defendant assigns several errors, two of which are treated in the brief and addressed to the refusal of the trial court to direct a verdict in its favor. These assignments will require an examination of the testimony in the light most favorable to the plaintiff.

In the progress of the matter brought here for review, it will not be necessary to state the testimony at any great length. It is sufficient to say that the evidence developed by the record discloses that an engine belonging to the defendant was wrecked in the yards of the com-

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

pany at Mobile, and, as a result thereof, it was ordered to the shops at Selma for repairs. The plaintiff, who had been in the service of the defendant as fireman for 11 months, was directed to accompany said engine and keep the same properly oiled, etc. He was not directed to ride upon said engine, nor did he do so. As the result of the injuries sustained, the cab, in railway vernacular, was "side swiped," and, in the language of one witness, it was completely wrecked. Plaintiff saw the engine, and demurred to the request that he attend the same, unless it was made safe. This the foreman promised to do, and his effort in this direction resulted in having the cab entirely removed. The train pulling the crippled or dead engine left Mobile about noon, and the plaintiff took passage on the head engine. At Pennsylvania Station, 14 miles from the starting point, he oiled the engine, and at Mt. Vernon, which was reached at about 4 o'clock in the afternoon, he again oiled the engine and removed from beneath the tender, attached to said engine, some brake rods which had become loose. Thereafter the train crew engaged in some switching, and passing plaintiff, who was standing upon the ground, he concluded that the train was leaving, and, while moving at a speed not to exceed five miles per hour, he attempted to mount the disabled engine, and, with the feed or oil can (about 3 feet long) in his right hand, reached for the handhold on the engine, lost his balance, fell, and received the injuries complained of. The evidence of the plaintiff further discloses that there was a handhold on the tender attached to the engine, and that the cab had two handholds on either side; same being attached to the cab and, of course, removed with it. He further states that he thought the handholds had been replaced, though there was nothing upon the engine to which they could be attached, except the woodwork of the cab. While the witness states that he thought the handholds had been replaced, he also says that there was no promise to do so. The absence of handholds is the sole ground of negligence relied upon.

To questions propounded by the court, the witness answered:

"The foreman (Nash) told me to go along with this engine and keep it oiled —keep the running gear oiled.

"Q. He employed you to go along and oil this broken engine? A. Yes, sir.

"Q. The cab was destroyed? A. Yes, sir.

"Q. And that part that had the handhold gone? A. Yes, sir.

"Q. Did you go on that engine at any time here in Mobile? A. No, sir; I was not on it.

"Q. You saw the condition of the cab? A. I saw the cab torn off.

"Q. And that handhold gone? A. Yes, sir.

"Q. The one on the tender still there? A. Yes, sir."

It appears that the engine was, with reference to the cab and handhold, in the same condition at Mt. Vernon, where the injury occurred, as when last seen by the plaintiff before leaving Mobile.

From the facts in this record, it conclusively appears:

1. That the defendant was not guilty of any act, or omission, which would constitute negligence, and therefore the plaintiff would not be entitled to recover.

2. That plaintiff knew the defective condition of the engine, this condition being the sole cause of sending the engine to the general

repair shops at Selma, and under every principle and authority the plaintiff assumed the risk incident to the patent and obvious defects in the engine, and particularly that caused by the absence of the handholds. He knew that the handholds were attached to the cab—"there was nothing else to attach them to"—and he knew that both cab and handholds had been removed before he left Mobile. To say that he thought they had been replaced is but to give rein to the imagination. With like propriety he might have thought that the cab had been replaced. The law charges him with the knowledge of defects so patent and plainly obvious.

The plaintiff is 24 years of age, has had adequate experience in the service, and, according to his testimony, was daily engaged in getting on and off engines. From the record we gather that he was not only experienced, but a man of intelligence. That a cause of action is not given to an injured employé, unless it first appears from the allegations and proof that the employer is guilty of negligence, would reasonably appear not to invite reference to authority. The doctrine which requires the master to furnish reasonably safe and suitable machinery, tools, appliances, premises, and the like, to the employé, is without application to cars and engines being moved to the repair shops for the purpose of complying with the rule that they be rendered safe and suitable. He had full and comprehensive notice of the defective condition of the engine.

The proposition that the employé engaged in making the necessary repairs, or engaged in moving a broken car or engine in order that the same may be repaired, assumes the ordinary risk of danger incident thereto, has abundant support.

In H. & T. C. Ry. Co. v. O'Hare, 64 Tex. 603, Mr. Justice Stayton, speaking for the court, says:

"That a railway company would not be liable to an employé engaged in running an engine for repairs to such place as might be necessary, if the employé knew of the defects, which made repairs necessary, is certainly true, for in such cases the employé would be held to have assumed the ordinary risks resulting from such defects."

In Railway Company v. Mayo, 14 Tex. Civ. App. 253, 37 S. W. 659, the facts were that Mayo met his death in attempting to couple two flat cars, upon one of which the coupling was defective. This car had tacked upon it a red card upon which was printed, "Bad order," and the same words were chalked upon the side of the car. The court held, upon the above facts, that there was no negligence upon the part of the company, and that the deceased assumed the risk.

In Watson v. Railway Company, 58 Tex. 438, the holding is announced:

"For general use the company must furnish its employés with sound, complete, and suitable cars, with all the usual and necessary attachments; but it is well known to all that the most complete and perfect car that can be contrived by the ingenuity of man is liable to become unfit for use, either by accident, or the nature of the business in which it is used, at points on the line where there are no facilities for making repairs, so that its removal to the shops of the company for that purpose becomes indispensable. Therefore some employé must engage in handling and removing them. This duty may be imposed upon any class of employés who are willing to assume the risks

incident to the employment; and it is immaterial whether this is the entire scope of the employment, or merely incidental to the main employment, the same result would follow. If the appellant accepted service as a brakeman, and by the usage or custom of the company it was a part of his duty to couple these defective or broken cars to the train so that the same could be carried to the shops for repairs, then he would be held to have assumed the risks incident to that particular employment. And as to the notice of the defective character of the car, if the usage of the company, in giving notice of such defect, consisted in chalking upon the car the words, "Out of order," and placing them upon a side track for removal, then it will be held that appellant engaged in the service subject to such usage or custom, and, if the notice in this case was given in the usual and customary manner, then it was sufficient."

In Flanagan v. Railway Company, 50 Wis. 462, 7 N. W. 337, it is said:

"Cars and engines are frequently damaged, and it becomes necessary to remove them to some proper place for repairs, and it may happen that they are so seriously damaged that their removal will be attended with some personal danger to those engaged in the work. Yet this is one of the perils of the business, and, if a person so employed is injured because of the broken and unsafe condition of the car or engine, he has no remedy against the owner, unless the owner has been otherwise negligent. Besides, in this case, the defect in the car which he attempted to climb upon was plain and visible, one which he could not fail to see had he looked where he was placing his foot."

To the same effect see: Yeaton v. Boston & Lowell Ry., 135 Mass. 418; Chicago & Northwestern Ry. v. Ward, 61 Ill. 130; Holden v. Fitchburg Ry., 129 Mass. 268, 37 Am. Rep. 343.

The general rule of law that a servant takes upon himself the risk of the dangers which ordinarily attend or are incident to the business in which he voluntarily engages, is well settled and undisputed. Where the employé handles defective appliances furnished by the master, where the defects are known to or plainly observable by him, without complaint to the employer, he assumes the risk of injury resulting therefrom. The authorities in support of this proposition are cited in volume 4, § 75, p. 3976, U. S. Digest (Lawyers Co-Operative Pub. Co.).

In the case of Railway Company v. McDade, 191 U. S. 68, 24 Sup. Ct. 24, 48 L. Ed. 96, after stating the general rule with reference to the duty of the master to provide suitable appliances in the operation of his business, the court announces:

"This rule is subject to the exception that where a defect is known to the employé, or is so patent as to be readily observed by him, he cannot continue to use the defective apparatus in the face of knowledge, and without objection, without assuming the hazard incident to such a situation. In other words, if he knows of a defect, or it is so plainly observable that he may be presumed to know of it, and continues in the master's employ without objection, he is taken to have made his election to continue in the employ of the master, notwithstanding the defect, and in such case cannot recover."

In the case of Butler v. Frazee, 211 U. S. 459, 29 Sup. Ct. 136, 53 L. Ed. ——, Mr. Justice Moody, speaking for the court, says:

"Where the danger is one that is suggested by the common knowledge which all possess, and both the conditions and the dangers are obvious to the common understanding, and the employé is of full age, intelligence, and adequate experience, and all these elements of the problem appear without contradiction from the plaintiff's own evidence, the question becomes one of law for the decision of the court. Upon such a state of the evidence, a verdict for

the plaintiff cannot be sustained, and it is the duty of the judge presiding at the trial to instruct the jury accordingly." Patton v. Texas Pacific, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361, and cases there cited.

We think it may be said, as a matter of law, that the plaintiff voluntarily assumed the risk.

Upon the errors assigned, the case should be reversed, and it is so ordered.

SPENCER v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. March 24, 1909.)

Nos. 2,684, 2,812.

1. JURY (§ 33*)—SELECTION—FEDERAL COURTS—DIVISION OF DISTRICT.
Act Cong. July 20, 1882, c. 312, 22 Stat. 172 (U. S. Comp. St. 1901, p. 349), divided Iowa into the Northern and Southern judicial districts, the Southern being in turn divided into the Eastern, Central, and Western divisions; and Act June 1, 1900, c. 601, 31 Stat. 249 (U. S. Comp. St. 1901, p. 353), created an additional or Southern division in the Southern district. Section 5 declared that all grand and petit jurors for the Southern division should be selected from citizens residing therein; no such provision being made, however, with reference to the other divisions of such district. *Held*, that such acts did not require that jurors drawn for service in the Central division should be citizens residing in such division, it being sufficient that they resided within the district.

[Ed. Note.—For other cases, see Jury, Dec. Dig. § 33.*]

2. STATUTES (§ 220*)—CONSTRUCTION—IMPLIED LEGISLATIVE INTERPRETATION.
The opinion of legislative bodies concerning an existing ambiguous or uncertain law, manifested by or implied from the passage of subsequent acts relating to the same subject, is some, though not controlling, evidence of the true meaning of the original law.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 298; Dec. Dig. § 220.*]

3. JURY (§ 33*)—"JURORS."
The word "jurors" as used in Rev. St. § 802 (U. S. Comp. St. 1901, p. 625), declaring that jurors shall be returned from such parts of the district from time to time as the court shall direct, etc., embraced both grand and petit jurors.

[Ed. Note.—For other cases, see Jury, Dec. Dig. § 33.*

For other definitions, see Words and Phrases, vol. 4, pp. 3887–3888.]

4. JURY (§ 33*)—TRIAL BY JURY—RESIDENCE OF JURORS—STATUTES.
Under Const. U. S. Amend. art. 6, providing that accused shall enjoy the right to a speedy and public trial by an impartial jury of the state or district where the crime shall have been committed, which district shall have been previously ascertained by law, Rev. St. § 802 (U. S. Comp. St. 1901, p. 625), providing that jurors shall be returned from such parts of the district as the court shall direct so as to be more favorable to an impartial trial, was not unconstitutional in so far as it permitted the summoning of jurors from parts of the district not containing the county in which the crime was committed, as depriving accused of a constitutional right to be tried by an impartial jury of the district wherein the crime was committed.

[Ed. Note.—For other cases, see Jury, Dec. Dig. § 33.*

Right to trial by jury in federal court, see notes to O'Connell v. Reed, 5 C. C. A. 603; Vany v. Peirce, 26 C. C. A. 528.]

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

5. EMBEZZLEMENT (§ 20*)—MONEY OF BANK—COLLECTION BY AGENT.
Accused's duty was to take drafts or other items received by a national bank by which he was employed from its patrons for collection, present them to the drawees or others liable thereon, receive the money due, and return it to the bank. He, however, reported a less amount collected than he actually received, and converted the difference. *Held*, that in making the collection he acted as the bank's agent, and that the money, while in his possession and before it had been actually deposited in the bank, belonged to it, and that he was therefore properly convicted of embezzling the same.
[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. §§ 22, 23; Dec. Dig. § 20.*]

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

Williamson S. Summers and Charles S. Bradshaw, for plaintiff in error.

Marcellus L. Temple, for the United States.

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

ADAMS, Circuit Judge. Two indictments were found against Carl M. Spencer, the plaintiff in error, in the District Court of the Central Division of the Southern District of Iowa—one charging him in 10 counts with making that number of false entries in one of the books of the Des Moines National Bank of which he was a clerk, with the intent of injuring and defrauding the bank; the other charging him in 5 counts with that number of separate embezzlements of the funds of the bank; each in violation of section 5209, Rev. St. (U. S. Comp. St. 1901, p. 3497). The cases were separately tried, and the defendant was found guilty on each and all the counts of both indictments, and judgment was pronounced against him accordingly. The present writs of error are prosecuted to secure a reversal of these judgments.

In the first case, involving the false entries, no other question is presented for our consideration except the legality of the constitution of the grand and petit juries which indicted and tried the defendant. That question, and also the question whether the money alleged to have been embezzled was the money and property of the bank as charged in the indictment, are the only questions presented in the second case. These cases were argued and submitted to the court together.

1. Touching the first question common to both cases, the only pertinent facts are that the jurors were drawn from the body of the Southern district of Iowa, and not exclusively from the Central division of that district where the trial occurred; and also that by an order of court before then made and applicable to all the divisions of the Southern district no citizen of the county in which the court should be held could be drawn for service on either the grand or petit jury, and as a result of that order no citizen of Polk county, the same being the county in which the District Court for the Central division was held, was permitted to serve in this case. Did either of these facts invalidate the panels?

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

By Act July 20, 1882, c. 312, 22 Stat. 172 (U. S. Comp. St. 1901, p. 349), the state of Iowa, which before then had constituted only one judicial district, divided into four divisions, was divided into two judicial districts—the Northern and Southern. The same act divided the Southern district "for the purpose of holding terms of court" into three divisions, called the Eastern, Central, and Western divisions, and designated the counties of the state which should constitute each one of these divisions. A later act approved June 1, 1900 (Act June 1, 1900, c. 601, 31 Stat. 249 [U. S. Comp. St. 1901, p. 353]), carved out of the counties composing the three divisions an additional division denominated the "Southern Division of the Southern District." By section 5 of the latter named act it was provided:

"That all the grand jurors and all jurors for the trial of civil and criminal causes in the division hereby created [the Southern] shall be selected from citizens residing in the division created by this act."

No such provision is found in the act of 1882 creating the Eastern, Central, and Western divisions.

Defendant's contention is that the jurors should have been drawn exclusively from the Central division of the district. This contention made under similar statutes was considered by us in the light of all the authorities in the recent case of Clement v. United States, 149 Fed. 305, 79 C. C. A. 243, and was disapproved. We there held that, although Congress subdivided the one judicial district of Minnesota which had been previously ascertained by law into six divisions "for the purpose of holding terms of court," those divisions were not thereby established as separate judicial districts so as to require a grand or petit jury to be drawn from each division for the accusation and trial of offenses originating therein. We see no reason for departing from the conclusion then reached, and, for the reasons there stated, we hold that the defendant was lawfully indicted and tried by jurors drawn from the body of the Southern district of Iowa.

2. It is next argued that, as section 5 of the act of 1900 creating a Southern division of the Southern district contains a provision that all grand and petit jurors in that division should be drawn from citizens resident therein, it amounts to a legislative declaration that as the residents of the Central division are disqualified from service on the juries in the Southern division, therefore the reverse is true, and no resident of the Southern or any other division is qualified to sit as a grand or petit juror in the Central division. We fail to appreciate the force of this argument. If any implication on this subject is manifest by section 5, it would seem to be exactly the contrary. If the law had previously been as now contended by defendant's counsel, there was no occasion for the enactment of section 5, as, even without it, only residents of the Southern division would be qualified to serve as jurors in that division. Why, therefore, did Congress make the special provision in section 5? Obviously because it recognized the general rule to be as indicated by us, and wished to depart from that rule and make an exception with respect to this particular division, and deemed it necessary to do so in express terms in order to accomplish its purpose.

The opinion of legislative bodies concerning an existing ambiguous or uncertain law manifested by or implied from the passage of subsequent acts relating to the same subject is some, though not controlling, evidence of the true meaning of the original law. License Tax Cases, 72 U. S. 462, 473, 18 L. Ed. 497; Davis v. Gray, 83 U. S. 203, 223, 21 L. Ed. 447; Matthews v. McStea, 91 U. S. 7, 13, 23 L. Ed. 188; Farmers', etc., Nat. Bank v. Dearing, 91 U. S. 29, 36, 23 L. Ed. 196; Pompton v. Cooper Union, 101 U. S. 196, 201, 25 L. Ed. 803; Fussell v. Gregg, 113 U. S. 550, 561, 5 Sup. Ct. 631, 28 L. Ed. 993; Sarlls v. United States, 152 U. S. 570, 577, 14 Sup. Ct. 720, 38 L. Ed. 556; Rosencrans v. United States, 165 U. S. 257, 262, 17 Sup. Ct. 302, 41 L. Ed. 708; Barber Asphalt Paving Co. v. City of Denver, 72 Fed. 336, 345, 19 C. C. A. 139.

3. Did the order of court excluding residents of Polk county from service on the grand or petit jury invalidate the panels? This order was made pursuant to the provision of section 802, Rev. St. (U. S. Comp. St. 1901, p. 625), that:

"Jurors shall be returned from such parts of the district from time to time as the court shall direct so as to be most favorable to an impartial trial and so as not to incur an unnecessary expense or to unduly burden the citizens of any part of such district with such service."

This statute, by employing the comprehensive term "jurors," embraces both grand and petit jurors (United States v. Stowell, 2 Curt. 153, Fed. Cas. No. 16,409; Agnew v. United States, 165 U. S. 36, 44, 17 Sup. Ct. 235, 41 L. Ed. 624), and in terms authorized the order in question. But the contention is that the statute violates the constitutional right of the accused to be tried by an impartial jury of the district wherein the crime was committed; in other words, that the vicinage from which the accused was entitled to have the jurors summoned embraced Polk county, and that the order in question deprived him of the right to which he was so entitled. We think this position is untenable. The Constitution left it to Congress to determine the districts from which the required impartial jury should be summoned.

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law." Article 6 of Amendments.

Obedient to this constitutional mandate, Congress created a judicial district known as the "Southern District of Iowa," and thereby ascertained and fixed the maximum limits of the territory from which a jury might be summoned to try cases originating therein.

The large number of counties which compose most judicial districts render it physically impossible to secure one grand juror, and very difficult to secure one petit juror, from each county of each district; hence, in the ordinary administration of the law governing the selection of jurors (section 800 et seq., Rev. St. [U. S. Comp. St. 1901, p. 623]), it would be impossible to secure a jury composed of one or more members from each county of a district. But in addition to this suggestion of convenience, it is apparent that one of the main purposes of the constitutional provision was to secure a trial by an im-

partial jury. The details of working out this main purpose were necessarily left to Congress. In the performance of this delegated function section 802 was early in our history (September 24, 1789) enacted. Its language discloses that its principal object was to secure the "speedy trial by an impartial jury" guaranteed by the Constitution. It therefore comes fairly within the powers conferred upon Congress, or within those necessarily implied, and is rather in execution than in derogation of the organic law.

The views just expressed have received judicial sanction in the following cases: United States v. Ayres (D. C.) 46 Fed. 651; United States v. Greene (D. C.) 113 Fed. 683; United States v. Peuschel (D. C.) 116 Fed. 642.

4. Did the money appropriated by the defendant belong to the bank? Defendant's duty was to take drafts or other items received by the bank from its patrons for collection, present them in person to the drawees or others liable on them, receive the money due on them, and return it to the bank. His method of doing it was to report to his superiors in the bank a less amount collected than he actually received, and convert the difference to his own use. He necessarily had made the collection and had taken the money into his own possession before the act of conversion took place. In making the collection he was clearly acting as agent for the bank, and his duty as such agent was to report and deliver the full amount collected to his principal. As between him and the bank the money undoubtedly belonged to the latter, and any appropriation of it was the appropriation of the money of the bank.

The conclusion just stated seems self-evident, and would not be noticed further except for the contention of defendant's counsel that title was not vested in the bank until the actual deposit in the bank of the amount collected by defendant. Some cases concerning title to money as between a depositor and the bank are called to our attention. They generally have arisen in attempts to follow trust funds where the circumstances connected with their deposit were determinative of the rights of the parties, and in them expressions are found to the effect that the relation of debtor and creditor does not arise until money is actually deposited over the counter, or the deposit is not complete until the money is actually delivered at the bank with intention to make a deposit. These cases are cited and referred to in Zane on Banks & Banking, §§ 130, 131. This case, however, does not concern the title or ownership of money as between the owner of the items sent for collection and the bank. Their relationship may be that of debtor and creditor, trustee and cestui que trust, bailor and bailee, according to instructions given at the time, custom and usage of business, or other facts and circumstances attending each particular transaction. We shall accordingly not undertake to discuss the law applicable to all such situations.

The Supreme Court of the United States in the leading case of Exchange Nat. Bank v. Third Nat. Bank, 112 U. S. 276, 5 Sup. Ct. 141, 28 L. Ed. 722, contrary to the rule prevailing in many states, held that when banks receiving items for collection forward them to their cor-

respondents to be collected from a debtor residing at a distance, in the absence of any contrary understanding, they make the correspondent their own agent and become liable for his conduct. Much more would this be true between the bank and its clerk or agent employed by it to make collections. The bank is responsible for the acts of its agent, and cannot escape liability to its patrons for the money appropriated by the agent. Clearly, then, as between the bank and the agent, the money belonged to the former, and the agent cannot be heard to say that the money which his principal authorized him to collect for its account belonged to any one but his principal.

The judgment in both these cases must be affirmed.

MILLER v. MISSOURI, K. & T. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. April 3, 1909.)

No. 2,900.

1. MASTER AND SERVANT (§ 101*)—INJURIES TO SERVANT—DEFECTIVE APPLIANCES.

It is the duty of the master to furnish appliances free from defects discoverable by the exercise of ordinary care.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 171–184; Dec. Dig. § 101.*

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

2. MASTER AND SERVANT (§ 285*)—INJURIES TO SERVANT—RAILROADS—DEFECTIVE FREIGHT CARS—NEGLIGENCE—QUESTION FOR JURY.

In an action for injuries to a railroad brakeman by a defective handhold on the corner of a freight car, whether the end of the handhold which came loose was fastened with a lag screw, or whether the wood comprising the roof of the car to which it was fastened had been permitted to become decayed so that it was insufficient to hold the screw, and, if so, whether such condition could have been discovered by reasonable and ordinary inspection, or whether the handhold had been fastened by bolts which had broken off by reason of some latent defect which could not have been so discovered, *held* for the jury.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 285.*]

3. MASTER AND SERVANT (§ 208*)—INJURIES TO SERVANT—ASSUMED RISK.

While an employé assumes all the ordinary risks incident to the service or business in which he is engaged, he does not assume the risk arising from the neglect of the employer to perform a positive duty as to furnishing proper appliances, except where the employé receives or uses a defective appliance, and, with knowledge of the defect, continues to use it without notice to the employer.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 551–558; Dec. Dig. § 208.*

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

4. NEGLIGENCE (§ 136*)—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Where there is uncertainty as to the existence of either negligence or contributory negligence, the question is one of fact for the jury; and this whether the uncertainty arises from a conflict of the testimony, or be-

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

cause, the facts being undisputed, fair-minded men may honestly draw different conclusions therefrom.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277–353; Dec. Dig. § 136.*]

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

C. C. Lawson and Silver & Brown, for plaintiff in error.

George P. B. Jackson, for defendant in error.

Before HOOK, Circuit Judge, and RINER and AMIDON, District Judges.

RINER, District Judge. This action, commenced in the state court, was removed to the Circuit Court of the United States for the Western District of Missouri by the defendant, on the ground that the controversy was one wholly between citizens of different states; the defendant being a citizen of the state of Kansas and the plaintiff a citizen of the state of Missouri. The parties are here arranged as they were in the court below, the plaintiff in error being the plaintiff and the defendant in error being the defendant, and for convenience they will be hereafter referred to as plaintiff and defendant, respectively. The object of the action is to recover for personal injuries suffered by the plaintiff while engaged as a brakeman in the employ of the defendant. At the conclusion of the testimony, the court instructed the jury to return a verdict in favor of the defendant. A judgment was entered in favor of the defendant upon the verdict, and this writ of error is sued out to reverse that judgment.

The record discloses the following state of facts: That the defendant was a railroad corporation created and organized under the laws of Kansas and operating a line of railroad from St. Louis, Mo., to Harrisonville, Mo., and in other states; that a part of its lines of railroad extended from Sedalia, Mo., to Paola, Kan.; that the plaintiff on September 29, 1905, was a brakeman on one of its freight trains being operated between Sedalia and Paola; that the train on which he was employed arrived at East Lynn, a station in Cass county, Mo., about 4:30 o'clock in the morning; that at the time the train arrived it was still dark; that there was no light in the station, and that he had no light other than that furnished by a lantern carried by him; that, upon the arrival of the train at East Lynn, the conductor directed the plaintiff to uncouple the engine and get a car that was then standing on the side track near the station; that between this car and the switch-head on the side track there was a string of cars which it was necessary to couple onto and push back east, the train being headed west, to a connection with the car they desired to take out so that it might be coupled on for the purpose of placing it in the train; that there was a road crossing near the station and this car was separated from the other cars at the crossing, the car desired being on the east side of the crossing, and the other cars in the string on the west side; that, after coupling the engine to the string of cars, the plaintiff ascended to the top of the first car to release the brakes upon this

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

string of cars so that they could be moved; that he passed from car to car, releasing the brakes upon each until he came to the last car but one, and, after releasing the brake, he proceeded to the ladder on the southeast corner of the car, as it then stood, for the purpose of descending in order to make the coupling with the car which they desired to put into the train; that in doing so he placed his feet upon one of the iron bars bolted to the car to be used as a step for the ladder, and got hold of what is designated in the testimony as the grab iron or bar which is bolted onto the roof of the car, and is used in conjunction with the bars on the side as a ladder; that as he was in the act of doing this the grab iron pulled loose at one end, causing the plaintiff to fall backward and to the ground, a distance of about 14 feet, striking on his hip and back, thereby receiving the injuries here complained of.

The testimony tends to show that this car from which the plaintiff fell was known as a "bad order" car, although there is nothing in the record disclosing that it was so marked or in what respect it was damaged. The evidence does show, however, that whatever the damage to the car was it did not affect the appearance of the car on top. The plaintiff testified that he did not know it was a bad order car, that at the time he attempted to descend he noticed the handhold by the light of his lantern, and that it was apparently all right. The testimony shows that the plaintiff was a brakeman on a through freight, and had been in the service of the company but a short time. He testified that, while he had heard some of the trainmen say there were some bad order cars scattered along at the different sidings, he did not know there were any cars of that character in the string he was then handling, and could not know from his position on top of the car. The record shows that the track upon which this car was standing was not a track set apart for "bad order" cars, but was a side track at a small station for general use; the shops being at Sedalia where "bad order" cars were usually stored for the purpose of being repaired.

John Beems, a car repairer in the shops at Sedalia, was sent out by the foreman of the shops the day following the plaintiff's injury to examine the car from which the plaintiff fell. He testified that one end of the handhold had been fastened to the top of the car with a lag screw, that the lag screw had pulled out, and that the timber on top of the car at the place where the lag screw had been fastened was decayed and rotten. He testified on cross-examination that he knew it had been fastened with a lag screw, because the screw, which was about four inches in length, was still in the handhold. He further testified that the corner of the car was not broken down or otherwise damaged, but that this screw had given way simply because of the rotten condition of the wood; that, if the car was damaged otherwise, it was not discernible from the top.

J. C. Ragsdale, a witness for the defendant, testified that he was a freight brakeman on the opposite crew to the plaintiff; that a few nights after the accident to the plaintiff his train stopped at East Lynn; that while doing some work there the other brakeman of his crew called his attention to the fact that this handhold was loose at one end; that he was at that time on the top of the car, and testified

that the car was not "cornered" at the time, meaning thereby, as the testimony shows, that it was not broken down.

Thickitt, a witness for the defendant, testified that he was one of its claim agents; that he saw the car from which the plaintiff fell in the yards at Sedalia on the 17th of November, 1906, a year and three months after the accident; that he identified it by its number; that the car at the time he saw it showed that it had been wrecked, knocked off its trucks, and the truss rods knocked out of place; that it had been "cornered" and the timber shattered. He further testified that the damage to the car was old; that the handhold at the top had been fastened at one end with an angle bolt, and at the other by a button-headed carriage bolt; that neither end had ever been fastened with a lag screw. He further testified that the car was chalk-marked "B. O." meaning bad order. An effort was also made to show that it was a custom of the defendant to put bad order cars upon side tracks at different stations.

It will thus be seen that the testimony was squarely in conflict upon the vital issue in the case. The rule is elementary that it is the duty of the employer to furnish appliances free from defects discoverable by the exercise of ordinary care, and that the employé has a right to rely upon this duty being performed; hence it was all important in this case to determine whether or not the end of this handhold which came loose was fastened with a lag screw, and whether the wood comprising the roof of this car to which it had been fastened was allowed to become rotten and decayed, so that it was insufficient to hold the screw, and, if so, whether that condition could have been discovered by the exercise of ordinary care—that is, reasonable and ordinary inspection—or whether the handhold had been fastened to the top of the car by bolts, and that these bolts had broken off by reason of some latent defect which could not be discovered by the exercise of ordinary care. In the one case, if by the exercise of ordinary care the defect could have been discovered, there would be liability in the other, if the exercise of ordinary care would not have disclosed the defect, there would be no liability; and this, we think, was a question for the jury to determine.

It is undoubtedly the settled rule that an employé entering the service of another assumes all of the ordinary risks incident to that service or business. He does not, however, assume the risk arising from the neglect of the employer to perform a positive duty owing to the employé with respect to appliances. The exception to this rule, which is abundantly established by judicial decisions, is that, where the employé receives for use a defective appliance and with knowledge of the defect continues to use it without notice to the employer, he cannot recover for an injury resulting from the defective appliance thus voluntarily used by him. But, as stated by the Supreme Court in the case of Texas & Pacific Railway Company v. Archibald, 170 U. S. 665, 18 Sup. Ct. 777, 42 L. Ed. 1188:

"No reason can be found for and no authority exists supporting the contention that an employé, either from his knowledge of the employer's methods of business or from a failure to use ordinary care to ascertain such methods, subjects himself to the risks of appliances being furnished, which contain de-

fects that might have been discovered by reasonable inspection. The employer on the one hand may rely on the fact that his employé assumes the risks usually incident to the employment. The employé on the other has the right to rest on the assumption that appliances furnished are free from defects discoverable by proper inspection, and is not submitted to the danger of using appliances containing such defects because of his knowledge of the general methods adopted by the employer in carrying on his business, or because by ordinary care he might have known of the methods, and inferred therefrom that danger of unsafe appliances might arise."

This rule does not relieve the employé from observing patent defects in the appliances, for in entering an employment which is hazardous he assumes the usual risks of that service, including those which are apparent to ordinary observation. The risks which are not obvious that the employé assumes are such perils only as exist after the master has used due care to guard the former against the danger. Gibson v. Erie Railway Co., 63 N. Y. 449, 20 Am. Rep. 552; De Forest v. Jewett, 88 N. Y. 264; Williams v. Delaware, Lackawanna, etc., Railroad, 116 N. Y. 628, 22 N. E. 1117; Hough v. Railway Company, 100 U. S. 214, 25 L. Ed. 612, and cases there cited; Choctaw, etc., Railway v. McDade, 191 U. S. 64, 24 Sup. Ct. 24, 48 L. Ed. 96; U. P. Railway Co. v. Snyder, 152 U. S. 684, 14 Sup. Ct. 756, 38 L. Ed. 597. The rule in cases where there is a substantial conflict of evidence upon a vital issue in the case, or where from the evidence fair-minded men might honestly draw different conclusions, is clearly stated by Mr. Justice Brewer in the case of Richmond & Danville Railroad Company v. Powers, 149 U. S. 43, 13 Sup. Ct. 748, 37 L. Ed. 642, as follows:

"It is well settled that, where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this whether the uncertainty arises from a conflict in the testimony, or because, the facts being undisputed, fair-minded men will honestly draw different conclusions from them"—citing in support of the rule Railway Co. v. Stout, 17 Wall. 657, 21 L. Ed. 745; Washington & Georgetown Railroad v. McDade, 135 U. S. 554, 10 Sup. Ct. 1044, 34 L. Ed. 235; Delaware, Lackawanna, etc., Railroad v. Converse, 139 U. S. 469, 11 Sup. Ct. 569, 35 L. Ed. 213; Gardner v. Railway Co., 150 U. S. 349, 14 Sup. Ct. 140, 37 L. Ed. 1107; Felton v. Bullard, 94 Fed. 781, 37 C. C. A. 1.

In the case of Gardner v. Railway Co., supra, the Supreme Court speaking by Chief Justice Fuller, said:

"The question of negligence is one of law for the court only where the facts are such that all reasonable men must draw the same conclusion from them, or, in other words, a case should not be withdrawn from the jury unless the conclusion follows as a matter of law that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish."

The defendant in error cites and relies upon two cases only. Chesapeake & O. R. Co. v. Hennessey, 96 Fed. 713, 38 C. C. A. 307, and Florence & C. C. R. R. Co. v. Whipps, 138 Fed. 13, 70 C. C. A. 443. We do not think either of these cases are decisive of this case. In the case of Railroad Company v. Hennessey, in which it was held that a recovery could not be had, the record disclosed that Hennessey was a switchman in the yards of the company at Russell where some of the company's repair shops were located; that it was his business to handle damaged cars and to put them on certain tracks set aside especially

for the purpose of handling such cars, and cars that had been repaired and these tracks were known as "repair tracks"; that the accident happened about 4 o'clock in the afternoon; that the damaged condition of the car was plainly observable, and therefore he must be held to have assumed the risk of handling it. The case of Florence & C. C. R. R. Co. v. Whipps was a case where a rock slide had occurred in a cañon in the mountains through which the railroad was operated, and that Whipps, together with some sectionmen and bridge hands, was sent to the point where the slide occurred to clear the track, and while engaged in that work a large rock fell from the mountain side, striking Whipps and producing injuries which resulted in his death. The work was being conducted at night; the slide occurring in the afternoon. A recovery was sought upon the ground that one of the sectionmen in reply to a question said that he had examined the slide before dark and that he considered the place safe, and, therefore, the rule that the railroad company was bound to furnish a safe working place for Whipps was invoked. The court held that "the doctrine of a safe place had no application." In disposing of the case the court said:

"The place was not in a condition made or chosen by the defendant, but in such condition as the disaster had left it. It was the plain duty of the servants in such an exigency, without awaiting orders, to engage in and hurry the work of clearing the obstruction from the track, and incidentally to look after and guard their own safety while so engaged."

After a careful examination of the record, in view of the conflicting character of the evidence, we are of opinion that the case should have been left to the determination of the jury under proper instructions.

The judgment must be reversed and the case remanded, with directions to grant a new trial.

PENNSYLVANIA CO. v. WHITNEY.

(Circuit Court of Appeals, Sixth Circuit. May 11, 1909.)

No. 1,841.

1. TRIAL (§ 83*)—OBJECTIONS TO EVIDENCE—SUFFICIENCY.
   An objection to evidence, the ground of which is not stated, is fatally defective.
   [Ed. Note.—For other cases, see Trial, Cent. Dig. § 198; Dec. Dig. § 83.*]

2. EVIDENCE (§ 539*)—EXPERT WITNESSES—COMPETENCY.
   Where a witness testified that he had had 25 years' experience as a brakeman and conductor on the E. Railroad, that he was familiar with railroading and the operation of engines, and also with the kind of engines used by defendant company, and knew of no particular in which they differed from the E. engines, his competency to testify as an expert concerning the operation of defendant's engines was sufficiently shown.
   [Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2349; Dec. Dig. § 539.*]

3. APPEAL AND ERROR (§ 1048*)—EVIDENCE—PREJUDICE.
   In an action for injuries to a railroad employé, defendant was not prejudiced by the allowance of a question asked of an expert witness

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

which failed to take into account a condition of the track, the only tendency of which could have been to show the necessity of greater diligence in the operation of defendant's engines.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4140; Dec. Dig. § 1048.*]

4. APPEAL AND ERROR (§ 1046*)—HARMLESS ERROR—REMARKS OF COURT.
Where, in an action for injuries to a railroad employé, after a question had been asked of an expert and the court asked whether an up or down grade of 10 per cent. was meant, plaintiff's counsel expressly disclaimed knowledge of the per cent. of the grade, and put the question again, assuming the engines to be going "slightly downgrade," defendant was not prejudiced by the court's query as assuming a percentage grade.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4134; Dec. Dig. § 1046.*]

5. MASTER AND SERVANT (§ 276*)—INJURIES TO SERVANT—EVIDENCE.
In an action for injuries to a servant by being thrown from the cab of his engine onto an adjoining track, where he was struck by another car, evidence *held* insufficient to require a judgment for defendant on the theory that the manner in which plaintiff claimed he was hurt was contrary to natural laws.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 950; Dec. Dig. § 276.*]

6. TRIAL (§ 191*)—INSTRUCTIONS—ASSUMED FACTS.
In an action for injuries to a railroad fireman by being thrown from the cab of his engine, an instruction that, if the accident happened in consequence of plaintiff leaving his engine by a voluntary movement not induced or caused by the shock or jolt of the preceding engine leaving the track, he could not recover, but that if he left the engine in consequence of the shock or jolt, being himself in the exercise of due care, defendant would be liable if negligent, was not objectionable as assuming a fact in dispute, viz., that there was a shock or jolt to the engine.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 430; Dec. Dig. § 191.*]

7. TRIAL (§ 281*)—INSTRUCTIONS—EXCEPTIONS.
An exception, "We except generally to the charge," is insufficient if the charge contains any correct proposition.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 694; Dec. Dig. § 281.*]

8. MASTER AND SERVANT (§ 291*)—INJURIES TO SERVANT—VARIANCE.
In an action for injuries to a servant, defendant's evidence was that plaintiff voluntarily left his engine and went on the track, where he was struck. This evidence presented a variance from the case pleaded by plaintiff, but the question of variance was not raised by a request to charge nor specifically by motion to direct a verdict, whereupon the court charged that, if the accident happened by plaintiff leaving his engine by a voluntary movement not induced or caused by the shock or jolt of the preceding engine leaving the track, he could not recover, but that he could recover if he was not negligent and left the engine in consequence of such shock or jolt. *Held*, that such charge was not erroneous as permitting a recovery on evidence constituting a variance, there being no claim that defendant was misled thereby.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1133; Dec. Dig. § 291.*]

9. PLEADING (§ 237*)—VARIANCE—AMENDMENT.
In an action for injuries to a railroad fireman, defendant introduced evidence that plaintiff voluntarily left his engine and went to the place where he was injured. The court charged that if the accident happened by plaintiff leaving his engine voluntarily he could not recover, but if he

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

left in consequence of a shock or jolt and defendant was negligent, plaintiff could recover. *Held*, that if the latter portion of the charge had been excepted to, because of an alleged variance with the petition, an amendment to the petition to meet the proofs would have been permissible.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 603; Dec. Dig. § 237.*]

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

W. B. Sanders, for plaintiff in error.

D. F. Anderson, for defendant in error.

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

KNAPPEN, District Judge. The defendant in error (hereafter called the plaintiff) sued to recover damages on account of injuries suffered by him while in the service of the defendant as a locomotive fireman, under these circumstances: A heavy freight train, made up at Ashtabula Harbor and bound south, pulled by one engine, required additional power to take the train to the summit of Munson's Hill, several miles south of Ashtabula Harbor. Accordingly, two freight engines were attached to the rear of the train for the purpose of pushing it, the caboose being in the rear of the two pushing engines. The plaintiff was fireman upon the second of the pushing engines. At or near the summit of Munson's Hill was a switch connecting with a side track, extending about 286 feet to the south and lying to the east of and (beyond the limit of the necessary curve) parallel with the main track. At the terminus of the switch track there were no bumpers, the ground being at that point considerably depressed. The disconnecting of the engines from the train at Munson's Hill, and the connecting of the caboose to the train, were accomplished by means of a flying switch, the engines (with the caboose in the rear) being detached from the train and stopped a short distance before reaching the switch points, the switch being thrown (after the train had passed onto the main track) so as to allow the engines to pass onto the side track, and the caboose during the forward movement of the engines being detached therefrom and its speed so checked as to permit the throwing of the switch after the passage of the engines upon the side track and before the caboose reached the switch points. The switch on this occasion was thrown by the fireman of the forward pushing engine. After the engines had passed some distance down the side track, and when parallel with the main track, the plaintiff in some way left his engine and was thrown or went upon the main track, in front of the caboose, and was injured. The testimony showed that the forward one of the two engines ran off the end of the switch track, dropping into the depression mentioned. The plaintiff contended that by the shock so communicated to the rear engine (which was coupled to the forward engine) he was thrown from his engine onto the main track without fault on his part. The defendant contended that the plaintiff voluntarily and negligently, and without reason there-

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

for, jumped from his engine, alighted upon his feet, and deliberately walked upon the main track in front of the approaching caboose.

It was the plaintiff's claim, as submitted to the jury, that both the conductor of the train and the engineer of plaintiff's engine were negligent in causing this flying switch to be made with two locomotives coupled together and on so short a switch track, and under the conditions then existing, which rendered it difficult to check the engines before reaching the end of the track. There was a verdict for the plaintiff, judgment was entered thereon, and motion for new trial denied. But three propositions are discussed in the brief of the plaintiff in error, no other questions being properly raised upon the record.

1. The plaintiff testified that, at the time the caboose was cut off, the pushing engines were going about 12 miles an hour. The witness Price testified that it would require 80 or 90 feet from the point of the switch for a caboose going down the main track to clear the engines on the switch track; that the two engines and tenders coupled together measured 120 feet, and that if going slightly downgrade and at 6 miles an hour they would require their length of 120 feet in which to stop; that if going from 10 to 12 miles an hour they would require about 300 feet; and that it is more difficult to make a flying switch with two engines than with one. The record shows that this testimony was objected to, the objection overruled, and an exception taken. The ground of the objection, however, is not stated. This omission is of itself sufficient to deny a right to review. Davidson S. S. Co. v. United States, 142 Fed. 315, 316, 73 C. C. A. 425; Deering Harvester Co. v. Kelly, 103 Fed. 261, 264, 43 C. C. A. 225.

The grounds of the objection urged in this court are that Price was not shown to be competent to testify as an expert regarding Pennsylvania engines; that nothing was said in his testimony about the condition of the rail, and the fact that its being wet and slippery would have made the stop more difficult; and that the side track was referred to in the question as "slightly downgrade," in opposition to the alleged fact that it was upgrade. Passing by the consideration that the grounds of the objections were not stated, none of them urged here are well taken. The witness testified that he had had about 25 years' experience as brakeman and conductor on the Erie Road, and was familiar with railroading and the operation of engines; that he was also familiar with the kind of engines used by the Pennsylvania Company, and that he knew of no particular in which they differed from the Erie engines. He was not cross-examined. The record is entirely barren of suggestion that his competency to testify as an expert regarding the operation of Pennsylvania engines was questioned. Had it been, the objection would not have been good. When Price's examination was had, the testimony had not shown the alleged slippery condition of the tracks; but had such evidence been in, the defendant could not have been prejudiced by failure to take into account a condition whose only tendency could have been to show the necessity of greater diligence in operating the engines. There was testimony of two witnesses to the express effect that the switch point was at the summit of the grade, and that the track was slightly downgrade from the switch point. It was, therefore, proper to as-

sume such fact in the question put to the expert witness. The query of the court (when the question was put, which did not show whether the grade was up or down), whether an upgrade or a downgrade of 10 per cent. was meant, could not have been prejudicial to the defendant as an assumption on the part of the court of the percentage of grade. Defendant's counsel paid no attention to the court's question. Plaintiff's counsel at once expressly disclaimed knowledge of the per cent. of grade, and the question was put again, assuming the engines to be going "slightly downgrade." The fact that it requires more room, or requires a greater length of side track, to make a flying switch with two engines than with one, is too obvious to justify objection to proof thereof.

2. At the close of the testimony the defendant moved the court to instruct the jury to return a verdict for the defendant, which motion was denied. The record does not state the grounds of the motion, and it is urged that plaintiff in error is for this reason not entitled to a review of the action of the trial court. There is respectable authority sustaining this proposition. In the view we take of the case, and inasmuch as there is nothing to indicate that the trial court did not understand the grounds of the motion, we do not feel called upon to pass upon the legal proposition invoked. It is here urged that the court should have directed a verdict for the defendant because the plaintiff's testimony as to the manner in which the accident occurred is contrary to physical and natural laws, and that there is no substantial testimony tending to show that the injury occurred through defendant's negligence; but, on the other hand, that the testimony that the injury occurred through plaintiff's negligence is undisputed. The rule is well settled that to sustain a verdict a mere scintilla of evidence is not sufficient, but that the testimony in support of a verdict must be substantial. It is also well settled that testimony contrary to reason, or contrary to natural or physical laws, cannot support a verdict.

Is the manner of the accident, as alleged by the plaintiff, opposed to natural laws? The plaintiff testified that, at the time the engine went off the end of the track, he was standing in the gangway between the engine and the tender, on the right or engineer's side, "leaning against the partition" (by which we understand him to mean either the front wall of the tender or the rear wall of the cab), facing and talking to the engineer; that by the jolt of the engine as it left the track he was thrown to the right and directly upon the main track, striking upon the back of his head. There was medical testimony of an injury to the back of his head. It is urged by defendant that the drop of the forward engine off the end of the rails could not have thrown plaintiff to the right, but must inevitably have thrown him forward. It is, to our minds, impossible upon this record to demonstrate to a certainty just what effect the action of the engine would have had upon the direction in which the plaintiff would be thrown. The record shows, however, that the west rail of the switch track (which was about 8 feet from the east rail of the main track) was from 10 to 15 feet shorter than the east rail of the switch track. This being so, the right-hand side of the engine would naturally drop first, with a tendency

to tilt the forward engine toward the main track. If, as the testimony tends to show, the engines were moving at a rate of five to seven miles per hour, there is a not unreasonable possibility that the shock communicated to the rear engine (which was coupled to the forward engine), occasioned by the dropping of the forward engine into a depression of several feet, might throw the plaintiff forcibly in the direction of the tilting of the forward engine, and thus upon the main track. We, therefore, cannot say that the plaintiff's testimony is contrary to physical laws. It is true that, as against the testimony of the plaintiff, three trainmen testified that the plaintiff voluntarily stepped from the engine, walked deliberately onto the main track, and there stood with his back to the approaching caboose, paying no attention to the warning shouts of the trainmen, and in this attitude was run over. The weight of this testimony was for the jury to determine, in connection with plaintiff's testimony and the question of the naturalness or unnaturalness of such conduct on plaintiff's part. In our opinion, the court did not err in refusing to instruct a verdict for the defendant.

3. The court charged the jury that if the accident happened in consequence of the plaintiff leaving his engine by a voluntary movement, not induced or caused by the shock or jolt of the front engine leaving the track, he could not recover; but if, on the other hand, he left the engine in consequence of the shock or jolt, being himself in the exercise of due care, the defendant would be liable, provided it was negligent. The court refused defendant's request to charge that "if the jury find that the plaintiff voluntarily left the engine upon which he was riding, and stepped in front of the oncoming caboose, then the plaintiff cannot recover in this action." The instruction given is criticised: First, as assuming that there was a shock or jolt to the engine, instead of leaving that question to the jury; and, second, as in effect instructing the jury that if the plaintiff left the engine by inducement of fear or impending danger, and was subsequently injured, he could recover. The charge, taken together, is not subject to the criticism that it assumes a fact in dispute. The ground of the second criticism to the charge given is not that the plaintiff could not recover if he voluntarily left the engine through fear of impending danger caused by the shock or jolt to the engine on which he was riding, but merely that such theory was not contained in plaintiff's petition, and that therefore such issue presented a variance from plaintiff's pleading. It is true that such theory does vary from that set forth by the plaintiff in his petition. The testimony, however, that the plaintiff voluntarily left the engine was introduced by the defendant. The question of variance was not raised by request to charge, nor (specifically) by motion to direct a verdict. The charge given was not excepted to, unless by exception No. 5, viz., "We except generally to the charge." This is not a sufficient exception to a charge containing any correct proposition. Anthony v. Louisville & Nashville R. R. Co., 132 U. S. 172, 10 Sup. Ct. 53, 33 L. Ed. 301; Allis v. United States, 155 U. S. 117, 122, 15 Sup. Ct. 36, 39 L. Ed. 91; Cunningham v. Underwood, 116 Fed. 803, 812, 53 C. C. A. 99; Hindman v. First Nat. Bank, 112

Fed. 931, 934, 50 C. C. A. 623, 57 L. R. A. 108. The alleged variance could not have misled the defendant, and no variance between pleadings and proofs offered is material unless of a character to mislead the opposite party (Grayson v. Lynch, 163 U. S. 468, 16 Sup. Ct. 1064, 41 L. Ed. 230; Baltimore & Potomac R. R. Co. v. Cumberland, 176 U. S. 232, 238, 20 Sup. Ct. 380, 44 L. Ed. 447; Schiffer v. Anderson, 146 Fed. 457, 459, 76 C. C. A. 667); and, had the portion of the charge in question been excepted to because of the alleged variance, an amendment to the petition to meet the proofs would have been permissible (Freund v. Greene & Sons [C. C.] 139 Fed. 703; Flint & P. M. Ry. Co. v. McPherson, 105 Fed. 210, 44 C. C. A. 449). It follows from what has been said that the defendant's request referred to was properly refused.

We find no error in the record, and the judgment of the Circuit Court is accordingly affirmed.

HIRSCH v. GEORGIA IRON & COAL CO.

(Circuit Court of Appeals, Sixth Circuit. April 20, 1909.)

No. 1,896.

1. EVIDENCE (§ 397*)—CUSTOMS AND USAGES (§ 17*)—PAROL EVIDENCE TO VARY CONTRACTS.

Parol evidence is inadmissible to change, contradict, qualify, or explain a written contract which is unambiguous; nor is it permissible to show a custom or usage when the words of the contract would be thereby contradicted or modified.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1756–1764; Dec. Dig. § 397;* Customs and Usages, Cent. Dig. § 34; Dec. Dig. § 17.*]

2. SALES (§ 177*)—CONSTRUCTION OF CONTRACT—TIME AND MANNER OF DELIVERY.

Under a contract for the sale and purchase of 3,000 tons of pig iron to be delivered about equally during three specified months f. o. b. cars at the seller's furnace, the buyer was obligated to accept delivery during the time specified on board cars at the furnace, and his refusal to give shipping directions so that delivery could be so made was a breach of the contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 445; Dec. Dig. § 177.*]

3. SALES (§ 175*)—DELIVERY AND ACCEPTANCE—REFUSAL TO RECEIVE.

Where the purchaser of a quantity of iron refused to accept delivery as required by the contract, the seller was under no duty to comply with the demand of the purchaser that it be otherwise delivered at an increased expense to the seller, but had the right to stand upon its contract and recover damages for its breach.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 435; Dec. Dig. § 175.*]

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

Action by vendor for breach of contract for the purchase of 3,000 tons of pig iron. The contract was upon a printed form. The vendor was the

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

Georgia Iron & Coal Company, whose furnace was at Rising Fawn, Ga. The vendee was Isaac C. Hirsch, doing business in Cincinnati, under the name of "The General Manufacturing & Supply Company of America." The contract was in these words:

"Sale Memorandum,
Issued from the Office of Rogers, Brown & Company,
Furnace Agents.

"Cincinnati, November 25, 1904.
"No. 79,342.

"Sold to General Manufacturing & Supply Company of America, Cincinnati, Ohio.

"3,000 tons Rising Fawn, No. 2, Foundry Pig Iron.

"Price (freight cash), $13.85, cash 30 days, per ton 2,240 lbs. f. o. b. cars furnace.

"If this lot is divided in delivery, settlement to be made for each lot promptly when delivered.

"Deliverable about equally during April, May and June.

~~"Ordered shipped (this includes all shipping directions rec'd. with your order."~~

[With the line across as set out above.]

"Subject to possible delay from strikes, accidents or other cause, or delays in transit, unavoidable delaying manufacture or delivery.

"Via. 11-26, 1904. Cinti., O.

"Georgia Iron & Coal Company,
"Per Rogers, Brown & Company, Agents.
"The General Manufacturing & Supply Company of America,
"Per I. C. Hirsch.

"(Dup. spn. formerly accepted by Hirsch, sent for 12-23-04).

There was jury and judgment for the plaintiff below.

Gilbert Bettman and Adam Kramer, for plaintiff in error.
H. L. Gordon, for defendant in error.

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

LURTON, Circuit Judge (after stating the facts as above). The errors assigned turn mainly upon the interpretation of the contract in respect to delivery. The plaintiff in error, when asked to furnish shipping directions, refused to furnish any, and directed that the iron be delivered to a storage or warrant company at Rising Fawn and certificates or warrants delivered to him. There was much correspondence and some oral interviews between the parties in respect to this demand for delivery by warrant, and the buyer's unwillingness to give such shipping directions as would enable the seller to secure cars upon which he could deliver as he was bound to do. Most of this correspondence and evidence was excluded, and this exclusion has been made the subject of many assignments of error. The evidence which was excluded comes to this: That the buyer did not want this iron sent to his plant at Cincinnati during the period of delivery named, as he was not prepared to use or store it. That he wished it deposited with a pig-iron storage company doing business at Rising Fawn, and certificates or warrants issued and delivery made to him by such negotiable warrants. This evidence tended to show that, though at first the sellers were unwilling to change the delivery at all, they did yield, and offered to deposit the metal with a warrant storage company and

make delivery as requested, provided the buyer would pay the cost and expenses incident thereto over and above cost of delivering aboard cars at the furnace. There was much correspondence and negotiating, which ended by the refusal of the plaintiff in error to agree to pay such added expense, and an absolute refusal to give any shipping directions as demanded. This attitude of the plaintiff in error is well illustrated by the sixth assignment of error. The defendant in error had shown by one of its attorneys, Mr. Hermann, that about the middle of June he had demanded shipping instructions and notified plaintiff in error that in default his client would sell the iron on account of Mr. Hirsch and hold him for any loss, and that Mr. Hirsch answered:

"I consider the contract canceled and will have nothing more to do with it. You can do what you want with it."

Mr. Hirsch was then recalled as a witness, and this occurred:

"Q. I will ask you to state whether or not anything was said by you in that conversation in which Mr. Hermann referred, that you were willing to take this iron if they would deliver the warrant or certificate to you, and pay for it according to the amount provided in that contract, but that you would not have it shipped up here? What, if anything, was said to that effect to Mr. Hermann on that occasion? (Question objected to. The court sustained the objection, to which ruling counsel for the defendant at the time excepted, and stated that they expected to show by this witness, if permitted, that on June 13, 1905, during this conversation with Mr. Hermann on behalf of the plaintiff, who had called for the purpose of notifying Mr. Hirsch in the office of his attorney, that he demanded of him to take the iron; that Mr. Hirsch replied to him that he was willing to take a warrant or certificate in place of the iron and pay the contract price, $13.85 per ton, which was declined.)"

The correspondence excluded, as well as this oral evidence offered, if admitted, would only have shown that the parties entertained different views about their rights under the contract in respect to delivery; that the seller was willing to accommodate the buyer by a delivery by warrant, provided he would pay the additional expense; that the buyer stood by his supposed legal rights, and would not pay anything for delivery by warrant above the stipulated price of $13.85 per ton free on board cars at the furnace.

The court excluded all such evidence, and instructed the jury that the contract of sale was plain and unambiguous, and needed no explanation, and admitted of no contradictions by parol. That under it the seller was obliged to deliver "f. o. b. at the furnace," which meant he should deliver free of handling and loading expense on board cars at the furnace. He also said that as cars were to be obtained only for the carriage of iron to some point of destination, it was the duty of the buyer to seasonably furnish shipping directions so that the seller could apply for cars upon which he could make delivery. There was no error in this construction. The buyer was obligated to accept delivery on board cars at the furnace. The destination of the iron so loaded was to be determined by himself only. He could not, under the plain terms of the agreement, say, "I will not give shipping directions," for that would be to say, "I will not accept delivery on board cars at the furnace," and was a breach of his agreement. It follows, therefore, that his willingness to accept delivery of deposit certificates or warrants to

be issued by a pig-iron warehouse company was no defense to an action for a breach by his refusal to furnish shipping directions.

The contract of sale was plain enough. Evidence is inadmissible to change, contradict, qualify, or explain a written contract which is unambiguous. Nor is it permissible to show a custom or usage when the words of the contract would be thereby contradicted or modified. Lillard v. Kentucky Distilleries & Warehouse Co., 134 Fed. 169, 67 C. C. A. 74; Sheffield Furnace Co. v. Hull Coke Co., 101 Ala. 447, 14 South. 672; Silberman v. Clark, 96 N. Y. 522.

Neither was the excluded evidence competent as showing a subsequent agreement to make delivery otherwise than as provided in the written agreement. No such new agreement was pleaded.

But it is now said that the excluded evidence was competent and relevant upon the measure of damages. They claim that, if the defendant in error had a right to stand upon the contract and make delivery only on board cars at the furnace, it was, nevertheless, the duty of the vendor company to deliver into a warrant yard, as requested, and rely upon its remedy over against the vendor for additional costs thus incurred. This is a novel application of the well-known rule that one who has been damaged by the breach of a contract must do nothing to aggravate his injury and all that he reasonably can to mitigate the loss. Lawrence v. Porter, 63 Fed. 62, 65, 11 C. C. A. 27, 26 L. R. A. 167; Lillard v. Kentucky Distilleries & Warehouse Co., 134 Fed. 170, 178, 67 C. C. A. 74. The duty imposed by the equitable rule referred to must be held within reasonable bounds. It is a rule which has never been regarded as requiring one to yield to a wrongful demand that he may thereby save the wrongdoer from the legal consequences of his own error. The reservation of the right to hold one's adversary to the payment of any added cost or expense thereby incurred does not help the case. When our civilization rises to the standard of the Sermon on the Mount the courts may be willing to require one to yield to another rather than stand upon the letter of his rights. There is no view of the excluded evidence which would make it competent.

The plaintiff in error has no reason to complain of the charge of the court in respect to the measure of damages. The defendant in error was under no obligation to treat the contract as finally repudiated until after the demand made in June and the absolute refusal of the plaintiff in error to go on with the matter. Indeed, we are impressed that every reasonable matter in mitigation of damages was given full force by the trial judge and the damages cut down to the lowest possible limit.

The assignments are all overruled, and the judgment affirmed.

MARX v. AMERICAN MALTING CO.

(Circuit Court of Appeals, Sixth Circuit. April 19, 1909.)

No. 1,883.

1. SALES (§ 71*)—VALIDITY OF CONTRACT—CERTAINTY AS TO QUANTITY.
Contracts for the supply of the material required for use in a certain business for a certain time limited are sufficiently certain as to quantity and are valid.
[Ed. Note.—For other cases, see Sales, Dec. Dig. § 71.*]

2. CONTRACTS (§ 169*)—CONSTRUCTION—EXTRINSIC CIRCUMSTANCES.
Where a written contract is ambiguous or contains provisions which may be conflicting, extrinsic evidence is admissible to show the surrounding conditions and circumstances, in the light of which the parties made it, to aid in its construction.
[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 752; Dec. Dig. § 169.*]

3. SALES (§ 71*)—CONSTRUCTION OF CONTRACT—QUANTITY.
A written memorandum of a sale of malt to a brewing company was made on November 12, 1906, on an order blank furnished by the seller, and contained the following items: "Quantity. All their requirements to December 31, 1907," and at the bottom: "Amount of malt to be used will be between 15,000 and 20,000 bushels." The buyer had previously used from 15,000 to 20,000 bushels per year, but was then building an addition to its plant which would considerably increase its requirements, as was known by both parties. *Held*, that the contract was for the sale of whatever quantity the purchaser should require in its business, the statement of the number of bushels being merely an estimate of the probable amount.
[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 189–196; Dec. Dig. § 71.*]

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

A. P. Cox, for plaintiff in error.
O. B. Taylor, for defendant in error.

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

SEVERENS, Circuit Judge. This is an action brought by the defendant in error, which was plaintiff below and will be so designated in this opinion, against the plaintiff in error, to be designated "the defendant," to recover the price and value of a quantity of malt alleged to have been sold and delivered by the plaintiff to the defendant at a certain stated price per bushel. The defendant, admitting his liability upon the cause of action stated in the declaration, nevertheless set up a counterclaim arising from a breach by the plaintiff of the stipulations of the contract under which the malt had been sold and delivered to him, demanded that the damages resulting to him thereby be recouped and set off against the plaintiff's demand to the extent thereof, and that for the balance he be given judgment. The contract of sale was partly printed and partly written upon an order blank such as used by

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

the plaintiff in its business, and, as the evidence tended to show, was filled up by it for execution. It was as follows:

"American Malting Company,

"Memorandum of Sale.

"Dated, Detroit, Mich., November 12, '06.

"Sold to Frank Marx Brewing Co.
"P. O. Address, Wyandotte, Mich.
"Quantity, all their requirements to December 31, 1907.
"Quality, standard malt.
"Price, fifty-eight cents per bushel.
"F. O. B. Detroit.
"Terms of payment, cash 3 mos. net from date of bill.
"When to be shipped, all to be taken by December 31, 1907.
"In bags.
"The bags when empty, to be bundled and returned to Detroit branch.
"Shipping directions; via, rail or boat.
"Remarks, If malt is taken in car lots from Detroit, same will be delivered f. o. b. cars Wyandotte at 58 cents per bushel.
"Amount of malt to be used will be between 15,000 and 20,000 bushels.

"American Malting Company,
"Per F. B. Northwood, Seller.

"Correct: Frank Mark Brewing Company,
"Per F. Marx, Purchaser.

"No privilege, option or refusal on an additional quantity will be recognized unless special and definite mention thereof is made on this order blank."

The original contract was exhibited at the hearing, but it is not difficult to distinguish the printed skeleton from the special matter written in. The construction of this agreement is admitted to be the essential matter in controversy. Upon the trial it was shown that 20,000 bushels of the malt had been delivered; but that more than this was required for the defendant's business before the end of the year, and that the plaintiff had refused to deliver more, and this upon the ground that its obligation was by the contract limited to 20,000 bushels. The market price had materially advanced during the year 1907, and the defendant had been obliged by the exigencies of his business to purchase elsewhere a considerable quantity of malt and at a higher price. It was shown that in recent years before the date of the contract the requirements of the defendant's business had been from 15,000 to 20,000 bushels; but it was further shown that at that date the defendant had erected and nearly completed extensive additions to its plant, which was intended to be used during the coming year, and that the requirements for malt would be likely to much exceed 20,000 bushels, and that the plaintiff understood these facts at the time of making the contract. The court, accepting the construction put upon the contract by the plaintiff in respect to the quantity it was bound to deliver as correct, held that it had fulfilled its obligation, and excluded all evidence offered by the plaintiff in support of his counterclaim. The plaintiff's claim being admitted, the court instructed the jury to find a verdict for the plaintiff for the amount thereof. The jury found a verdict accordingly, and a judgment was entered thereon.

We think the court was in error. Contracts for the supply of the material to be used in a certain business for a certain time limited, or

for the purchase of the entire output of a certain plant or manufactory, for a certain time or season, are valid; this specification of the quantity contemplated by the parties is held to be sufficiently certain; that the certainty can be ascertained from the means to be supplied by the future exercise of the business in good faith and in the normal manner of such business. As this is a commercial transaction, we need go no further than to cite authorities from the federal courts. Brawley v. United States, 96 U. S. 168, 24 L. Ed. 622; Loudenbeck Fertilizer Co. v. Tennessee Phosphate Co., 121 Fed. 298, 58 C. C. A. 220, 61 L. R. A. 402; Lima Locomotive, etc., Co. v. National Steel, etc., Co., 155 Fed. 77, 83 C. C. A. 593, 11 L. R. A. (N. S.) 713; Inman Bros. v. Dudley & Daniels Lumber Co., 146 Fed. 449, 76 C. C. A. 659.

Coming to the construction of the contract, we are of opinion that, in respect to the quantity of the malt contracted for, the dominating specification is found in the words, "All their requirements to December 31, 1907," and that the words below, "Amount of malt to be used will be between 15,000 and 20,000 bushels," are a mere estimate of the probable requirement intended by the seller as a memorandum to be considered as advisory in the conduct of its own business, or possibly an assurance that the purchaser would want at least that quantity.

There are several reasons for this conclusion. In the first place, it seems improbable that the vendee, evidently contemplating the enlargement of his business and then making provision for it would have limited himself while contracting for his requirements for the ensuing year to the requirements of his old business. Nor could the vendor have supposed that the old limits would be adequate to the new conditions. So far as appears there was no reason why the vendor should desire such a limitation. The words of the sentence are themselves indefinite and seem to indicate that they were employed as rather a negligible expression than as a substantive term of the contract. Then, again, it is a fundamental rule in the interpretation of agreements that we should ascertain the prime object and purpose of the parties, and, in case of ambiguity produced by its minor provisions, the latter should, if possible, be so construed as not to conflict with the main purpose. It is clear enough that these parties had in mind, not the sale of a certain number of bushels of malt, but so much as the business of the vendee would require during the period mentioned. And the rule just stated would require that the particular language upon which the vendor relies should, if possible, be held to be the expression of an estimate merely of the probable requirements. And we think it is easily possible to give the language that construction. In many cases a more stringent rule has been laid down, which is that, if the minor provision of the contract is irreconcilable with the obvious general intent, it would for that reason be sacrificed altogether for the promotion of the general purpose of the agreement. Another reason for adopting a more harmless meaning to this language than one which should defeat the main purpose is that the instrument was prepared by the vendor, and the rule is that, in case of doubt or ambiguity arising from the use of words, they should be construed most favorably to the other party.

But the court below took another view of the stipulations of this contract, and held that the words, "Amount of malt to be used will be between 15,000 and 20,000 bushels," constituted a limitation upon the words, "Quantity, all their requirements to December 31, 1907." Accordingly all evidence given or offered to show the conditions and circumstances in which the contract was made, and in reference to which the parties were dealing, was, either directly or by the effect of instructions, put aside. There could be no complaint of this if the view which the court took of the contract was correct. The evidence referred to, however, was for the information of the court, and to enable it to rightly construe the agreement; and the effect of the ruling was to say that the language was clear and no aid was needed to interpret it. As we have said, we reach a different conclusion. We think such evidence was competent for the purpose for which it was offered. It was not disputed, and it disclosed highly important facts in aid of the right construction of the agreement. We do not say that all of the evidence offered was admissible for this purpose. Mere words passing from one to another of the parties about matters which were subsequently reduced to writing were not admissible to alter, cut down, or enlarge the terms of the contract; but whatever had reference to the conditions and the probable requirements of the business which the vendee expected, and the knowledge of these conditions and expectations by the respective parties, was admissible. Within the rule, we think it was competent to prove by parol evidence that the vendor was informed of the conditions of the vendee's business and of the enlargement of the plant, and of the probable increase of the requirements resulting therefrom. Runkle v. Burnham, 153 U. S. 216, 224, 14 Sup. Ct. 837, 38 L. Ed. 694; Scott v. United States, 12 Wall. 443, 20 L. Ed. 438; Bell v. Bruen, 1 How. 169, 11 L. Ed. 89; Nash v. Towne, 5 Wall. 689, 699, 18 L. Ed. 527; 9 Cyc. 587, where it is said:

"To determine the intention of the parties, if the meaning is not clear, it is necessary that regard shall be had to the nature of the instrument itself, the condition of the parties executing it, and the objects which they had in view, for which purpose parol evidence is admissible."

Such parol testimony is not directed to the written agreement of the parties, but simply and only to prove that the conditions and expectations existed, and that the parties were informed of them. This, we think, is all we need to say concerning the assignment of error relating to this subject.

The judgment must be reversed, with costs, and a new trial awarded.

In re NEW ENGLAND BREEDERS' CLUB.

Ex parte HUB CONST. CO.

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

No. 797.

1. BANKRUPTCY (§ 439*)—PETITION—DISMISSAL—REVIEW.
Where a bankruptcy proceeding is dismissed for want of jurisdiction, the trustee, having duly excepted, was entitled to have the order of dismissal reviewed, for error in matters of law, on an original petition, in the Circuit Court of Appeals.
[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 439.*]

2. BANKRUPTCY (§ 100*)—JURISDICTION.
An involuntary bankruptcy petition having been filed against a breeders' club, it was declared a bankrupt January 1, 1908, and a trustee appointed. On June 16th following, a creditor filed a petition alleging that the proceedings were void because the bankrupt was not a corporation within the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]), not being principally engaged in trading or mercantile pursuits. The trustee moved to dismiss the petition because of the petitioner's laches and because certain valuable rights of creditors would be lost by vacation of the adjudication; but the court, on a master's report that the bankrupt was not principally engaged in trading or mercantile pursuits, dismissed the proceeding for want of jurisdiction without reference to the petitioner's laches, waiver, estoppel, or interest. *Held*, that the court had jurisdiction to pass on the sufficiency of the cause alleged for the vacation of the adjudication, and therefore erred in refusing to consider the objections raised by the trustee.
[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 100.*
Jurisdiction of federal courts in suits relating to bankruptcy, see note to Bailey v. Mosher, 11 C. C. A. 313.]

3. BANKRUPTCY (§ 100*)—ADJUDICATION—VACATION—RIGHTS OF CREDITOR.
A creditor of an alleged bankrupt has a sufficient interest to petition for the vacation of the adjudication on the ground that the bankrupt is not within the act.
[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 100.*]

Petition for Review of Order of the District Court of the United States for the District of New Hampshire, in Bankruptcy.

For opinion below, see 165 Fed. 517.

Henry F. Hollis, for petitioner.

Thomas G. Frost, for respondent.

Before COLT, PUTNAM, and LOWELL, Circuit Judges.

LOWELL, Circuit Judge. An involuntary petition in bankruptcy was filed against the New England Breeders' Club on April 19, 1907. An adjudication followed January 1, 1908. Hobbs was appointed trustee February 8, 1908, and the administration of the estate proceeded in the usual manner. On June 16, 1908, the Hub Construction Company, a creditor of the bankrupt, filed a petition alleging that the above-mentioned bankruptcy proceedings were void, because the bankrupt was not a corporation within the purview of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]),

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

not being principally engaged in trading or mercantile pursuits. The petition prayed the District Court to determine whether or not it had obtained jurisdiction of the person of the club for the purpose of declaring it a bankrupt, and to set aside the adjudication. On the same day Hobbs moved to dismiss the petition of the Hub Company on several grounds, viz.: That no appeal had been taken from the adjudication within the statutory time; that the Hub Company did not show any interest in vacating the adjudication; that it had been guilty of laches; and that certain rights valuable to creditors would be lost by a vacation of the adjudication. Without passing specifically upon Hobbs' motion, the District Court "ordered upon consent of the parties that Burns P. Hodgman be appointed master to make findings upon the following questions of fact" among others:

"(1) Was the New England Breeders' Club at the time of the adjudication principally engaged in trading or mercantile pursuits, or were they at all engaged in such pursuits, or had they at any time and to any extent been engaged in such pursuits?"

The referee found that the New England Breeders' Club was not within the purview of the bankruptcy act, and the judge thereupon entered the following order:

"I hold the impression that the facts found by the master, that the Breeders' Club, at the time of the adjudication, was not principally engaged in trading or mercantile pursuits, and that it was never to any extent engaged in such pursuits, present a situation of absolute lack of jurisdiction, and that such lack of jurisdiction cannot be cured by laches, waiver, or estoppel, even as against a petitioner who has no interest in raising the jurisdictional question. I therefore do not pass upon either the question of fact involved in the claim of waiver, estoppel, or laches, nor upon the question of legal or equitable interest of the Hub Construction Company.

"The proceedings are dismissed.

"The trustee in bankruptcy excepts, and the execution of this order is stayed pending review."

The trustee thereupon brought an original petition in this court seeking to review the order of the District Court for error in matter of law. That this was a proper proceeding to obtain the reversal of the order complained of was decided in Plymouth Cordage Co. v. Smith, 194 U. S. 311, 24 Sup. Ct. 725, 48 L. Ed. 992.

The trustee's contention in effect is as follows: He does not dispute the correctness of the master's report concerning the nature of the bankrupt's business, but he contends that the District Court erred in holding its want of jurisdiction to be absolute, and in disregarding the questions of laches, damage to creditors, and the like, which were raised by his petition to dismiss. He does not contend that the District Court was altogether without jurisdiction to vacate the bankruptcy proceedings, but he does contend that the District Court was not obliged to vacate the proceedings as matter of law and without considering the circumstances and consequences. The Hub Company, on the other hand, contends that the finding of the master has shown that the District Court was altogether without jurisdiction to adjudicate the club a bankrupt, and that the court was therefore absolutely required to vacate the proceedings as soon as the nature of the bankrupt's business was established. The action of the learned judge in

the District Court was plainly based upon his agreement with the Hub Company's contention as stated above, and not upon consideration of the issues which the trustee sought to raise. The adjudication was vacated solely because of a supposed legal necessity arising from an absolute want of jurisdiction, and not because the petitioning creditors and the trustee failed to make out the allegations of the trustee's petition. Upon this distinction rests the decision of the case at bar.

To determine what allegations and facts are necessary to support the jurisdiction of a court, and what go only to establish a plaintiff's right to recover, is sometimes matter of difficulty. It is well settled, for example, that the allegation of diversity of citizenship is necessary to uphold the jurisdiction of the federal courts in those cases where jurisdiction depends upon diversity of citizenship; and even in the ultimate court of appeal the omission of this allegation may be noticed by the court, and, unless remedied, it will cause a vacation of the entire proceeding. But where the plaintiff's allegation of diverse citizenship is sufficient, the defendant, under ordinary circumstances, loses in time his right to dispute the allegation. Hartog v. Memory, 116 U. S. 588, 6 Sup. Ct. 521, 29 L. Ed. 725. In the case at bar there was no fraud upon the court. In Denver Bank v. Klug, 186 U. S. 202, 22 Sup. Ct. 899, 46 L. Ed. 1127, the petition in involuntary bankruptcy contained a sufficient allegation of the nature of the respondent's business. This allegation was traversed, and the jury found that the respondent was "engaged chiefly in farming" within the meaning of the bankruptcy act. The District Court dismissed the petition, and the petitioning creditors took an appeal directly to the Supreme Court as in a case where the jurisdiction of the District Court was in issue. The Supreme Court dismissed the appeal, saying that:

"The District Court had and exercised jurisdiction. The conclusion was, it is true, that Klug could not be adjudged a bankrupt, but the court had jurisdiction to so determine, and its jurisdiction over the subject-matter was not and could not be questioned. Mueller v. Nugent, 184 U. S. 15, 22 Sup. Ct. 269, 46 L. Ed. 409; Louisville Trust Co. v Comingor, 184 U S. 25, 22 Sup. Ct. 293, 46 L. Ed. 413; Smith v. McKay, 161 U S. 355, 16 Sup. Ct. 490, 40 L. Ed. 556."

In Smith v. McKay, cited in Denver Bank v. Klug, the Circuit Court had dismissed a bill in equity for want of equity, and the complainant took an appeal to the Supreme Court as on a question of jurisdiction. That court dismissed the appeal and quoted as follows from World's Columbian Exposition v. United States, 56 Fed. 654, 666, 6 C. C. A. 58, 71:

"We do not understand that the power of the Circuit Court to hear and determine the cause was denied, but that the appellants contended that the United States had not, by their bill, made a case properly cognizable in a court of equity. The objection was the want of equity, and not the want of power. The jurisdiction of the Circuit Court was therefore not in issue within the intent and meaning of the act." 161 U. S. 358, 16 Sup. 492, 40 L. Ed. 556.

In Denver Bank v. Klug therefore the Supreme Court decided that the allegation of the bankrupt's business in a petition in involuntary bankruptcy is analogous to the allegation of equity in a bill in equity, and is not analogous to the allegation of diversity of citizenship. If it be true, as the Supreme Court has thus held by implication, that

an insufficient allegation of the respondent's business does not deprive the District Court of jurisdiction of a petition in involuntary bankruptcy, a fortiori the District Court is not deprived of jurisdiction by proof that this allegation is untrue. Substantially this result has been reached by several Circuit Courts of Appeals. In re First Nat. Bank of Belle Fourche, 152 Fed. 64, 81 C. C. A. 260; Broadway Savings Bank Trust Co., 152 Fed. 152, 81 C. C. A. 58; In re T. E. Hill Co., 159 Fed. 73, 86 C. C. A. 263; Columbia Iron Works v. Nat. Lead Co., 127 Fed. 99, 62 C. C. A. 99, 64 L. R. A. 645.

We are compelled therefore to reverse the order of the District Court vacating the adjudication. We do not decide that that court was without authority to vacate the adjudication upon the Hub Company's petition, if the Hub Company was found not to have lost its right of objection, and if the creditors would not be too greatly prejudiced thereby. We do not decide that the District Court was without authority to reopen its decree for sufficient cause shown, but that it had general jurisdiction to pass upon the sufficiency of the cause. The master reported certain findings of fact concerning the Hub Company's laches, its interest in the proceedings, and the consequences tc the creditors of a vacation of the adjudication. We prefer not to deal with these findings in the first instance, but to leave them to the District Court, which has full knowledge of the whole course of the case. The trustee urged before us that the Hub Company had shown no interest in the vacation of the adjudication, but we hold that its interest as a creditor, without more, was sufficient for that purpose.

Let there be a decree not inconsistent with the opinion passed down the 18th day of February, 1909, with costs for the petitioner.

BIRCHER v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. May 3, 1909.)

No. 1,593.

PUBLIC LANDS (§ 21*)—WRONGFUL INCLOSURE—STATUTES—CONSTRUCTION—INDICTMENT—"MADE."

Act Cong. Feb. 25, 1885, c. 149, § 1, 23 Stat. 321 (U. S. Comp. St. 1901, p. 1524), declares illegal all inclosures then or thereafter made, erected, or constructed on lands to any of which the person making or controlling the inclosure had no claim or color of title or asserted right at the time when the inclosure was made, and also declares unlawful "the maintenance, erection, construction or control of any such inclosure." *Held*, that the word "made," as so used, had a more comprehensive meaning than the words "constructed" or "erected," that a person "makes" an inclosure so long as he maintains it, and that since the statute was therefore violated, where a person maintained the inclosure of land to which he had no claim, color of title, or asserted right, an indictment charging such an inclosure was not defective for failure to allege that, at the time the inclosure was made, defendant had no claim or color of title to the land made or acquired in good faith or a right thereto asserted with a view to entry.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 21.*

For other definitions, see Words and Phrases, vol. 5, pp. 4269, 4270.]

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

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

The plaintiff in error was indicted and convicted under Act Feb. 25, 1885, c. 149, 23 Stat. 321 (U. S. Comp. St. 1901, p. 1524), for unlawfully maintaining an inclosure of government land. After describing the land, the indictment charged that the defendant "did wrongfully and unlawfully maintain and control and cause to be maintained and controlled by him, the said Emil Bircher, an inclosure of the said lands, consisting of a fence of posts and wires, which said fence then and there inclosed all of the said tract of land comprising an area of approximately 1,920 acres of land, said lands so inclosed as aforesaid being public lands of the United States. And he, the said Emil Bircher, at the time of so maintaining and controlling said fence and inclosure as aforesaid, has no claim or color of title made or acquired in good faith, or an asserted right to said lands by or under claim made in good faith with a view to entry thereof at the proper land office under the general laws of the United States to said lands, or any part or parcel thereof."

The statute under which the indictment was found is as follows:

"Section 1. That all inclosures of any public lands in any state or territory of the United States heretofore or to be hereafter made, erected, or constructed by any person, party, association, or corporation, to any of which land included within the inclosure the person, party, association, or corporation making or controlling the inclosure had no claim or color of title made or acquired in good faith, or an asserted right thereto by or under claim made in good faith with a view to entry thereof at the proper land office under the general laws of the United States at the time any such inclosure was or shall be made, are hereby declared to be unlawful, and the maintenance, erection, construction, or control of any such inclosure is hereby forbidden and prohibited; and the assertion of a right to the exclusive use and occupancy of any part of the public lands of the United States in any state or any of the territories of the United States without claim, color of title, or asserted right as above specified as to inclosure is likewise declared unlawful and hereby prohibited."

Geo. W. Myers and Walsh & Nolan, for plaintiff in error.

James W. Freeman, U. S. Atty., and S. C. Ford, Asst. U. S. Atty.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). No objection was raised to the indictment for any defect therein until after a verdict of guilty had been returned against the plaintiff in error. Then a motion in arrest of judgment was interposed, and the question now presented on the writ of error is whether or not that motion should have been allowed on the ground that the indictment failed to state an offense against the United States. It is the contention of the plaintiff in error that the indictment is fatally defective in omitting to charge that, at the time when the inclosure was made, the plaintiff in error had no claim or color of title to the land made or acquired in good faith, or an asserted right thereto by and under claim made in good faith with a view to entry thereof, and that the intention of the statute, as indicated by its language, is to denounce a penalty against those only who, at the time when the inclosure was made by them, had neither claim nor asserted right to the lands included therein. If this objection is well taken, it is very clear that Congress, by an unfortunate misuse of words, has failed to express the real intention of the act. The title of the act (Act Feb. 25, 1885, c. 149, 23 Stat. 321 (U. S. Comp. St. 1901, p. 1524) is "An act to prevent unlawful occupancy of public lands." One of its sections authorizes the President to take such

measures as shall be necessary to remove and destroy any unlawful inclosure of any of such lands, and to employ such civil and military force as may be necessary for that purpose. The obvious intention of the statute was to make unlawful any exclusive use and occupancy of any of the public lands without claim or color of title, or asserted right under the land laws, whether by inclosing the same or otherwise.

The first clause of section 1 declares unlawful all inclosures "then or thereafter made, erected or constructed of lands to any of which the person making or controlling the inclosure had no claim or color of title or asserted right at the time when the inclosure was or shall be made," and the second clause declares unlawful "the maintenance, erection, construction or control of any such inclosure." What inclosure? Does it mean an inclosure of lands to which the person maintaining the inclosure had no claim or color of title or asserted right, or does it mean an inclosure of land to which the person maintaining the inclosure had no such right or title at the time when the inclosure was erected? We think it means the former. To hold otherwise is to ignore the spirit and purpose of the statute and to disregard the reasonable construction of its words. Could it be said that one who has acquired a color of title to land which had been inclosed by his grantor without color of title could be indicted under the act for the reason that he had no such claim or color of title when his grantor constructed the fence? Obviously not, and yet, under the words of the statute as counsel for the plaintiff in error construe them, he would be subject to the penalty denounced by the act.

The statute describes two classes of acts with reference to the public lands: First, the act of erecting or constructing an inclosure thereof; second, the act of maintaining such inclosure. And the test of the criminality of either class of acts is whether the person who committed the act had, at the time of committing it, color or claim of title, or asserted right under the land laws. It makes punishable the act of unlawfully inclosing the government lands, and it makes punishable the act of unlawfully maintaining an inclosure, whether the person maintaining the same was the person who erected it, or whether, at the time when it was erected, it was erected with or without authority of law. The word "made," as used in the statute, when construed in the light of the subject-matter, has a more comprehensive meaning than the words "constructed" or "erected." In a certain sense one who maintains an inclosure makes an inclosure, and as long as he maintains it he makes it. If we are to follow the very words of the statute, we are authorized, from the underlying purpose thereof, its context, and its scope, to say that the word "made" was used in this comprehensive sense, and that, with reference to the second clause of the section, it means also maintained.

We do not overlook the general rule that the intention of the Legislature is to be gathered from the words which they employ, and that while a case may fall within the mischief to be remedied, and in the same class therewith, still, if it be not within the words of the statute, construction will not be permitted to bring it therein. What we hold is that the language used authorizes us to determine that the of-

fense charged against the plaintiff in error is within the intention of the statute.

In American Fur Co. v. United States, 2 Pet. 358–367, 7 L. Ed. 450, it was held that a construction which will sanction a glaring evasion of the whole policy of the law ought in no case be adopted unless the natural meaning of the words of the act require it. Said the court:

"Even penal laws, which it is said should be strictly construed, ought not to be construed so strictly as to defeat the obvious intention of the Legislature."

In United States v. Morris, 14 Pet. 464–475, 10 L. Ed. 543, Chief Justice Taney said:

"In expounding a penal statute, the court certainly will not extend it beyond the plain meaning of its words, for it has been long and well settled that such statutes must be construed strictly. Yet the evident intention of the Legislature ought not to be defeated by a forced and over-strict construction."

In United States v. Lacher, 134 U. S. 624–628, 10 Sup. Ct. 625, 33 L. Ed. 1080, this principle of construction was reaffirmed.

In Camfield v. United States, 66 Fed. 103, 13 C. C. A. 361, Judge Thayer, for the Circuit Court of Appeals, said:

"Section 1 of the act of February 25, 1885, supra, declared, in effect, that it should thereafter be deemed unlawful for any person, association, or corporation to make or maintain an inclosure which embraced within its limits any public land of the United States, to which the person making or maintaining the inclosure had no claim or color of title and to which he asserted no right under a claim made in good faith," etc.

In Krause v. United States, 147 Fed. 442, 78 C. C. A. 642, the same court, in passing upon the sufficiency of an indictment under section 1 of the act, which charged the defendant with maintaining and controlling a fence and inclosure of public lands "then and there having no claim or color of title to any of said lands, or any asserted right thereto," etc., said:

"This clearly enough charges the offense of maintaining and controlling an inclosure of public lands within the prohibition of the statute."

The case of United States v. Churchill (D. C.) 101 Fed. 443, cited by the plaintiff in error, decided on demurrer to an indictment, seems to express a contrary view of the statute; but, as the case is reported, we are not advised of the reasoning on which the conclusion was reached, nor of all the allegations of the indictment.

We are of the opinion that there is no error in the judgment of the lower court, and that it should be affirmed.

CARDWELL v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. May 24, 1909.)

No. 1,597.

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

Massena Bullard and W. T. Pigott, for plaintiff in error.

James W. Freeman, U. S. Atty., and S. C. Ford, Asst. U. S. Atty.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. The indictment upon which the plaintiff in error was convicted, and the questions involved upon the writ of error, are identical with those which were under consideration in Bircher v. United States (decided at this term of the court) 169 Fed. 589, and upon the reasons which controlled decision in that case the judgment is affirmed.

CROTTY v. CHICAGO GREAT WESTERN RY. CO.

(Circuit Court of Appeals, Eighth Circuit. May 4, 1909.)

No. 2790.

1. DEPOSITIONS (§ 95*) —EVIDENCE—READING OF PART ONLY.

There is no sound objection to the reading of a part only of a deposition, if what is read does not consist of mere fragmentary excerpts, a correct appreciation of which depends upon the context, and the opposite party be left at liberty to read what is omitted.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 276, 277; Dec. Dig. § 95.*]

2. APPEAL AND ERROR (§ 1097*)—SECOND WRIT OF ERROR—LAW OF THE CASE—CHANGE IN EVIDENCE OR FACTS.

Propositions once considered and decided by an appellate court in a given case cannot be reconsidered by that court upon a second writ of error in the same case; but this does not prevent the consideration upon the second writ of such questions as may arise from a substantial change in the evidence or in the established facts at an intervening trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4358–4368; Dec. Dig. § 1097.*]

3. MASTER AND SERVANT (§ 216*)—ASSUMPTION OF RISK—UNUSUAL AND NEGLIGENT CONDUCT OF CO-SERVANT WHOSE ACT A STATUTE ATTRIBUTES TO THE MASTER.

Where a brakeman, at the direction of his conductor, goes between a moving train and car, separated by a space of seven feet, for the purpose of holding a post between them so that the car can be staked over a switch, and the conductor then negligently causes the train to be moved in the direction of the car with unusual, unnecessary, and increasing force and speed, whereby the brakeman is fatally injured, the enhanced and extraordinary peril arising from the conductor's negligence is not among the risks assumed by the brakeman, there being a statute attributing the conductor's negligence to the master.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 567–573; Dec. Dig. § 216.*]

4. MASTER AND SERVANT (§ 248*)—NEGLIGENCE OF INJURED PERSON AS A KNOWN CONDITION AFFECTING DUTY OF ANOTHER—SUPERVENING NEGLIGENCE OF LATTER.

Where a brakeman, at the direction of his conductor, negligently takes a position of peril between a moving train and car, separated by a space of seven feet, for the purpose of holding a post between them so that the car can be staked over a switch, a position in which the brakeman is without power to take precautions for his own safety and is dependent upon such as are taken by the conductor, and the latter, with that as one of the existing and known conditions affecting his duty in the premises, negligently causes the train to be moved in the direction of the car with unusual, unnecessary, and increasing force and speed, whereby the brakeman is fatally injured, the negligence of the latter in taking the exposed position is no defense to an action for his death grounded upon

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

the supervening negligence of the conductor, there being a statute attributing the conductor's negligence to the master.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 804; Dec. Dig. § 248.*]

5. LIMITATION OF ACTIONS (§ 127*)—COMPUTATION OF PERIOD—PLEADING—AMENDMENT TO PETITION.

An amendment to a petition which sets up no new cause of action, demand, or charge, but merely amplifies and gives greater precision to the allegations supporting the cause of action, demand, or charge originally presented, relates back to the commencement of the action, and the running of the statute of limitations is arrested at that point.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 543-547; Dec. Dig. § 127.*]

(Syllabus by the Court.)

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

See, also, 141 Fed. 913, 73 C. C. A. 147, 4 L. R. A. (N. S.) 832.

R. P. Roedell and H. C. Kenline (Maurice O'Connor, on the brief), for plaintiff in error.

W. J. Ainsworth (A. G. Briggs, M. F. Healy, Thomas D. Healy, and Robert Healy, on the brief), for defendant in error.

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

VAN DEVANTER, Circuit Judge. This case is before us a second time. It is an action by an administratrix to recover damages for the death of her intestate, James J. Crotty, which occurred while he, as a brakeman in the defendant's service, was participating in staking a loaded coal car over a switch connecting two parallel tracks, a process in which the force of a freight train moving backward on one track was applied to the coal car on the other track by means of a post held between the rear car of the train, a caboose, and the coal car. When the staking began, Crotty attempted to hold the post in a diagonal way between the nearest corners of the caboose and the coal car, but later, at the conductor's direction, attempted to hold it between the coupler of the caboose and the coal car. As the staking advanced, the coal car came gradually to be in front of the caboose, considering the direction in which the latter was moving, and while they were moving in that relation, separated by the length of the post, seven feet, the post slipped and fell, the cars came suddenly together, and Crotty was crushed to death. Several acts of negligence, attributable to the defendant under the local statute, were charged in the petition, but the only ones which the evidence produced at the first trial tended to establish were that staking, although known to be dangerous, was resorted to by the conductor's direction when other and entirely safe methods of moving the car over the switch were reasonably open, and that by the conductor's direction an engine and train were used in the staking when the use of an engine alone was reasonably possible and was known to be attended with less danger. Upon that trial the plaintiff obtained a verdict and judgment, but upon a writ of error this

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

court, being of opinion that the undisputed evidence established that Crotty had assumed the risk of injury and was guilty of contributory negligence, reversed the judgment and remanded the case for a new trial. 73 C. C. A. 147, 141 Fed. 913, 4 L. R. A. (N. S.) 832.

Among the acts of negligence charged in the petition were these:

"And, in pursuance of the conductor's orders, said James J. Crotty went between said cars and held and placed said post as directed, and while thus occupied, and unaware of the danger to which he was exposed, the freight train, in response to the conductor's signals, negligently backed against said post with great and unusual force, by reason of which, together with the facts aforesaid, * * * said post * * * slipped and the said cars suddenly and with great force came together, crushing said James J. Crotty without fault on his part."

"The conductor, although knowing the peril to which said James J. Crotty was exposed while occupied between the cars, carelessly and negligently caused the train to be backed, and failed to use all reasonable efforts to protect him from injury."

After the judgment of reversal, and as the result of proceedings which do not require special mention, the petition was amended, by leave of the court, by adding thereto the following:

"Said conductor at said time had full knowledge * * * of the exposed position of peril to which plaintiff's intestate was exposed while attempting to hold said stake, * * * and, while plaintiff's intestate had every reason to believe that said * * * conductor would so operate said train as to create the least possible chance of an injury to plaintiff's intestate, the said * * * conductor, without warning to plaintiff's intestate, and while he had every reason to believe that the speed of said train would not be increased, negligently and carelessly and without necessity therefor greatly increased the speed of said train to such an extent as to greatly increase the peril and hazard in which the plaintiff's intestate was placed, and increased the speed of said train to the extent that the same could not be controlled or stopped as readily and as suddenly as it could and would have been stopped had the rate of speed been not increased."

The defenses interposed to the amended petition were a denial of the negligence charged, assumption of the risk by Crotty, contributory negligence on his part, and the statute of limitations, the last being directed specially against what was embraced in the amendment to the petition. A second trial resulted in a directed verdict for the defendant, upon which judgment was entered, and thereupon the plaintiff sued out the present writ of error.

In the course of the trial, the defendant was permitted to read in evidence a portion of each of four depositions taken by the plaintiff, but not used by her, the plaintiff objecting in each instance that it was not admissible to read a part only of a deposition, and that the portion read did not include all bearing upon the same subject. Error is assigned upon this ruling, but the assignment cannot be sustained. The bill of exceptions sets forth what was read, but not what was not read, so it does not appear that the former did not include all bearing upon the same subject, or that the latter had any tendency to help the plaintiff. Neither does it appear that what was read consisted of mere fragmentary excerpts, a correct appreciation of which depended upon the context, but rather that it consisted of a narrative seemingly complete in itself. Not only this, but the court, as part of its ruling, declared that the plaintiff would be at liberty to read all or any part

of what was not read by the defendant, and she declined to exercise that right. There is some diversity of opinion among the courts upon this question of practice, but the prevailing and better opinion is that there is no sound objection to the reading of a part only of a deposition, if what is read does not consist of mere fragmentary excerpts, a correct appreciation of which depends upon the context, and the opposite party be left at liberty to read what is omitted. Scherer v. Everest (C. C. A.) 168 Fed. 822; Watson v. St. Paul City Ry. Co., 76 Minn. 358, 363, 79 N. W. 308; Morrison v. Wisconsin, etc., Co., 59 Wis. 162, 171, 18 N. W. 13; Miles v. Stevens, 3 Pa. 21, 41, 45 Am. Dec. 621; Herring v. Skaggs, 73 Ala. 446, 453; Norris v. Brunswick, 73 Mo. 256; 4 Wigmore, Ev. § 2103.

Passing other assignments which are without sufficient merit to require special mention, we come to the chief question in the case, which is, Was the evidence such as to justify the court in directing a verdict for the defendant, as was done? Of course, the answer must be in the affirmative, if the evidence produced upon the second trial was substantially the same as that which was before us upon the first writ of error, when we ruled that the defenses of assumption of risk and contributory negligence were conclusively established (73 C. C. A. 147, 141 Fed. 913, 4 L. R. A. [N. S.] 832); for that decision has become the law of the case and presents an insuperable obstacle to a reconsideration, upon a second writ of error, of what was then considered and determined. Thatcher v. Gottlieb, 8 C. C. A. 334, 59 Fed. 872; Balch v. Haas, 20 C. C. A. 151, 73 Fed. 974; Haley v. Kilpatrick, 44 C. C. A. 102, 104 Fed. 647; Board of Com'rs v. Geer, 47 C. C. A. 450, 108 Fed. 478; Guarantee Co. v. Phenix Ins. Co., 59 C. C. A. 376, 380, 124 Fed. 170; Denver & Rio Grande R. Co. v. Arrighi, 72 C. C. A. 100, 141 Fed. 67; Mutual Reserve Ass'n v. Ferrenbach, 75 C. C. A. 304, 144 Fed. 342. Upon the first trial the evidence was without substantial conflict, and upon the second, although in other respects the same, it was quite contradictory as respects the manner in which the train was controlled and moved during the second attempt to stake the car. In one view, that most favorable to the defendant, the train was controlled and moved as well as it could be in the circumstances, as was shown upon the first trial; but in the other view, that most favorable to the plaintiff, the conductor, who was in charge of the work and fully understood the peril of Crotty's position between the train and the car, negligently caused the train to come back with unusual, unnecessary, and increasing force and speed, thereby enhancing the peril of Crotty's position and making it as dangerous for him to release his hold upon the post and to attempt to escape from his position as to maintain his hold and to attempt to keep the cars apart by means of the post, and this negligence of the conductor was the immediate cause of Crotty's death. In our opinion, this conflict worked a substantial change in the evidence upon a material point, and required that the cause be submitted to the jury, whose province it was to determine all disputed questions of fact. And, having regard to the opposing views so presented by the evidence, the jury should have been instructed that, if they resolved the

conflict in favor of the view first stated, their verdict should be for the defendant, but if they resolved it in favor of the other view, a verdict should be returned for the plaintiff. This is so, because in the first contingency the established facts would have been the same as when the case was here upon the first writ of error, and the decision then given would have been controlling, and because in the other contingency the changed state of facts would have made it necessary to give controlling effect to these further considerations: (1) It was the duty of the conductor, while Crotty was in the exposed position between the train and the car, to exercise reasonable care for his protection, and if, in disregard of that duty, the conductor negligently caused the train to come back with unusual, unnecessary, and increasing force and speed, his negligence was attributable to the defendant under the state statute, and the enhanced and extraordinary peril resulting therefrom was not among the risks assumed by Crotty. Chicago, Milwaukee & St. Paul Ry. Co. v. Donovan, 87 C. C. A. 600, 160 Fed. 826. (2) If, with Crotty's exposed position as one of the existing and known conditions affecting the conductor's duty in the premises, he negligently caused the train to come back in the manner just stated, and that was the immediate cause of the fatal injury, the fact that Crotty was negligent in taking such an exposed position was no defense to the action, in so far as it was grounded upon such supervening negligence of the conductor. Chunn v. City & Suburban Ry. Co., 207 U. S. 302, 309, 28 Sup. Ct. 63, 52 L. Ed. 219; Louisville, etc., Co. v. East Tennessee, etc., Co., 9 C. C. A. 314, 317, 60 Fed. 993; Cincinnati Co. v. Whitcomb, 14 C. C. A. 183, 189, 66 Fed. 915. Upon this point, the case is readily distinguishable from St. Louis & San Francisco Ry. Co. v. Schumacher, 152 U. S. 77, 81, 14 Sup. Ct. 479, 38 L. Ed. 361, Illinois Central R. Co. v. Ackerman, 76 C. C. A. 13, 144 Fed. 959, and Denver City Tramway Co. v. Cobb (C. C. A.) 164 Fed. 41, wherein it conclusively appeared that it was within the power of the injured person, down to the moment of the injury, to avoid it by the exercise of reasonable care; for, practically speaking, while Crotty was attempting to hold the post in a proper position between the moving train and car, he was without power to take precautions for his own safety, and was dependent upon such as were taken by the conductor.

But it is urged that the charge relating to the supervening negligence of the conductor was first brought into the case by the amendment to the petition allowed after our former judgment of reversal, that the limited period prescribed in the state statute for commencing actions such as this had then expired, and that the defense based upon the statutory limitation was conclusively established in so far as that charge was concerned. It is true that the period of limitation had expired when the amendment was allowed, but it properly cannot be said that the supervening negligence of the conductor was first charged in the amendment. On the contrary, the excerpts from the petition and the amendment hereinbefore set forth make it plain that such negligence was intended to be, and was substantially, charged in the petition, and that the amendment, instead of presenting a new

charge, merely amplified and gave greater precision to one already presented. And, this being so, the case was well within the rule that an amendment to a petition which sets up no new cause of action, demand, or charge, but merely amplifies and gives greater precision to the allegations in support of the cause of action, demand, or charge originally presented, relates back to the commencement of the action, and the running of the statute of limitations against the cause of action, demand, or charge so pleaded is arrested at that point. Whalen v. Gordon, 37 C. C. A. 70, 95 Fed. 305; Patillo v. Allen-West Commission Co., 65 C. C. A. 508, 131 Fed. 680; Hutchinson v. Otis, 190 U. S. 552, 555, 23 Sup. Ct. 778, 47 L. Ed. 1179; Thayer v. Coal Co., 129 Iowa, 550, 105 N. W. 1024; Gordon v. Railway Co., 129 Iowa, 747, 106 N. W. 177.

We conclude that there was error in taking the case from the jury, and the judgment is accordingly reversed with a direction to grant a new trial.

KEELEY et al. v. OPHIR HILL CONSOL. MINING CO. et al. (two cases).

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

Nos. 2,838, 2,839.

1. APPEAL AND ERROR (§ 209*)—OBJECTIONS TO EVIDENCE—SUFFICIENCY OF EVIDENCE—NECESSITY OF OBJECTION AT TRIAL.

An assignment that there was no evidence to support the judgment presents a question of law which cannot be reviewed unless presented to and passed on by the trial court by some appropriate action before the end of the trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1290–1300, 1302½, 1303; Dec. Dig. § 209.*]

2. APPEAL AND ERROR (§ 850*)—REVIEW—GENERAL OR SPECIAL FINDINGS—DETERMINATION BY COURT—"SPECIAL FINDING."

Rev. St. § 700 (U. S. Comp. St. 1901, p. 570), provides that when an issue of fact in any civil action in the Circuit Court is tried and determined by the court without a jury as authorized by section 649, and the court's finding is special, a review may extend to the sufficiency of the facts found to support the judgment. *Held*, that an opinion of the trial judge analyzing the facts and applying the law was not a "special finding" of facts within section 700.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 850.*

For other definitions, see Words and Phrases, vol. 7, p. 6576.]

3. APPEAL AND ERROR (§ 273*)—EXCEPTIONS—SCOPE AND EFFECT.

An exception reserved to the "entry of the judgment" is not sufficiently specific to present a question of law that there was no evidence to support the judgment for determination by an appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 273.*]

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

W. H. Dickson (William C. Hall and Ellis, Ellis & Schulder, on the brief), for plaintiffs in error.

Edward B. Critchlow (Henry P. Henderson, Frank Pierce, W. J. Barrette, and John P. Gray, on the brief), for defendants in error.

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

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

ADAMS, Circuit Judge. These two suits were actions of trespass brought to recover the value of ore alleged to have been mined by the Ophir Hill Consolidated Mining Company from beneath the surface of the "Henrietta" mining claim in the first case, and the "Our Boys" mining claim in the second case.

These claims were alleged to belong to the respective plaintiffs in the two cases. The mining company admitted that it mined ore as charged, but justified its action on the ground that it owned several claims adjoining or in near proximity to the Henrietta and Our Boys claim, and that a certain vein which had its apex within the surface lines of its claims extended vertically down, passed in its dip underneath the surface of the Henrietta and Our Boys claim, and that the ore taken by it was taken from that vein, and therefore belonged to it.

There is no controversy as to the ownership by plaintiffs of their claims or by defendant of its claims as alleged in the pleadings of the respective parties. The chief, if not the only, question, is one of fact whether the vein from which the defendant mined the ore had its apex in defendant's claims. As the two cases involved similar issues, it was agreed that they should be tried together, and, a jury having been duly waived, they were submitted to the court on the evidence produced by both parties. No exceptions were preserved to any of the rulings of the court made during the progress of the trial, and particularly no request was made at the close of the cases for a definite ruling that on all the evidence there must, as a matter of law, be a finding in favor of the plaintiffs. The cases were submitted to the court for a general finding according to the preponderance of the proof, and such finding only was made. On this a general judgment was rendered in each case in favor of the defendants. The only exception as disclosed by the one bill of exceptions, which, by agreement served in both cases, was taken after the entry of the judgment, and in the language of counsel was "to the making and entry" of the judgment. The cases are brought here by writs of error, and the only assignment of error is that there was no evidence to support the judgments. Under this assignment we are asked to examine all the evidence taken on both sides and determine therefrom whether there is any substantial evidence to support the judgments rendered in favor of the defendants.

This is a question of law, one upon which the trial court was not asked to pass, and upon which it never did pass. As this is a court which, in actions at law, can only correct errors committed by the trial court, there appears to be nothing for our consideration.

Section 700 of the Revised Statutes (U. S. Comp. St. 1901, p. 570), reads:

"When an issue of fact in any civil cause in a circuit court is tried and determined by the court without the intervention of a jury according to section 649, the rulings of the court in the progress of the trial of the cause, being excepted to at the time and duly presented by a bill of exceptions, may be reviewed by the Supreme Court upon a writ of error or upon appeal, and

when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment."

In Cooper v. Omohundro, 19 Wall. 65, 22 L. Ed. 47, the Supreme Court held that:

"Where issues of fact are submitted to the Circuit Court, and the finding is general, nothing is open to review * * * except the rulings of the Circuit Court in the progress of the trial, and the phrase 'rulings of the court in the progress of the trial' does not include the general finding of the Circuit Court nor the conclusions of the Circuit Court embodied in such general finding."

The same conclusion was announced by the Supreme Court in Martinton v. Fairbanks, 112 U. S. 670, 5 Sup. Ct. 321, 28 L. Ed. 862; where the former cases are reviewed, and also by this court in the cases of Grattan v. Chilton, 38 C. C. A. 84, 97 Fed. 145, 150; McMaster v. New York Life Ins. Co., 40 C. C. A. 119, 99 Fed. 856; Ogden City v. Weaver, 47 C. C. A. 485, 108 Fed. 564; York v. Washburn, 64 C. C. A. 132, 129 Fed. 564; United States Fidelity & G. Co. v. Board of Com'rs, 76 C. C. A. 114, 145 Fed. 144, 151.

The question of law whether on all the proof the judgment can be sustained is not self-assertive. It commands consideration only when raised by counsel by some appropriate motion and on due exception taken to an adverse ruling thereon by the court. In the last-mentioned case this court said:

"The question of whether or not at the close of a trial there is substantial evidence to sustain a finding in favor of a party to the action is a question of law which arises in the progress of the trial. In a trial to a jury it is reviewable on an exception to a ruling upon a request for a peremptory instruction. In a trial by the court without a jury it is reviewable upon a motion for a judgment, a request for a declaration of law, or any other action in the trial court which fairly presents this issue of law to that court for determination before the trial ends."

In that case this court also said:

"The finding of the court was general and was in favor of the defendant. Like a verdict of a jury, it concludes all issues of fact and all mixed questions of fact and law save the questions of law reserved by demurrer, motion, request, or exception."

The exception reserved to the "entry of the judgment" under repeated rulings of this court is not sufficiently specific to present a question of law for determination by an appellate court.

The learned trial judge wrote an opinion analyzing the facts and applying the law, but this opinion is not such a special finding of facts as within the purview of section 700, Rev. St., enables us to review them and determine whether they are sufficient to support a judgment. York v. Washburn, Ogden City v. Weaver, supra.

Certain cases in which the Supreme Court has felt itself at liberty to notice a plain error in a matter vital to defendants in criminal cases have been called to our attention (Wiborg v. United States, 163 U. S. 632, 658, 16 Sup. Ct. 1127, 41 L. Ed. 289; Clyatt v. United States, 197 U. S. 207, 221, 25 Sup. Ct. 429, 49 L. Ed. 726), and we are asked by learned counsel for plaintiffs to apply that doctrine to this case. This we are indisposed to do for three reasons: (1) Be-

cause this is not a criminal case wherein rights of personal liberty are at stake or wherein great principles of international law, as in the Wiborg Case, or of constitutional law, as in the Clyatt Case, are involved; (2) because the submission by the plaintiffs' counsel, without protest, of the voluminous evidence taken in this case to the trial court for its consideration and determination, according to the preponderance of proof and the able argument made in support of the finding below, indicates that no plain error was committed; (3) because it is better to adhere to established and well-known rules of practice than to depart from them, even if we are at liberty to do so, except in very exceptional cases where obvious and flagrant injustice will result.

The judgment of the Circuit Court must be affirmed.

It is so ordered.

KEELY et al. v. OPHIR HILL CONSOL. MINING CO. et al. †

(Circuit Court of Appeals, Eighth Circuit. April 23, 1909.)

No. 2,858.

1. MINES AND MINERALS (§ 38*)—OWNERSHIP—PRESUMPTIONS.

While the presumption that an owner of the surface of a mining claim owns all minerals beneath it ceases when it is made to appear that some vein found beneath the surface has its apex in a claim belonging to another, yet the burden of proving ownership of such apex vein and its dip and descent to and underneath another claim so as to overcome the presumptive ownership of the surface owner is on him who asserts it.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 38.*]

2. MINES AND MINERALS (§ 38*)—ADVERSE CLAIM—ACTION—JUDGMENT—EFFECT.

The Utah statute provides that an action may be brought by any person against another who claims an estate or interest in real property adverse to him to determine such adverse claim. *Held* that, since it is only when a claim of an adverse estate or interest is made that the owner can avail himself of such remedy, a locator of a claim in a mining district, where there may be extralateral rights existing in favor of those owning contiguous or neighboring claims, cannot compel them in such an action to assert and make proof thereof, or be forever barred from claiming or asserting them, and hence a judgment in such an action is only conclusive as to the rights of the parties in the ownership of discovered veins.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 38.*]

3. JUDGMENT (§ 948*)—RES JUDICATA—PLEADING.

Where an action at law to recover for ore mined by defendants from a certain mining claim and a suit in equity to quiet title to the claim both depended on whether defendants were entitled to mine a particular vein within the surface limits of plaintiffs' claim by virtue of defendants' extralateral rights, and both causes were instituted and disposed of nearly simultaneously, the rendition of the judgment at law in favor of defendants, and its subsequent affirmance by the Circuit Court of Appeals having occurred after the final submission of the equity suit, such judgment was available as res judicata in the equity suit without being so pleaded.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1787; Dec. Dig. § 948.*]

4. APPEAL AND ERROR (§ 790*)—DISMISSAL—MOOT QUESTION.

Where an action at law and a suit in equity were instituted and submitted to the trial court nearly simultaneously and were based on the

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

† Rehearing denied July 12, 1909.

same question, a determination of the action at law in favor of defendants, affirmed by the Circuit Court of Appeals, constituted ground for a dismissal of the appeal in the equity suit on the theory that it thereafter presented a mere moot question.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 47, 3132, 4383, 4384; Dec. Dig. § 790.*]

5. APPEAL AND ERROR (§ 712*)—MOOT QUESTION—FACTS OUTSIDE RECORD.

The Circuit Court of Appeals may take notice of facts appearing outside the record, which disclose the moot character of a question presented to it and decline for that reason to consider it.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 712.*]

Sanborn, Circuit Judge, dissenting.

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

William H. Dickson (William C. Hall, A. C. Ellis, A. C. Ellis, Jr., and R. G. Schulder, on the brief), for appellants.

Edward B. Critchlow and John P. Gray (Henry P. Henderson, on the brief), for appellees.

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

ADAMS, Circuit Judge. This was a suit in equity authorized by the provisions of section 3511 of the Revised Statutes of Utah of 1898 to quiet title to a mining claim owned by complainants situated in the Utah mining district and known as the "Henrietta Lode No. 87." This suit was instituted in the Circuit Court of the District of Utah simultaneously with an action at law brought in the same court, to recover for ore actually mined by defendants from the same claim. The action at law, according to the pleadings and stipulations of the parties, went to trial on the issue whether the ore mined was taken by defendants from veins which had their apex within certain claims belonging to the defendants located in near proximity to the Henrietta. The trial of the law action resulted on October 7, 1907, in a judgment on the merits in favor of the defendants, and necessarily determined that the veins from which the ore had been taken had their apex in defendants' claims, and therefore belonged to the defendants and not to the plaintiffs. On October 10th, following, the present cause was submitted to the court on the testimony taken in the action at law, and a decree was rendered dismissing the bill. The law case was brought here by writ of error, where the judgment has recently been affirmed. 169 Fed. 598. The present appeal was taken from the decree in the equity suit.

We are first confronted with a motion to dismiss the appeal on the ground that the controversy between the parties was fully and finally determined in the action at law, and that the present record presents only a moot case in which no effective relief can be granted. The defendants (appellees) contend that no question was tried or could have been tried in this suit other than what was tried in the action at law, namely, which of the parties was the owner of the particular veins which had been discovered underneath the Henrietta claim and

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

from which the ore had been mined? The complainants (appellants) contend that in this suit to quiet title it is competent to determine and settle for all time which party was the owner not only of the veins actually discovered and mined underneath the surface of the Henrietta, but also of all undiscovered and unknown minerals which might perchance lie vertically thereunder. If the defendants are right, there does not seem to be any doubt but what the judgment in the action at law concluded the question involved in this suit, because no other vein whatsoever had been discovered or worked underneath the Henrietta except the ones from which defendants had taken the ore which was the subject-matter of that action.

The bald question is therfore presented whether a locator of a claim in a mining district, where there may be extralateral rights existing in favor of others who own contiguous or neighboring claims, may compel all others who may have such extralateral rights to assert and make proof of them within the short time permitted by the rules and practice in equity or be thereafter forever barred from claiming or asserting them. It seems to us that the statement of this contention carries its own refutation. The nature of mining property is such that even if the apex of a vein, ledge, or lode should appear on the surface of a neighboring claim, and much more if one should exist but its existence be unknown, underneath the surface and within the vertical lines of the boundary of the claim extending downwardly, the owner of the claim, and therefore of that vein, might not be able to make proof of the dip and extension of his vein within any short time. It is a notorious fact that there is no way to prove the existence of a vein at any particular place except by actually following and developing a known vein to that place or digging into the bowels of the earth and locating it there. The value and property of a mining claim consist mainly of the developed and undeveloped minerals within it, and not merely of the surface of the claim. In fact the surface is ordinarily of no value except to facilitate the extraction of the minerals under or appertaining to it.

The statute of Utah upon which this suit was based reads as follows:

"Action to determine adverse claim. An action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim."

It cannot escape notice that a present existing claim of some adverse right is an essential condition to the exercise of jurisdiction under this statute. Presumptively the owner of the surface of a mining claim owns all minerals beneath it. This presumption ceases when it is made to appear that some vein found underneath the surface has its apex in a claim belonging to another; but the ownership of this apex vein and its dip and descent to and underneath another claim so as to overcome the presumptive ownership of it in the owner of the surface is a matter of proof, the burden of which rests upon him who asserts it. Inasmuch as the enlarged remedy provided by the statute has been held applicable to mining claims (Lawson v. United States Min. Co., 207 U. S. 1, 28 Sup. Ct. 15, 52 L. Ed. 65), the contention is that the owner of such a claim may institute his suit, estab-

lish his ownership of the surface, and thereby cast the difficult and usually impossible burden upon the owners of adjoining claims, whom he may name as defendants, to make immediate proof of their rights, whether they know the facts conferring such rights or not, and practically to assert adverse claims to a thing before they know it exists.

It is only when a claim of an adverse estate or interest is made that the owner can avail himself of this remedy. If the owner's title to the surface of the mine as a whole is denied on the ground of alleged failure to take some steps essential to its acquisition, the owner might well resort to the statutory remedy and require all claimants to make good their adverse claims to such title or be forever barred from doing so. Here would be found a real and existing adverse claim, one which well falls within the remedial provisions of the statute; but whether a vein exists underneath the surface, or whether it so dips and reaches its apex within the body of a claim owned by another, is always purely conjectural until the facts are ascertained by discovery and development. One can know about and make a claim to the title of a mine, but it is not perceived how he can know about and make a claim to an undiscovered vein which oftentimes lies deep within the bowels of the earth.

The defendants, in the absence of a discovered and known vein emanating from their claims and extending under the Henrietta, cannot, in our opinion, be said to be asserting an adverse claim to the Henrietta mine within the true meaning of the Utah statute. There is no evidence that they were making any claim except to the veins which had been discovered and which formed the subject of the action at law. Obviously they could not make a claim until the facts should develop which under the law would give them a right. Their only right was a conditional and contingent one which they might assert, or might not, when the facts arose which would require them to take action.

No cases have been called to our attention, neither have we in our researches found any, which sustain complainants' contention in this regard. Incidentally, however, it may be stated that the cases of Boston, etc., Mining Co. v. Montana Ore Co., 188 U. S. 632, 23 Sup. Ct. 434, 47 L. Ed. 626, and United States Min. Co. v. Lawson, 67 C. C. A. 587, 134 Fed. 769, and Id., 207 U. S. 1, 28 Sup. Ct. 15, 52 L. Ed. 65, which concern the general subject now under consideration, disclose that the courts there undertook to quiet title to veins only which were being actually worked and actually claimed adversely by defendants, underneath the surface of complainants' claims. We conclude therefore that from the peculiar nature of mining property, and particularly of those rights known as "extralateral rights," no bill to quiet title lies to require possible claimants of such rights to assert them before they are known to exist. There being no such right involved in this case except the one adjudicated in the action at law, nothing appears to be left for the present bill to operate upon.

But it is said there is no plea of res adjudicata or estoppel by former judgment, and that therefore we cannot notice the defendants' present contention. Necessarily there is no such plea, as both causes

were instituted and disposed of nearly simultaneously. The rendition of the judgment in the action at law in the trial court and its subsequent affirmance in this court were events which occurred after the final submission of this cause to the trial court.

Nevertheless it is certain that the only issue now before us has been actually and finally adjudicated by a court of competent jurisdiction. The present record and the record in the action at law which has just been before us conclusively show this. Must we shut our eyes to these obvious facts and sagely proceed to an idle and bootless investigation and to a determination of a mere moot question? The forms of a judicial procedure are not so unyielding as to require us to do this vain thing. In the case of Mills v. Green, 159 U. S. 651, 16 Sup. Ct. 132, 40 L. Ed. 293, the Supreme Court passed upon a motion to dismiss an appeal because no actual controversy existed. It there said:

"The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it."

To the same effect are Washington Market Co. v. District of Columbia, 137 U. S. 62, 11 Sup. Ct. 4, 34 L. Ed. 572; Kimball v. Kimball, 174 U. S. 158, 19 Sup. Ct. 639, 43 L. Ed. 932; Tennessee v. Condon, 189 U. S. 64, 23 Sup. Ct. 579, 47 L. Ed. 709; In re James Lincoln, 202 U. S. 178, 26 Sup. Ct. 602, 50 L. Ed. 984; Faucher v. Grass, 60 Iowa, 505, 15 N. W. 302; Board of Freeholders v. Board of Freeholders, 44 N. J. Law, 438; Blythe Estate, 103 Cal. 350, 37 Pac. 392.

The court may take knowledge of facts appearing aliunde the record which disclose the moot character of a question presented to it and decline to enter upon its consideration. Cleveland v. Chamberlain, 1 Black, 419, 17 L. Ed. 93; Lord v. Veazie, 8 How. 251, 254, 12 L. Ed. 1067; Wood-Paper Co. v. Heft, 8 Wall. 333, 336, 19 L. Ed. 379; Dakota County v. Glidden, 113 U. S. 222, 5 Sup. Ct. 428, 28 L. Ed. 981; Butler v. Eaton, 141 U. S. 240, 11 Sup. Ct. 985, 35 L. Ed. 713; Kimball v. Kimball and In re James Lincoln, supra. In the Butler Case the Supreme Court had under examination a judgment rendered in the Circuit Court of the District of Massachusetts in favor of a stockholder of a national bank who had been sued for an unpaid subscription to capital stock. It appears that in the trial in the Circuit Court the defendant set up a judgment in her favor on substantially the same issue rendered by the Supreme Judicial Court of the state of Massachusetts as an estoppel. The judgment of the state court was brought to the Supreme Court for re-examination and resulted in a reversal. The same result also followed on the writ of error to the Circuit Court of the District of Massachusetts. The two cases appear to have been under consideration and to have been decided by the Supreme Court at the same time, and in disposing of the latter mentioned case the Supreme Court held that the Circuit Court committed no error in holding that the judgment of the state court as it stood at the time of the trial constituted an estoppel, and said:

"It cannot be said therefore, looking to the record in this case alone, that there is error in the judgment now before us; but by our own judgment just

rendered in the other case, the whole basis and foundation of the defense in the present case, namely, the judgment of the Supreme Judicial Court of Massachusetts, is subverted and rendered null and void for the purpose of any such defense. * * * The judgment complained of is based directly upon the judgment of the Supreme Judicial Court of Massachusetts, which we have just reversed. It is apparent from an inspection of the record that the whole foundation of that part of the judgment which is in favor of the defendant is, to our judicial knowledge, without any validity, force, or effect, and ought never to have existed. Why, then, should not we reverse the judgment which we know of record has become erroneous, and save the parties the delay and expense of taking ulterior proceedings in the court below to effect the same object? Upon full consideration of the matter, we have come to the conclusion that we may dispose of the case here."

In the Kimball Case the Supreme Court said:

"From the necessity of the case, this court is compelled, as all other courts are, to allow facts which affect its rights and its duty to proceed in the exercise of its appellate jurisdiction, but which do not appear upon the record before it, to be proved by extrinsic evidence."

In the Lincoln Case the Supreme Court, after adverting to several other cases, said:

"In each of which, intermediate the ruling below and the time for decision here, events had happened which prevented the granting of the relief sought, and the appeals or writs of error were dismissed on the ground that this court did not spend its time deciding a moot case."

From our own records we are advised that the ownership of the only discovered veins in the Henrietta claim has been finally and conclusively adjudged to be in the defendant. By reason thereof any decree we might now render in favor of complainant could not be carried into effect. We must therefore decline to entertain this appeal.

In view of the conclusions already reached and stated, it appears that the only subject-matter of this suit were the veins of ore which had been discovered in the Henrietta claim and which were being worked at the time this suit was brought. It follows that the decree rendered herein is referable only to those veins and cannot stand in the way of another bill to quiet title to any vein which may hereafter be discovered if complainants desire to avail themselves of such a remedy.

The motion to dismiss the appeal must be sustained, and it is so ordered.

SANBORN, Circuit Judge, dissents.

VAN RAALTE v. ENTERPRISE TRANSP. CO.

(Circuit Court of Appeals, First Circuit. April 28, 1909.)

No. 811.

1. INSOLVENCY (§ 122*)—UNSECURED CREDITORS—PRIORITY.

In order to justify interference of equity to enforce the claim of one creditor against others, and give it priority in an insolvency proceeding, it must appear, through the intrinsic nature of his claim, that he has an equity superior to that of creditors over whom he claims a preference.

[Ed. Note.—For other cases, see Insolvency, Dec. Dig. § 122.*]

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

2. INSOLVENCY (§ 118*)—PREFERRED CLAIMS—LABORERS.
Petitioner, an independent ticket broker, contracted with defendant and with other companies to sell their transportation. His agreement with defendant provided that he should sell tickets for passage on all its lines from New England to New York, and receive as his compensation 10 per cent. in tickets on the amount of business done by him. *Held* that, on defendant's insolvency, plaintiff was not entitled to priority over other unsecured creditors, under the rule creating a superior equity in behalf of laborers.
[Ed. Note.—For other cases, see Insolvency, Dec. Dig. § 118.*]

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

Lee M. Friedman (Morse & Friedman, on the brief), for appellant.
Samuel Williston, for appellee.

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

ALDRICH, District Judge. The question to be considered arises under an intervening creditor petition, filed in a proceeding in equity, in which a receiver was appointed on grounds of insolvency and in accordance with the general course of equity.

The petitioning creditor claims priority over the general creditors under circumstances which relieve the situation from all considerations of bankruptcy or other statutory liens or priorities, except so far as they may have a bearing by way of analogy. We must view the case, therefore, as one involving the single question whether this particular creditor is entitled to priority under the general doctrines of equity.

The general rule is that unsecured creditors stand alike and should have equal equity, and it follows that, in order to justify the interference of a court of equity, to enforce the claim of one creditor against others and give it priority, it must be made to appear, through the intrinsic nature of his claim, that he has an equity superior to that of the creditors over whom he claims a preference.

Under this general rule, we perceive no reason whatever for giving the creditor in question priority over the other unsecured creditors. The creditor's case has been argued with ingenuity and ability, but when it is relieved from ingenious argument, based upon somewhat remote analogies, it is difficult to see how a creditor could have a much weaker case in the direction of priority.

The relationship between the petitioner and the transportation company was created and defined by special contract in writing, and the scope and nature of the contemplated business transactions were such as to wholly exclude the idea of the peculiar merit of that particular kind of relationship, which is commonly understood to be requisite when the relationship between employer and employé is accepted as something creating a superior equity in behalf of laborers, which justifies, under cautious limitations and in special circumstances, the interposition of courts of equity to establish priorities and preferences among unsecured creditors.

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

Under the contract, the petitioner, who was an independent ticket broker, maintaining an independent ticket office in the city of Boston (with a supply of clerks, as suggested in argument), and who sold tickets for other companies, was, as ticket agent for the transportation company in question, to sell tickets for passage on all its lines from New England to New York, and was to receive as compensation ten per cent. in tickets on the amount of business transacted by him. While there may be some ground for technical reasoning otherwise, the substance of the requirements of the obligations of the contract was that the transportation company should furnish the petitioner with tickets, and that the petitioner should sell them, and as a commission, or as compensation, that he should realize for himself 10 per cent. of the proceeds of such sales as he might make.

The matter of marking the tickets was a thing incidental to the leading feature of the contractual relations, and was quite likely designed to aid in the accounting; but it in no substantial sense changed the contemplated relationship of the parties. While it is not necessary to a decision of the question, it would be reasonable to say that the petitioner became jointly interested with the transportation company in respect to the furtherance of its enterprise through the sale of tickets.

If we were to apply the general rule laid down by Judge Putnam in Dickinson v. Saunders, 129 Fed. 16, 19, 63 C. C. A. 666, the result would be unfavorable to the petitioner, because he was not one who furnished labor with no intention of giving credit, but with the anticipation of immediately being paid from day to day out of the accruing earnings of the property, and because, on the contrary, he was one of those who did give credit under the terms of the contract, and did rely for compensation upon the sale of tickets, and upon making himself whole through the avails of 10 per cent. of such tickets as he might sell.

On the whole, we are not persuaded that equity requires that a preference should be accorded to the petitioner, and, as we decide that the intrinsic nature of the petitioner's claim is not such as to entitle it to priority, we need not consider the question whether the doctrine of equitable preference or priority among unsecured creditors may be extended to steamboat companies; and, as the assignment of errors raises the single question of the right of priority, we need not deal with any question as to the general creditor status of the petitioner under the contract.

The decree of the Circuit Court is affirmed, with costs.

NEBRASKA BRIDGE SUPPLY & LUMBER CO. v. JEFFERY.

(Circuit Court of Appeals, Eighth Circuit. April 26, 1909.)

No. 2,832.

NEGLIGENCE (§ 121*)—RES IPSA LOQUITUR—REBUTTAL.

Plaintiff, a railroad lumber inspector, was inspecting piling being loaded by defendant contractor onto flat cars by means of skids and a rope, one end of which was hitched to a horse or team. The rope, which was seven-eighths of an inch in diameter and had only been used once before to secure a raft of logs in the river, broke, causing a piece of piling to roll back rapidly to the ground and injure plaintiff, who was standing near the center of the pile of timbers on the ground, before he could escape. Defendant's evidence showed that the rope was purchased but a short time before, that it was a good rope, had been inspected at the time it was purchased, and that its size was amply sufficient for the purpose, the cause of the break not being shown. *Held* that, even if the doctrine res ipsa loquitur applied, defendant's evidence tended to rebut any presumption of negligence raised thereby to warrant the submission of such question to the jury, and it was therefore error to charge that from the mere fact that the rope broke and the accident happened defendant was negligent in not providing a safe rope.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 218; Dec. Dig. § 121.*]

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

For opinion below, see 157 Fed. 932.

Charles C. Collins (G. Otis Bogle and Thomas & Lee, on the brief), for plaintiff in error.

G. L. Grant and W. A. Oldfield (R. E. Jeffery and Charles F. Cole, on the brief), for defendant in error.

Before SANBORN and ADAMS, Circuit Judges, and RINER, District Judge

RINER, District Judge. This is a writ of error to the Circuit Court for the Eastern District of Arkansas. The action was brought in the state court and removed to the Circuit Court by the plaintiff in error, hereafter called the "Bridge Company," where a trial was had resulting in a verdict for the defendant in error, hereafter called the "plaintiff."

The record discloses the following facts: That in July, 1907, the Bridge Company had a contract with the St. Louis, Iron Mountain & Southern Railway Company to deliver to the Railroad Company at Cotter, Ark., and other points along its line of railroad, certain piling and other timber; that on the 17th of July, 1907, the Bridge Company was loading piling on the cars at Cotter, Ark.; that the plaintiff was in the employ of the railroad company as a lumber inspector, and was, by direction of his employer, at Cotter, on the day above mentioned, for the purpose of inspecting the piling then being loaded on a flat car by the Bridge Company; but the piling was loaded by means of a rope and skids; that the skids extended from the ground to the platform of the car, one end of the rope being fastened to a stake in

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

the side of the car opposite the place where the pilings were located on the ground; the rope was then passed around the piling desired to be loaded, the loose end of the rope passed back over the car, a horse or team hitched thereto, and then started, and by this means the pile was rolled up these skids onto the car; that, as the piece of piling was being rolled up on the skids, there was a man stationed at either end for the purpose of keeping it straight; that when the car was about one-half loaded, and when a piece of piling was partway up on the skids, the rope, which was seven-eighths of an inch in diameter, broke, causing the piece of piling to roll back rapidly to the ground; that there were a number of these piling timbers at the place where this loading was going on at the time the rope broke, causing the piece of timber on the skids to roll back, and plaintiff was standing on the pile of timbers then on the ground and near the center thereof; that the timbers were 18, 16, and 14 feet in length; that back of the pile of logs upon which plaintiff was standing was a mud hole 6 or 7 feet wide, and for that reason plaintiff claimed that he was obliged to go upon the timbers for the purpose of inspecting them; that the instant the rope broke some one called out, "Look out!" that the plaintiff attempted to get out of the way, but before he could do so was caught by the log and his heel and ankle injured.

There is some evidence in the record tending to show that Mr. Wolf, who had charge of loading these pilings on the car for the Bridge Company, cautioned the men, in the presence of Mr. Jeffery, to be on the lookout, as there was danger of a skid slipping or something happening by which they might be injured.

The evidence offers no explanation of the cause of the parting of the rope. It does show, however, that the rope had been recently purchased, and had only been used on one occasion prior to this time, and then for the purpose of securing a raft of logs in the river; that it was a manila rope, and at the time it was purchased was carefully inspected; that it was of the size usual for the purpose for which it was then used, and was apparently in good condition.

The court gave the jury the following instruction:

"Now the rope which was used for the purpose of hauling those logs, and which caused the accident, broke; there is no evidence here to show what caused the rope to break; there is no evidence here to show that the rope was defective, or that would justify the jury in finding from the evidence itself that the defendant is guilty of negligence; but in view of the position occupied by the defendant in this case, the court charges you as a matter of law that, when the rope broke and caused the accident, the law presumes, in the absence of any other evidence, that the defendant must have been guilty of negligence in using such rope, until by competent evidence introduced on the part of the defendant that presumption has been rebutted.

"Now in this case there was no such proof. It is true the defendant's main witness testified that the rope he was using had only been purchased a short time before, in May; that it was a good rope, because he inspected it at the time he bought it; that it is a three-quarter inch rope, and that frequently they use a half-inch rope; that, from the time he had purchased it until it was used in loading these logs at the time of the accident, it had only been used 24 hours. Before it had been used on that day there is no evidence that the defendant inspected it, to be sure that it was not defective. Now we all know that a rope may be perfect to-day, but to-morrow it might be defective. For that reason, the rule of law is that a person, before he uses anything that

might be the cause of great injury, should have made an inspection of it before using it. Therefore the court charges you that the mere fact that the accident happened, the defendant was guilty of negligence in not providing a safe rope."

It was doubtless the view of the Circuit Court that the maxim res ipsa loquitur was applicable to an accident of the character disclosed by the evidence, and that, in the absence of explanation by the defendant as to the cause of the rope breaking, the inference of negligence was conclusive under the circumstances. To this view we are unable to assent. Even if it be conceded that from the mere fact of the rope breaking it was competent for the jury to infer, as a proposition of fact, that there was some negligence on the part of the defendant, it ought not to have the weight of a conclusive presumption either of law or fact, so as to compel the defendant, in order to avoid liability, to prove affirmatively that it was guilty of no negligence and that the accident was unavoidable. At most, the question of negligence should have been left to the jury to determine upon the evidence actually introduced.

If it be admitted that the maxim res ipsa loquitur is not, and should not be, confined to cases of contractual relations, the admission does not help the plaintiff's case, for that doctrine is based upon the general consideration that, where the management and control of the instrumentality which occasioned the injury are in the defendant, it is within defendant's power to produce evidence of the actual cause of the accident which the plaintiff may be unable to produce.

"Its application," as was said by the New York Court of Appeals, in Griffen v. Manice, 166 N. Y. 188, 59 N. E. 925, 52 L. R. A. 922, 82 Am. St. Rep. 630, "presents principally the question of the sufficiency of circumstantial evidence to establish, or to justify the jury in inferring, the existence of the traversable or principal fact in issue, the defendant's negligence." Graham v. Badger, 164 Mass. 42, 41 N. E. 61; Parrot v. Wells Fargo Co., 15 Wall. 524, 21 L. Ed. 206; Brown v. Kendall, 60 Mass. 292; Huff v. Austin, 46 Ohio St. 386, 21 N. E. 864, 15 Am. St. Rep. 613; Donnelly v. Granite Co., 90 Me. 110, 37 Atl. 874; Stearns v. Ontario Spinning Co., 184 Pa. 519, 39 Atl. 292, 39 L. R. A. 842, 63 Am. St. Rep. 807; Texas & Pac. Ry. Co. v. Barnett, 166 U. S. 617, 17 Sup. Ct. 707, 41 L. Ed. 1136; Cryder v. C., R. I. & P. Ry. Co., 152 Fed. 417, 81 C. C. A. 559; I. C. R. R. Co. v. Coughlan, 132 Fed. 801, 65 C. C. A. 101.

We think there was sufficient evidence offered on behalf of the defendant tending to rebut any presumption of negligence on its part, to warrant the court in submitting that question to the jury, and that it committed error in declaring that from the mere fact that the rope broke and the accident happened the defendant was guilty of negligence in not providing a safe rope.

The view we have taken of this case renders it unnecessary to discuss the other assignments of error.

The judgment of the Circuit Court is reversed, with instructions to grant a new trial.

In re NEW YORK HOUSE FURNISHING GOODS CO.

(Circuit Court of Appeals, Second Circuit. April 13, 1909.)

No. 216.

1. SALES (§ 296*)—STOPPAGE IN TRANSITU—RIGHT OF BUYER—TERMINATION.
The transitus of goods for the purpose of exercise of the right of stoppage in transitu is not ended until there has been an actual or constructive delivery of the goods to the consignee, for so long as the goods are in the carrier's custody, whether as carrier or warehouseman, at destination, the right of stoppage may be exercised.
[Ed. Note.—For other cases, see Sales, Cent. Dig. § 837; Dec. Dig. § 296.*]

2. SALES (§ 289*)—STOPPAGE IN TRANSITU—CHANGE OF RELATION.
A carrier cannot by his own will change his character so as to become the buyer's agent or warehouseman without the latter's assent, nor can the buyer change the capacity in which the carrier holds the goods, so as to make him the buyer's bailee, without the carrier's assent, to the prejudice of the seller's right of stoppage in transitu.
[Ed. Note.—For other cases, see Sales, Cent. Dig. § 824; Dec. Dig. § 289.*]

3. SALES (§ 296*)—STOPPAGE IN TRANSITU—EXERCISE OF RIGHT.
A bankrupt purchased certain refrigerators f. o. b. with instructions to ship by rail to New York. The goods were delivered to a carrier on February 13, 1908, who issued a bill of lading therefor. They arrived at destination, freight unpaid, on March 12th, and immediate notice was given to the consignee to remove them. A few days later they were levied on while still in the cars, after which a petition in bankruptcy was filed and a receiver appointed, and on March 25th the seller notified the carrier of its election to exercise its right of stoppage in transitu. *Held* that, the goods being still in the carrier's possession, the right of stoppage still existed, notwithstanding the levy.
[Ed. Note.—For other cases, see Sales, Cent. Dig. § 838; Dec. Dig. § 296.*]

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

This is an appeal by the receiver of the bankrupt from an order of the District Court, Southern District of New York, directing the receiver to pay to the Home Metallic Refrigerator Company the sum of $500 now in his hands as the proceeds of the sale of certain goods with costs and disbursements to be paid out of general funds of the bankrupt estate.

H. W. Newburger (George Edwin Joseph and Herbert H. Harris, of counsel), for appellant.

Fuller & Reuman, for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. The proceeds in question represent 100 refrigerators which the bankrupt had ordered from the Home Company two months and more before petition was filed; the price was agreed upon f. o. b. cars and instructions given to ship by rail to New York. The goods were on February 13, 1908, delivered to the

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

Chicago, Milwaukee & St. Paul Railway, which issued bill of lading giving the consignee's name and address "New York City, N. Y.," and guaranteeing that the freight should not exceed rates specified therein. The freight was not prepaid. They arrived at the Thirty-third Street freight station of the New York Central & Hudson River Railroad on March 12th. Notice was immediately given by the carrier to the consignee of their arrival, with a request to remove them. The consignee did not remove them, nor make any attempt so to do. A few days later a deputy sheriff, under an execution issued upon a judgment against the house furnishing goods company, called at the freight station and served a notice upon the person in charge that he had levied upon the refrigerators then standing in the cars. On March 18th petition in bankruptcy was filed and receiver appointed. On March 25th the Home Company notified the general freight agent of the New York Central & Hudson River Railroad Company to hold the refrigerators until arrangements could be made relative to their disposal. Arrangements were subsequently made between it and the receiver whereby the freight was paid and the goods removed and sold and the proceeds placed in the hands of the receiver subject to the order of the court.

The only question in the case is whether the right of stoppage in transitu continued in existence when the vendor reclaimed the goods. The general rule of law is well stated in Hutchinson on Carriers, §§ 415, 417:

"In the case of railroad companies transporting goods as common carriers, the transitus will not be considered as having come to an end, as soon as the goods have arrived at destination and have been stored, whether such carriers be required to give notice to the consignee or not, or whether their liability be held to cease as carriers upon the arrival and warehousing of the goods, without more, or not. As long as the goods are in their custody, whether as carriers or warehousemen, they must recognize the right of the vendor to stop delivery. * * * An actual or constructive delivery of the goods to the consignee will defeat the right. * * * It is not necessary that the goods should have come into the actual possession of the buyer, to put an end to the right of the vendor. * * * If the consignee, for his own convenience, agree with the carrier to let the goods remain in his warehouse, to be delivered when or as he should want them, or if that be the course of dealing between them, the carrier becomes the warehouseman or agent of the buyer, although he may still have a lien upon them for his freight. But the carrier cannot of his own will change his character so as to become the buyer's agent or warehouseman without the latter's assent; nor can the buyer change the capacity in which the carrier holds the goods, so as to make him a bailee for the buyer, without the carrier's assent. The intentions of both must concur."

Our attention is called to no facts in this case which evidence any such agreement or course of dealing or concurrence as would make the New York Central & Hudson River Railroad the warehouseman of the buyer touching these goods, which the latter did not demand or pay freight on prior to March 25, 1908. The levy or attempted levy by the sheriff in no way operated to defeat the vendor's right of reclamation. Covell v. Hitchcock, 23 Wend. (N. Y.) 612.

We find nothing in the authorities cited on appellant's brief in conflict with the statement above quoted. In Becker v. Hallgarten, 86 N. Y. 167, the goods had come into "the complete possession and control

of the vendees." In Dixon v. Baldwin, 5 East, 175, they had passed out of the hands of carrier into the actual possession of the vendee's agent at Hull. The right of stoppage was sustained in Covell v. Hitchcock, 23 Wend. (N. Y.) 613, because the warehouseman to whom the goods were delivered was not the general agent of the purchaser. To the same effect is Harris v. Pratt, 17 N. Y. 249. In E. & G. Brooke Iron Co. v. O'Brien, 135 Mass. 442, the agent of the vendee had chartered two schooners, taken the goods from the shipping agent and loaded them on the vessels. In Wentworth v. Outhwaite, 10 Morg. & W. 436, they were actually in the "defendant's warehouse at Leeds, a large shed near the railway terminus, where it was the custom for the defendants to receive goods sent for the vendee." In Sawyer v. Joslin, 20 Vt. 172, 49 Am. Dec. 768, they had been landed upon a wharf, half a mile from the vendee's place of business, which wharf was the usual place of the vendee's receiving goods in that town. They were not subject to any lien for freight or charges, and, after they were landed at the wharf, neither the wharfinger, nor any person for him, or for the carrier, had any charge of the goods. In Biggs v. Barry, 2 Curtis (U. S.) 259, Fed. Cas. No. 1,402, they had been delivered to "forwarding agents, employed by the buyer, to remain with them until the buyer should send orders respecting their destination." This was held to be in legal effect a delivery to the buyer.

The facts in the case at bar will not sustain a holding that the transitus had terminated by March 25th.

The order is affirmed, with costs.

CENTRAL UNION DEPOT & RY. CO. v. MANSFIELD.

(Circuit Court of Appeals, Sixth Circuit. April 19, 1909.)

No. 1,877.

1. RAILROADS (§ 282*) — OPERATION — INJURIES TO LICENSEES—ACTIONS—QUESTIONS FOR JURY.

In an action to recover for a personal injury sustained by plaintiff by falling down some steps in a railway passenger station, where a direct issue was made by the pleading whether or not the hallway into which the steps led was lighted at the time, on which the evidence was conflicting, and it was a further question whether defendant was relieved from the charge of negligence by the maintenance in the hall of a single arc light, shown to be subject to frequent suspensions or stoppage, the court properly refused to direct a verdict for defendant.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 282.*]

2. EVIDENCE (§ 373*)—DOCUMENTARY EVIDENCE—AUTHENTICATION.

On an issue as to whether an arc light in a railway station was burning at the time of an accident to plaintiff, a daily report of a watchman to witness, an electrician of the building, with respect to the condition of the lights, which did not show any stoppage of lights on the day in question, was inadmissible; the report not being made by witness, and he having no personal knowledge as to the matter reported.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 373.*]

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

3. EVIDENCE (§ 143*)—MATERIALITY.
The report was inadmissible because it was not a report of any fact and proved nothing except by inference.
[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 143.*]

4. APPEAL AND ERROR (§ 273*)—EXCEPTIONS TO INSTRUCTIONS.
An exception to a charge, in order to found a right to review, must be sufficiently distinct and specific to direct the attention of the court to the particular error which is the subject of complaint.
[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 273.*]

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

B. B. Nelson, for plaintiff in error.
H. A. Reeve and C. F. Williams, for defendant in error.

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

SEVERENS, Circuit Judge. The plaintiff in error is a corporation organized under the laws of Ohio, and, as alleged in the petition, was at the time of the occurrences stated therein engaged in the conduct and operation of a general depot and passenger station for steam railways at Cincinnati intended for the use of all passengers arriving and departing on railway trains operating therein. The plaintiff was on a trip from Pittsburg to Atlanta, and on the morning of November 16, 1905, left the incoming train at Cincinnati about 8 o'clock, intending to continue her journey by the next train on a railroad going south. On leaving the train by which she came, she, in company with a daughter, passed into a reception room provided for passengers in the depot. After waiting there a short time, they attempted to go across a hall or passageway to the dining room in the depot. There were some steps at the doorway, which was not the one by which she entered the reception room. The hall was dark, and it had been customary to maintain an electric light therein, near the doorway, by which she left the reception room; but on the present occasion, as the plaintiff claims, there was no light burning in the hall, and she did not see the steps, and in her petition she alleges:

"That by reason of the default, negligence, and carelessness of the defendant, in failing to provide said passageway with suitable and proper lights, this plaintiff, without fault or negligence on her part, fell and was violently thrown into an areaway in said station or depot, and by reason thereof dangerous wounds were inflicted about her person, breaking her right leg near the hip and otherwise bruising and wounding her about the body, and that, by reason of the injuries so as aforesaid inflicted upon the body of this plaintiff, she will necessarily suffer as the result of said injuries great pain and agony during the period of her natural life and will be permanently crippled therefrom."

The answer of the defendant was as follows:

"This defendant denies that there was any default, negligence, or carelessness on its part in failing to provide the passageway between said reception room and dining room with suitable and proper lights, but, upon the contrary, that said passageway was well lighted, safe, and in proper and safe condition for the use of the public, and avers that if the plaintiff fell, or was violently thrown into the areaway in said station and depot, it was solely because of

the carelessness, negligence, and inattention of the plaintiff, and not because of any fault, neglect, or negligence on the part of this defendant. Defendant avers that it has no knowledge whatever of any injuries received by the plaintiff, and therefore denies the same."

For reply the plaintiff averred:

"That she denies that the said passageway was well lighted and safe; and denies that same was in a safe condition for the use of the public, and denies that she, said plaintiff, was guilty of any carelessness or negligence in the premises."

The cause was tried before a jury and resulted in a verdict in favor of the plaintiff for $3,500.

The errors assigned are grouped under three topics for discussion in the brief of counsel for the plaintiff in error, which we will consider in his order.

1. At the conclusion of the evidence, the court overruled a motion to direct a verdict for the defendant. The testimony of the plaintiff and her daughter was to the effect that the morning was dark and gloomy, that there was no artificial light in the hall, that the hall was dark, that there was only a ray of light coming from the street outside, that she did not see the steps, and that she "just walked off, fell." The defendant called witnesses who testified that the defendant maintained an electric light near the door of the reception room, and that it was alight shortly before and shortly after the accident, perhaps 10 minutes; but no one testified more definitely than this how long before the light went out, if indeed it went out at all. There was also evidence to show that arc lights, such as this was, frequently go out and have to be attended to, and sometimes they go out and light again "on their own motion," as the witness said. Upon this evidence there was a question whether the hall was lighted at the time of the accident. This was the issue made by the pleadings, and, the evidence being conflicting, the question was for the jury. Another question germane to the issues was whether a single light in so large an area, subject, as it was, to frequent suspensions, was a sufficient provision for light in a place so much frequented. Of this also the jury were to judge.

In support of his contention counsel further urges that sufficient time had not elapsed after the lamp went out to charge the defendant with notice of it. Apparently, it would be a sufficient answer to this to say that the issue made by the defendant's answer was that the passageway was well lighted, safe, and in proper and safe condition for the use of the public; but, waiving this, prima facie it was sufficient for the plaintiff to show that the hall was not lighted at the time she fell and was hurt. If there were any facts which, being proven, would excuse the defendant for the conditions existing, it was for that party to prove them. Moreover, it appears that the defendant had employés on the spot to look after the lamps and see that they were kept burning, and there was evidence from which the jury might think they had not discharged that duty; or the jury might think, as we have said, that the provision of this single lamp for such a place was not adequate to the requirements. The court did not err

in refusing the request of defendant for a peremptory instruction in its favor.

2. The defendant called as a witness one Lagouskey, who stated that he was the electrician in charge of the lights at the depot, that it was customary for him to have and keep a record of daily reports brought in by a man about the station in regard to any defects occurring in the lighting, that he had with him a report for the day in question, but that he had no personal knowledge as to the lighting in the hall that day. Counsel for defendant then offered the report in evidence, stating that it did not show any "outage" (stoppage) of the lights on that circuit that day. On objection the report was rejected. It was not a report made by the witness, and he at no time had any knowledge whether the report was correctly made or not. It was not a report of any fact and proved nothing except by inference. We think it was properly rejected.

3. The defendant complains of the instruction of the court in regard to the duty of the defendant to keep the hall lighted. The court said:

"It was the duty of the company to furnish proper light so that she could see her way, so that intending passengers of the various trains in this depot could pass from the waiting room into the dining room in safety. Did the defendant do its duty in that regard?"

This was unobjectionable, if we have regard to the issue made by the answer, which is perhaps enough to say of it; but counsel for the defendant says that it was incorrect in not stating that the defendant's duty was to use due care, reasonable diligence, in keeping the hall lighted, and that the duty to keep the hall lighted was not an absolute duty. The language of the court was nearly correct, but not quite. If the counsel had called the attention of the court to it and stated the correction, no doubt the court would have set the matter right. No doubt, the error being slight, the counsel did not observe it, or, if he did, forebore to raise the point, considering it unimportant. We think it cannot now be raised to overturn the judgment. We were confronted with a similar question in the case of Coney Island Co. v. Dennan, 149 Fed. 687, 691, 692, 79 C. C. A. 375, and disposed of it in the same way.

If the jury believed the testimony of the plaintiff, as they seem to have done, the defendant has no fair ground for complaining of the verdict.

The judgment will be affirmed, with costs.

KERN v. UNITED STATES.

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

No. 1,890.

1. APPEAL AND ERROR (§ 1032*)—EVIDENCE—EXCLUSION—HARMLESS ERROR.
Where original records and files in a case in the state court were excluded on objection that certified copies only and not the originals were admissible, and the contents of the records and files were not shown,

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

nor did it appear that they contained anything which would serve the purpose for which they were offered, and there was no statement to the court of any particular matter contained therein which would be relevant to the issue, harmful error did not appear.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4048; Dec. Dig. § 1032.*]

2. BANKRUPTCY (§ 485*)—CONCEALMENT OF ASSETS.

Where a bankrupt's schedule was indefinite and the bankrupt was by active endeavor keeping valuable assets in hiding, the fact that title to all of his property passed to the trustee by operation of law was no defense to a prosecution for concealing assets, since the schedules would point out to the trustee only such assets as the bankrupt actually discovered to him or as the trustee would be likely to discover.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 485.*]

3. BANKRUPTCY (§ 491*)—OFFENSES—FALSE SWEARING—CONCEALMENT.

The offenses of false swearing and concealment of assets by a bankrupt when once committed could not be retrieved by the bankrupt's atonement after extradition by disclosing to the trustee the assets concealed.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 491.*]

4. CRIMINAL LAW (§ 655*)—REMARKS OF COURT.

In a prosecution of a bankrupt for false swearing and concealment of assets, a remark by the court, in explanation of a ruling denying an insistence by defendant's counsel that defendant's subsequent discovery to the trustee of concealed assets could be used to rebut the inference of a criminal intent or to obviate the consequence of the original false swearing and concealment, that "a man could not be allowed to file an amended schedule and escape the result of a criminal prosecution," was not error.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 655.*]

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

James R. Penland, for the United States.

Before LURTON, SEVERENS, and WARRINGTON, Circuit Judges.

SEVERENS, Circuit Judge. The plaintiff in error was convicted in the court below upon an indictment containing two counts charging him with having, after being adjudicated a bankrupt on the petition of his creditors, first, concealed while a bankrupt from the trustee property belonging to his estate, and, secondly, with having made a false oath or account in the proceedings in bankruptcy, in violation of the provisions of section 29 of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 554 [U. S. Comp. St. 1901, p. 3434]). The first count charged him with prejury in swearing to his schedule of assets, and the second, with concealing his assets from the trustee. He was found guilty of both offenses, and was sentenced to a punishment on each count for a term of imprisonment for one year and one day, the terms to run concurrently. There are several assignments of error. Those which seem to us to deserve special consideration are these:

It appears that not long before the petition in bankruptcy was filed the plaintiff in error had been made a defendant in a suit brought by a creditor for the benefit of his creditors in general in a chancery court of Tennessee; and in that proceeding a receiver had been appointed.

The defendant (who is plaintiff in error here) presumably filed a schedule of his assets in that proceeding. What was the enumeration or description of his assets therein contained does not appear from the record in this case. On the initiation of the bankruptcy proceedings and the choice of a trustee, the Tennessee chancery court made an order that the assets be turned over to the trustee. But before this, when the bankrupt made out his schedule of assets, he said in his statement of personal property, "all articles of personal property by me formerly owned went into the hands of Jno. W. Sneed, receiver in chancery court," and under the head of choses in action he said, "all accounts, choses in action, bills receivable, notes, etc., went into the hands of Jno. W. Sneed, receiver in chancery." The receiver of the state court testified that none of the property which the bankrupt was charged with concealing ever came to his possession or knowledge, and that he made diligent endeavor to find more than the items of assets that he succeeded in finding. Other evidence was introduced tending to show that the bankrupt took steps to conceal his assets and prevent them coming to the possession or knowledge of the trustee. One of the principal points made in behalf of the bankrupt on the trial, and here, is that by the general terms of his schedule all his assets had gone by operation of law into the hands of the receiver in the state court and so passed from his control; that the effect of this was to vest the legal possession in the receiver wherever they might be situated; and, further, that to know what property passed to the receiver it was necessary to know what the proceedings in the state court would show in regard to the property surrendered to the receiver. On the trial counsel for the defendant offered in evidence the original records and files in the case in the state court. On objection by the district attorney on the ground, among others, that the originals were not receivable but certified copies only, they were excluded. Assuming that the objection was untenable, counsel for the defendant did not take the necessary steps to save his point. The contents of the records and files are not shown, and it does not appear that they contained anything which would serve the purpose for which they were offered. There was no statement to the court of any particular matter contained therein which would be relevant to the issue. In these circumstances there is nothing to show that the defendant was harmed by the exclusion of the evidence. Assuming, also, that under the general description of his property in his schedule and by operation of law the title to all his property as well as the right of possession passed to the trustee, such facts would be of no avail if there was no enumeration or description, and the bankrupt was by active endeavor, as the evidence tended to prove, keeping valuable assets in hiding; that would be the concealment which the law makes criminal. Moreover, his schedule being indefinite, it would point to no more assets than in aid of it he should actually discover to the trustee, or, at least, to only so much as the trustee would be likely to discover. And, if he had formed the purpose to conceal the other assets from the trustee, his verification of the schedule was a falsehood. The very purpose of it was to show what his assets were and the whole of them. It was a question for the jury whether he meant to swear that all his assets

were those in sight. Soon after the commencement of the bankruptcy proceedings the bankrupt fled to Canada, picking up, as there was evidence tending to show, some of his undisclosed assets in other states on his way, and from Canada endeavored to gather in more. He was brought back by extradition, and, having seen the error of his ways, assisted to some extent the trustee in gathering the assets which he ought to have before disclosed. Probably this was the reason for a moderate punishment by the court. There was evidence tending to show that before he went to Canada he was in respect to some of his conduct acting under the advice of counsel, upon the character of which we need make no comment. But the court gave the defendant the benefit of this circumstance by charging the jury that he would not be responsible for acting on such advice. After he returned from Canada, the bankrupt by leave of the court filed an amended schedule of assets which included those he is charged with having concealed, and counsel argues that this related back to his original schedule, and operated as an atonement which, being made while the proceedings were yet in progress, redeemed his fault, so that in the end nothing was concealed from the trustee. But we are unable to agree that it would have such an effect. The offenses of false swearing and concealment when once committed could not be retrieved by right and lawful conduct and the doing of things "meet for repentance," however they might affect the judgment of the court in imposing sentence.

Complaint is made that the court, in discussing this subject, said in the presence of the jury that "a man could not be allowed to file an amended schedule and escape the result of a criminal prosecution." It is said that this would be liable to prejudice the jury; but it was a remark made in explanation of the ruling denying the insistence of counsel that such facts could be used to rebut an inference of criminal intent or to obviate the consequence of the original false swearing and concealment. We think it was a correct statement of the law, and the statement of it in answer to the contention of counsel is not a ground for criticism as being in excess of the right and privilege of the court.

There are no other questions which merit discussion. We perceive no error.

The judgment must be affirmed.

LITTELL v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. May 3, 1909.)

No. 1,665.

1. FALSE PRETENSES (§ 19*)—UNITED STATES' OFFICERS—EVIDENCE.

Evidence *held* to warrant a finding that prosecutrix relied on defendant's representations that he was an officer of the United States in extending credit to him and in loaning him money.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. §§ 23, 24; Dec. Dig. § 19.*]

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

2. FALSE PRETENSES (§ 19*)—STATUTES—CONSTRUCTION.

A statute provides that every person, who, with intent to defraud either the United States or any other person, pretends to be an officer or employé of the United States, and who in such pretended character shall demand or obtain from any person any money or other valuable thing, shall be deemed guilty, etc. *Held*, that the gist of the offense is false personation of an officer of the United States, and that the section is not limited to the extortion of money or property from another by the assertion of a claim for money or property due or owing the United States which the defendant in his pretended official capacity represents it is his duty to collect.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. §§ 23, 24; Dec. Dig. § 19.*]

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

The plaintiff in error was convicted upon an indictment drawn under Act April 18, 1884, c. 26, 23 Stat. 11 (U. S. Comp. St. 1901, p. 3679), which charged that, with intent to defraud one Josephine C. Dabney, he falsely assumed and pretended to be an officer and employé, acting under authority of the United States and of the Treasury Department thereof, to wit, as an officer of the United States Secret Service, and in such pretended character as such officer and employé as aforesaid, did unlawfully, knowingly, and feloniously demand and obtain from said Josephine C. Dabney a thing of value, to wit, etc. There were four counts, charging, respectively: First, that he obtained board and lodging at the house of the prosecuting witness of the amount and value of $30; second, that he obtained of her $2 in money; third, that he obtained of her $5 in money; fourth, that he obtained of her $600 in money. The evidence was that Josephine C. Dabney, with her two daughters, aged 16 and 17 years, conducted a rooming house in Seattle, Wash., for the support of herself and her daughters, and that they had no other means of support. In answer to a matrimonial advertisement which she published in a newspaper, the plaintiff in error appeared at her house, and by way of reference stated that he was an officer of the United States Secret Service, and was then in Seattle to superintend and hasten the work on the Federal building, and other works which the government was then constructing. He made arrangement with Mrs. Dabney for board and lodging at her house at $6 a week. Subsequently he borrowed from her the sum of $2, and later the sum of $5. About four weeks after he first appeared at her house, Mrs. Dabney sold out her lodging house business, obtaining therefor the sum of $950, and upon the application of the plaintiff in error, and his representation that, if he had $600 available at once, he could make an excellent investment, she loaned to him $600, for which he gave her a draft on a man in Detroit who, he said, was his father.

F. H. Holzheimer and W. A. Holzheimer, for plaintiff in error.

Elmer E. Todd, U. S. Atty., and Charles T. Hutson, Asst. U. S. Atty.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). The plaintiff in error contends that there was no evidence to go to the jury to show that Mrs. Dabney relied upon the representations of the plaintiff in error that he was an officer of the United States in extending credit to him and loaning him money, and that the evidence shows, on the other hand, that the credit was given and money was loaned on other considerations, especially upon consideration of the

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

relations resulting from the answer of the plaintiff in error to the advertisement of Mrs. Dabney and his subsequent engagement of marriage with her. This contention is not sustainable. An examination of the record produces the conviction that the plaintiff in error, before going to Mrs. Dabney's house, deliberately planned to impersonate an officer of the United States falsely for the purpose of cheating Mrs. Dabney. He took pains to arm himself with indicia of the office which he claimed to hold. He brought to her house packages of papers which he exhibited to her and declared to be government papers. He displayed to her a badge which he represented to be the badge of his office. He often referred to the government property which he said was in his custody, to the burdens of his official duties, and to his anxiety about the Federal building and the delay in its construction. All of these things were sufficient to impose upon a woman of the education, experience, and intelligence of Mrs. Dabney, and it is no answer to their inculpating effect to say that she omitted to take precautions to verify the statements, and that the falseness thereof might have been readily ascertained. She testified that she believed them and relied upon them in advancing money and extending credit. It is argued that in making the $600 loan to the plaintiff in error Mrs. Dabney relied upon other security than his representations, to wit, upon the draft which he drew; but what security was his draft? It was nothing more than his promissory note would have been, and Mrs. Dabney testified expressly that in lending him the money she relied, not upon the draft, but upon the standing of the plaintiff in error as an officer of the United States.

The only remaining question in the case which requires discussion is whether or not the facts proven constitute the offense which is defined in the statute which reads as follows:

"That every person who, with intent to defraud either the United States or any person, falsely assumes or pretends to be an officer or employé acting under the authority of the United States, or any department or any officer of the government thereof, and who shall take upon himself to act as such, or who shall in such pretended character demand or obtain from any person or from the United States, or any department or any officer of the government thereof, any money, paper document, or other valuable thing, shall be deemed guilty," etc.

The plaintiff in error, if guilty, is to be held so for violation of the latter clause of the statute, in that "in such pretended character" he obtained money or credit, or both, from Mrs. Dabney. The statute is so worded as to suggest the inquiry whether or not it was the intention of Congress to limit the wrongful act to the extortion of money or property from another by way of asserting a claim for money or property due or owing the United States which, in his pretended official capacity, the accused represents that it is his duty to collect. The language used is comprehensive enough, we think, to show that it was the intention to include the false impersonation of an officer of the United States for the purpose of obtaining money "from any person," and that the gist of the offense is not the demanding or obtaining of the money or other thing of value of another. If it were, there might be doubt whether the act, although done with crim-

inal intent, could be made an offense against the United States, for the reason that it has no relation to the execution of any of the powers of Congress or to any matter within the jurisdiction of the United States; but the gist of the offense is the false impersonation of an officer of the United States. The false impersonation of another was made punishable at common law, and Congress undoubtedly has the power to punish the false impersonation of an officer of the United States. It has seen fit to limit punishment to cases where the criminal intent of such impersonation is evidenced by certain acts which the statute defines. This construction of the statute is in harmony with every reported decision in which it has been brought under consideration. United States v. Taylor (D. C.) 108 Fed. 621; United States v. Ballard (D. C.) 118 Fed. 757; United States v. Farnham (D. C.) 127 Fed. 478.

The judgment is affirmed.

ERKEL v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. May 3, 1909.)

No. 1,666.

1. APPEAL AND ERROR (§ 842*)—REVIEW—PROCEEDINGS AT THE TRIAL.

No question of law can be reviewed on a writ of error except those arising on the process, pleadings, or judgment, unless the facts are found by a jury, by a general or special verdict, or are admitted by the parties on a case stated.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3316–3330; Dec. Dig. § 842.*]

2. APPEAL AND ERROR (§ 1008*)—REVIEW—TRIAL BY COURT—WAIVER OF JURY.

Rev. St. §§ 649, 700 (U. S. Comp. St. 1901, pp. 525, 570), provide that issues of fact in civil cases in a Circuit Court may be determined and tried by the court without a jury whenever the parties file a written stipulation waiving a jury, when the findings of the court on the facts shall have the same effect as a verdict, and the rulings, if excepted to at the time and duly presented by a bill of exceptions, may be reviewed on a writ of error when the finding is special, and such a review may extend to a determination of the sufficiency of the facts found to support the judgment. *Held*, that where a case is tried to the court without a jury, and there is no written stipulation waiving the jury, none of the questions decided at the trial can be re-examined on writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3955–3969; Dec. Dig. §§ 1008.*]

3. COURTS (§ 352*)—FEDERAL COURTS—PRACTICE—STATE STATUTES—"WRITTEN WAIVER OF JURY."

Code Civ. Prac. Cal. § 631, permitting the waiver of a jury trial in actions at law by oral consent in open court entered in the minutes, does not apply to federal courts sitting in California in the trial of actions at law as a substitute for a written waiver of a jury within Rev. St. §§ 649, 700 (U. S. Comp. St. 1901, pp. 525, 570), providing that, in case of a written waiver of a jury in an action at law, rulings of the court duly excepted to and presented by bill of exceptions, if the finding is special, may be reviewed on a writ of error.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 352.*

Following state practice, see note to Nederland Life Ins. Co. v. Hall, 27 C. C. A. 394.]

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*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 Division of the Southern District of California.

Sidney Dell, for plaintiff in error.

Oscar Lawler, U. S. Dist. Atty.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. This case comes here upon writ of error to review a judgment rendered in an action of ejectment brought by the plaintiff in error against the defendant in error after a trial without a jury in the court below; there having been no written stipulation waiving a jury trial. The assignments of error raise the question of the sufficiency of the evidence to sustain the findings on which the judgment was based.

It is well settled that no question of law can be reviewed on error, except those arising upon the process, pleadings, or judgment, "unless the facts are found by a jury by a general or special verdict, or are admitted by the parties upon a case stated." Campbell v. Boyreau, 21 How. 223, 16 L. Ed. 96. In that case it was held that the finding of issues of fact by the court upon the evidence is altogether unknown to a common-law court, and cannot be recognized as a judicial act. The court said:

"And this court therefore cannot regard the facts so found as judicially determined in the court below, nor examine the questions of law, as if those facts had been conclusively determined by a jury or settled by the admission of the parties."

The court further held that no exceptions are to be taken pending a trial, "unless a jury was actually impaneled and the exception reserved while they were still at the bar." That decision was had prior to the enactment of the statute which is carried into the Revised Statutes as sections 649 and 700 (U. S. Comp. St. 1901, pp. 525, 570). Those sections provide that issues of fact in civil cases in any Circuit Court may be tried and determined by the court without the intervention of a jury whenever the parties or their attorneys of record file with the clerk a stipulation in writing waiving a jury, that the finding of the court on the facts shall have the same effect as the verdict of a jury, and that, where a case is so tried, the rulings of the court in the progress of the trial, if excepted to at the time and duly presented by a bill of exceptions, may be reviewed on writ of error, and, when the finding is special, the review may extend to the determination of the sufficiency of the facts found to support the judgment. Under that statute it has been uniformly held that if a case is tried before the court without a jury, and there is no written stipulation waiving a jury, none of the questions decided at the trial can be re-examined in an appellate court on writs of error. Kearney v. Case, 12 Wall. 275, 20 L. Ed. 395; County of Madison v. Warren, 106 U. S. 622, 2 Sup. Ct. 86, 27 L. Ed. 311; Bond v. Dustin, 112 U. S. 604, 5 Sup. Ct. 296, 28 L. Ed. 835; Branch et al. v. Texas Lumber Co., 4 C. C. A. 52, 53 Fed. 849; Merrill v. Floyd, 3 C. C. A. 494, 53 Fed. 173; Rush v. Newman, 7 C. C. A. 136, 58 Fed. 158; Ham v. Edgell, 45 C. C. A. 661, 106 Fed. 820; City of Defiance v. Schmidt, 59 C. C. A. 159, 123 Fed. 1.

Counsel for the plaintiff in error contends that by virtue of the provisions of the Civil Practice Code of California (Code Civ. Prac. § 631), permitting the waiver of jury trial in actions at law by oral consent in open court, entered in the minutes, an exception is created as to cases tried in a Circuit Court of the United States for a district of California such as was recognized by the Supreme Court in Campbell v. Boyreau as to trials in a Circuit Court for the district of Louisiana; but the contention involves a misconception of the decision in that case. Chief Justice Taney, in delivering the opinion, held that courts of the United States, so far as questions of law are concerned, are regulated in their modes of proceeding according to the rules and principles of the common law, with the single exception of the courts of the state of Louisiana, where, under the civil law, the facts, by consent of parties, may be tried and found by the court without the intervention of a jury. The court said:

"But the practice in relation to the decisions in that state is an exception to the general rules and principles which regulate the proceedings of the courts of the United States; nor can the laws or the practice of any other state authorize a proceeding in the courts of the United States different from that which was established by the acts of 1789 and 1803, and the subsequent laws carrying out the same principles and modes of proceeding."

It follows that the judgment must be affirmed.

DOYLE v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. April 20, 1909.)

No. 1,875.

CRIMINAL LAW (§ 427*)—USING MAILS TO DEFRAUD—CRIMINAL PROSECUTION—EVIDENCE.

In a prosecution for using the mails in conducting a scheme to defraud in violation of Rev. St. § 5480 (U. S. Comp. St. 1901, p. 3696), there is no hard and fast rule requiring that concert of action between two defendants should first be shown before evidence of acts of one can be admitted against the other, but the order of evidence is within the discretion of the court, and it is sufficient if the jury, before considering such evidence, are satisfied either by direct evidence or by proof of facts and circumstances from which it may be reasonably inferred that such concert existed, and that defendants were conducting a joint scheme.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1013; Dec. Dig. § 427.*]

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

E. E. Wright, for plaintiff in error.

Casey Todd, for the United States.

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

SEVERENS, Circuit Judge. The indictment in this case contained six counts. The plaintiff in error was convicted upon the first three,

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

and was acquitted, by direction of the court, of the offenses alleged in the other three. The first three of the counts charged the defendant, Doyle, and other persons, who were not found, with having violated the provisions of section 5480 of the Revised Statutes (U. S. Comp. St. 1901, p. 3696) by using the mails of the United States for the promotion of a scheme devised by them to defraud the persons severally mentioned in the said three counts and other unnamed persons. These counts are similar in their character, except that they each designate different persons intended to be defrauded, and different times and places when and where the fraudulent practices were intended to be, and actually were, practiced. The scheme to defraud, as the charge is, was to effect sales of "mackintosh" coats by means of false representations of the name and place of business of the reputed seller—that is to say, the "Goodrich Mackintosh Company, Branch Office, Memphis, Tennessee"—and by the employment of an intricate gambling device whereby tickets were to be sold as in a lottery, and the holder of the winning ticket would take the coat, and the party operating the scheme would also be entitled to a coat for his pains. This local operator was to forward by mail the proceeds of the sale of tickets to the defendants, or some of them, at Memphis, where they would receive the letters containing such proceeds, and, on receipt, they would be required to send the coats.

It was further alleged in the indictment that, in devising the scheme to defraud, the defendant did not intend to furnish the coats so pretended to be sold to the winner at the lottery nor to the persons who should effect the sales. Upon the trial evidence was given to show that at the time when the scheme is alleged to have been in operation the defendant Doyle was staying at a saloon in Memphis belonging to one King. He testified that he was not operating the saloon, except that he was general manager, and making collections for King in the latter's absence. Further evidence was to the effect that before King left Doyle went with a man whom he called King to the post office at Memphis and made application for a box to be rented in King's name, and lock box No. 370 was assigned to him. In the "literature" which was employed in carrying on the business of selling the mackintosh coats the inference was conveyed that King was an agent or manager of the Goodrich Mackintosh Company, to whom all letters intended for the company should be addressed, and to whose order all remittances were to be made payable. Later on Doyle got the letters at the Memphis post office which were directed to King at that office, and obtained moneys or postal orders payable to King contained in the letters, which orders were indorsed by Doyle in King's name to himself. At about the time when the lock box at the post office was secured Doyle took a person whom he called "McKnight" to a printer's, and there "McKnight" secured a quantity of letter paper, envelopes, business cards, and letter heads purporting to concern the business of the Goodrich Mackintosh Company. This "McKnight" shortly thereafter was engaged "in the field," as the saying is, in disposing of the mackintosh coats in the manner described in the indictment, carrying along with him and using the stationery of the so-

called Goodrich Mackintosh Company. He made the arrangements for disposing of the coats with the several parties named in the indictment. They made the sales by the method above stated, received the money for the tickets, forwarded it by postal orders to "King" at Memphis, where Doyle got the proceeds. No coats were ever received either for the winners or for the agents, and there was no such concern as the Goodrich Mackintosh Company discoverable at Memphis. The evidence so clearly showed that "McKnight" and "King" were one and the same person that counsel for the respondent seems in his brief to accept that as a fact. At all events, it seems a safe inference. Several of these agents who effected sales for the Goodrich Mackintosh Company were called as witnesses on the trial and testified under objection by counsel for the defendant about the transactions and the conversations with "McKnight" on the occasions when they were employed by him. The objection to what "McKnight" said or did on these occasions was:

"That the defendant Doyle was never in the state of Arkansas, and the conversation and contract entered into by and between the codefendant McKnight and the witness Moseley were not in the presence of the defendant, Doyle, and such contract, if ever made, was made in the state of Arkansas, and not in the state of Tennessee. And for the further reason that no connection between them is shown by the witness, or that the defendant, Doyle, knew anything of the contract entered into or had anything to do with the correspondence which took place between him and McKnight."

The court overruled the objection and defendant excepted to the ruling of the court, and stated to the jury that this part of witness' evidence could not be considered by them against this defendant until they were satisfied from the other evidence in the case that the defendant was a party to the scheme to defraud, and that this agent in Arkansas was the agent of the defendant, and others who had advised and were executing this scheme. And the stress of the argument is to demonstrate that the court erred in permitting such proof, and that without it there was no evidence on which the defendant could have been convicted.

If it was intended by the objection just mentioned to insist that Doyle's connection with the scheme should be first shown, there are two answers: First, that enough had already been proven to warrant the belief that Doyle was involved in the scheme; and, secondly, there is no hard and fast rule that the evidence of concert should be first put in. The substance of the rule is that the jury must be satisfied that the concert existed before they can consider what one of the parties did or said in carrying out the joint purpose. In overruling the objection, the court very properly instructed the jury as to what the rule is. Besides, the order of production of evidence is one largely in the discretion of the court. But, further, as has been observed in many instances, probably in most, direct proof of the formation of the plot is not obtainable. Such plots are usually formed in secret. The existence of preconcert may be inferred from the subsequent conduct of the parties. In Reilley v. United States, 106 Fed. 896, 905, 46 C. C. A. 25, 34, we said:

"It is also urged that the evidence did not justify the verdict, in that there was no proof of conspiracy to do what was done. As has been often remarked,

it is not necessary that direct evidence of a formal agreement should be given in such cases. If the evidence of the separate details of the transaction as it was carried out indicates with the requisite certainty the existence of a preconcerted plan and purpose, that is sufficient; and we think the evidence was such as to warrant the verdict."

And again in Chadwick v. United States, 141 Fed. 225, 241, 72 C. C. A. 343, 359, we said:

"The fact of the existence of a conspiracy is a fact which is seldom capable of express or direct proof. But evidence of an express agreement to violate the certification statute was not necessary. Evidence of facts and circumstances from which the existence of a preconcerted plan might be inferred is enough. And so, too, the facts and circumstances from which a conspiracy is to be inferred may be and often must be shown singly. Their collocation is for the jury, and the order in which they may be shown is generally one in the discretion of the court"—citing Wharton on Criminal Law (10th Ed.) 1398.

Two other assignments of error are added. They are assignment No. 2, "there is no evidence upon which the verdict of the jury or the judgment of the court can be sustained," and assignment No. 3, "The verdict of the jury and the judgment of the court is contrary to the law and the evidence." We have recited enough of the evidence and of the facts to show that neither of these contentions is maintainable. No error is shown by the record, and the judgment must be affirmed.

MEYER v. HOT SPRINGS IMP. CO.

SAME v. WRIGHT.

(Circuit Court of Appeals, Ninth Circuit. April 5, 1909.)

Nos. 1,679, 1,680.

TIME (§ 10*)—FEDERAL COURTS—PROCEDURE—REVIEW—TIME OF TAKING PROCEEDINGS—CONSTRUCTION OF LIMITATION IN STATUTE.

Under the provision of section 11 of Act March 3, 1891, c. 517, 26 Stat. 829 (U. S. Comp. St. 1901, p. 552), creating the Circuit Courts of Appeals, that "no appeal or writ of error by which any order judgment or decree may be reviewed in the Circuit Court of Appeals under the provisions of this act shall be taken or sued out except within six months after the entry of the order judgment or decree sought to be reviewed," when the last day of the six months is Sunday it is not excluded, and an appeal cannot be taken on the next day.

[Ed. Note.—For other cases, see Time, Cent. Dig. §§ 34–52; Dec. Dig. § 10.*]

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

On motion to dismiss appeals.

A. L. Leavitt, F. H. Mills, and Arthur P. French, for appellants.

Williams, Wood & Linthicum, Thomas Drake, and J. C. Flanders, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. The appellee moves to dismiss the appeals in these cases on the ground that they were not taken within

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

the time allowed by law. The last day of the statutory period of six months was Sunday, and the appeals were not taken until the following day. The question arises whether, in the computation of the time, Sunday, being the last day thereof, is to be excluded. At common law, when Sunday is the last day of the time within which an act is to be performed under a contract, it is excluded, and performance on Monday is allowed. Hammond v. American Mutual Life Ins. Co., 10 Gray (Mass.) 306; Salter v. Burt, 20 Wend. (N. Y.) 205, 32 Am. Dec. 530; Pressed Steel Car Co. v. Eastern R. Co., 121 Fed. 609, 57 C. C. A. 635. So, in construing rules of court in respect to time for pleading and other matters of mere practice, if the last day fall on Sunday, the whole of the next day is allowed within which to perform the required act. Anonymous, 2 Hill (N. Y.) 375, and cases there cited. But while courts may construe their own rules equitably and extend the time therein limited, they have no such power as to statutes, and the decided weight of authority is that when the act is to be done within a time fixed by statute, and the last day thereof falls upon Sunday, that day will not be excluded, unless a different rule for computing the time is also provided by statute. Alderman v. Phelps, 15 Mass. 225; Ex parte Dodge, 7 Cow. (N. Y.) 147; Drake v. Andrews et al., 2 Mich. 204; Pearpoint and Lord v. Graham, 4 Wash. C. C. 232, Fed. Cas. No. 10,877; Shefer et al. v. Magone (C. C.) 47 Fed. 872; Johnson et al. v. Meyers et al., 54 Fed. 417, 4 C. C. A. 399; Hermann v. United States (C. C.) 66 Fed. 721. While the codes and statutes of most of the states provide for the exclusion of Sunday when it is the last day within which an appeal may be taken or other act performed under statutory authority, Congress has made no such provision in reference to appeals from any of the federal courts. The fact that it has made such provision specially as to certain other proceedings is to be taken as indicative of its intention to limit the same to those proceedings. Shefer et al. v. Magone (C. C.) 47 Fed. 872. A case directly in point is the decision of the Circuit Court of Appeals for the Eighth Circuit in Johnson et al. v. Meyers et al., supra.

The motions will be allowed, and the appeals dismissed.

1900 WASHER CO. et al. v. CRAMER et al.

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

No. 8.

1. PATENTS (§ 157*)—CONSTRUCTION—READING CLAIMS AND SPECIFICATION TOGETHER.

No patented invention can be practically or fairly understood or explained if the language of the claims is entirely dissociated from the specification, and the claims and specification should be read together.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 235; Dec. Dig. § 157.*]

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

2. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—WASHING MACHINES.
The Cramer & Haak patent, No. 829,631, for an improvement in washing machines consisting of means for applying mechanical power to actuate an oscillating tub, was not anticipated and discloses patentable 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 Middle District of Pennsylvania.

For opinion below, see 163 Fed. 296.

Samuel O. Edmonds, for appellants.

Joseph C. Fraley, for appellees.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

GRAY, Circuit Judge. The decree appealed from in this case was for an injunction and an accounting, in a suit against the appellants (hereinafter called the defendants), for infringement of letters patent No. 829,631, dated August 28, 1906, issued directly to the appellees (hereinafter called the complainants). The defendants alleged lack of patentable invention and noninfringement. Infringement was asserted and adjudged as to claims 1, 3, 4, 5, and 6 of the patent. The structure in all five of the claims is the same structure, the elements covered being the same elements. Claims 3, 4, 5, and 6 covering details somewhat more specific than claim 1, the discussion was confined substantially to the latter claim.

The invention is stated in the specifications to relate to improvements in washing machines, and particularly to an oscillating tub, the object in view being the provision of means for securing maximum leverage and facilitating actuation of a tub and for providing for resiliency of movement of such a tub. Oscillating tubs were old in the art. Their general structure was that of a tub with a spider or framework at the bottom, so fastened as that its center should coincide with that of the bottom of the tub. Through this center, a shaft or pivot extended to a proper bearing upon a suitable framework, or support, below the tub, and was made secure by proper stays or supports above the bottom of the tub, the object being that the tub might turn easily upon this shaft or pivot. The tub was oscillated by hand, the handle fixed at the upper rim of the tub for that purpose. What was called in the record the standard tub at the time of the issuance of the patent, was fitted with a movable sleeve around the shaft or pivot directly below the bottom of the tub, from which extended from opposite sides short arms or levers, the ends of which were connected with the bottom periphery of the tub by helical springs. The function of these springs was to graduate or modify the oscillation, when the tub was moved by hand, applied as above described, giving a retarding and cushioning effect at either end of the oscillation, and by their resiliency promoting the beginning of the return movement of the oscillation. This tub being moved by hand, human intelligence could govern and regulate the application of the power, so that the retarding and resilient function of the springs might have play. The washer thus generally

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

described, is admitted to have been what was called a standard washer in use at the time of the issuance of the patent in suit.

So far as the record discloses to the contrary, there were at that time no washers except those oscillated by hand power, and in that respect the learned judge of the court below was not wrong in so stating. Whether he was strictly accurate in saying that there was "nothing in use but hand power" prior to the patent in suit, or thereby raised a false issue, is not material to our present consideration. The appeal is from the decree, and not from the opinion, of the court. It is certain that no successful power driven washing machines have been shown to have been in use, and the problem for solution at the time of the patent in suit may be fairly stated, as how to adapt "power"—i. e., mechanical power—to the oscillating of such a tub. In no other device had the power, generally, if not always, hand power, been applied otherwise than to the tub itself, either at its outer periphery, top or bottom, or to the bottom of the tub, between the periphery and the center. That this was so in the case of the so-called standard washer, so often referred to by the defendants (an excellent drawing of which, for purposes of illustration, is inserted in their brief), is apparent, and, as we have said, this washer seems to have been the one most approved in common use, with its helical springs graduating and softening the motion as above described.

It would seem obvious, that to apply mechanical power, however produced, merely in the manner in which hand power was applied, you must lose at once the benefit of the directing and governing intelligence by which the cushioning and resilient functions of the springs can be availed of. It needs no ocular demonstration to enable us to perceive, that the rigid uniform and prescribed motion incident to the use of mechanical power for actuating the washer, would result in the arc, through which the oscillation would proceed, being absolutely fixed, that the oscillation each way would be stopped with a jerk, and that the retarding and cushioning function of the springs would be unavailable. It is also apparent that this would be the result at whatever part of the tub the mechanical power should be applied. The merit of the patent in suit is, that the power is not applied directly to the tub, but to the end of a short lever attached to a sleeve surrounding the pivot at the bottom of the tub, and turning freely around it. From the end of this lever, and in line with it, a helical spring extended and was fastened to the bottom periphery of the tub, just as it was in the standard washer, above described. The power being applied to the short, rigid part of the lever, the tub was moved by its attachment to the end of the spring, which was in effect an elastic prolongation of the rigid lever. In the standard, hand-moved washer, the power was applied to the tub, and the tub moved the lever, while in the device of the patent in suit, the power is applied to the lever, which, through its spring attachment, moves the tub.

The movement caused by the mechanical power thus applied to the short arm fulcrumed on the pivot, is as rigid and unqualified, and as short and sudden in its stops and beginnings, as, in the case supposed, it would be in the application of the power directly to the tub itself;

but the happy thought of the invention is, that between this rigid, jerky movement of the lever thus fulcrumed, and the tub, is interposed, the spring-like attachment extending from the lever to the outer periphery of the tub, so that during and after each movement of this rigid lever, through its prescribed course, we have a retarding and cushioning effect of the spring, together with a resiliency thereof to aid in the return movement. The arc of the oscillation of the tub, therefore, is not measured by that of the lever to which the mechanical power is applied, but the tub has a motion independent thereof, due to the switching function of the spring. It was not, therefore, a mere substitution of mechanical power for hand power, in the oscillation of the tub, but such an adaptation in the use of mechanical power, as would make available the function of the springs shown in the standard washer then in use, and avoid the jerkiness and rigidity of movement that would have been intolerable if the mechanical power was applied to the tub itself, as the hand power had previously been. It was this whip or switch-like movement of the helical spring, that the inventor availed himself of, in order to successfully solve the problem of a mechanical power actuated washing machine.

After the careful discussion of the prior art by the learned judge of the court below, it is only necessary to say that we agree with him in the opinion that there is nothing in that art that would negative patentable invention, in this successful adaptation of mechanical power for the movement of such machines. We should, perhaps, however notice the Wearne patent, No. 630,146, which was chiefly relied upon by the defendant, as such a suggestion of the prior art as would negative patentable invention in the device of the patent in suit. The Wearne patent is the standard washer, already referred to, with the spider-like arms collared on the pivot and turning thereon, with the helical springs extending from the ends of said levers to the periphery of the tub and fastened thereto. But the power is applied to the tub, and not to the lever, and is applied by hand. Moreover, in the Wearne device, there are pins attached to the frame, which check the motion of the levers and allow the power to be used in stretching the springs, thereby promoting their resiliency. The springs are inert until the lever strikes the pin, and the power is then used to move the springs alone. This did not solve the problem, nor did it suggest, in any way that we can see, the device of the patent in suit, by which the power is applied to the lever and the switch-like movement of the spring is used in oscillating the tub.

The first claim of the patent in suit is as follows:

"1. In a device of the class described, the combination with a pivotally mounted tub of a lever fulcrumed on the pivot of said tub, means for actuating said lever, and a spring connecting the lever with said tub."

The combination or description of the standard washer, or of this Wearne tub, can be read it is contended by defendants' counsel into this first claim. This may be true, if we stick in the bark, by looking at the language of the claim, dissociated from the specifications; but no invention can be practically or fairly understood or explained, if such dissociation is absolutely adhered to. As we have already shown,

the element described in the first claim, as "means for actuating said lever," must not be taken to be any means, such as impracticable hand power applied to the lever, but the efficient practical means described in the specifications. Reading the claim and the specifications together, the invention of the patentee was clearly such an application of mechanical power as would oscillate the tub with all the advantages afforded by the resiliency and retardation of the springs of the standard washer preserved. Such an adaptation, and such a result, are shown nowhere in the prior art, and could not have been achieved by the mere substitution of mechanical power for hand power, as it was applied in the standard washer, the Wearne machine, or in any of the devices of the prior art. It was an application of power in a different way and upon a different principle; and this would be true, even if the power applied, directly or indirectly, were hand power.

We are of opinion that, notwithstanding the prior art, the device of the patent in suit involves patentable invention, and we turn to the question of infringement. We find that defendants' structure, in use by it at the time of the filing of the bill in the court below, is covered by the first claim of the patent in suit, both literally and in substance and meaning, when interpreted by the specifications, in connection with which it must be read. The defendants' machine is in terms a combination, with a pivotally mounted tub, with a lever fulcrumed on the pivot of said tub, means for actuating said lever, and a spring connecting the lever with said tub. We also have embodied in defendants' device the principle of the invention of the patent in suit, in that power is applied, not to the tub, but, to a lever fulcrumed on a shaft, communicating motion to the tub by the interposition of a helical spring attached to the end of the short lever, and extending to the bottom periphery of the tub to which it is fastened. The lever thus fulcrumed, with its spring extension, is a driving mechanism nowhere found in the prior art, and is of the very essence of complainants' invention. This element is clearly appropriated in defendants' machine.

But defendants claim that in addition to this elastic driving lever, they have twin cushioning springs in their structure, connected with the movable frame or spider which carries the tub, and with the base; that these are struck by the lever as it nears the end of each oscillation, thereby furnishing additional elastic buffers or cushions, to aid in checking the momentum of the tub. Having these cushioning springs so placed, defendants use a weaker spring extension to its lever. This, however, is clearly a matter of degree, and the function of the spring lever is the same as that of the spring lever in the device of the patent in suit. These cushioning springs could be removed, as was done by defendants' expert, with no resulting change in the operation of the tub, except what would be produced by the weaker action of the driving spring. These cushioning springs were a mere addition to the complete structure of the complainants' device. They supplemented the cushioning function of the driving spring, but did not dispense with it. The defendants do not substitute anything for the patented device, but employ it in its entirety, and then merely add

elements which, without destroying its functions, supplement or partake of them. As remarked by the learned judge of the court below:

"How can it be said that the combination of that which is not an infringement with that which is, saves the result?"

Referring to and adopting the clear and elaborate opinion of the court below upon the question of infringement, its decree is hereby affirmed.

WESTINGHOUSE ELECTRIC & MFG. CO. v. CUTTER ELECTRIC & MFG. CO.

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

No. 55.

1. PATENTS (§ 328*) — VALIDITY AND INFRINGEMENT — AUTOMATIC CIRCUIT BREAKER.

The Wright and Aalborg patent No. 633,772, for an automatic circuit breaker, claims 2 and 5, were not anticipated and disclose patentable invention, the device being a distinct advance on the prior art. Also *held* infringed by devices operating on the same principle and different only in the substitution of equivalent parts.

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

2. PATENTS (§ 22*)—INFRINGEMENT—SUBSTITUTION OF EQUIVALENT PARTS.

The substitution of a cam for a toggle joint in a patented mechanical combination does not avoid infringement, where the two have the same purpose in the combination and effect it in substantially the same manner.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 24; Dec. Dig. § 22.*]

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

See, also, 149 Fed. 437.

Thomas B. Kerr and Thomas W. Bakewell, for appellant.

Joseph C. Fraley, for appellee.

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

Fraley & Paul (Jos. C. Fraley, of counsel), for defendant.

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

BUFFINGTON, Circuit Judge. In the court below, the Westinghouse Electric & Manufacturing Company, owner of patent No. 633,772, granted September 26, 1899, to Wright and Aalborg, for an automatic circuit breaker, filed a bill against the Cutter Electric & Manufacturing Company charging infringement of the second and fifth claims thereof. The court below, on an application for a preliminiary injunction (149 Fed. 437), refused such injunction and subsequently on final hearing dismissed the bill, whereupon the complainant appealed

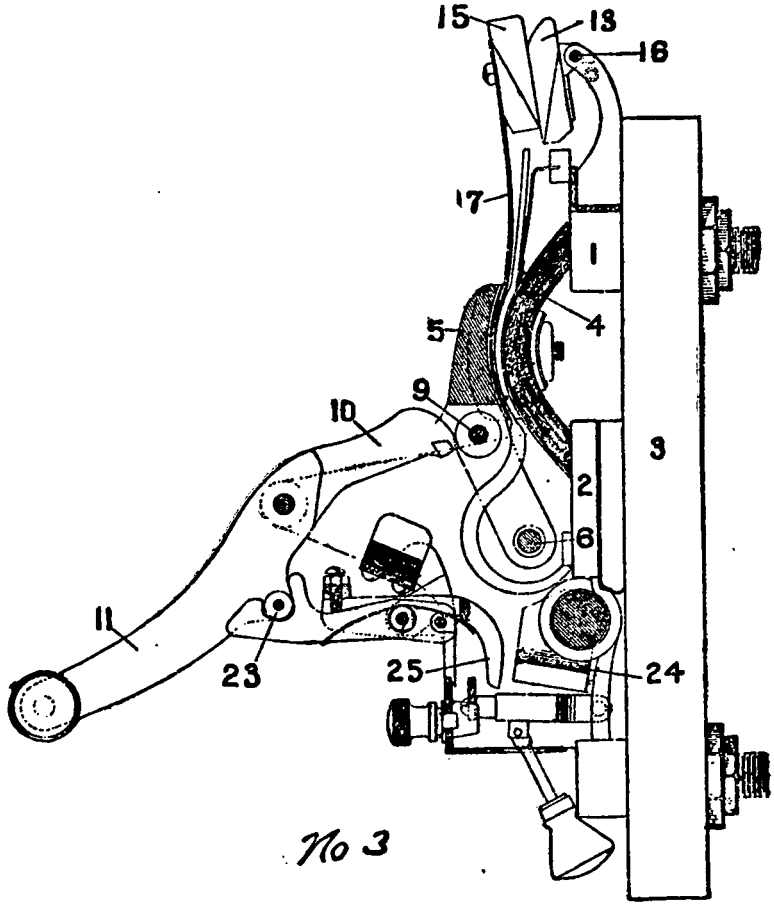
*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

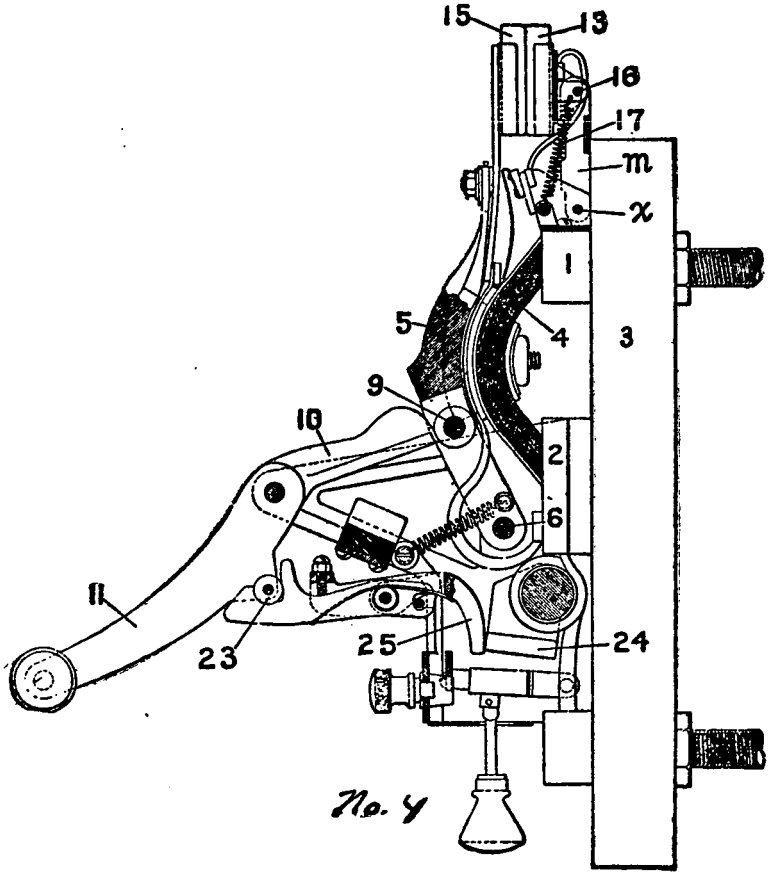
to this court from such decree. The claims here in question were held valid by this court in an opinion reported at 143 Fed. 966, 75 C. C. A. 152, and by the Circuit Court of Appeals for the Second Circuit in an opinion reported in Westinghouse Electric & Mfg. Co. v. Condit Electric Co., 167 Fed. 546, subsequent to the argument of the present case.

In carrying heavy electric currents for lighting and power, it is necessary to use switches for opening and closing circuits. These are protected against the abnormal currents caused by lighting or overloading by automatic circuit breakers. The main contacts of the circuit breakers are copper, which is highly conductive and relatively expensive. Their surfaces must be kept smooth and unpitted, otherwise dangerous and destructive arcs will form. Moreover, when an electric circuit is opened or interrupted, an arc forms between the contact surfaces owing to the current continuing for an instant between unconnected contacts, and if the current is large the damage both to the contacts and the surrounding apparatus may be great. To obviate that difficulty a supplementary or shunt current having carbon contacts is resorted to around terminals. These carbons are cheaper, and, being refractory, are less liable to injury from the arc. Such shunt contacts are arranged to open after and close before the main contacts, so that when the circuit is opened the current flows last through the shunt terminals, and the first contact is also between such carbon terminals when it is closed. These general principles were present in various constructions prior to the patent in question. The patentees, however, embodied the principle in a device which not only made these successive contacts by a novel form of connecting apparatus, but they so vertically aligned the parts of the apparatus as to produce a new type of long, narrow circuit breaker styled "Edgewise." This edgewise type developed several important advantages. To combine safety with great carrying capacity and yet secure economy of space, it is important that the apparatus should not be spread laterally, but that the different parts of a circuit breaker should be so located with reference to each other, and the circuit breaker itself to other circuit breakers, that currents should not stray to other instruments or parts of the same instrument, and arcs should be minimized and instantly extinguished without contact with other apparatus. These requirements were met by the patentees' device. The breaker is long, narrow, and all parts vertically aligned. It opens outwardly from the switchboard, and carries all working parts away from adjoining instruments. The arm is hinged at the bottom, and the shunt contacts, being above the copper ones, pass over longer arcs. These main contacts are laminated, being composed of a number of springy, metallic, bevel-edged plates. When forced against the flat surface of the main stationary contact, they make a maximum metallic conductive surface and utilize the entire conductive cross-section. The whole mechanism is adapted to ease and rapidity in closing. These and other advantages led this court in the opinion cited to hold that the invention "was a distinct advance upon the prior art, producing new and valuable results."

In the present suit the respondent has adduced testimony, not before the court in the prior one, in the patent of Herrick No. 504,528, two English patents and a prior use. In view of the fact that it is conceded that all the elements of the patent in suit are old, these several citations, which simply show that some of the elements of the patent in suit were old, but do not show all of the elements of the claims in combination, do not avail to defeat the patent. Together with the testimony relating to type B of complainant's device, they have been considered, but we see no reason to depart from the court's former holding that the patent is valid.

This leaves us to consider the question of infringement which is predicated on Exhibits 3 and 4, illustrated in the accompanying cuts:




15
13
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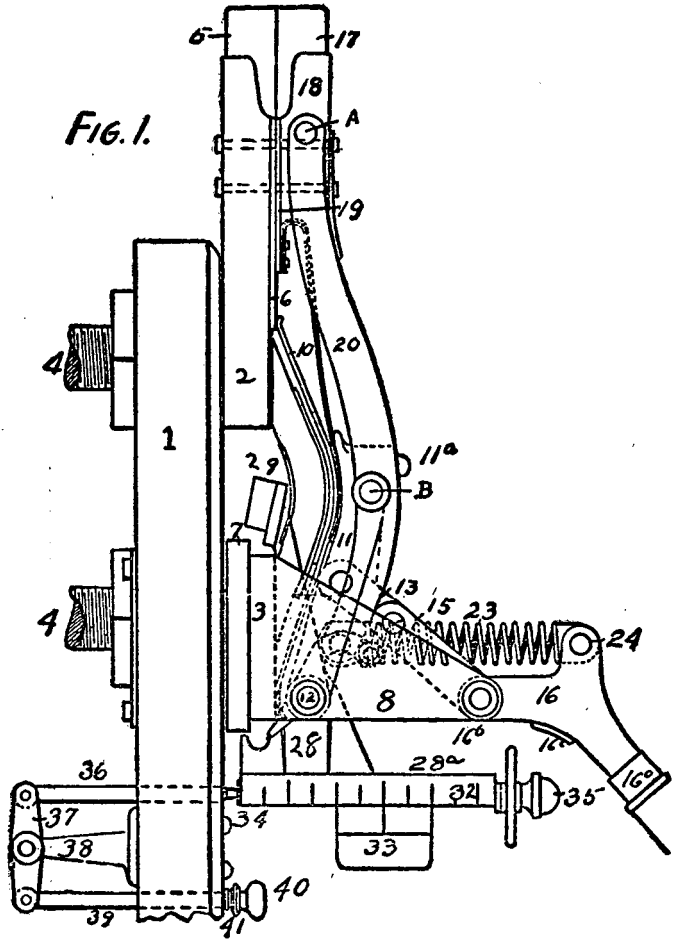
No. 4

Complainant's breaker is illustrated in the cut following:



The difference between the device of complainant and those of respondent falls within a narrow compass. Both complainant's device and respondent's No. 3 agree in having the stationary shunt carbon yieldingly pivoted, but in complainant's device the movable shunt carbon is mounted on a spring pivot, while in respondent's it is mounted on a spring arm on the one side, and a spring pivot on the other side of the device. Now, we are clear the two methods are practically the same. The functional parts in each are: First, a pivot to permit motion; and, secondly, a spring to compel motion. In the case of a spring arm the yielding point which corresponds to the play of a pivot is placed at one end of the arm, and the arm itself is made resilient. In the other, the movable member is pivoted in the center, and a spring is so located that both ends of the member move from the pivot center. In a general way, a pivoted spring arm may be described as half of a centrally-pivoted, spring-equipped member. It is evident, therefore, that this mere change of form was not a change in substance, and both devices have a pivotal carbon-movement relation to the copper-contact member, and fall within the general description of claim 2, viz., "a movable shunt-contact member pivoted to said laminated contact member," and of claim 5, viz., "a shunt-contact member pivoted to said main member at a distance from its axis of movement." In respondent's No. 4 device, the shunt carbon 13 on the switchboard side of the breaker is yieldingly held forward so that its upper end is thrust outward toward the movable, shunt carbon, 15. Thereby the two carbons make an edge contact when the breaker is closed. The carbon, 13, then turns on the pivot, 16, so as to bring its face in full contact with the movable shunt carbon. The two carbons thus joined, owing to the spring in the arm supporting carbon, 13, jointly yield as the entire arm is pressed in, and thus permit the closing of the laminated member, 4, against the main stationary terminals. The fact that respondent pivots its carbon on the rear side of the mechanism is not material. It is a mere mechanical transfer of the functional action to another alternative point; in fact, an obvious transfer of position with retention of functional identity. There was a double pivoting in the original case, and of it the court said:

"That the complainant pivots only one of its carbons, while the defendant pivots both of them, is an immaterial difference. Either one or both may be pivoted to secure the desired yielding and turning motion."

Nor does the fact that respondent actuates the breaker by a cam instead of a toggle joint avail to relieve it from infringement. Abstractly, a cam may have broader capabilities than a toggle joint. But those broader capabilities are not functionally needed by the respondent. It simply employs those capabilities which the cam possesses in common with the toggle joint to accomplish in its machine what the toggle joint did in that of the patentees. Its substitution is manifestly not to accomplish any other or different result from that effected by the toggle joint, but merely to avoid its duplication. Without, therefore, saying that in all cases the two mechanisms are equivalent, yet having the same purpose in combination, and effecting that purpose in sub-

stantially the same manner, they are, as to the combination here involved, equivalents of each other.

We are therefore of opinion that infringement has been established, and a decree so adjudging will be entered in the court below.

WYSONG & MILES CO. v. OAKLEY et al.

(Circuit Court, N. D. West Virginia. April 16, 1909.)

PATENTS (§ 328*)—INVENTION—SANDING MACHINE.

The Welker patent, No. 575,187, for a sanding machine, is void for lack of patentable novelty and invention.

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

In Equity. On final hearing.

C. W. Miles and Church & Church, for complainant.

Merrick & Smith, for defendants.

DAYTON, District Judge. This suit is based upon alleged infringement of letters patent No. 575,187, granted to Louis Welker January 12, 1897, and assigned to complainant company for improvements in sanding machine. The single claim alleged to have been infringed is as follows:

"3. In a sanding machine the combination of a pulley, a stationary former, a sanding belt extending between said pulley and former, and means for adjusting said former, substantially as set forth."

The defenses relied on, while variously stated, may be epitomized to be a denial of infringement, and a charge that, in view of the condition of the prior art, this Welker patent is void for lack of novelty and patentable invention.

After careful consideration of the case, I am convinced that the latter must prevail, and for these reasons: The operation of a belt upon two or more pulleys is common to mechanics. That these pulleys may or may not have rims to enclose the belt, may or may not be adjustable, or may or may not be capable of being rendered stationary, are functions alike common and well known in mechanics. If two pulleys should be connected by a sanding belt, one stationary and without inclosing rims, the other revolving at such speed as to revolve the belt, the stationary pulley would be as capable of polishing in its circular form as would the former found in the Welker machine. What inventive faculty is required to substitute for this stationary pulley different formers suitable for the different wood curvatures desired to be polished? What greater novelty is involved in having the belt run over two pulleys and a former, the latter stationary, than is involved in having it run over three different pulleys, one of which is stationary? It seems to me to be wholly immaterial whether you call these old and very common devices pulleys or formers, the mechanical operation is the same, and no new or novel principle or new

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

application of old principles is involved such as to warrant a patent monopoly.

I do not think such devices involve patentable novelty at all, but, if I be mistaken in this view, I am reasonably certain every principle of them will be found in the prior Coy patents Nos. 294,766 and 296,535.

It follows that complainants' bill must be dismissed, with costs.

PETER T. COFFIELD & SON v. SPEARS & RIDDLE et al.

(Circuit Court, N. D. West Virginia. April 16, 1909.)

No. 136.

1. PATENTS (§ 237*)—INFRINGEMENT—SUBSTITUTION OF EQUIVALENTS.
The replacing of a coil spring in patented machine by a flat or leaf spring which performs the same function in substantially the same way is merely the substitution of a mechanical equivalent, and does not avoid infringement.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 374; Dec. Dig. § 237.*]

2. PATENTS (§ 112*)—EFFECT OF DECISIONS OF PATENT OFFICE—PROCEDURE.
Irregularities in the Patent Office in relation to the issuance of an original or reissued patent must not only be pleaded but established affirmatively by full and satisfactory proof to defeat the patent or reissue.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 162; Dec. Dig. § 112.*]

3. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—WATER MOTOR.
The Coffield reissue patent No. 12,719 (original No. 806,779), for a water motor, was not anticipated, and discloses invention, and is not invalidated by any irregularity in the granting of either the original patent or the reissue. Also *held* infringed.
[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

In Equity. On final hearing.

This suit is based upon alleged infringement of reissued letters patent to Peter T. Coffield, No. 12,719, applied for July 28, 1906, granted November 12, 1907, the original patent, No. 806,779, having issued to Coffield December 12, 1905. The assignments of both the reissued and original patents by Coffield to the complainants are not controverted. The defenses to the suit are, substantially, (1) lack of infringement and (2) invalidity of the reissue, in that (a) the application for the original patent was unlawfully amended by the introduction of new matter not sworn to by the inventor; (b) no inadvertence, accident, or mistake has been shown such as would warrant the grant of the reissue; (c) the reissue is an expansion of the original patent not warranted by law; (d) the reissue is invalid in so far as it may be held to include the intervening rights acquired by defendants in the manufacture of their motors; and (e) that no invention is shown in the alleged improvements set forth in complainants' patent, wherefore it is void. The object of the invention as set forth in the specifications are:

"To provide a water motor for driving light machinery, such, for example, as washing machines or other machines having a reversed motion.

"A further object of the invention is to provide a water motor of the above type, which is positive and reliable in its operations, and in which means are provided for preventing stoppage of the motor at any point of its stroke while under power; a motor which will continue in its operation without attention."

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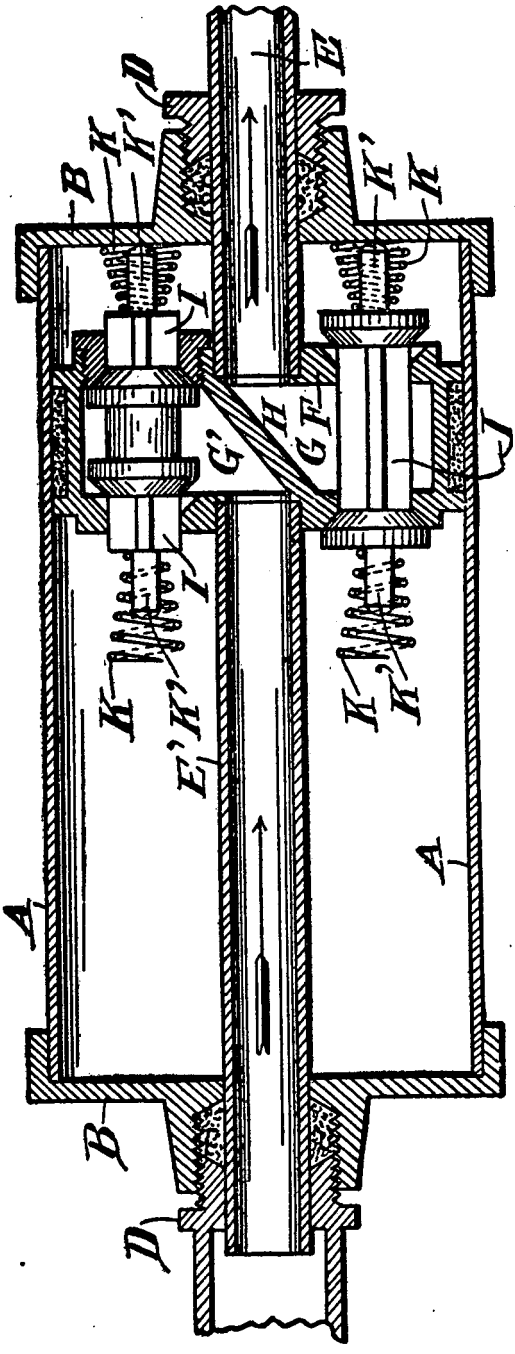
*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes


E
D
K'
K
B
I
G'
H
G
F
J
E'
A
B
D

Referring to an enlarged drawing reproduced from the patent one, filed by complainants, and now attached hereto, the parts and their functions of this motor are fully described as follows:

A cylinder, A, the ends of which are inclosed by two heads, B, B.

A piston, F, movable in opposite directions within the cylinder by the pressure of water which alternately enters the cylinder on each side of the piston. The piston is divided into two chambers, G and G', made noncommunicating by the intervening wall, H. Chamber, G', is the inlet chamber, and receives the water from the faucet through a pipe or hollow piston rod, E. Chamber, G, is the exhaust chamber, into which the water passes from the cylinder after exerting its pressure to drive the piston in one or the other of its movements. The exhaust or spent water passes from this chamber, G, out of the motor through a pipe or hollow piston rod, E'. The inlet pipe or hollow piston rod, E, is connected with the faucet at the kicthen sink by means of a piece of hose, in order that the piston, F, and the pipes or hollow piston rods, E, E', may be free to move back and forth as the piston moves back and forth. The hollow piston rods or pipes, E, E', pass through stuffing-boxes, D, D, in the cylinder heads, B, B, and the hollow piston rod, E', which carries away the spent water, is connected to a rack or cog bar, which in turn connects with a cogwheel on the dasher or agitator of the washing machine and imparts oscillating movement to said dasher or agitator. In Fig. 1 of the drawings of the patent, a portion of the cog bar referred to is shown. The spent water conveyed from the motor through the hollow piston rod, E', is conveyed to the sink or elsewhere by means of a rubber hose, or in any suitable manner.

Within the inlet chamber, G', of the piston is located double puppet inlet valves, I, which seat alternately in the interior sides of the piston when the motor is in operation. These valves control the flow of water from the piston chamber, G', alternately to one or the other side of the piston. The said valves are connected and have extensions, K', extending on each side of the piston, and upon these extensions, K', are located coil springs, K. As the piston approaches one or the other end of the cylinder, one or the other of the springs, K, first engages one or the other of the cylinder heads, B, and the continued movement of the piston compresses said spring until the valve extension, K', engages a cylinder head, B, and unseats or initially moves the valve from its seat in the piston. At this moment the valve would remain in a balanced position owing to the equal water pressures on each side thereof, and the piston would remain still at an end of the cylinder. The compression of the spring, K, has the effect, however, of imparting, instantaneously, a further or final movement to said valve to shift the same to the opposite seat. The result is, one seat is opened on one side of the valve, and the other seat is closed, to compel the water from the piston chamber, G', to pass out on one side of the piston at a time and to thus supply the cylinder alternately on one side or the other of the piston with the necessary water to drive the piston back and forth in the cylinder. The discharge of the water from the cylinder on one or the other side of the piston after said water has had the effect of moving the piston to one or the other end of the cylinder is controlled by double puppet exhaust valves, J, which are mounted in the exhaust chamber, G, of the piston, and seat alternately in seats in the outer sides of the piston. These exhaust valves, J, it will be observed, are connected to a common stem just as are the inlet valves, I, but they are spaced further apart, in order that they may seat on the outer sides of the piston, while the inlet valves, I, seat on the inner sides of the piston, as before stated. The said exhaust valves, J, have extensions, K', at each end, upon which are mounted coil springs, K. As the piston reaches one or the other end of the cylinder, the spring, K, on one or the other end of the valves, J, engages a cylinder head, B, and is compressed by the continued movement of the piston until the extension, K', engages the cylinder head and opens the valves. At this moment the water pressures on both sides of said valve, J, would balance said valve and cause the piston to stop, just as in the case of the inlet valves, I, but the compressed spring, K, instantly throws said exhaust valve, J, to one or the other of its seats, and thus seats one of said valves on one side of the piston and unseats the other on the other side, thus admitting water to the

piston chamber, G', from one end of the cylinder, thus preventing said water from entering said chamber on the other side of the piston or other end of the cylinder.

The functions of the springs, K', are the same in the case of both valves; they immediately complete the movement of the valves after said valves have been given their unseating or initial movement. The valves move in opposite directions; for example, when the inlet valves, I, move in one or the other direction by the piston arriving at one or the other end of the cylinder, the movement imparted to it by the extension, K', and the spring, K, is in an opposite direction from that imparted to the exhaust valve, J, its extension, K', and spring, K, engaging the cylinder head substantially at the same time the extension, K', and spring, K, of the inlet valve engages said cylinder head. The result is, the inlet valves, I, establish a communication between the inlet chamber, G', in the piston and the cylinder on one side of the piston, while the exhaust valves, J, establish a communication between the exhaust chamber, G, in the piston and the cylinder on the other side of the piston, and thus water flows to the cylinder on one side of the piston and discharges from the cylinder on the other side of the piston, and thus a continued reciprocating movement is imparted to the piston as long as the water is turned on at the faucet, and this movement is imparted to the washing machine.

Looking at Fig. 1 of the patent drawing, the piston is moving to the right under the pressure of water admitted from the chamber, G', through the left-hand valve, I, to the left side of the piston, and the water which was previously admitted to the right side of the piston to drive the piston in the opposite direction is passing into the exhaust chamber, G, through the right-hand exhaust valve, J, which is shown to be unseated.

Upon the arrival of the piston at the end of the cylinder, as shown in this large drawing of complainants' motor, the position of the valves is about to be reversed; the inlet valve, I, being still open on the left-hand side of the piston, and the exhaust valve, J, being still open on the right-hand side of the piston. In the enlarged drawing of complainants' motor, the piston is shown in a position where the springs, K, K, have been compressed to a sufficient extent to permit the valve extension, K', K', to engage the cylinder head, B, at that end of the motor. The inlet valve, I, is just about to be unseated on the right side of the piston, and the inlet valve, I, is about to be seated on the left-hand side of the piston, or reversed from the position shown in said drawing by the combined action of the valve extension, K', engaging the cylinder head and the effect of the compressed springs, K; the exhaust valve, J, is about to be seated on the right-hand side of the piston and opened on the left-hand side, or reversed from the position shown in said drawing by the combined action of the valve extension, K', engaging the cylinder head, and the effect of the compressed spring, K. When the reversal of these valves occurs, which is instantaneous upon the arrival of the piston at one or the other end of the cylinder, the return stroke of the piston takes place, and there is thus kept up a continuous reciprocation of the piston during the period of its operation.

It will be seen that the motor is in fact "a reciprocating water motor whose piston travels back and forth in the cylinder without crank and fly wheel to accomplish such operation. The travel of the piston itself carries the valves to a position where they are mechanically unseated, and at that moment springs which have a special function come into action, and instantly complete the movement of the valve, thus permitting the reciprocating action of the piston to continue."

The two claims of the reissued patent involved in this controversy are:

"(1) In a water motor, a cylinder, a piston divided into two communicating chambers, hollow rods communicating with said chambers, double puppet inlet valves and double puppet exhaust valves mounted in said piston, in combination with springs adapted to impart to said valves their final movements after being unseated, thereby reversing the travel of the piston.

"(2) In a water motor, a cylinder having inclosing heads, a piston divided into two noncommunicating chambers, hollow piston rods communicating with said chambers, balance exhaust valves lying on the outside of one of said chambers and seating against the outer side of the piston, said exhaust

valves being connected to a common stem and having extensions beyond the valves, balance inlet valves located within the other chamber, said inlet valves having stems projected on each side beyond the piston, coil of springs carried on the stems of said exhaust and inlet valves and adapted to impart the final movement to the valves after said valves have been given their initial movement by the contact of their stems with the cylinder heads, substantially as set forth."

Under contract, in January, 1906, the personal defendants under the firm name of Spears & Riddle became the selling agents in specified territory of complainants' motors. This contractual relation existed for some months, when defendants terminated it and engaged in the manufacture of water motors independently. The motors so manufactured are described in two patents secured by the defendant Ralph R. Spears, under dates of April 2, 1907, and June 11, 1907, numbered 849,279 and 856,992, respectively.

Richard J. McCarty, for complainants.
Frank C. Cox and E. G. Siggers, for defendants.

DAYTON, District Judge (after stating the facts as above). Unusual as the statement may be in cases of this character, it does not seem to me that this controversy involves any great degree of difficulty in its determination. So far as the question of infringement is concerned, it is very clear that the motors manufactured by defendants are identical with those manufactured by complainants under their reissued patent, except that defendants have substituted flat or leaf springs attached to the cylinder heads for the coil ones carried on the stems of the exhaust and inlet valves in complainants' motors. The thing to be accomplished in both is precisely the same—to impart the final movement to the valves after said valves have been given their initial movement by contact with the cylinder heads. Simply expressed, this is done in the one case by a spring attached to the valve striking the plain cylinder head, in the other case by the plain valve striking the spring attached to the same cylinder head; the only difference being in the form and location of the spring. It is impossible for me to see what advantage can be derived by either the changed form or location of the spring adopted by the defendants under the conditions existing. It is a clear case of substitution of a mechanical equivalent designed to perform the same function, and in substantially the same way. "The substantial equivalent of a thing, in the sense of the patent law, is the same as the thing itself; so that if two devices do the same 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." Union Paper Bag M. Co. v. Murphy, 97 U. S. 126, 24 L. Ed. 935; Morley S. M. Co. v. Lancaster, 129 U. S. 263, 9 Sup. Ct. 299, 32 L. Ed. 715. I, therefore, have no trouble in determining that the motors constructed by defendants under the Spears patents are clear infringements of complainants' reissued patent as to both claims of the latter.

Nor, after examination of the prior art patents, do I have trouble in reaching the same conclusion arrived at by the Board of Appeals in the Patent Office, that Coffield, the patentee, was the first to use, in connection with the elements of the mechanism, springs which complete the stroke of the valve, and that, taken as a whole, the device

is new, useful, and patentable. This Board of Appeals has twice considered this invention, first upon the original patent, and lastly upon the reissued one. Upon the latter consideration it has clearly and concisely considered the prior art patents relied upon and pointed out in its report, made part of the record, and the distinguishing features of complainants' device. It would be useless for me to attempt to add to what is there so well and clearly said touching this matter.

As to the technical defenses touching alleged irregularities in the Patent Office in the issuing of the original and reissue patents without proper affidavits and evidence of inadvertence, accident, or mistake, it is to be remembered that no such irregularities will be assumed to have occurred, but, on the contrary, the granting of the patent is prima facie evidence that the law has been complied with, and fatal irregularities in the Patent Office must not only be aptly pleaded but shown by full and satisfactory proof. In case the original patent has been surrendered and a reissued one has been granted, it has been held that such office proceedings can only be impeached for fraud. Stimpson v. Railroad Co., 4 How. 380, 11 L. Ed. 1020; Battin v. Taggart, 17 How. 77, 15 L. Ed. 37; Seymour v. Osborne, 11 Wall. 516, 20 L. Ed. 33. In this case the allegations of the answer are not sufficient to put in issue any such defense. The third paragraph thereof substantially denies, instead of charging, such irregularities in the issue of the original patent as are now relied upon in argument, and the mere expression of opinion by an expert witness, based solely upon an examination of the file wrapper, that such irregularities may have existed, is wholly insufficient evidence to support any such charge.

Finally, the main contention of the defendants that the reissued patent to Coffield was an unwarranted expansion of the original one, and therefore invalid so far as it affected the intervening rights of defendants, is not, in my judgment, tenable, because, as I have heretofore indicated, I regard the substitution of the flat or leaf springs attached to the cylinder heads adopted by the defendants to be nothing more than a mechanical equivalent for complainants' coil springs carried on the stems of the exhaust and inlet valves, and therefore no legal "intervening rights" of defendants have been affected by this reissue. But if I am wrong in this conclusion, and if the reissue does broaden the original by any additional claim, I am very clear that the conditions here are such as not only to warrant but even require me to uphold such reissue, under the well-settled rules laid down in such cases as Topliff v. Topliff, 145 U. S. 156, 12 Sup. Ct. 825, 36 L. Ed. 658, Fay v. Mason (C. C.) 120 Fed. 506, and United Blue-Flame Oil Stove Co. v. Glazier, 119 Fed. 157, 55 C. C. A. 553. There can be no laches charged against the plaintiffs in making the application. The original patent bears date December 12, 1905, and the application for reissue was made less than eight months thereafter on July 28, 1906, before defendants had manufactured a single motor, and when the contract of agency existing between complainants and defendants was still existing, it having been terminated by notice as of August 1, 1906. It therefore would seem that defendants are in no

way affected in their intervening rights by this reissue, simply because they had none to be affected.

Let the injunction issue and an accounting be directed.

WILLIAM A. FORCE & CO., Inc., v. BATES MACHINE CO.

(Circuit Court, E. D. New York. April 7, 1909.)

PATENTS (§ 328*) — VALIDITY AND INFRINGEMENT — MACHINE FOR ENGRAVING METAL BLANKS.

The Chase patent, No. 517,680, for a machine for engraving metal blanks, was not anticipated and discloses invention; nor is it void on the ground of prior public use of the machine, nor that the patentee was not the original inventor. Also, *held* infringed.

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

In Equity. On final hearing.

William E. Warland, for complainant.

F. Warren Wright, for defendant.

CHATFIELD, District Judge. The complainant corporation has succeeded to the rights of one Henry A. Chase, who obtained letters patent No. 517,680, upon the 3d day of April, 1894, upon an application filed May 29, 1893, for what Chase called a new and useful improvement in machines for engraving characters upon metal blanks. Chase assigned the rights under his application, before the patent was issued, to a copartnership, which subsequently was incorporated, and the corporation thus formed took over this patent, among other assets, some time prior to the commencement of the action.

The defendant is a corporation which has been in a similar line of business to that of the complainant during nearly all the time with which the testimony in this action has to do. A third company, known as the "New York Stencil Works," was in business and had a factory in Brooklyn, from some time in the year 1887, until its plant was moved to New York in the year 1893. The Brooklyn factory of the New York Stencil Works was first located in Lexington avenue, and was moved to St. Marks avenue, according to the testimony of one Meyer, early in the year 1890. During these years from 1888 to 1892, one Joseph D. Mallonee was the superintendent and manager of the factory of the New York Stencil Works, and Henry A. Chase, who had previously worked for Mallonee, in Hartford, was brought, on August 1, 1898, to the factory on Lexington avenue, gradually being promoted until he was foreman or assistant to Mallonee, and continuing in that position until the month of July, 1891. At that time Mallonee had Chase arrested, upon the charge of taking patterns from the vaults of the New York Stencil Works and selling the information to rival concerns. The hearing resulted in the discharge of Chase by the police, and soon after Chase went into the employment of the complainant's firm, where he was located until the year 1893, when

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

the transactions with relation to the taking out of the patent in suit occurred.

Meantime, and in the year 1892, around the month of October, Mallonee, who had then left the employment of the New York Stencil Works, constructed for the firm of Stewart & Company six engraving machines, of a style shown by certain drawings introduced in evidence, and almost exactly like the machines described in the Chase patent and manufactured and used by the complainant. Subsequently Mallonee made some other machines for Stewart & Co., then became engaged in other employments, and his whereabouts were not known to any of the parties to the suit until after the commencement of this action. As early as 1890, Stewart & Co. seem to have been furnishing wheels for what were called "Ajax" machines, which wheels were manufactured by the New York Stencil Works, and, according to the the testimony in the suit, seem to have been made by machine, in a manner similar to the methods of the complainant's patent. Evidence of the existence of such a product was given by one Willard W. Sawyer, who at the time of the trial of this action was foreman in the defendant's factory, and prior to that time had been the defendant in two actions brought by the present complainant for infringement of patent, in which suits the complainant seems to have been successful. In addition, the Bates Manufacturing Company, a corporation having an office in New York, was incorporated in September, 1890, and Edwin C. Bates, who had been manager of that company, was at the time of the trial president of the defendant herein, and litigation was also at that time existent between the Bates Manufacturing Company and the Bates Machine Company, the defendant herein.

It also appears by the testimony that difficulties arose in the New York Stencil Works, and that, at the time Mallonee left its employment, he filed a letter of resignation, in which he intimated that his relations with the company were satisfactory, and that he did not intend to engage in any competing business, while, according to his testimony in the suit, he left the company because he was unwilling to have further relations with the persons who had gained control. The minutes of the company show that questions were raised as to the legality of his actions as trustee and secretary, through his having held no stock in the company. It also appears from the record that Mallonee, in 1888, made a contract with the New York Stencil Works, by which all inventions and improvements made by Mallonee should be the property of the New York Stencil Works, and that no information regarding any machinery, method, or process of manufacture, in use by the New York Stencil Works, should be given to any one except on consent; while Mallonee testifies, in the course of the trial, that, until about the year 1889, he was under no contract obligation with respect to inventions and methods. He also testified upon the trial that he gave the information respecting the engraving machines, and built certain of these machines for Stewart & Co., in order that he might cause trade competition against the New York Stencil Works, and that he never attempted to patent the engraving machine in question, for the reason that he thought it better to keep the con-

struction of such a machine secret, and that he had been released from his agreement with the New York Stencil Works when he left their employ.

Mallonee produces a sketch of a machine similar to the design of the Stewart machines which were built in 1892, and identifies the drawings so produced as made by him in the early part of 1889, fixing this date by the place of his residence, and in this his wife gives some corroborating testimony as to events; but her testimony is not particularly persuasive as to the identity of the drawings and machines referred to.

The record also shows that some years later Chase, or a man by the same name, and who is partially identified by photograph, was imprisoned for a considerable period in the state prison at Weathersfield, Conn. This testimony was properly objected to by the complainant. Chase was not a witness in the case, his testimony and credibility were not at issue, and, inasmuch as the charge under which the man in Connecticut was imprisoned was for cohabiting with a woman not his wife, such testimony is illustrative only of the bad feeling existing between the various parties to the case, and can throw no light on whether he invented the machine in dispute.

The complainant brought its action charging infringement of the patent described. The defendant answered denying infringement, denying the validity of the patent on the grounds of anticipation, public use for more than two years prior to applying for the patent, lack of invention in the patent itself, and various other statements of defenses, which have not been seriously contended for upon the trial.

The issues were joined, and the taking of testimony was begun upon the questions of anticipation, lack of invention, and infringement; but the admitted use by the defendant of a single machine made by Chase, and practically identical with the patented device, and a number of other machines sketched in the evidence by the witness Day, which embodied all the essential elements of the Chase patent, resulted in an admission by the defendant, which is equivalent to an admission of infringement, if the patent be valid, and the complainant's rights thereto be substantiated. On the argument of the case, however, counsel for defendant has contended that these admissions were of no benefit to the complainant, in that the particular machine made by Chase had been sold by him to the defendant, at a time prior to the taking out of his patent, and that therefore they are licensees as to that machine. Further, certain differences are pointed out between the machine sketched in the Day drawings and the patent, from which the defendant attempts to argue that the Chase patent covers a different combination than that of the defendant's machines. This issue may be dismissed very briefly. The Day drawings show the machine in all essential parts like that of the Chase patent, with the substitution of a universal joint for the ball and socket joint of the patent; but the functions of both are the same, and one must be held to be an equivalent of the other.

As to the question of license for the use of the machine purchased from Chase, a valid defense might have been pleaded; but, inasmuch as

the question was not raised until the argument of the case, no distinction need be made in so far as the defense of infringement is concerned, but the testimony relating to this particular machine should be considered in mitigation of damage, as Chase, prior to the issuance of the patent, but after the making of the application, would seem to have had the right to sell a machine covered by his patent, and the question of damage would be between him and his assignee.

The testimony shows that the complainant has made a considerable use of the device described in the Chase patent. The particular purpose of the machine patented by Chase was to accomplish the routing or cutting of raised letters or numerals upon the circumference or outer surface of disks for time stamps and other manufactures of metal, where previously the trade had been compelled to use hand tools, necessarily a much slower and more expensive process. The machine described in the Chase patent may be briefly explained to be a solid upright support, carrying a knee upon which the pattern is placed, and with an arm above holding the block on which the character is to be engraved. Another arm carries a ball and socket joint, within the ball of which a shaft operates up and down through a sleeve. This shaft carries at the lower end the cutting instrument, and is also attached to a cord running over a pulley, by which a counterbalance is applied. The shaft, in the form of an arm, extends back through an opening in the upright, and, coming down and forward again, holds a pointer which can be placed in contact with the pattern, and with which the pattern is traced, while the movement of the point is reproduced on a smaller scale by the cutting instrument at the extremity of the arm. An alternative form, in which the swinging arm does not pass through the upright, but is divided into branches which unite lower down, after passing each side of the cutting tool and work, is no different in principle. The use of a properly shaped cutting tool enables, through the freedom of motion obtained from the ball and socket joint, an undercutting, and the entire arm can be raised and lowered with the aid of a counterbalance, which allows the operator to lift the tracer from the pattern, at the same time thus raising to a proportionate extent the cutting tool.

As has been said, the same elements are present in the devices used by the defendant; but, the defendant insists, in a different combination or form.

Before any examination of earlier patents, or of the condition of the art was entered into upon the trial, the whereabouts of Mallonee were ascertained, and he was produced as a witness. He immediately claimed to be the inventor of the device patented by Chase, and the first issue considered was therefore whether the patent in suit was invalid, in that it had not been taken out by the original inventor. The testimony upon this point has been substantially recited above. It is extremely unfortunate that such an issue could not be tried before the court, as the witnesses themselves should be listened to in order to give true weight to the testimony. The evidence seems to explain the complainant's failure to produce Chase, while the bitter feeling shown throughout the statements of most of the witnesses leads the court to

conclude that, after such a length of time, and after such disputes and disagreements as are testified to in connection with the different parties thereto, taking into account his failure to secure a patent even when building a similar machine, it does not seem that the defendant has proven with sufficient certainty that the patent was not rightfully taken out by Chase. Mallonee in one place testified that in October, 1892, when he made the Stewart machines, he had heard that Chase had procured a patent, but Chase's application was not filed until the following year; yet Mallonee did not interfere, nor had he made any effort to obtain a patent, which he says was valuable, for himself. Further, the sale of wheels bearing figures cut by a machine may show the output of a product more than two years prior to the application; but the testimony shows that whatever use was made by the New York Stencil Works was secret, in so far as the machine itself was concerned. Experiments were being made, but the testimony does not seem to conclusively prove public use on the part of any person for so long a period as two years previous to the summer of 1893, when the application was filed. As Mallonee left in July, 1891, and certainly had drawings or knew of the machine before leaving, there can be no doubt of the existence of the machine for the two years; but a public use was evidently avoided. As to the defenses of anticipation and the progress of the prior art, as shown by the testimony, a long discussion is unnecessary, in the view which is taken by the court of the patents put in evidence.

The prior inventions which have been set up by the defendant, and which are included in the record, fall immediately into separate classes: First, those embodying merely the qualities of a pantograph, such as the patent to Ware, No. 190,797, issued May 15, 1877, and to Allen, No. 11,922, issued November 14, 1854. It must be noted that the Ware patent contained the principles of a ball and socket joint, and of the sleeve to allow of the vertical movement of the tracer; but the Ware patent was confined to a drawing pencil for tracing designs, while in the Allen patent the idea of the pantograph or of the tracer, which was later on used by Chase, was applied to the carving of marble or stone, and provided for vertical as well as horizontal movement, by the combination of two pantographs, one horizontal and one vertical.

The second class of patents shows a development in the application of the pantograph principle to engraving machines, and in the Engle patent, No. 246,737, September 6, 1881, and his later patent of April 10, 1883, No. 275,618; and in the Moore patent, No. 387,595, August 7, 1888, many well-known ideas, which are also made use of in the Chase patent under consideration, were combined in differing combinations to produce an engraving machine which would follow copy and operate over different surfaces and different levels.

The third class of patents applied the same idea of the pantograph to the functions of carving metal, wood, and stone, and included in this class of patents we find the S. F. Moore patent, No. 384,995, June 26, 1888; No. 409,695, August 27, 1889; No. 394,710, December 18, 1888; the Luce patent of August 4, 1874, No. 153,836; the Hun-

zinger, No. 463,836, November 24, 1891; and, in a sense, the Allen patent, No. 11,922, November 14, 1854, previously mentioned.

A still different class of machines, and in some respects closely related to the patent in suit, was that invented by Benton, issued December 22, 1885, No. 332,990.

Benton's specifications and drawings show a tool for cutting type-punches, in which he has a swinging-frame, suspended by a universal joint, working on a fixed standard, which swinging-frame carried a pointer for tracing the pattern, and a rotating-cutter in said swinging-frame, supported by the universal joint, and with holders attached to the fixed standard for the pattern, and also for the block to be cut. The latter support also carrying the universal joint by which the oscillating arm is swung. The defendant's device, represented by the Day sketch, resembles this Benton machine more closely even than does the Chase patent, in that the connection used is a universal joint, rather than a ball and socket construction with a sleeve; but in the Benton machine the entire weight of the oscillating arm and its appliances rests upon the pattern, while the cutting tool is located on the under side or below the block to be cut, which necessitates adjustment, and a holding of the work against the cutter, and of the pointer against the pattern, by means of a spring at the top of the arm. The freedom of motion and ease of operation provided by the use of a counterbalance and of the sleeve, found in the Chase machine and the defendant's device, are not present; and although Benton provides that he may change the relative position of the work and the tool, making the work stationary and the cutting tool movable, he does not show a combination of the different elements covering the application of all those elements which are found in the claims of the Chase patent.

The same thing is true of all of the patents which have been recited. Nearly every idea made use of in the Chase patent can separately be traced from some other patent, with the exception of the principle of the counterbalance; but the Chase patent is shown to be useful and practicable, the combination of these elements is an advance over any one of the others, and no one of the others would disclose or teach the precise relative union of means for accomplishing the ends desired, without combining elements which had never previously been joined for such a purpose in any one machine. As has been said, the Benton machine may more nearly combine a number of these ideas, and it may have been a shorter step from that patent to the Chase than from any of the others; but there are certain defects in the Benton machine which have been obviated in the Chase patent, and the practical application of a combination which will remedy these defects seems to the court to be original with Chase and to be worthy of protection by a patent.

The defendant has caused to be built a number of machines in which these same difficulties have been removed in the same or an equivalent manner. The ball and socket joint with the sleeve is neither improved upon nor is any new combination shown by using the principle of a universal joint. No difference lies in the fact that the patent in suit lifts by the counterbalance the entire swinging arm, including the ball

and socket joint, while the defendant's machine lifts the swinging arm by means of the support forming a part of the universal joint itself. The device of Chase, set forth in the fourth claim of his patent, would seem to be infringed, and to have been a patentable novelty at the time the patent was issued.

Claims 1, 2, and 3 might with much more reason be held to have been anticipated by the patents above referred to, and claims 5, 6, 7, and 8 add nothing to the principles of the device set forth in claim 4, so far as the questions arising between the complainant's and defendant's machines are concerned.

The complainant therefore may have a decree, based upon claim 4 of its patent, and also an injunction with reference to the alternate form of construction of the swinging or tracer arm, as described in claim 3, where said arm is stated to extend "down behind the standard and forward through said opening therein," the two constructions being substantially equivalent, and both being properly within the principles of the combination used by the defendant, although the precise form of the defendant's machine cannot be held to infringe the language of claim 3, just quoted, and hence no damage thereby has been proven or can be awarded on that claim.

CRITCHER v. LINKER.

(Circuit Court, W. D. Wisconsin. April 17, 1909.)

1. PATENTS (§ 214*)—LICENSES—FORFEITURE.
   Under a contract of exclusive license by a patentee providing for the payment of royalties, the making of periodical reports, and that in case of default on the part of the licensee the licensor might, on notice, terminate the contract, the failure to make reports at the specified times was not alone ground for such termination, where in several instances it was waived and reports made at longer intervals accepted without objection, and where, by reason of extensive infringements and litigation respecting the patent, it was for a time considered of doubtful value by both parties.
   [Ed. Note.—For other cases, see Patents, Dec. Dig. § 214.*]

2. PATENTS (§ 218*)—LICENSES—CONSTRUCTION AND OPERATION.
   A provision in an exclusive license contract under a patent that, in case the patent should be held not infringed by a certain manufacture by "any court of competent jurisdiction," the royalty should be reduced and limited in all to a certain sum, must be construed as meaning a decision which should finally settle the question of such infringement and a decision of noninfringement by a trial court, which was reversed on appeal, did not have the effect of reducing the royalty.
   [Ed. Note.—For other cases, see Patents, Dec. Dig. § 218.*]

3. PATENTS (§ 214*)—LICENSES—RIGHT OF FORFEITURE.
   By an exclusive license contract under a patent it was provided that, on failure of the licensee to pay royalties to the amount of $3,500, at the end of two years, the licensor might terminate the contract on notice. At the end of the two years, such notice was given; the licensee having then paid royalties of about $3,450. The licensee had also expended a large sum in establishing a manufacturing business under the patent. The licensor was obligated by the contract to protect the validity of the patent and protect the licensee from infringements, but although one suit

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

was finally carried to a successful issue, and a decision of the appellate court sustaining the patent obtained, other infringing articles were in the market which practically evicted the licensee from enjoyment of the patent right. *Held*, that under such facts a court of equity would not decree a cancellation of the contract.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 214.*]

In Equity.

Jones, Addington & Ames, for complainant.
James Thompson, for defendant.

SANBORN, District Judge. The complainant is the patentee in letters patent 781,635, dated February 7, 1905, on combination underwear for women; the patent having been sustained by the Circuit Court of Appeals of this circuit in Leona Garment Co. v. Jenks, 164 Fed. 188, decided July 22, 1908. In Leona Garment Co. v. Jenks, 160 Fed. 693, decided June 5, 1907, the patent was held valid, but very narrowly construed, and held not infringed by the "Ideal" garment there in question. On appeal the decree was reversed, and the patent held valid and infringed by the "Ideal" garment.

Shortly after the issue of the patent, Mrs. Critcher made an exclusive license, operating as an assignment, to the defendant for the full patent term, to make, use, and sell the garments in question. Defendant had been for seven years the foreign buyer of H. W. Gossert Company of Chicago in ladies' furnishings, including laces, silk, linens, velvets, trimmings, embroideries, and ribbons. She made her headquarters in Paris, visiting America as often as necessary. Both parties appeared in court on the hearing. They are able and competent, and both seem to be possessed of practical ability in an unusual degree. It is shown by the record, however, that complainant occasionally mixed Christian Science with matters of business, not invariably producing the best results. Upon the making of the contract defendant established herself in La Crosse, Wis., in the business of making and selling the goods. She now has 28 sewing machines, some of them made specially for her, buttonhole machines, ruffler, double-needle machine, and hemstitcher. She advertised the business quite extensively and at considerable expense. She hired traveling salesmen and a force of needlewomen, and estimates her total investment in the business at $35,000.

At the time the license was made, complainant had a contract with Charles A. Stevens & Co. of Chicago for the sale of $60,000 of the garments in three years, and had commenced the infringement suit already referred to. The contract was assigned with the monopoly. December 22, 1905, the license agreement now sought to be canceled was made. In consideration of $1,600 paid down, $400 to be paid within 10 days, and the promise to pay certain royalties, an exclusive license for the full patent term was given, to make and sell the patented garments. The stipulated royalty was 7 per cent. of the gross sales, payable January 25th, April 25th, July 25th, and October 25th. If, at the end of the second year, the royalty paid should not amount

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

to $3,500, the licensor might annul the contract, provided she should, at the end of such time, give the licensee written notice of her desire to cancel it; and if the licensee should not, before the end of 90 days from the receipt of notice, pay the licensor, either as advance or accrued royalty, a sum sufficient, with that before paid, to make $3,500, the license should terminate. The $1,600 and $400 payments were to be regarded as advance payments on royalty. If the licensee should fail to pay royalties, at the times specified, then at any time they should be at least 30 days in arrears, the licensor might terminate the license, after serving written notice of such termination on the licensee, provided the amount of royalties in arrears should not be paid within 20 days from receipt of notice.

The licensee agreed to make a written report to the licensor, on each payment day, of the total number of garments made and sold during the preceding three months, and keep accurate account books. The licensor was given the right of examination of such books. If the licensor should cause the contract to be terminated, she should, at the time of such termination, purchase from the licensee at cost all her stock in trade connected with her business in the manufacture and sale of the garments, and should purchase, at a fair market valuation, all her fixtures connected with said business. The licensor agreed, at her own expense, to protect the validity of the patent, and protect the licensee against infringement. In all suits for infringement by the licensor the recovery was to be divided between the parties, in like proportion as if the infringing garments had been sold by the licensee. If the licensor should not bring suit against any infringer, the licensee should have the option to do so within 30 days after written notice of infringement should be served on the licensor, and retain all damages and profits recovered.

The most important provision of the license contract follows:

"Sixteenth. In case said patent should be declared invalid by any court of competent jurisdiction, or should be declared by such court as not infringed by the garment heretofore manufactured by Jenks & Sutherland, for which suit for infringement is now pending against said Jenks & Sutherland, in the United States Circuit Court of the Northern District of Illinois, Northern Division, then the amounts herein specified by said second party to said first party, shall be reduced to one-half of the amounts so specified, and said second party agrees that on all undergarments of the kind described and claimed in said letters patent, which she shall thereafter make and sell, she will pay to said first party one-half of the amounts hereinbefore specified as royalties, until the total sums paid by said second party to said first party (exclusive of said sixteen hundred dollars and said four hundred dollars), shall amount to five thousand dollars ($5,000.00); it being agreed that said second party shall thereafter be relieved from further payments under this contract; and it being understood that the payment of royalties made by said second party to said first party under said contract for foreign patents, shall be applied in making up said total of five thousand dollars."

A further oral agreement was made later between the parties by which defendant was to advance attorney's fees and legal expenses in the Jenks suit, to be credited as advance royalty. This she did until March, 1907, practically up to the time of the hearing of the Jenks suit in the Circuit Court, but refused to advance anything further.

Matters of dispute and mutual complaint soon arose. Defendant

complained that her trade was destroyed by infringements everywhere, which complainant did not stop, as she had agreed to do, and that the attorney's bills in the Jenks suit were outrageously high, and after the decision of the Jenks suit, holding no infringement, that the patent was so narrow as to be practically worthless. Complainant complained that defendant did not furnish quarterly reports, did not pay attorney's bills as agreed, nor answer business letters, and, after the adverse decision, she for a time refused, through her husband, E. P. Critcher, acting as her agent, to put up any more money in the litigation. Later she raised the money and procured the reversal.

Soon after the sale commenced, the traveling salesmen reported infringing garments being sold, and this interfered quite seriously with the disposition of the "Leona" garments, as they were called. One of the infringing garments was made by Madame Tiede-Kugel, of New York, and another, called the "Ideal," by Genevieve Sutherland of Chicago. The last was the one held an infringement by the Court of Appeals. The Tiede-Kugel garment was found to be on sale all over the country. The traveling salesmen reported infringements everywhere they went. Complainant wrote defendant March 24, 1907, that the largest houses in America were manufacturing the garment, "infringing our claim, and it will take money to fight this claim." Later, however, she learned she had been misinformed, and that this statement was not strictly true. The record clearly shows that the infringements encountered by defendant in attempting to market the goods were most discouraging, and amounted nearly, if not quite, to an eviction from the substantial enjoyment of the patent right. Walker on Patents, § 307; White v. Lee (C. C.) 14 Fed. 791.

By the license contract complainant agreed to protect the patent, and protect defendant against infringements; and under the rule stated by Judge Drummond in Goodyear v. Honsinger, 2 Biss. 1, 3 Fish. Pat. Cas. 147, Fed. Cas. No. 5,572, complainant performed her duty under the contract, by prosecuting the Jenks suit and warning infringers. But she could not stop infringement nor prevent the ouster. The chief question on the hearing was whether the notice of annulment given by complainant to defendant January 29, 1908, was effectual and sufficient ground to require a decree of rescission. It was stated in the notice that it was given for defendant's failure to make the quarterly statements, and an alleged failure to pay the stipulated royalty of 7 per cent., and up to the minimum of $3,500 due at the end of the second year.

As to the failure to make quarterly reports: Early in March, 1907, defendant made a written statement showing the amount in dollars and cents of the garments sold from April 1, 1906, to February 28, 1907, by months, and computing the royalty at 7 per cent. This statement is referred to in complainant's letter of March 23, 1907, and was called for by her letter of March 8, 1907. The next statement was from December 22, 1905, to December 1, 1907, not showing monthly sales, but grouping those of several months together. The royalty was computed at 3½ per cent., on the theory that the Jenks garment had been held not an infringement, and that the contract rate was thus

diminished one-half. It does not appear when this statement was made. Neither of these statements was strictly according to the contract, but no objection on that ground was made by complainant. In January, 1908, complainant availed herself of her contract right to examine defendant's books, employing an accountant for that purpose. He reported January 30, 1908. He found that defendant had paid (including interest) $3,450.41, and overpaid her the sum of $588.42, if the royalty was computed at 7 per cent., and $1,683.65, if computed at 3½ per cent. About the date of this report, and on January 29, 1908, complainant served notice in writing purporting to cancel the license contract for the alleged failure to make quarterly reports, and for the alleged failure to pay royalty at 7 per cent., and up to the contract minimum of $3,500 at the end of the second year. Three other statements similar to the one of March, 1907, were made; one February 12, 1908, one March 25, 1908, and the last June 26, 1908. No further payments on the license have been made.

It is claimed by defendant that the reports made substantially complied with the contract, that it would have been useless for her to report for the period up to January, 1908, covered by the reports of the accountant, and that complainant had led her to believe that strict reports would not be required. The correspondence shows that on January 19, 1906, complainant said she was in no hurry for a report, and on July 30, 1906, that if defendant was still without a bookkeeper she would wait. Nothing further appears until after the Circuit Court decision, when complainant, on October 3, 1907, demanded a report. This was met by a reply from defendant stating that the contract was broken, and it was therefore unnecessary to make further statements. On November 22, 1907, there was a further demand for a statement, followed by that of December 1, 1907; and on November 29, 1907, defendant wrote claiming a failure of consideration, and asking a proposition of settlement.

In view of the fact that statements were made in March and December, 1907, not objected to, and that after the reports of the accountant of January, 1908, a report up to January 1, 1908, would have been an idle ceremony, of no possible use to complainant, I conclude that this ground of forfeiture was not sufficient. Jones, etc., Co. v. Crary, 234 Ill. 26, 84 N. E. 651; Densmore v. Tanite Co. (C. C.) 32 Fed. 544.

As to the other ground, the case presents some difficulty. That ground was that defendant had not paid the 7 per cent. royalty, up to the $3,500 minimum. It is necessary to examine the contract to determine whether the royalty was not 3½ per cent., and the minimum $1,750, in which case the defendant had overpaid. If it was $3,500, she was about $50 short. The contract provides that, if "any court of competent jurisdiction" should declare the patent not infringed by the Jenks garment, "then the amounts herein specified * * * shall be reduced to one-half of the amounts so specified, and said second party agrees that on all undergarments * * * which she shall thereafter make and sell she will pay one-half the amounts * * * specified as royalties, until the total sums paid (exclusive of the $1,600 and $400)

shall amount to $5,000, it being agreed that said second party shall thereafter be relieved from further payments under this contract."

The parties must have known that any decree of noninfringement might be appealed and reversed. It must be inferred that they were referring to a decree which should finally settle such infringement. If not, then complainant is put in the position of giving up all her monopoly for $7,000 if it should happen that any Circuit Court erred in holding the patent void, even though the error were speedily corrected; or if the Circuit Court for Illinois should erroneously declare noninfringement by the Jenks garment, and such error be also speedily corrected. It must be supposed that the contracting parties intended to provide for contingencies which might destroy the monopoly, and not those having only a temporary influence. In this view the term "any court of competent jurisdiction" quite clearly was intended to mean one whose decision would be final. Evidently the term was not employed in its technical sense, but the word "competent" was intended to mean competent to finally settle the question. The opposite interpretation leads to highly unjust results, and should be excluded unless the plain intent requires its adoption.

The only remaining question is whether complainant was in a position to renounce or annul the license by the notice of January 29, 1908. Defendant had paid all royalty due up to the time of the notice except about $50; but complainant had been unable to accomplish very much by way of preventing infringement. As has been seen, defendant, after large outlay, was substantially evicted. While it cannot be said that complainant had broken her contract to protect, yet she had at times shown little disposition to carry out that contract. She wrote on October 14, 1906, that she would willingly go on with all infringement suits if she had the money, "but as I have not I fail to protect the patent." Her teacher in the mysteries of Christian Science had deluded her into the belief that, as she had given up the "little garment" to defendant, she must also give up thinking about it, "for two people cannot work on the same problem unless they constantly know each other's thought, and know they are working in perfect harmony. So I give up all the work to you unreservedly and entirely. Mr. McRoberts (her patent attorney) can attend to all the work in the infringement cases." While this foolish declaration should not be taken too strongly against complainant in view of her mental state at the time, and her heroic later efforts to obtain a reversal of the Jenks decree, yet she shows she did not have much regard for her obligation to protect. On June 10, 1907, just after the adverse decision in the Jenks suit, E. P. Critcher wrote defendant he would advance no more money in the litigation. Complainant testified that after this decision she made no special efforts to protect the patent outside the Jenks suit. In that suit, however, her zeal was wonderful. She pawned her jewelry, sold her rugs, tapestries, and furniture, and borrowed all she could to prosecute the appeal. In this way she raised $1,650, and is still in debt to her attorneys. Probably she did all the law required, but at the same time, while she was making these laudable efforts, infringements were multiplying to defendant's great injury. The situation involved delay

and consequent loss to defendant, who was practically ousted from all beneficial use of the monopoly, and at the same time called on to put up more money.

Another fact which may have influenced the situation somewhat was that in the statement of December 1, 1907, the royalty was computed at 3½ per cent., and no objection or protest by complainant. Her accountant also stated the account at both rates. Defendant may well have supposed that complainant acquiesced in her construction that after the adverse decision the royalty was cut in two. It is true that the notice of renunciation requires payment at 7 per cent., up to $3,500, so that this theory of acquiescence should not be given any great weight.

While I find that complainant did all the law required to prevent infringement, yet because she did not succeed, because defendant was practically evicted, because of the relatively small sum due from her when the notice was served, and in view also of the large outlay of defendant, much of which would be lost even if complainant should be required to purchase the stock in trade and fixtures, it is evident that it would be highly inequitable to give effect to the notice of renunciation. By the tenth clause of the contract defendant must pay $5,000 for the year 1908, and a like sum every succeeding year, or the contract may be canceled. Were it not for the fact that complainant has been offered a large sum for a half interest in the patent, it is probable she would not seek to enforce cancellation. At all events, it would be highly unjust to decree it for the reasons stated.

A decree will be entered dismissing the bill without costs for or against either party, but the defendant directed to pay such fees of the clerk of this court as may be unpaid.

WESTON ELECTRICAL INSTRUMENT CO. v. AMERICAN INSTRUMENT CO. et al.

(Circuit Court, E. D. Pennsylvania. March 20, 1909.)

No. 213.

PATENTS (§ 297*)—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

While, as a general rule, an adjudication of the validity of a patent will be required as a basis for the granting of a preliminary injunction against its infringement, it will not be required where the patent has been sustained by the Patent Office in interference proceedings with defendants and on successive appeals therefrom is clearly one of merit, and it also clearly appears that one of the defendants to whom the invention was disclosed by the patentee fraudulently appropriated and patented it as his own.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 481–488; Dec. Dig. § 297.*

Grounds for denial of preliminary injunctions in patent infringement suits, see note to Johnson v. Foos Mfg. Co., 72 C. C. A. 123.]

In Equity. Suit for infringement of letters patent No. 906,498, for shunts or electrical resistances, granted to Edward Weston December 8, 1908. Motion for preliminary injunction. Motion granted.

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

The bill alleges that the individual defendants, Benecke, Fischer, and Biddle, who were former employés of the complainant, had conspired to utilize the secret and confidential knowledge of the complainant's secret processes, devices, inventions, and trade secrets gained while in complainant's employ for their individual gain and profit by making, using, and selling devices made by the complainant's secret processes, and embodying the inventions owned by the complainant, including the invention of the patent in suit, and in furtherance of such conspiracy, and to evade personal liability, had formed the defendant corporation American Instrument Company, as a cloak under which to shield their unlawful acts and to escape personal liability. The patent in suit, No. 906,498, was granted to Edward Weston, assignor of the complainant, upon an application which had been in interference with United States patent No. 845,997, granted to the defendant Benecke, assignor of the defendant American Instrument Company, the latter patent having issued March 5, 1907, and being for the same invention as the letters patent in suit. As soon as this Benecke patent issued, Edward Weston, president of the complainant company, caused an application to be filed in his name for the same invention set forth in letters patent No. 845,997, and requested that an interference be declared between his application and the said letters patent No. 845,997. The interference was declared and testimony taken on behalf of Edward Weston, Benecke, however, electing not to take any testimony, and the issue came on for hearing before the examiner of interferences, who awarded priority of invention to Weston. Subsequently Benecke appealed in order to the board of examiners in chief, the Commissioner of Patents, and the Court of Appeals of the District of Columbia from this decision of the examiner of interferences. The board of examiners in chief and the Commissioner of Patents affirmed the decision of the examiner of interferences, and awarded originality and priority of invention to Weston, and the Court of Appeals of the District of Columbia dismissed Benecke's appeal on the ground that he had not duly perfected his appeal.

The evidence taken in the interference showed that Weston conceived the invention set forth in the issues and had disclosed the same to the defendant Benecke while Benecke was in the employ of the Weston Electrical Instrument Company, the complainant, and given him instructions to assist in reducing the invention to practice. Benecke, after his discharge from the complainant company, filed an application without the knowledge of Weston, for the invention which Weston had disclosed to him upon which application said letters patent No. 845,997 were issued. The defendant company, under the direction of the individual defendants, made and sold devices embodying the invention of the said patents Nos. 845,997 and 906,498, and shortly after the issuance of the letters patent in suit, upon the termination of the said interference, complainant filed its bill of complaint, and moved for preliminary injunction against the above-named defendants, relying in part upon the result of the interference proceedings.

The defendants American Instrument Company, Benecke, and Biddle interposed a demurrer, which was overruled, with costs, and the defendant Fischer filed a plea which was stricken from the files, with costs. Each of the said patents Nos. 845,997 and 906,498 recite in the specifications that the invention therein is an improvement over the invention of letters patent 497,482, issued May 16, 1893, to Edward Weston, the patentee of the letters patent in suit.

Horace Pettit and Seward Davis, for complainant.

ARCHBALD, District Judge[1] (orally). I suggested when I agreed to hear this motion that I should have to dispose of it upon the argument without taking the papers; and while I have only heard one party, and it is always unsatisfactory to decide a case without hearing from both, the case has been so fully and clearly presented that I will proceed, notwithstanding the lack of this, to the order which I propose to make.

[1] Specially assigned.

The case as it is disclosed appeals strongly to a court of conscience. There has been a complete and unblushing appropriation of the invention—a clear "steal" in the words of the street. The proof of this does not rest alone upon the affidavits filed, but has been established by the proceedings taken and the various and protracted appeals prosecuted in the Patent Office. It would be somewhat of a reflection upon the court under the circumstances if it were not willing to move promptly at the very outstart in such a case. It is true that ordinarily in applications for preliminary injunctions based upon infringement of letters patent an adjudication of the validity of the patent is required as a basis on which to grant this extraordinary relief; but the patent in suit has already been subjected to close and critical examination and by reiterated adjudications on appeal has been sustained, so that independent of any idea which I may have got from the argument, which certainly is strongly in its favor, and even if there existed any doubt in my mind, which there does not, I certainly would be inclined to yield my judgment for the time to the careful consideration which has been so shown. After an independent examination, however, of my own, such as it is, I see no occasion to doubt anything with regard to it. The device is clearly one of merit, and an inventive advance not only upon the existing art, but upon the previous patent granted to the same inventor, and the appropriation of it in the patent to the defendant the American Instrument Company, as assignee of Benecke, is very clear; no substantial distinction between them being able to be made. It would be an injustice therefore to allow a bankrupt concern, such as the defendant now is, and the other parties who have stood in confidential relations to the complainant company, to go on taking advantage of the wrong that they have perpetrated. And it would be a reflection on the court did it hesitate to brush aside in the interest of justice the technical defenses which the defendant's affidavits suggest.

Let a preliminary injunction issue as prayed for.

NOTE.—On April 16, 1909, upon a motion by the defendants for a rehearing of the above motion for preliminary injunction, after argument by counsel for the defendants in support of the motion, and by counsel for complainant in opposition, a rehearing was denied. Defendants' motion for stay of proceedings was also heard and argued at the same time, and was also denied.

SCOTT v. LAZELL et al.

(Circuit Court, S. D. New York. January 21, 1909.)

PATENTS (§ 298*)—SUITS FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

A preliminary injunction against infringement of a patent will not be granted, when the question of infringement is in serious doubt.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 478; Dec. Dig. § 298.*

Grounds for denial of preliminary injunctions in patent infringement suits, see note to Johnson v. Foos Mfg. Co., 72 C. C. A. 123.]

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

In Equity. On motion for preliminary injunction.

Macdonald & Macdonald, for complainant.
Grafton L. McGill, for defendants.

NOYES, Circuit Judge. One of the elements of the claim in question is the series of slits in the lower portion of the bustle connected together at their edges. The defendants' device does not have this series of slits. Whether the defendants' method of gathering in the material is an equivalent for them is a question too doubtful to be determined upon a motion for a preliminary injunction.

The motion is denied.

RHEIMS CO. v. UNITED STATES.

(Circuit Court, S. D. New York. February 16, 1909.)

No. 4,155.

1. CUSTOMS DUTIES (§ 44*)—CLASSIFICATION—HORSEHAIR GOODS.
Trimmed and untrimmed hats, and braids, composed of horsehair, are respectively dutiable by similitude as straw hats, trimmed and untrimmed, and straw braids, suitable for hats, under Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 409, 30 Stat. 189 (U. S. Comp. St. 1901, p. 1673).
[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 44.*]

2. CUSTOMS DUTIES (§ 52*)—EVIDENCE—PRODUCTION OF SAMPLES.
In the proof of the character of imported goods it is not essential that samples should be produced. Proof by other means is permissible.
[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 52.*]

On Application for Review of a Decision by the Board of United States General Appraisers.

The decision below, which is reported as G. A. 6,223 (T. D. 26,897), related to importations at the port of New York. The articles in controversy consisted of trimmed and untrimmed hats, and of braids, which were assessed under Tariff Act July 24, 1897, c. 11, § 7, 30 Stat. 205 (U. S. Comp. St. 1901, p. 1693), and section 1, Schedule L, par. 390, 30 Stat. 187 (U. S. Comp. St. 1901, p. 1670), as silk hats and silk braids, by similitude. The board found them to be composed wholly or in chief value of imitation horsehair, and held them to have been properly assessed.

Paragraph 409, Schedule N, 30 Stat. 189 (U. S. Comp. St. 1901, p. 1673), mentioned in the opinion of the court herein, reads as follows, so far as pertinent:

"409. Braids * * * composed wholly of straw, * * * suitable for making or ornamenting hats, * * * if bleached, dyed, colored or stained, twenty per centum ad valorem; hats * * * composed of straw, * * * whether wholly or partly manufactured, but not trimmed, thirty-five per centum ad valorem; if trimmed, fifty per centum ad valorem."

Walden & Webster (Henry J. Webster, of counsel), for importers.
J. Osgood Nichols, Asst. U. S. Atty.

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

HOLT, District Judge. The articles in this case, the duty upon which is in controversy, are certain braids used for making hats and certain kinds of hats. The importer claims that they are composed wholly or in chief value of real or natural horsehair. The Circuit Court of Appeals has held, in Paterson v. United States, 166 Fed. 733, that horsehair braids used exclusively in the manufacture of hats are dutiable by similitude to braids wholly of straw, suitable for making hats, enumerated in paragraph 409; and under that decision these articles, if in fact composed of natural horsehair, should be taxed under paragraph 409. No samples of the articles in question were produced upon the argument, and the brief of the government's counsel says that none were placed in evidence before the Board of Appraisers. The government's counsel claims that this appeal should be dismissed on the ground that, no samples being produced, the court cannot pass upon the question what the goods were. But I take it that, if samples were not produced before the Board of Appraisers, the character of the goods may be proved by evidence. The evidence in this case is uncontradicted that all of the goods imported, except certain goods, marked in the invoice "crinol," are made of natural horsehair. The witness before the Board of Appraisers testified that the goods were made of horsehair, but the appraiser in his appraisal states that they are goods made of imitation horsehair. It appears in evidence that the term "horsehair" is commercially applied to goods which are in fact imitation horsehair, but the evidence before the appraisers was absolute that the goods were horsehair; and on the appeal in this court affirmative evidence was given that they were not imitation horsehair, but were actual horsehair. Under these circumstances, it seems to me that I am bound by the record. The evidence being absolutely uncontradicted that the goods in question were natural horsehair, I think that the decision of the appraisers should be reversed, and that the goods should be assessed for duty under paragraph 409, in conformity with the case of Paterson v. United States (C. C. A.) 166 Fed. 733.

Extract from Order.

It is ordered, adjudged, and decreed that there was error in said proceedings before said Board of General Appraisers, that their decision be and the same is hereby reversed, and that the entries of merchandise involved herein shall be reliquidated as follows:

(1) That all items designated on the invoices as "crin braids" shall be reliquidated at 20 per cent. ad valorem.

(2) That all items designated on the invoices as "horsehair hat" and as "chapeaux crin" shall be reliquidated at 35 per cent. ad valorem.

(3) That all items designated on the invoices as "horsehair trimmed hat" shall be reliquidated at 50 per cent. ad valorem.

WANAMAKER v. UNITED STATES.

(Circuit Court, E. D. Pennsylvania. April 2, 1909.)

No. 69 (1,973.)

1. CUSTOMS DUTIES (§ 44*)—CLASSIFICATION—HORSEHAIR HATS—SIMILITUDE.
By virtue of the similitude clause, horsehair hats are dutiable at the rate provided for "hats of straw * * * not trimmed," by Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 409, 30 Stat. 189 (U. S. Comp. St. 1901, p. 1673).

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 44.*]

2. COURTS (§ 96*)—COMITY.
This court will follow the decision in a customs case by the Circuit Court in the Second Circuit, in order to avoid conflict of decision between the collection districts of the two jurisdictions.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 327; Dec. Dig. § 96.*]

On Application for Review of a Decision by the Board of United States General Appraisers.

The decision below, which is reported as G. A. 6,606 (T. D. 28,217), affirmed the assessment of duty by the collector of customs at the port of Philadelphia on importations by John Wanamaker.

Comstock & Washburn (George J. Puckhafer, of counsel), for importer.

J. Whitaker Thompson, U. S. Atty., and Jasper Yeates Brinton, Asst. U. S. Atty.

J. B. McPHERSON, District Judge. The merchandise in question is untrimmed hats made of horsehair, and was assessed for duty by the Board of General Appraisers under Act July 24, 1897, c. 11, § 1, Schedule L, par. 390, 30 Stat. 187 (U. S. Comp. St. 1901, p. 1670), by similitude to silk wearing apparel. The importer contends, inter alia, that the assessment should have been made under paragraph 409, Schedule N, 30 Stat. 189 (U. S. Comp. St. 1901, p. 1673), by similitude to "hats of straw * * * not trimmed," and this position I think should be sustained. My reason for thus ruling is found in the fact that the Circuit Court for the Southern District of New York has recently decided the precise question in Rheims v. United States, 169 Fed. 662; the opinion of Judge Holt being based on Paterson v. United States, a case in the Court of Appeals for the Second Circuit that has just been published in 166 Fed. 733. The government argues earnestly that Rheims v. United States should be disregarded, because the opinion does not show that the court considered the position now taken by the United States attorney in support of the board's classification; but, as it seems to me, this argument does not furnish a sufficient reason for making an exception to the rule of comity that has been frequently applied in this circuit in order to avoid conflict of decision between the collection districts of New York and Philadelphia. Murphy v. United States (C. C. A.) 162 Fed. 871; Hill v. Francklyn (C. C. A.) 162 Fed. 880; Vandegrift v. United States (C. C.) 164 Fed. 70. If the

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

government is not satisfied with Judge Holt's decision, it should be reviewed in the Second Circuit; or it may in effect be attacked here by an appeal in the present proceeding, since my ruling is rested wholly upon the authority of that case.

The decision of the Board of General Appraisers is reversed, and it is now ordered that the merchandise be assessed for duty under paragraph 409.

UNITED STATES v. A. & H. VEITH.

(Circuit Court, S. D. New York. March 29, 1909.)

No. 4,213.

CUSTOMS DUTIES (§ 26*)—CLASSIFICATION—"PRESSED OR STAMPED SHAPES."

Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 135, 30 Stat. 161 (U. S. Comp. St. 1901, p. 1638), relating to "pressed or stamped shapes," includes steel stampings which have been pressed or stamped into an open-work or raised pattern and are used in manufacturing ornaments, etc.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 26.*]

On Application for Review of a Decision of the Board of United States General Appraisers.

The decision below, which is reported as G. A. 6,293 (T. D. 27,131), reversed the assessment of duty by the collector of customs at the port of New York. The opinion filed by the Board of General Appraisers reads as follows:

FISCHER, General Appraiser. The merchandise in question is described on the invoices as "steel ornaments," "steel stampings," and "metal stampings." 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), as manufactures of metal; and it is claimed to be dutiable properly "at the appropriate rate for sheared, pressed or stamped shapes" in paragraph 135, 30 Stat. 161 (U. S. Comp. St. 1901, p. 1638).

We find, from the testimony and the samples admitted in evidence, that the articles are produced by being stamped out of a sheet or strip of steel, into meter lengths of open-pattern raised work, simulating "steel-point" work. The sheet is then sheared to the desired width. The resultant is a strip of fancy steel work, which, when cut up, is ready to be sewed on garments or hats. Some of the goods in question have been so cut off and are in the form of individual ornaments.

In G. A. 6,170 (T. D. 26,773) the board held that steel-point ornaments were dutiable under paragraph 193 at 45 per cent., reversing the decision of the collector assessing duty at 60 per cent. under paragraph 434, Schedule N, 30 Stat. 192 (U. S. Comp. St. 1901, p. 1676). In that case, however, there was no claim made under paragraph 135, and hence the point now before us was not passed upon. But there are a number of other adjudicated cases which tend strongly to support the contention of the importers herein, and which are conclusive, in our opinion, in favor of the claim under paragraph 135. In G. A. 5,927 (T. D. 26,061), the prevailing opinion held that steel wool, an article manufactured from steel wire, the latter itself a completely manufactured article, the steel wool being, in the condition imported, a finished product ready for the use to which it is applied, was dutiable under paragraph 135 as steel in all forms and shapes, not specially provided for, as against the government's contention that it was dutiable as manufactures of steel. On appeal this decision was affirmed in the cases of Buehne v. U. S. and U. S. v. Buehne (cross-appeals, C. C.) 140 Fed. 772 (T. D. 26,452), and in so deciding Judge

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

Townsend cited U. S. v. Binney, 82 Fed. 992, 27 C. C. A. 347, and Boker v. U. S., 97 Fed. 205, 38 C. C. A. 114, as authorities for the proposition that paragraph 135 is a more specific provision than paragraph 193. In the Binney Case small particles of steel, used in sawing stone, were held by the Circuit Court of Appeals to be dutiable as steel in forms. In Morris v. U. S. (C. C.) 140 Fed. 774 (T. D. 25,183), an engraved steel plate used in the manufacture of plate glass was held to be dutiable under paragraph 135; the board's decision holding it to be a manufacture of metal being reversed. In G. A. 5,682 (T. D. 25,296) steel shapes, some flat and some curved, with slotted holes drilled through, were held to be dutiable under paragraph 135 as "plates and steel in all forms, not specially provided for," and no appeal was taken from this decision.

In all these cases the articles were complete as imported—that is, they were finished products. Certainly the reasoning which impelled the courts and the board to classify them under paragraph 135, which it is urged was intended to provide only for merchandise in the nature of material to be made into manufactured goods ready for use, applies much more strongly to the goods before us, which consist of material for the use of manufacturers in fabricating so-called steel-point ornaments, buckles, etc., for attaching to women's wearing apparel. Under the authorities we are constrained to hold that the claim under paragraph 135 has been successfully maintained.

The protests are sustained, and the decision of the collector reversed in each case.

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

Brooks & Brooks (Frederick W. Brooks, of counsel), for importers.

HOLT, District Judge. Appraisers' decision affirmed.

THEODORE W. MORRIS & CO. v. UNITED STATES.

(Circuit Court, S. D. New York. March 29, 1909.)

No. 5,265.

CUSTOMS DUTIES (§ 26*)—CLASSIFICATION—STEEL PLATES—"PLATES AND STEEL IN ALL FORMS AND SHAPES."

The provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par 135, 30 Stat. 161 (U. S. Comp. St. 1901, p. 1638), for "plates and steel in all forms and shapes," does not include plates that have been manufactured into some other completed commercial article, such as a so-called engraved steel table, consisting of a rectangular slab incised with a pattern to be impressed upon plate glass.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 26.*]

On Application for Review of a Decision by the Board of United States General Appraisers.

The decision below, which is reported as G. A. 6,744 (T. D. 28,888), affirmed the assessment of duty by the collector of customs at the port of New York. The opinion filed by the board reads as follows:

FISCHER, General Appraiser. According to the invoice description the merchandise is an engraved steel table. It was assessed with duty under Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 193, 30 Stat. 167 (U. S. Comp. St. 1901, p. 1645), as a manufactured article composed of steel, not specially provided for, and is claimed to be dutiable properly at the applicable specific rate, according to value per pound, as "plates and steel in all forms and shapes not specially provided for," under par. 135, 30 Stat. 161 (U. S. Comp. St. 1901, p. 1638).

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

It appears, from the testimony of the importer taken at the hearing, that the so-called steel table is in fact a slab of steel 15 feet long, 4 feet 2 inches wide, 6.6 inches thick, weighing 13,384 pounds, and worth 17,850 marks. The article is not imported as a table, but as a table top, to be mounted after importation on a wooden frame. It is a slab of steel covered on one side by an engraved or depressed design, which runs to within about 1 or 1.5 inches of its edge, and is to be used in the manufacture of a certain kind of plate glass. Glass is pressed or rolled against this steel table top, and takes the impression of the pattern from its engraved surface.

In G. A. 4,650 (T. D. 21,975), an engraved plate in the form of a table top, which was used by glass manufacturers for making devices or figures on plate glass, was not regarded as a plate of the kind provided for in paragraph 166, 30 Stat. 165 (U. S. Comp. St. 1901, p. 1643), which were held to be only such as are used for printing on paper or similar material. In that case the present issue under paragraph 135 was not raised. A question similar to that here involved arose in G. A. 5,409 (T. D. 24,626), wherein the importers' present contention was sustained; the board following Morris v. U. S. (C. C.) 140 Fed. 774 (T. D. 25,183). In the Morris Case the Circuit Court for the Southern District of New York, Hazel, J., reversed the board without opinion and sustained the claim of the importers that the article, differing in no particular from the merchandise here under review, fell within the provision for "plates and steel in all forms and shapes."

The issue again arises in view of the opinion of the court, Hazel, J., in the case of U. S. v. C. Newman Wire Co. (C. C.) 152 Fed. 488 (T. D. 27,896), affirmed (C. C. A.) 159 Fed. 123 (T. D. 28,600). It is claimed that in the last-mentioned opinion of the Circuit Court the Morris Case is disapproved. The court observed: "Conceding, however, an analogy between the articles under consideration and the steel table in the Morris Case, I am nevertheless constrained by the evidence and the reasoning of counsel for the government to now hold that Congress primarily intended by paragraph 135 to simply include steel plates that have not been manufactured into some other completed commercial article." The appellate court, in its affirming opinion, considers the term "plates" as a sheet of metal, and distinguishes between articles which may be called, but not described, by that term.

In this case we hold that the article has been changed in character from its condition as a steel plate or slab by reason of the depressed design worked out on its surface, and that the amount of work which has been done on the steel, as material, does involve a change in the dutiable classification. The case of U. S. v. Wood (C. C.) T. D. 28,655, affirming G. A. 5,886 (T. D. 25,915), may be referred to, as in that case the steel floor plates are not only called, but properly described, by the term "plates." Those plates had not been advanced by any process of manufacture from their condition as plates, and their character had in no way been changed. That would distinguish the case from the one at bar. It is proper to add that the rulings of this board as to "ball mill plates," "kominuter plates," and "steel casting grinding plates," were to a certain extent influenced by and decided on the authority of the Morris Case, supra.

With reference to the article now before us, which is considered in the light of the rulings as to the scope to be given to the provisions of paragraph 135, here applicable, it would seem to us that a steel table top over 6 inches thick, weighing over 6 tons, formed from steel and then further advanced by having a design engraved on its surface, useful only on account of its incised pattern, which acts somewhat as a mold, cast, or model, to give shape or form to plate glass, is in fact steel "manufactured into some other completed commercial article." Newman Case, supra. Its character as a steel plate must be considered as having "merged into the higher mechanical plane of a manufactured article." Bromley v. U. S., 156 Fed. 958, 84 C. C. A. 458 (T. D. 28,520), affirming (C. C.) 154 Fed. 399.

The protests must be overruled, and the decision of the collector affirmed.

Brooks & Brooks (Frederick W. Brooks, of counsel), for importers.
J. Osgood Nichols, Ast. U. S. Atty.

HOLT, District Judge. Appraisers' decision affirmed.

In re BRUNSING, TOLLE & POSTEL.

(District Court, N. D. California. April 3, 1909.)

No. 5,526.

BANKRUPTCY (§ 345*)—DEBTS ENTITLED TO PREFERENCE—TRUST FUNDS.

A trust creditor of a bankrupt is not entitled to a preference over general creditors merely because of the character of his claim; but he must show that the trust fund or property into which it was converted came into the hands of the trustee in bankruptcy, although the specific property need not be identified.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 539; Dec. Dig. § 345.*]

In Bankruptcy. On certificate of referee.

Jellet & Meyerstein, Wm. M. Cannon, and Vogelsang & Brown, for creditors.

Samuel Rosenheim, for bankrupt.

DE HAVEN, District Judge. This is a proceeding to review an order of the referee directing that the sum of $265.65 should be paid in full to one John S. Petterson in advance of dividends to other creditors. The referee found, as appears from his certificate, that Petterson was employed by the bankrupt corporation as a collector, and "that as security for the faithful performance of his duty he deposited with said corporation, on the day of his employment, the sum of $500," all of which was repaid except the sum of $265.65. The referee further finds:

"The sum of $500.00, originally deposited as herein set forth, was probably deposited by said corporation with the San Francisco National Bank to its general credit, as the books of the corporation disclose the fact that the sum of $525 was so deposited on the day the petitioner gave his money to the corporation. Against its general account with said bank the corporation drew checks in payment of merchandise and for other purposes. The merchandise so paid for was commingled with the general stock carried by said corporation. In September, 1907, the corporation was placed in charge of its creditors, and at that time a small amount of money, viz., less than $25, and no more, was found in the possession of the corporation."

The evidence upon which the referee acted is not before the court, and the petition for review was argued upon the assumption that the certificate of the referee contained a full and correct statement of the facts. It will be observed that the referee does not find, specifically, that the bankrupt used $265.65 of Petterson's deposit to pay for merchandise which went into the general stock of merchandise carried by the bankrupt; nor is there any finding that such merchandise, or its proceeds, came into the hands of the trustee. The deposit, constituting the trust fund, is not, by the findings of the referee, sufficiently traced as part of the assets of the bankrupt estate. The rule applicable in cases like this is thus stated by Gilbert, J., in Spokane County v. National Bank, 68 Fed. 979, 16 C. C. A. 81:

"Both the settled principles of equity and the weight of authority sustain the view that the plaintiff's right to establish his trust and recover his fund

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

must depend upon his ability to prove that his property is in its original or a substituted form in the hand of the defendant."

In other words, the depositor is not entitled to an equitable lien upon the entire mass of the estate of the bankrupt, but only upon that portion of it into which his deposit can be traced. In the well-considered case of Cavin v. Gleason, 105 N. Y. 257, 11 N. E. 506, the court said:

"It is clear, we think, that upon an accounting in bankruptcy or insolvency a trust creditor is not entitled to a preference over general creditors of the insolvent merely on the ground of the nature of his claim; that is, that he is a trust creditor, as distinguished from a general creditor. We know of no authority for such a contention. The equitable doctrine that as between creditors equality is equity admits, so far as we know, of no exception founded on the greater supposed sacredness of one debt, or that it arose out of a violation of duty, or that its loss involves greater apparent hardship in one case than another, unless it appears in addition that there is some specific recognized equity founded on some agreement, or the relation of the debt to the assigned property, which entitled the claimant, according to equitable principles, to the preferential payment."

I do not understand that the Supreme Court, in Peters v. Bain, 133 U. S. 670, 10 Sup. Ct. 354, 33 L. Ed. 696, announced any different rule. Of course, under this rule, it was not incumbent on the depositor, in the present case, to show that the identical merchandise purchased with his money passed into the hands of the trustee. If such merchandise was commingled with the bankrupt's general stock, and this general stock or the proceeds arising from the sale thereof, whether money, credits, or other property, can be shown to form a part of the assets of the bankrupt estate, the depositor would be entitled to an equitable preference in the distribution of such estate. In the case of Cavin v. Gleason, 105 N. Y. 256, 11 N. E. 504, above cited, the court, after stating that "it is the general rule, as well in a court of equity as in a court of law, that in order to follow trust funds and subject them to the operation of the trust they must be identified," proceeded to say:

"A court of equity, in pursuing the inquiry and in administering relief, is less hampered by technical difficulties than a court of law, and it may be sufficient, to entitle a party to equitable preference in the distribution of a fund in insolvency, that it appears that the fund or property of the insolvent remaining for distribution includes the proceeds of the trust estate, although it may be impossible to point out the precise thing in which the trust fund has been invested, or the precise time when the conversion took place. The authorities require at least this degree of distinctness in the proof before preference can be awarded."

The order of the referee is reversed, with directions to find from the evidence already taken, and such additional evidence as may be offered, whether the deposit of Petterson, either in its original or substituted form, is or is not a part of the assets of the bankrupt, under the rule stated in this opinion.

KINSMAN BLOCK SYSTEM CO. v. UNION SWITCH & SIGNAL CO. et al.

(Circuit Court, S. D. New York. February 2, 1909.)

CONTRACTS (§ 312*)—CONSTRUCTION—BREACH.

A contract requiring defendant Switch & Signal Company, in any printed matter relating to the use of certain "train stops" on a specified railway system, to mention the fact that such train stops were the invention of K., was not broken by a failure to give K. credit in printed matter subsequently issued by such company with reference to an "automatic train-stopping system" on such railroad, though an automatic train stop was one of the factors of the system.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 312.*]

In Equity. Upon demurrer filed by all defendants except the Union Switch & Signal Company.

Blandy, Mooney & Shipman, for complainant.
Clarence D. Kerr, for defendants.

PLATT, District Judge. The bill sets up a contract between the complainant and the nondemurring defendant, the Union Switch & Signal Company, about certain automatic *train stops*, and then goes on to say that said defendant did not do as it agreed. In the contract said defendant agreed that in any printed matter relating to the using of said *train stops* upon Interborough Rapid Transit Railway System it would mention the fact that said *train stops* were the invention of Mr. Kinsman, of complainant company. The bill also sets up that all the defendant corporations were affiliated, and worked together, and were generally known as the "Westinghouse Companies" and that defendant George Westinghouse dominated and controlled each and all of the companies, and they published a pamphlet in 1905 going into the matter of the *automatic train-stopping system* on said Interborough Rapid Transit Railway System, and omitted to mention the fact that the *"automatic train-stopping system"* installed therein by the Union Switch & Signal Company is the invention of said Kinsman, and even went further and represented that such *"train-stopping system"* is the *device* of some one else. The underscoring is my own.

It is apparent on the face of the bill that the demurring defendants were not parties to the contract. The complainant seeks to hold them, however, upon the theory that they were so closely tied up with the defendant Union Switch & Signal Company that they are all jointly responsible for the pamphlet published by the Westinghouse Companies, on the principle that one who knowingly helps another to break a contract is himself responsible for the breach. There is no allegation of community of interest in the contract between the defendants, and nothing to show that the demurrants knew anything about the contract; but we will not go into that. Nothing is alleged about the pamphlet which shows that the matter therein published was in violation of the contract. The contract has to do with automatic train stops, and the pamphlet refers to a train-stopping system, which is an

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

entirely different matter, and is not the same thing described in another way. An automatic train stop is one of the factors which, combined with others, goes to make up an automatic train-stopping system. The defendant did not agree to give Mr. Kinsman, or the complainant, credit for the *system* installed in the subway.

The bill is manifestly without equity as to the demurring defendants, and should be dismissed as to them, with costs to defendant to be taxed. So ordered.

UNDERGROUND ELECTRIC RYS. CO. OF LONDON, Limited, v. OWSLEY et al.

(Circuit Court, S. D. New York. April 21, 1909.)

1. COURTS (§ 260*)—FEDERAL COURTS—EQUITY—PROBATE JURISDICTION.
   Since the United States Circuit Courts in equity have the jurisdiction of the High Court of Chancery at the adoption of the Constitution, such courts have no jurisdiction of pure probate proceedings quasi in rem establishing the succession of a decedent's property, which at that time was within the exclusive jurisdiction of the ecclesiastical courts.
   [Ed. Note.—For other cases, see Courts, Cent. Dig. § 792; Dec. Dig. § 260.*
   Probate jurisdiction, see note to Bedford Quarries Co. v. Tomlinson, 36 C. C. A. 276.]

2. COURTS (§ 260*)—FEDERAL COURTS—CLAIMS AGAINST ESTATES.
   Federal courts act with reference to estates of deceased persons only to ascertain and enforce claims between citizens of different states after the state courts have probated the will or established intestacy.
   [Ed. Note.—For other cases, see Courts, Dec. Dig. § 260.*]

3. COURTS (§ 260*) — APPOINTMENT OF RECEIVERS — JURISDICTION OF FEDERAL COURTS.
   While proceedings for the probate of a will or the establishment of intestacy of a decedent's estate are in abeyance or in dispute, the federal Circuit Court has jurisdiction, at the instance of a noncitizen creditor, to appoint receivers to preserve the estate.
   [Ed. Note.—For other cases, see Courts, Dec. Dig. § 260.*]

4. EQUITY (§ 427*)—BILL—PRAYER FOR RELIEF.
   Where a bill prays for general relief, a court of equity may give any relief consistent with the case made, though it is more, less, or different from the relief specifically prayed for.
   [Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 1005–1008; Dec. Dig. § 427.*]

5. COURTS (§ 260*)—FEDERAL COURTS—APPOINTMENT OF RECEIVER.
   Nonadministration of a large estate had continued for four years, and was likely to continue much longer. Large charges had accumulated, and taxes had remained unpaid for several years. An art gallery had been advertised for sale under a mortgage amounting to nearly $300,000, and no insurance had been taken out on the decedent's house or its contents. Decedent's real estate was worth over $2,000,000, and his collections, worth over $1,000,000, were in the possession of one not entitled to the possession of the real estate, who had paid no rent therefor, and who was not entitled to a large part, if any, of the collections, which might at any time be removed from the state. The Surrogate's Court in New York had previously taken jurisdiction constructively of the personalty, but the executor was enjoined from proceeding therein until further order of the circuit court of Cook county, Ill., which injunction had not

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

been set aside. *Held*, that a nonresident creditor was entitled to the appointment of a receiver by a federal court to take charge of the property until proceedings were taken for its disposition in the probate court.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 260.*]

6. WILLS (§ 801*)—WIDOW'S ELECTION—EFFECT.

Where a will authorized testator's widow to occupy the home as long as she desired, her election, after the expiration of 40 days, as provided by Real Property Law N. Y. (Laws 1896, p. 587, c. 547), § 184, to take against the will, was tantamount to a refusal to occupy the premises, so as to require her to vacate them.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2077–2090; Dec. Dig. § 801.*]

7. RECEIVERS (§ 14*)—GROUNDS OF APPOINTMENT—PRESERVATION OF PROPERTY.

Where a widow continued in possession of property of her husband's estate more than the 40 days, during which she was authorized by Real Property Law N. Y. (Laws 1896, p. 587, c. 547), § 184, to occupy the homestead after her husband's death, and subsequently elected not to take under her husband's will, bequeathing to her the use of the home for life at her election, her possession of the property after such election was unavailable to her in the federal courts as against the legal title as affecting the right to the appointment of a receiver of the property.

[Ed. Note.—For other cases, see Receivers, Dec. Dig. § 14.*]

In Equity.

Cravath, Henderson & De Gersdorff, for complainant.

Hornblower, Miller & Potter and Jas. R. Soley, for defendant Yerkes.

WARD, Circuit Judge. April 5, 1909, the complainant filed a bill as creditor in the sum of $796,619.01 of the estate of Charles T. Yerkes, deceased, of Chicago, Ill., upon its own behalf and on behalf of all other creditors who should come in against Louis S. Owsley, as executor, and the Central Trust Company, as trustee under the decedent's will, Mary Adelaide Yerkes, his wife, Charles E. Yerkes, and Bessie L. Rondinella, his children, and Edward O'Malley, Attorney General of the state of New York, praying for the appointment of a receiver of the real and personal property of the estate within this district. The executor, the trustee, and the children consented to the application. Mrs. Yerkes and the Attorney General were not present nor represented nor notified. A temporary receiver was appointed with an order on the parties to show cause why the receivership should not be continued during the pendency of the suit, returnable April 9th. The marshal made due service of the subpœna issued to Mrs. Yerkes, and on the return day she was represented by counsel, who entered a special appearance objecting to the jurisdiction of the court.

December 29, 1905, Mr. Yerkes died, and his will, dated May 22, 1905, was duly proved and admitted to record in the probate court of Cook county, Ill., March 15, 1906. Of the executors named only Louis S. Owsley qualified. The Illinois Trust & Savings Bank declined the appointment February 2, 1906, and Mrs. Yerkes, under the name of Mary Adelaide Mizner, she having intermarried January 30, 1906, with one William Mizner, declined the appointment February 17, 1906.

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

The real estate in this district consists of a stable No. 139 East Sixty-Ninth street, and premises at the southeast corner of Sixty-Eighth street and Fifth avenue, No. 864 Fifth avenue, which latter were bought in three separate parcels. July 5, 1892, the first lot on the corner of Sixty-Eighth street and Fifth avenue, together with the stable No. 139 East Sixty-Ninth street, were conveyed to Mrs. Yerkes by deed dated July 5, 1892, recorded July 13, 1893. Title to these premises Mrs. Yerkes conveyed to Mr. Yerkes by two sets of deeds, viz., the first through Carlos E. Cook, dated February 1, 1893, and recorded December 3, 1908, and the second through Mary A. Fitzpatrick, dated January 23, 1903, recorded June 10, 1905. January 23, 1903, Mr. Yerkes conveyed a lot adjoining the above-mentioned premises on the east to Mrs. Yerkes, who on the same day through Mary A. Fitzpatrick, reconveyed the same to him; the deeds being recorded June 10, 1905. December 8, 1903, a lot adjoining the premises above mentioned on the south was conveyed to Mr. Yerkes, deed recorded February 10, 1904, which he subsequently mortgaged for the sum of $225,000, payable February 10, 1906.

The personal property consists of railroad stocks and bonds pledged in the hands of third parties for loans to Mr. Yerkes, and of collections estimated to be worth over $1,000,000.

The will gave the use of 864 Fifth avenue, together with its contents, to Mrs. Yerkes for life, and further provided that:

"Upon the death of my said wife, Mary Adelaide Yerkes, or in case she shall notify my trustee hereinafter named, or its successor, in writing, that she desires to relinquish her right to use said premises as a home, then and in that event I direct my said trustee hereinafter named to immediately, on the happening of either of said events, cause to be incorporated under the laws of the state of New York, or by special act of the Legislature of said state, a corporation for the purpose of establishing, maintaining and preserving an art gallery or galleries in said premises, and hereby give, devise and bequeath in such event to said corporation when so formed the said plot of ground and the building thereon, together with all paintings, works of art, statuary, bronzes, tapestries and bric-a-brac therein contained and also that may be located elsewhere, under such rules and regulations as said corporation may prescribe upon the express condition subsequent and continuing that the properties so bequeathed and devised shall be known and designated as the Yerkes Galleries, and upon failure at any time of such condition the said property, together with the paintings, works of art, statuary, bronzes, tapestries and bric-a-brac therein contained shall be and become a part of my residuary estate."

The testator further provided:

"I hereby nominate and appoint as my trustee under this my last will and testament, the Central Trust Company of New York, a corporation organized under the laws of the state of New York, and hereby direct my executors hereinafter named, upon a settlement of my estate in the probate court of Cook county, Ill., to transfer all my property, real, personal and mixed, not herein otherwise disposed of, to my said trustee, to be held by it for the purpose of carrying out the provisions of this my last will and testament."

The provisions in the will in favor of Mrs. Yerkes were to be in lieu of dower. The residue of the estate was given to the trustee to be held on certain trusts.

In October, 1905, when Mr. Yerkes was in London, Mrs. Yerkes had his safe in 864 Fifth avenue, the combination of which was known only to Mr. Yerkes and the defendant Owsley, drilled open, and she found in it, among other things, the deeds dated February 1, 1893, conveying the house and stable through Cook to Yerkes, and a bill of sale dated May 24, 1896, assigning to her "her executors, administrators and assigns, all and singular the furniture and household goods together with each and every painting and picture now contained in the house, No. 864 Fifth avenue in the city of New York of which a schedule is hereunto annexed. * * *" The only reference to pictures in the schedule is "all pictures in picture gallery and in the house as are published in the catalogue 1893."

Mrs. Yerkes also has a declaration signed by Mr. Yerkes dated November 19, 1884, as follows:

"In order that there may be no question arise at my decease or at any time respecting the ownership of the furniture in my house at No. 3201 Michigan avenue, Chicago, Ill., I hereby state and declare that my beloved wife Mary Adelaide Yerkes of Chicago aforesaid is the sole and absolute owner of said furniture, including all crockery, cutlery, silver, plated and glassware, carpets, curtains, bedding, linen and all other household goods and effects, in said house or belonging thereto and that said property was purchased for my said wife, and on her account and in her right, and as her own, with money given by me to her and appropriated to that purpose."

And a bill of sale dated July 14, 1887, assigning to her, her executors, administrators, and assigns:

"All the furniture of every kind, name and description, all the silverware, silver plated ware, glassware, china, crockery, linens, bedding, carpets, musical instruments, pictures, objects of virtue, articles of bric-a-brac, and all other objects of household use and adornment, all in the dwelling house No. 3201 Michigan avenue, in the city of Chicago, county of Cook and state of Illinois."

Mr. Yerkes returned from London in November, 1905, going directly from the steamer to the Waldorf-Astoria Hotel, where he died December 29, 1905. March 14, 1907, Mrs. Yerkes elected to take against the will and was thereupon entitled to dower in one-third of the real estate and one-third of the personalty after payment of debts. January 18, 1909, the defendant Owsley filed his petition for ancillary letters testamentary in the Surrogate's Court for the County of New York, and a citation was issued returnable March 18th. On the same day Mrs. Yerkes filed a petition in the probate court of Cook county, Ill., for the removal of Owsley as executor, which was denied March 20, 1909. March 25, 1909, Mrs. Yerkes filed a petition in the superior court of Cook county in chancery, asking for the appointment of a receiver of the estate of Charles T. Yerkes, and that Owsley be restrained from further prosecuting his petition for ancillary letters in New York. A temporary injunction was granted, and a motion to vacate the same is pending for hearing.

It will be seen from the foregoing that Mrs. Yerkes had title to the first parcel of 864 Fifth avenue for a little over six months, to the second parcel but for an instant, and to the third not at all; also, that she has had no title to the first parcel and to the stable since February 1, 1893, nor to the second parcel since January 23, 1903. Her claim to

any of the personalty rests upon the declaration which, if it covers collections at all, speaks only of property in 3201 Michigan avenue, Chicago, of the date November 19, 1884, and bill of sale which does cover art objects in the same place July 14, 1887, both of which were apparently delivered to her, and the bill of sale taken from Mr. Yerkes' safe, which was apparently never delivered, and covers pictures in 864 Fifth avenue in the catalogue of 1893. The order appointing the temporary receiver authorized him to take possession of the property temporarily, and the defendants were ordered to turn the same over to him and enjoined from in any way interfering with his possession and management.

It is often said in the cases that the United States Circuit Courts in equity have the jurisdiction of the High Court of Chancery at the time of the adoption of the Constitution. Fontain v. Ravenel, 17 How. 369, 384, 15 L. Ed. 80. The ecclesiastical courts had at that time the sole right of probating wills and establishing administrations. These are pure probate proceedings quasi in rem, establishing the succession to a decedent's property. The Court of Chancery habitually distributed the estates because of its power to regulate trusts, compel discovery, and settle accounts. Broderick's Will, 21 Wall. 503, 22 L. Ed. 599; Bispham's Principles of Equity, §§ 528, 529. Accordingly, the United States Circuit Courts in equity have no jurisdiction of these purely probate proceedings and cannot distribute generally, because the state courts must first establish the right of succession. The federal courts only act in the way of ascertaining and enforcing claims between citizens of different states after the state courts have probated the will or established the intestacy; but, while such proceedings are in abeyance or in dispute, the federal court may appoint receivers for the preservation of the decedent's estate. When the power of the United States Circuit Courts in equity to administer a decedent's estate is mentioned, as it often is in the cases, I do not think that general administration is meant. Comstock v. Herron, 55 Fed. 803, 811, 5 C. C. A. 266; Herron v. Comstock, 139 Fed. 370, 376, 71 C. C. A. 466; Hayes v. Pratt, 147 U. S. 557, 570, 13 Sup. Ct. 503, 37 L. Ed. 279; Byers v. McAuley, 149 U. S. 608, 13 Sup. Ct. 906, 37 L. Ed. 867; Hale v. Tyler (C. C.) 115 Fed. 833. The court, however, went much further in the case of Ball v. Tompkins (C. C.) 41 Fed. 486.

It must be admitted that the bill does pray for the administration of the estate. As, however, it contains a prayer for general relief, the court is competent to give any relief consistent with the case made out in the bill, even if it is more or less or different from the relief specifically prayed for. The situation disclosed is certainly a very unsatisfactory one for creditors. The decedent died December 29, 1905, and nothing whatever has been done with reference to his property within this district. Large charges have been allowed to accumulate. Taxes are in arrears upon the main house for 1903, 1904, 1905, 1906, and 1907, and unpaid for 1908, upon the gallery for 1904–1908, inclusive, upon the stable for 1903, 1904, 1905, 1906, 1907, and 1908 unpaid, aggregating about $200,000. The gallery is advertised for sale in June under the mortgage amounting now to nearly $300,000. There

is no insurance on the house or its contents. The decedent's real estate, worth over $2,000,000, and his valuable collections, worth over $1,000,000, are in the possession of one not entitled to the possession of the real estate, nor paying any rent for it, nor entitled to a large part, if any, of the collections. The latter might at any time be taken out of the state. We need not inquire whether this is due to the supineness of the executor or to the mutual suspicions and ill will existing between many of the parties in interest. The nonadministration has continued for nearly four years and is likely to continue much longer. The property should be preserved in the hands of a disinterested person for the benefit of the creditors, if that can be done. The complainant's interest is only as creditor. It has no controversy with the estate because its claim has been presented, proved, and established; but it is distinctly interested in the preservation of the decedent's estate as a fund out of which it may be paid.

Before this bill was filed, the Surrogate's Court for the County of New York had taken jurisdiction of the personalty at least constructively. Farmers' Loan & Trust Company v. Railroad Co., 177 U. S. 51, 20 Sup. Ct. 564, 44 L. Ed. 667. When the defendant Owsley applied for ancillary letters here, and the citation was issued and served, a proceeding was begun which I think ordinarily would prevent this court from intervening; but the proceeding has been stopped on the motion of Mrs. Yerkes by the injunction of the superior court of Cook county, Ill., in chancery, enjoining Owsley from proceeding in it until the further order of the court. For all that appears his application may never be proceeded with. Therefore I will continue the receivership as to the personalty until that motion is disposed of. If Owsley is permitted to proceed and obtains letters, no reason is now apparent why the personalty should not be turned over to him.

As by the law of New York the decedent's real estate may be resorted to if his personalty is insufficient to pay his debts, I think a federal court of equity may proceed against it even if a state court could not. In other words, the form of reaching it prescribed by the state law cannot limit the power of the federal court. Payne v. Hook, 7 Wall. 425, 19 L. Ed. 260. And, similarly, the fact that the Surrogate's Court of New York County can appoint a temporary administrator upon the application of creditors does not limit the power of this court to appoint a receiver.

In Atkinson v. Henshaw, 2 Ves. & Bea. 96, Lord Eldon held that the Court of Chancery would appoint a receiver of a decedent's estate during a contest as to probate in the ecclesiastical court, notwithstanding that court had itself power to appoint a temporary administrator. This is the very situation that exists in the present case. Much later Vice Chancellor Malins held that the Chancery Court would not appoint a receiver if the probate court had actually appointed a temporary administrator. Veret v. Duprez, L. R. 6 Eq. 329.

Real property in this state cannot be resorted to unless it appears that the decedent's personalty is insufficient to pay his debts. Code Civ. Proc. §§ 2749, 2756. The executor in this case is of opinion that the personalty will not pay the debts. I suppose the trustee of the re-

siduary estate is of the same opinion, because, although Mrs. Yerkes' refusal to take under the will is tantamount to her refusal to occupy the premises as a home, the trustee has taken no steps to organize a corporation, as required by the will, to take over the premises and their contents as the Yerkes Galleries, and has consented to this application.

The only statement of Mrs. Yerkes' claim to be the owner of 864 Fifth avenue excepting the gallery is to be found in article 20 of her petition to the superior court of Illinois in chancery, as follows:

"That your oratrix was the owner in fee simple of said real estate from the year 1892, until May 23, 1903, upon which date she was induced to convey the said premises to one Mary A. Fitzpatrick, and the said Mary A. Fitzpatrick then conveyed the said premises to the said Charles T. Yerkes. That no money was paid to your oratrix or to any one as a consideration for the execution of the said deeds, but your oratrix caused the said title to pass from her to the said Charles T. Yerkes upon the representation that the said Charles T. Yerkes had made certain bequests to your oratrix in a certain last will and testament then and there by him executed, and upon other representations then and there made to your oratrix. That said representations constituted a contract with your oratrix, and have not been carried out, but were defeated by the said Yerkes by the execution of a later will, and the said considerations and representations have wholly failed. That your oratrix first discovered the failure of the consideration for said deeds upon the death of said Charles T. Yerkes, and has ever since asserted her claim as owner to the said premises, and has remained in actual physical possession thereof."

This claim she has taken no steps to make good. It is said that her claim that she owns the premises entitles her to possession. I do not think so. During his lifetime her occupation from February 1, 1893, was consistent with his title, and from June 10, 1905, with his record title as his wife. After his death she was, as widow, entitled to remain, by virtue of her dower right, in possession for 40 days, and no longer (Real Property Law [Laws 1896, p. 587, c. 547] § 184), or under his will she was entitled to remain until she determined whether she would occupy the premises as a home. March 14, 1907, she determined not to do so, when she elected to take against the will. After these periods had passed, her possession might be sufficient notice of her claim to a purchaser, if she subsequently made it good in a court of equity; but it would not avail her in the federal courts against the legal title.

As in the case of the personalty, if steps are taken in the Surrogate's Court of the County of New York to dispose of the realty, this court, as at present advised, will withdraw its receiver. The receivership will be continued until the further order of the court.

AMERICAN-HAWAIIAN S. S. CO. v. MORSE DRY DOCK & REPAIR CO. et al.

(District Court, S. D. New York. March 2, 1909.)

DAMAGES (§ 106*)—NEGLIGENCE IN PERFORMING CONTRACT—MEASURE.

Exceptions to commissioner's report that the libellant had failed to prove any damages. The evidence showed that the steamer would have sailed if it had not been for the damage repairs on the 8th of September, 1906, and as, owing to such repairs, she did not get away until the 17th, the exception sustained and *held*, that the libellant was entitled to compensation for nine days' detention less the amount it saved by not being obliged to pay overtime charges.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 272; Dec. Dig. § 106.*]

(Syllabus by the Judge.)

See, also, 157 Fed. 274.

Wheeler, Cortis & Haight, for libellant.

Wing, Putnam & Burlingham, for Merritt & Chapman Co.

ADAMS, District Judge. This action was brought by the American-Hawaiian Steamship Company to recover from the Morse Dry Dock & Repair Company and the Merritt & Chapman Derrick & Wrecking Company the value of the time of the steamship American during certain repairs made in the latter part of August, 1906, said in the libel to amount to $3,921.87. It arose out of a state of affairs fully described in the action of Morse Company v. Merritt Company (D. C.) 157 Fed. 274, where it was determined that the Morse Company was entitled to recover its damages, caused by the falling of the low pressure piston of the steamer, from the Merritt Company by reason of its negligence in removing the piston. This action was tried with that action and it was held:

"There will also be a decree in favor of the American Company against the Morse Company, with an order of reference. The latter decree to be satisfied in the first instance by the Merritt Company, but this provision is without prejudice to the right of the American Company to recover from the Morse Company should satisfaction from the Merritt Company fail."

Upon this decision an interlocutory decree was entered as follows:

"American Hawaiian Steamship Company against Morse Dry Dock & Repair Company, and the Merritt & Chapman Derrick & Wrecking Company, Brought in by Petition.

The above entitled cause having come on to be heard on the pleadings and proofs adduced by the respective parties, and having been argued and submitted by the proctors for the respective parties, and due deliberation having been had,

Now on motion of Wheeler, Cortis & Haight, proctors for the libellant, it is Ordered that the libellant herein recover its damages suffered by reason of the matters complained of in the libel, and that it be referred to Herbert Green, Esq., United States Commissioner, to ascertain and report the amount of such damages to the court with all convenient speed."

The claim in the libel was:

"Fifth. By reason of the premises it became necessary to put, in new parts and to repair the injury done to the said vessel as above stated. The respondent herein has made said repairs and has restored the said steamship to her proper condition, but in making the said repairs, the said respondent detained the steamer for a period of five days and one half hours longer than would have been required had the repairs contracted for been performed with due care.

Sixth. The value of the said steamship to the libellant at the time that she was delayed was about $750 per day, and the libellant, therefore, lost the sum of $3.921.87 through its inability to use the said steamship for the said period. and the said sum of $3,921.87 is now due the libellant from the respondent."

On the reference, it was stated:

"Mr. Haight: I claim the vessel was worth $750 a day, and I claimed in my libel only 5½ days, but I shall have to ask for an amendment to the ad damnum, which I believe is allowed up to the amendment" (entry) "of the Decree, to increase the number of days as I get my information now."

* * * * * * * * * * * *

"Mr. Haight: Yes. I claim, in accordance with the testimony given by Mr. Blackford, that if the steamer had arrived at the dock on the night of August 29th, when she was expected, her loading would have been completed on the afternoon of September 7th, and that the steamer would have sailed on September 8th, and that the American Hawaiian Steamship Company is entitled to nine days demurrage, at the rate of $530.55 per day, which is the actual net earnings of the steamer on the voyage from New York to Seattle.

Mr. Putnam: I still ask you to give us the days that you claim that we should pay for.

Mr. Haight: I have done so.

Mr. Putnam: I don't think you have.

Mr. Haight: That she should have sailed on the 8th and did not sail until the 17th; a total of nine days."

Thereafter the commissioner made a full report. In concluding he said:

"Libellant's whole case consists of little more than assertions that if the accident had not happened, the other necessary work would have been rushed, some of the work actually done would not have been undertaken, the ship would have sailed leaving other portions uncompleted, the inspection would have been hastened, and the ship would have been loaded and despatched with a speed unusual in libellant's business. I regard all this as too vague, doubtful and conjectural to found a decree upon. No claim was made for damages for detention while the ship was repairing, and apparently no intimation was given that such a claim might be made. Mr. Mills admits that he did not request Morse to hurry the accident work, or complain that it was delaying the ship. If the Morse Co. had been under a time limit by its original contract, with a per diem penalty clause, it is very doubtful that libellant could have recovered penalties in view of all the additional work it ordered, both originally and from time to time as the repairs proceeded up to the very end, without a suggestion that it would claim damages for delay. If libellant's silence and orders for additional work would not have operated as a waiver, it would seem that they would at least have been regarded as an implied extension of the time on its part. Under the facts here, I do not see why the Morse Co. is not in a position at least as good as that, nor do I see why the Merritt & Chapman Co. should occupy a worse position. The liability of the one is no broader than that of the other, although primarily it rests upon the Merritt & Chapman Co. My conclusion is that libellant has failed to prove that the ship was detained by reason of the accident.

To enable the court to dispose of the case finally in the event of the above conclusion not being sustained, it is proper that I should find the rate of damages which libellant would be entitled to recover. Computations were

submitted purporting to show that the net daily earnings of the ship on her west bound voyage, the one in question, were $530.55 per day, and upon a demand of the respondent, similar computations were presented as to the return of east bound voyage, and these showed net daily earnings of $394.84. The accuracy of these computations has not been questioned. The daily average for the two voyages was $426.28. Upon the reference it was contended that the last mentioned rate would apply, but the question has not been discussed in respondent's brief. I do not see why the east bound voyage should be considered, any more than the next following, or successive voyages subsequently made. Each voyage was separate and distinct. If the ship was detained, I think that she would be entitled to recover the net earnings which she would have made during the days of detention. I therefore find the rate to be $530.55."

On the 8th of February, 1909, the libellant duly excepted to the report, pointing out in detail the errors relied upon.

It is claimed that if the piston had not been dropped by the Merritt & Chapman Company the vessel would have sailed early on the morning of September 8th.

It appears that the repairs to the vessel, other than those caused by the accident, were of two kinds, viz.: a special contract relating to the low pressure cylinder, which had been made a year or more before, and the incidental repairs which are nearly always made while a vessel is in port. When the contract was made, it was agreed that the work should be done while the vessel was engaged in discharging and loading. On this occasion, the vessel arrived at the repairing place on the 24th of August and was docked about 3:30 p. m. of that day. The testimony shows that the time covered from the date of arrival to September 7th would have given the Morse Company ample time to make the repairs and it is proved explicitly that it agreed to make the repairs in about ten days. It was testified that when the accident happened, all the work was purposely delayed because the company had such a long time to make the accident repairs that it centered all its force upon that work and got it out before it started on the general repair work. It was shown that no jobs of the latter would have interfered with the former and sufficient men could have been employed to do them all. It was principally overhauling and not actually necessary to do the work before the vessel put to sea.

It appears also that the loading would have been completed before September 8th. The time that it actually took to load this particular cargo was 103½ hours. When the accident occurred and it appeared that the vessel would be detained a long time in port, the libellant saved the expense of loading overtime and on holidays, amounting to $609.04. There was no question that the cargo would have been ready to load. It was the libellant's duty to mitigate damages and an avoidance of incurring the expense of overtime and holiday loading was in this direction.

It was the intention of the libellant that the vessel should sail September 8th. It had no regular days for sailing, they varying from 16 to 35 days apart, but as soon as one of its vessels arrived in port, a sailing day for her was fixed and shippers were notified accordingly.

Other matters were taken into consideration in fixing the day, the regular insurance for example, covering that period. Orders were given to load as soon as the steamer docked. When the time for sailing

was originally fixed for September 8th, an entry to that effect was made in red ink on the freight engagement list. When the accident occurred shippers were notified to hold their freight back and subsequently the sailing date was fixed for September 15th, when it was expected the repairs would be completed.

The loading was started with no overtime work, the only time it was ever done. The testimony shows that this was because of the accident.

The libellant hurried the work in all possible ways. In obtaining the new column, for example, they sent it by express to the Morse Company.

Some consideration has been given by the commissioner to the loading time of the libellant's other vessels and he argues therefrom that the time used here was not exceptional, but I am unable to agree with his reasoning. The circumstances were quite different. This was an unusually light and bulky cargo, 6,097 tons. There were often as much as 10,000 tons, and it does not follow that the time required for loading should have been as great. Comparisons based upon quite different situations are evidently of little value and in any event do not prove that this steamer would not have completed her loading, apart from the accident, by the 8th of September.

Comment has been made by the commissioner on the fact that other work was done by the libellant, while the ship was waiting and that the ship's engineers and part of her crew, during the time, were engaged in repair work and probably his decision was influenced thereby. The utilization of a vessel's idle days, however, does not create a right to defeat a claim for detention. Actiesselskabet Albis v. Munson (D. C.) 130 Fed. 32, affirmed 139 Fed. 234, 71 C. C. A. 360. It was not necessary to the libellant's recovery to prove that the crew remained idle during the period of waiting.

The construction of 2 deck houses by Morse & Co. for the libellant is also mentioned by the commissioner, but it has been shown that this work was done under a general contract and was not to be used until the vessel went into a new service. As a matter of fact this building did not in the slightest degree retard the sailing.

Other repairs outside the contract were also mentioned by the commissioner and possibly had some effect in bringing about his decision, but what has been said just above is equally applicable here. They were the ordinary ship's repairs which kept coming up day by day but in no way caused any delay.

Some argument has been made that a cause of delay was the inspection of the vessel by the Local Inspectors. There was no legal necessity for an inspection before October 18, 1906, as the vessel had been inspected on that date in 1905. It is provided that certificates of inspection shall not be issued for any period less than one year—General Rules and Regulations of the Dept. of Commerce and Labor 1907, p. 107—but it is customary in cases of necessity to anticipate the time. It is clear that the inspection in this case could have been made before September 8th, if necessary, but it was more convenient to do it when there was steam in the boilers. The delay until just before sailing was

more economical and in conformity with the libellant's policy of avoiding needless expense.

Taken altogether, the testimony is very persuasive that the libellant is entitled to demurrage. It had use for the vessel, it was very careful to provide that there should be no detention beyond the date mentioned. It was the invariable custom of the libellant to despatch its vessels as soon as loaded and if instructions had not been given to hold back the freight, a full cargo would have been provided in the ordinary course. Profitable employment for the vessel was at hand. The libellant's agent was very explicit about not wanting the vessel detained by the putting in of the new cylinder, to which the Morse Company agreed, also that the work should not take more than ten days, that is, to September 6th. That the fifteen days' time required for loading would be up the 8th was noted by the traffic manager, and it seems that there can be no reasonable doubt that sailing was intended on that date.

Although the damage work was repaired promptly, it was not completed until 3:45 p. m. September 16th, but the vessel was delayed until the 17th, testing the engine room work, incidental to the piston damages.

Even assuming that the commissioner was justified in considering the question of a waiver or extension of time, I fail to find any evidence which would justify a conclusion that there was either by the libellant.

The steamer would have sailed, if it had not been for the damage caused by the falling of the low pressure piston, on the 8th of September and as through the detention, due to the damage, she did not sail until the 17th, there was a demurrage delay of 9 days caused by the respondents. That would entitle the libellant to $4,774.95, but as it saved $609.04 in overtime in loading, that amount should be credited, leaving a balance of $4,165.91, for which a decree may be entered.

THE TRIGNAC.

(District Court, E. D. New York. April 3, 1909.)

SHIPPING (§ 141*)—CARRIAGE OF GOODS—LIMITATION OF LIABILITY—IMPROPER STOWAGE.

During the voyage of a steamship across the Atlantic burlap bags containing walnuts, stowed with other cargo in the hold, which was without partitions, were torn, apparently by wooden cases containing other cargo which were thrown around by the pitching of the vessel, and the walnuts were lost or damaged. The voyage was rough, but no more so than should reasonably have been anticipated at the season. *Held*, that the loss was not due to perils of the sea, within the exceptions in the bills of lading, but to negligent stowage, for which the vessel was liable; due care requiring that the bags should have been kept separate from the other cargo which was likely to injure them, by means of partitions or otherwise.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 498; Dec. Dig. § 141.*

Loss by perils of the sea, see notes to The Dunbritton, 19 C. C. A. 465; Southerland-Innes Co. v. Thynas, 64 C. C. A. 118.]

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

In Admiralty. Suit for loss of cargo.

Ritch, Woodford, Bovee & Butcher, for libelant.
Wing, Putnam & Burlingham, for claimant.

CHATFIELD, District Judge. The libelant was the owner of certain bags of walnuts, imported upon the steamer Trignac, from France, in the year 1906. The Trignac sailed from Bordeaux upon the 14th of November, and arrived in New York on the 6th of December. The Trignac is owned in France, and carried general cargo, including other walnuts, and goods in wooden cases. The walnuts were packed in burlap bags, and upon arrival at the port of New York the contents of 24 entire bags, and part of the contents of 56 damaged bags, were not turned over to the libelant, to make up the quantity called for by the bill of lading. The bill of lading contained the usual terms, including exemption from—

"loss or damage resulting from defects in the condition of the packages, * * * breakage, stowage, or contact with other merchandise."

The bill of lading also contains the statement:

"Weight, contents and value unknown, and not responsible for leakage, breakage or rust."

The testimony shows that on this trip the vessel encountered heavy weather, the wind sometimes blowing at a rate classified as a gale, and that the ship rolled a great deal. The Trignac was peculiar, in that, while not a large vessel, being of but 1,047 tons, she had an extremely large undivided cargo space in proportion to her size. The cargo space was not divided as is usual in such vessels, with what is known as "between-decks," and in consequence of this peculiarity the entire cargo was piled upon the planking or floor of the hold of the vessel (as closely as possible throughout the entire cargo space) up to the main deck.

The testimony shows that a strongback, or brace of heavy angle iron, passed across the ship near each hatchway, some five or six feet below the level of the main deck. A stanchion ran from this angle iron to the frame of the hatch, and the bar was thus used to stiffen the frame of the vessel. The cargo necessarily had to be stowed around these iron beams, and dunnage was used in the form of planks, some nine inches wide, six or seven feet long, and a little over an inch thick, to prevent the cargo from coming in contact with these iron bars, and also with the sides of the vessel. The testimony shows that, when the vessel arrived at New York, the cargo which had been stowed away well up into the hatchway had settled from four to six feet; but the testimony of the witnesses, as to how much the general level of the cargo under the decks, away from the hatch, had changed, was indefinite, and furnished no basis for a satisfactory conclusion. There was a conflict of testimony as to whether the bags of nuts had been injured, in the neighborhood of these iron bars, in greater proportion than in other parts of the cargo space, and the libelant has attempted to show that the stowing of the cargo was negligently performed, in that the method of packing the bags of nuts, with loose

dunnage around the iron bars and frames of the vessel, did not show the exercise of reasonable caution on the part of the owners of the vessel or their agents.

The claimant has offered evidence to show that various portions of the cargo, especially the wooden cases of goods, shifted and worked around, under the influence of the rough weather which the vessel encountered, and that the burlap bags containing the nuts were torn and broken by these cases, and by the pressure exerted upon the various portions of the cargo. The claimant has also offered testimony to show that the passage was so rough, and the weather so severe, that the vessel would be excused, under the terms of the charter, from damage resulting because of such weather; but the evidence does not show any wreck or disaster, or weather conditions which it would seem should not be reasonably anticipated by those who were stowing the vessel for a trip across the Atlantic. On the contrary, the trip was made under conditions as to which both those responsible for the stowage of the cargo, and those responsible for the strength of the packages in which the cargo was shipped, must be held to have reasonably known the needs of the situation. There is some evidence on the part of the claimant to the effect that the bags containing the walnuts were insufficient; but it is thought that the evidence shows these bags to have been of the ordinary kind, and in reasonably good condition, and no loss would seem to be attributable to either of these causes.

The libelant does not satisfactorily meet the burden of proof with reference to his allegations that the angle iron or beam penetrating the cargo space was the cause of any extensive injury. On the contrary, the weight of evidence would seem to indicate that the bags of walnuts were torn in different parts of the cargo, and in such ways that something else must have been the first cause of the injuries. The proof likewise is not sufficient to indicate that the mere use of loose dunnage around the iron bars or frames of the vessel was the cause of conditions resulting in the damage shown. As was intimated at the close of the trial, the whole question of the liability of the vessel seems to depend upon the general proposition arising from the terms of the bill of lading, and the responsibility on the part of the owners and officers of the Trignac for carrying, in a ship of her shape and construction, general cargo in a loose condition, without compartments or decks to divide the different classes of packages. The damage would seem to have been done through the gradual creation of space, as the bags in which the nuts were confined became torn from pressure or wear. The cargo thus settled around the iron beams above referred to, and all through the hold, while at the same time the wooden cases were given opportunity to be thrown about under the pitching of the vessel.

The vessel must either be held responsible on the ground that those stowing the cargo should have reasonably anticipated that the burlap bags containing nuts would not stand the particular pressure and wear to which they would be subjected, or else the libel must be dismissed upon the ground that no injury has been satisfactorily proven,

which could have reasonably been foreseen from the formation of the cargo space and the method of stowing. The libelant has not satisfactorily proven the particular portion of the dunnage which became disarranged, nor the particular object which first destroyed or tore any of the bags. But the libelant has shown, and the testimony of the ship's officers, and of Mr. Gillett, manager of the Associated Operating Company, who was present several hours each day while the Trignac was being unloaded, does show, that the injuries resulted from the contact or wear which the bags received, under the influence of weather not unusually rough. Mr. Gillett further testified, in answer to a more or less hypothetical question, that a settling of four feet in the cargo could be assigned by him to no cause other than improper stowage; and it would seem that, inasmuch as the injuries were not within the exceptions of the bill of lading, and should reasonably have been anticipated from the character of the place in which the cargo was stowed, the vessel must be held liable.

Three cases have been cited which are closely applicable to the question.

In Bethel v. Mellor & Rittenhouse Co. (D. C.) 131 Fed. 129, the provisions of section 1 of the Harter act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946]) are held to apply, and that exceptions in the bills of lading, of a similar character to those in the case at bar, could not protect the ship from the responsibility for negligent loading and stowage.

In the case of The Orcadian (D. C.) 116 Fed. 930, the vessel was held answerable for negligent stowage, "whether due to carelessness, or a mistake in judgment on the part of the stevedores employed by the ship." In that action some barrels of oil were stowed next to bales of wool; the barrels being separated by pieces of wood, and the entire cargo of barrels being wedged so as to be presumably compact. Some such weather as that in the present case, at about the same time of the year, was experienced. The vessel was not injured, but some of the barrels went adrift, were broken, and the oil damaged the wool. The case was decided upon the ground that a temporary bulkhead, or some other means of protecting the barrels from being thrown around, should have been employed. The similarity between the responsibility fixed by the court in that case and the responsibility resting upon the owners of the Trignac is very great.

Again, in the case of Marx v. The Britannia (D. C.) 34 Fed. 906, where the evidence showed that under the influence of rough weather the wood dunnage between two drums of glycerine had dropped out, thus allowing the drums to pound or chafe, Judge Brown said that if there had been a general disarrangement of the wood, or had it dropped away between other drums, the inference might have been warranted that the trouble was caused by severe weather (that is, a peril of the sea); but, where it occurred to but part of the cargo, the only fair inference is that the wood between these two drums was not secured in the usual and proper manner, and that negligence in this respect was the cause of the wood's dropping out, and thereby of the leakage which caused the loss—citing The Burgundia (C. C.) 29 Fed. 607, and The Surrey (C. C.) 29 Fed. 608.

In the present instance the damage was confined to the bags of nuts, and there was no shifting of the cargo as a whole, nor any disarrangement, except in so far as the comparatively rough weather caused pressure and hard treatment to the part of the cargo which was contained in the burlap bags. As has been said, if bags of nuts were packed around the hatchways and angle irons, with loose dunnage, in a space where any displacement would cause pressure and shifting of adjacent cargo, injury would seem to be reasonably expected, and must be held to be negligence, which was the cause of the damage to the walnuts with respect to which this action is brought.

The libelant may have a decree therefor.

UNITED STATES v. MILLS et al.

(Circuit Court, S. D. Alabama. April 3, 1909.)

No. 251.

1. PUBLIC LANDS (§ 120*)—SUIT BY UNITED STATES FOR CANCELLATION OF PATENT—MEASURE OF PROOF REQUIRED.

In a suit by the United States to cancel a patent to public land on the ground of fraud the burden of proof to establish the fraud is on the government, and the evidence, whether direct and positive or circumstantial, must be clear, unequivocal, and convincing.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 335; Dec. Dig. § 120.*]

2. PUBLIC LANDS (§ 120*)—SUIT BY UNITED STATES FOR CANCELLATION OF PATENT—FRAUD IN HOMESTEAD ENTRY.

Defendant, a young unmarried man, without means, working by the day, his compensation including his board, filed a homestead claim on government land a few miles distant from his place of employment. He went upon the land, built a house, chicken house, and horse stable, and inclosed a small part of the land. During the five years before making final proof he had tenants, mostly negroes, living in the house and cultivating the land on shares. He boarded and slept for the most part where he worked, but visited the land every few days, and once in every four or five months slept there. *Held*, that under Rev. St. § 2291 (U. S. Comp. St. 1901, p. 1390), which requires proof that a homestead entryman has "resided upon or cultivated" the land for five years, such facts were not sufficient to establish fraud in the entry or final proof, which entitled the government to a cancellation of the patent issued for the land, there being no substantial evidence that defendant did not act in good faith and in the belief that he had complied with the law.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 120.*]

In Equity.

Wm. H. Armbrecht, Dist. Atty., for the United States.
McIntosh & Rich, for defendants.

TOULMIN, District Judge. This is a bill in equity filed by the United States to cancel a patent issued by the United States to the defendant Henry C. Mills. The bill is filed to set aside and annul the patent upon the ground of fraud in obtaining it.

The bill alleges that the testimony of said Mills and that of his witnesses in making the final proof in a homestead entry made by him was false and fraudulent; that it was false and fraudulent in that said Mills did not establish actual residence upon the land covered by the entry; that he did not live on it continuously from the date of the entry, January 15, 1898, to January 3, 1903, the date of final proof proceeding, and did not cultivate the same during that period; that the defendant Henry Brannan was a witness in the said final proof proceeding, and that his testimony then given was false and fraudulent as to said Mills having established an actual residence on said land and cultivated the same; and that it was false and fraudulent in that said Brannan testified that he was not interested in said homestead entry. The bill charges that the defendants Henry Brannan and Thomas H. Brannan, with knowledge of the alleged fraud, purchased the land covered by the patent.

Each of the defendants answers denying specifically the allegations of fact in the bill of complaint in so far as it alleges any fraudulent conduct on their part, and affirms that the testimony which was given in the final proof proceeding was true.

"Canceling an executed contract is an exertion of the most extraordinary power of a court of equity. The power ought not to be exercised except in a clear case, and never for an alleged fraud, unless the fraud be made clearly to appear." Atlantic Delaine Co. v. James, 94 U. S. 207, 24 L. Ed. 112.

A suit by the government to set aside or annul a patent issued by it should be sustained only when the allegations on which it is attempted are clearly stated and fully sustained by proof. U. S. v. Stinson, 197 U. S. 203, 25 Sup. Ct. 426, 49 L. Ed. 724; U. S. v. Budd, 144 U. S. 154, 12 Sup. Ct. 575, 36 L. Ed. 384.

In the case of the United States v. De Moines & Co., 142 U. S. 541, 12 Sup. Ct. 316, 35 L. Ed. 1099, the court said: "Muniments of title issued by the government are not to be lightly destroyed."

"In a suit by the United States to cancel a patent of public land, the burden of producing proof and establishing the fraud is on the government, from which it is not relieved although the proposition which it is bound to establish may be of a negative nature." Colorado Coal & Iron Co. v. U. S., 123 U. S. 307, 8 Sup. Ct. 131, 31 L. Ed. 182.

"The testimony on which this is done must be clear, unequivocal, and convincing. It cannot be done upon a bare preponderance of evidence which leaves the issue in doubt." Maxwell Land Grant Cases, 121 U. S. 325, 7 Sup. Ct. 1015, 30 L. Ed. 949; United States v. San Jacinto Tin Co., 125 U. S. 273, 8 Sup. Ct. 850, 31 L. Ed. 747.

"Fraud is never presumed, and it devolves upon him who alleges fraud to show the same by satisfactory proof." Walker v. Collins, 59 Fed. 70, 8 C. C. A. 1.

In the case of United States v. Detroit Timber & Lumber Co. (C. C.) 124 Fed. 393, the court said:

"This rule applies with increased force where the government seeks to cancel a patent which has been issued by it. * * * The facts established, as a whole, should be inconsistent and irreconcilable with the integrity of the patent or the integrity and legality of the actions of the defendants charged

with the fraudulent entries, and should be so satisfactory as to make it clear to the court that the land was procured by fraud."

In view of these legal rules, which are well settled by the United States courts, and tested by them, let us consider what facts are established by the evidence, and whether they, as a whole, are inconsistent and irreconcilable with the integrity and legality of the action of the defendant charged with the fraudulent entry in question in this case.

The burden of producing proof and establishing the fraud is on the government, and the evidence, whether direct and positive or circumstantial, must be clear, unequivocal, and convincing. The date of the homestead entry involved in this case was November 16, 1897. The final proof to perfect the entry was made January 3, 1903, and the patent issued March, 1904. The law provides that no patent shall issue until the expiration of five years from the date of the entry, and the person making such entry shall prove by two credible witnesses that he has resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit, and makes affidavit that no part of such land has been alienated, etc. Rev. St. § 2291 (U. S. Comp. St. 1901, p. 1390). The law also provides that if at any time after the filing of the affidavit required of the applicant, and before the expiration of five years mentioned in section 2291, the person having filed such affidavit has actually changed his residence, or abandoned the land for more than six months at any time, then and in that event the land so entered shall revert to the government. Rev. St. § 2297 (U. S. Comp. St. 1901, p. 1398).

The complainants allege that the testimony of said Mills, the entryman, and of his witnesses, in making said final proof, was false and fraudulent, in that said Mills did not establish actual residence upon the land covered by the entry, did not live on the land continuously from the date of the entry to the date of making final proof, and did not cultivate said land during that period. While the evidence on the part of the complainants to sustain these allegations is in some respects vague, indefinite, and uncertain, particularly as to dates, its substance is that the defendant Mills claimed a parcel of land which was called the "Clay Mills homestead." It had on it a small house containing two rooms and a gallery, a small chicken house, and perhaps a horse stable. The testifying witnesses occasionally passed by the place along a nearby public road. There was a very small part of the land under fence, which was at times cultivated as a vegetable garden and potato patch. Said witnesses had never seen said Mills on the place during the time he claimed it as a homestead. There were some negroes living in the house for a considerable part of the time, and were sometimes seen working the land. Said Mills did not live on the land, but stayed most of the time at a turpentine still belonging to the defendants Henry Brannan and Thomas H. Brannan. Mills was employed by said Brannans and worked at their still, which was several miles distant from said homestead; that he took his meals and usually slept at the still in a room connected with a store there which belonged to said Brannans. Mills was a nephew of said Henry Brannan, and

he was sometimes seen, principally on Sundays, at Henry Brannan's dwelling house, situated three or four miles from the still. Mills kept clothes at the still in the room where he slept, which room he occupied with said Thomas H. Brannan, who kept his clothing there, and who was also employed at the still. One of complainants' witnesses testified that said Mills got him to move a family of negroes into the house on the homestead. Another witness for complainants testified that he, as a physician, visited some families living on the homestead between seven and ten times and never saw Mills there. There was some conflict in the evidence as to the amount of land under fence and in cultivation, and also as to the value of the improvements on it.

The evidence on the part of the defendants was, in substance, that the defendant Mills was an unmarried man at the time he entered the homestead, and remained so until some time after the final proof was made; that he was a poor young man, and owned nothing except his clothes and a horse which horse he used in his work for Brannan & Son's still. He was what is called "the woods rider," and his employment required him to go into the woods and to ride them almost daily. Soon after he entered the land he settled on it and built a lumber house of two rooms and gallery, a small chicken house, and a horse stable, and put a fence around the house and garden. He also fenced in another piece of the land which he cleared up for a patch. Said land was cultivated each year thereafter until final proof was made. Said Mills furnished the money to make the improvements on the land without assistance from any one. He had no money to buy furniture to put in the house, and none with which to hire a cook. He made his living by his daily work, and worked for Brannan & Son by the day for so much a day and his board. He took his meals at the still, and usually slept there in a room with said Thomas H. Brannan. His work carried him to the woods almost daily, and in passing backward and forward he was on his homestead every few days—at least, once a week. He did not actually reside on the homestead continuously, but he was on the land every few days looking after it and exercising control over it; that he had persons actually living on the homestead taking care of the improvements for him and cultivating the land. He furnished fertilizers to make the crops, and the occupants of the land worked them for a division of the products. A large part of the time there were negroes occupying the house and cultivating the land on the terms mentioned, and a part of the time a white man named Dan Brannan cultivated the land for said Mills. There was also evidence on the part of defendants that while defendant Mills did not actually reside on said homestead—did not abide there; did not eat and sleep there as a regular or general thing—he went there occasionally, at least every four or five months, and spent a night on the homestead under the idea that this was such a compliance with the law as would avoid the effect of section 2297, Rev. St., which provides that if, at any time, the homesteader before the expiration of five years from the date of the entry has actually changed his residence or abandoned the land for more than six months at any time, then and in that event the land so entered shall revert to the govern-

ment. The proof was that said Mills had no other home, claimed no other, and exercised control over no other. The substance and effect of said Mills' explanation or excuse for not "actually" and "continuously" residing on said land was that he had to go away from it to get work to maintain himself; that his compensation was small, and included in it his board or rations which were furnished him at the place where he worked; and that, not being able to hire a person to cook for him, he, as a matter of convenience and economy, ate and usually slept where he worked.

There was also evidence that, some months after the final proof was made, Mills conveyed to the defendants Henry Brannan and Thomas H. Brannan the land covered by his entry for a price considered as being a good price for the land at that time. This circumstance may, and doubtless did, raise some suspicion that the land was entered for the benefit of said Henry Brannan, and not honestly and in good faith for the purpose of actual settlement and cultivation by said Mills. Circumstances, however, that do but little more than to raise a suspicion are not sufficient to authorize a court of equity to set aside or to annul a written instrument for fraud in its execution. Moreover, Mills and Henry Brannan in their testimony state the circumstances under which said conveyance was made and the purpose for which it was made. This testimony is uncontradicted.

The question then presented is, Are the facts and circumstances established by the evidence, as a whole, inconsistent and irreconcilable with the integrity and legality of the actions of said Mills, the entryman charged with the fraudulent entry? Is that evidence so clear, unequivocal, and convincing as to satisfy the court that the land was procured by fraud? If there was fraud, there was perjury in making the final proof. From the evidence I am inclined to believe that Mills and Henry Brannan were not conscious of wronging, or of any attempt to wrong the government, and honestly thought that Mills' acts in relation to the land were in compliance with the requirements of the law, and all that was necessary to perfect his entry.

Now, were Mills' acts in relation to the land in compliance with the requirements of the law? In making the final proof, the law provides that the entryman should prove that he had resided upon or cultivated the land for the term of five years immediately succeeding the time of filing the affidavit with his application for the entry, and makes affidavit that no part of such land has been alienated, etc. Rev. St. § 2291. The evidence is that Mills filed his affidavit November 16, 1897; that he settled on the land in January, 1898, and built a dwelling house thereon in July, 1898; that he put up fences on the land and cultivated a few acres of it every season from January, 1898, to January, 1903, when the final proof was made; that he had no other residence or home of his own; that he worked elsewhere, and usually ate and slept where he worked, but that he made frequent visits to the land, exercised acts of ownership and control over the same, and had persons by and under his permission or authority actually residing on the land, who cultivated the same for their and his joint account. There is some evidence to the contrary, but of a negative character, at least as to many of the facts stated.

The statute says that the entryman shall reside upon or cultivate the land, etc. From the evidence in the case there can be no question that Mills settled on the land by making improvements on it, by fencing in a part of it and cultivating it (to a small extent, it may be), and subsequently building a dwelling house on it. But if this was done honestly and in good faith, this bill cannot be maintained. No question as to the defendants Henry and Thomas H. Brannan being innocent purchasers of the land in question is, in my opinion, raised by the evidence in this case, for if there was fraud in procuring the patent I am satisfied that they had knowledge of it.

The sole question, then, on which the case turns is whether there was perjury committed in making the final proof, and the patent thereby fraudulently procured. If so, the complainants would be entitled to a decree. But it is upon them to sustain the allegations of fraud charged in their bill of complaint by clear, unequivocal, and convincing testimony. This, in the opinion of the court, they have not done.

The bill is therefore dismissed.

EPREMIAM et al. v. WARD, Collector of Internal Revenue.

(Circuit Court, N. D. New York. May 7, 1909.)

1. INTERNAL REVENUE (§ 15*)—CIGARETTE TAXES—ASSESSMENT—"WHOLESALE VALUE OR PRICE."

Rev. St. § 3394, as amended by Act Cong. July 24, 1897, c. 11, § 10, 30 Stat. 206 (U. S. Comp. St. 1901, p. 2221), classifies cigars and cigarettes for internal revenue duty, and imposes a stamp tax of 54 cents per thousand on cigarettes weighing not more than three pounds to the thousand, and the wholesale value or price of which is not more than $2 per thousand, including the tax, and, if the value exceeds such sum, then they are required to carry a tax of $1.08 per thousand. *Held* that, where intestate manufactured cigarettes and sold them at wholesale at his storeroom to any one who might apply in reasonable wholesale quantities at $2 per thousand, the fact that the larger part of the cigarettes manufactured by him were purchased by his son at $2 per thousand and sold by him at wholesale with cigarettes of other manufacture for more than such price did not make the "wholesale price or value" of intestate's cigarettes more than $2 per thousand, and hence he was not subject to an assessment prescribed by section 3371, as amended by Act March 1, 1879, c. 125, § 14, 20 Stat. 346 (U. S. Comp. St. 1901, p. 2205), for insufficient stamping.

[Ed. Note.—For other cases, see Internal Revenue, Dec. Dig. § 15.*]

2. EVIDENCE (§ 590*)—WEIGHT AND SUFFICIENCY—INTERESTED WITNESSES.

The court is bound to give credit to uncontradicted testimony of interested witnesses when it is substantiated and is not inconsistent with well-known facts, experience, and reason.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2439; Dec. Dig. § 590.*]

At Law. This is an action to recover the sum of $245.39, with interest thereon from September 6, 1907, making a total at the date of April 6, 1909, of $268.70, claimed to have been wrongfully collected by the defendant as taxes on cigarettes from one Hagop Epre-

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

miam, now deceased, by means of an assessment levied and made because of alleged insufficient stamping.

Walter E. Ward, for plaintiffs.
George B. Curtiss, for defendant.

RAY, District Judge. Hagop Epremiam, from August, 1906, to July, 1907, inclusive, was a cigarette manufacturer carrying on his business in the city and county of Schenectady, N. Y. He had a small shop, and was assisted by his daughter. He had a son, Krikor Epremiam, who traveled on the road and sold cigarettes to various customers at wholesale. The factory of Hagop Epremiam was a small affair, as was the business of his son. The son during said time purchased cigarettes from a number of different houses, of different qualities, and also purchased the larger part of the product of his father's factory. The son had his storehouse in the same building and on the same floor with his father's factory. They were separated by board partition only. Hagop Epremiam came from Turkey, where he had been engaged in the same business. He was upwards of 60 years of age. But there is no evidence that he was incompetent to do business or to carry on business. In connection with manufacturing cigarettes, the father maintained and carried on a sort of wholesale house selling at his factory in reasonable quantities to all comers. It was generally known in Schenectady that he not only manufactured cigarettes but sold at wholesale, and he had a considerable number of customers at that place. The demand for his cigarettes was not large in that city, but there is no evidence that he did not do a wholesale business in the regular way. There is no evidence that there was any contract, agreement, or understanding between the father, Hagop, and the son, Krikor, that the son would take either the whole output of the father's factory or the major part thereof. It is conceded that the cigarettes in question did not weigh more than three pounds per thousand, but it is claimed that the wholesale value or price of same was more than $2 per thousand, and that therefore the lawful tax thereon was $1.08 per thousand. They were stamped with internal revenue stamps by Hagop, and put upon the market to all customers stamped at 54 cents per thousand. If the wholesale value or price of these cigarettes was not more than $2 per thousand, then the full tax was paid by Hagop Epremiam. If the wholesale value or price was more than $2 per thousand, then the lawful tax that should have been paid was $1.08 per thousand. The proof shows that Hagop sold these cigarettes to all comers at $2 per thousand, and that they weighed not more than three pounds per thousand. He sold the main portion of his product to the son, Krikor, at $2 per thousand; but Krikor, traveling upon the road, sold in the main, if not entirely, at wholesale to dealers at places distant from Schenectady at from $2.50 to $3 per thousand. Discovering these facts, the collector of internal revenue, without giving the notice required by the proviso of section 3371 of the Revised Statutes, as amended by section 14 of the act of March 1, 1879, c. 125, 20 Stat. 346 (U. S. Comp. St. 1901, p. 2205), made an assessment for the additional tax claimed of

54 cents per thousand, and this, under protest, was finally paid after an appeal to the commissioner of internal revenue at Washington, who decided that the assessment was lawful and must be paid.

This action was brought to collect back the amount of the assessment aforesaid so made. This action was commenced by Hagop Epremiam, but, he having died, his administrators were substituted as plaintiffs. On the trial the plaintiffs called several witnesses, who testified that during the time mentioned they purchased cigarettes of the kind and character in question of Hagop Epremiam at wholesale at $2 per thousand. There was no evidence that he ever declined to sell to or supply any would-be purchaser. There was no evidence, except by inference, that Hagop ever entered into any oral or written agreement or contract for the sale of his cigarettes to any one or more persons or firms exclusively, or that he was unwilling or not ready at all times to sell cigarettes to jobbers or the trade generally in reasonable quantities for the price named—$2 per thousand. There was no evidence that this manufacturer sold his cigarettes to one or more persons exclusively, or that any one or more persons took the entire product and then sold or distributed the goods or cigarettes to the trade at a wholesale price fixed by them in excess of $2 per thousand. By section 3394 of the Revised Statutes as amended by section 10 of the act of July 24, 1897, c. 11, 30 Stat. 206 (U. S. Comp. St. 1901, p. 2221), cigars and cigarettes are defined and classified. Section 3371 provides for an assessment for deficiency in stamping. This section, containing the proviso "that no such assessment shall be made until and after notice to the manufacturer of the alleged sale and removal to show cause against said assessment; and the commissioner of internal revenue shall, upon a full hearing of all the evidence, determine what assessment, if any, shall be made," does not specifically name or mention cigarettes. However, the regulations established by the commissioner of internal revenue and signed by John C. Capers, commissioner, and approved by the Secretary of the Treasury, treat this section as applicable to cigarettes. The government contends that the proviso quoted has no application to cigarettes, and calls attention to section 47 of chapter 349 of the act of August 27, 1894, 28 Stat. 562 (U. S. Comp. St. 1901, p. 2275), reading as follows:

"That whenever any article upon which a tax is required to be paid by means of a stamp, is sold or removed for sale by the manufacturer thereof, without the use of the proper stamp, in addition to the penalties imposed by law for such sale or removal, it shall be the duty of the commissioner of internal revenue, within a period of not more than two years after such removal or sale, upon such information as he can obtain, to estimate the amount of the tax which has been omitted to be paid, and to make an assessment thereon upon the manufacturer or producer of such article. He shall certify such assessment to the collector who shall immediately demand payment of such tax and upon the neglect or refusal of such payment by such manufacturer or producer shall proceed to collect the same in the manner provided for the collection of other assessed taxes."

I do not think it necessary to decide whether or not the proviso quoted applies to cigarettes. I think the decision of this case depends upon how we are to determine the "wholesale value or price" of the cigarettes in question. If the wholesale value or price was more than $2

per thousand, then the assessment was legally made and collected. If the wholesale value or price was only $2 per thousand, then the assessment was illegally made and collected.

Hagop Epremiam ran the so-called factory. The numbers of cigarettes manufactured were small compared with some establishments, but still it was a factory, and we are to get at the wholesale value or price in the same manner we would in the case of a large or an extensive factory. Hagop Epremiam did not sell at retail. There is no pretense by the government that he sold his entire output to his son, Krikor Epremiam. It is substantially conceded that he did sell the greater part of his output to that son at $2 per thousand, and who in turn traveled about the country and sold them to dealers and jobbers at from $2.50 to $3 per thousand. He also sold other tobacco and cigarettes. Selling in this way, he would be expected to make a profit. He could not afford to go on the road and sell as he did unless he could dispose of the cigarettes for more than he paid for them. There is no evidence of any collusion between Hagop and Krikor, the son. Hagop ran the business of manufacturing, aided by his daughter, Mary, and the fact that he was old and failing does not militate against him. Krikor was in the same building, but it is well known that foreigners coming to this country frequently live in close and cramped quarters, sometimes several families in a house that would suffice for one American family only. Hagop had the right to sell to Krikor. But he did not sell or contract to sell all his output to the son, and there is no evidence that he did. There is no evidence that Hagop contracted to supply him any definite amount or to restrict his sales to others. He had an open factory, and sold all he could to all comers. Krikor took what he wanted at the same price Hagop fixed as his wholesale factory price, and at the same price Hagop sold to his customers, of whom he had several. It seems to me that the evidence establishes that Hagop ran a wholesale store in connection with his factory, advertising openly and selling openly to all comers, and that the sales to his son, Krikor, were made in good faith as a part of his wholesale business, and that he thereby established a wholesale value or price for these cigarettes at Schenectady, N. Y. I do not think that for the purpose of taxation under the internal revenue law we can follow the goods from one wholesaler to another and fix the wholesale value or price for taxation as that demanded or paid by the one remote from the factory, in case it is greater than the wholesale price at the place of manufacture. It is perfectly apparent that Hagop might not have sold any to the son had his local custom exhausted his entire output. Krikor was a traveling wholesaler of these cigarettes and others, and sold them in the main at points distant from the factory. If he had sold in Chicago and Minneapolis and St. Louis to wholesalers, who in turn had sold at wholesale at an increased price to small retailers about the country, which wholesale value or price would govern for the purpose of fixing the stamp tax? I do not think the case is within Treasury Decision 871, March 1, 1905, or Treasury Decision 896, May 24, 1905, vol. 8, January-December, 1905.

In "Regulations Established Concerning Tax on Tobacco, Snuff, Cigars and Cigarettes, August 1, 1907, by John C. Capers, Commis-

sioner of Internal Revenue, Approved by Geo. B. Cortelyou, Secretary of the Treasury," it is said:

"The wholesale value or price of cigarettes weighing not more than three pounds per thousand will apply to cigarettes that have been properly packed and stamped, and will include the tax; and, if the wholesale value or price, with tax included, does not exceed $2 per thousand, such cigarettes may be tax-paid at the rate of 54 cents per thousand.

"Before selling stamps for the payment of the tax on cigarettes at the rate of 54 cents per thousand collectors will require the manufacturer to file an affidavit setting forth the trade-mark name or brand of the cigarettes, and that the same will not be sold for a greater price than $2 per thousand, tax included.

"The affiant should also be required to state that he has not entered into, and will not enter into, any oral or written agreement or contract for the sale of such cigarettes to any one or more persons or firms exclusively, but that he is willing and ready to sell the same to jobbers or the trade generally, in reasonable quantities, for not exceeding the price named.

"Collectors shall also investigate in each instance in order to ascertain whether the manufacturer does sell his cigarettes to one or more persons exclusively who may own the trade-mark brand, and take the entire product of that brand and then sell or distribute the goods to the trade at a wholesale price fixed by them exceeding $2 per thousand. In such a case the jobber or person purchasing the cigarettes and distributing them to the trade would fix the wholesale price, and not the manufacturer, and the cigarettes would be properly subject to the higher rate of tax of $1.08 per thousand."

It seems to me clear that when a manufacturer has established a wholesale store at his factory, where he actually sells to all comers at wholesale only and at a uniform price, and does not enter into any oral or written agreement or contract or understanding with any one for the sale of his cigarettes to any one or more persons or firms exclusively, but is ready and willing to sell the same to jobbers and to the trade generally in reasonable quantities for not exceeding the price of $2 per thousand (of the proper weight), and does so sell, he is a wholesaler, and has fixed the wholesale value or price of his product. In such case he is within and protected by the rules and regulations quoted. This is true even if some person takes the greater part of his product, purchasing the same in due course of business, and in turn disposes of same at wholesale to others at distant points at a profit. It was quite natural for Krikor to purchase of his father. So long as he was not a manufacturer himself, he had to purchase of some one if he traveled on the road and sold to the trade generally. I see no impropriety in all this. I must take the evidence as it was given on the trial of the case. I saw nothing inconsistent in the stories or suspicious in the manner of the daughter or son, or anything that indicated other than a legitimate business. The evidence was of such a character that the burden was thrown on the United States to show that the business of Hagop Epremiam was not a legitimate wholesale business, or that he had some sort of contract or agreement with Krikor that he was to take all or substantially all his output. We may suspect that there was some sort of an agreement between father and son, and that a legitimate and proper wholesale price at Schenectady was more than $2 per thousand for these cigarettes, but there was no proof whatever that such was the fact. The statute fixes the tax on all cigarettes weighing not more than three pounds per thousand, and of a whole-

sale value or price of not more than $2 per thousand, at 54 cents per thousand. It was conceded that these cigarettes did not weigh more than three pounds per thousand, and that the tax of 54 cents per thousand was duly paid before this assessment was made. I think, on the evidence, the plaintiff's intestate had fully complied with the law. The assessment, as shown by the papers, was based on the assumption that, inasmuch as the greater part of the entire manufacture of the father was taken by the son at $2 per thousand and sold at other points at wholesale for a greater price, and they occupied the same building, their warerooms being separated by a board partition only, there must have been some secret understanding or agreement. This falls short of proving an agreement. It was also shown that the son purchased considerable stock for the father. It was not unnatural that the son purchased stock for the father. The son says that he used the father's money and that there was no partnership between them, and that the father owned and carried on the manufacturing business and sold at wholesale to all comers. There is no proof, only suspicion, to the contrary.

The court is bound to give credence to uncontradicted testimony even from interested persons when it is substantiated as it was here, and is not inconsistent with well-known facts, experience, and reason.

I assume that the assessment was made in good faith, and that the burden was on the plaintiff here to show by a fair preponderance of credible evidence that such assessment was illegally made; that the full tax imposed by law had been paid by affixing the stamps, 54 cents for each thousand, before the cigarettes were put upon the market; that the wholesale value or price of such cigarettes had been fixed at not more than $2 per thousand at Schenectady by general sales at wholesale at that place to all comers, and that there was no agreement, contract, or understanding that any one or more persons would take the whole output of the factory at a fixed price. This was done in this case.

Holding these views of this case, there will be a judgment for the plaintiffs for the amount claimed, with costs.

THE AVALON.

(District Court, N. D. West Virginia. April 21, 1909.)

1. SHIPPING (§ 33*)—MORTGAGES—RECORDING.

A re-registry of a vessel at a different port does not necessitate the re-recording in the collector's office at that port of a mortgage duly recorded when made at the former port.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 113; Dec. Dig. § 33.*]

2. MARITIME LIENS (§ 14*)—UNDER MARITIME LAW—ADVANCES.

Banks lending money to a "steamer and owners," without knowing, or making any effort to know, for what purpose it was expended, are not

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

entitled to maritime liens on the general testimony of the master that the money was used in the operation of the boat.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 18; Dec. Dig. § 14.*]

3. COURTS (§ 372*) — FEDERAL COURTS — STATE LAWS AS RULES OF DECISION — COMMERCIAL LAW—ATTORNEY'S FEES.

A provision in a negotiable note for the payment of attorney's fees by the maker in case of collection by suit, when such note is collected in a court of admiralty in another state by the enforcement of a mortgage on a vessel securing the same, is not governed by the law of the state where the contract was made, but by the general commercial law, and will not be enforced by a federal court, and especially where, owing to the death of the maker, insolvent, the amount, if allowed, must be taken from holders of junior liens.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 977–979; Dec. Dig. § 372.*]

4. SHIPPING (§ 32*)—MORTGAGES—PRIORITY OF LIEN.

A mortgage executed by part owners of a vessel on their interest and duly recorded in the office of the collector where the vessel is registered, on distribution of the proceeds of the vessel when sold in admiralty to pay liens, is entitled to priority from the mortgagors' share of the proceeds over debts of the owners which were not liens.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 105; Dec. Dig. § 32.*]

In Admiralty.

On January 12, 1907, R. Wild filed his libel against the steamer Avalon for debt. Numerous intervening libels were filed for like purpose, all of which were referred to Commissioner L. V. G. Morris to ascertain, among other things, "the nature, amount, character, and priority of all maritime liens, or liens, under the provisions of section 14 of chapter 75 of the Code of West Virginia, against the steamer Avalon." Also, "what liens by mortgage, deed of trust, or otherwise, exist that are not maritime liens, or liens under the said statute of West Virginia, and whether such liens exist against the whole vessel, or individual interests therein, giving the nature, amount, and priority of all such liens." This same decree appointed a receiver for the steamer, and under subsequent ones sale was made of it and confirmed, and the proceeds have been paid into the registry of this court. Commissioner Morris has filed three reports in the cause. To the last one, filed June 9, 1908, exceptions have been filed, which present the matters in controversy now to be determined.

The commissioner has reported numerous liens in seven distinct orders of priority. Those reported as first, second, third, and fourth have been in no way controverted, and, by orders entered herein, have been paid by the registrar. The steamer sold for $9,800. The costs and four first classes of liens so paid amounted to $7,227.98, leaving $2,572.02 yet to be disbursed. The commissioner has reported as fifth in order of priority, now first payable out of the remaining balance of the fund (less any additional costs unpaid), a balance of a debt of $1,049.11 to the First National Bank of Chattanooga, Tenn. The origin of this debt was as follows: On May 9, 1903, L. Cramer was the sole owner of the steamer, but owed $11,000 of the purchase money, due to the Chattanooga & Tennessee River Packet Company for its half interest purchased by him from it. On that day he executed three notes for this purchase money to the packet company, and, to secure the same, a mortgage upon the steamer, which was duly filed and recorded in the collector's office of the port of Chattanooga. These three notes so executed and secured, upon their face provided that, "if this note is collected by an attorney by suit or otherwise," all fees and costs of collection were to be paid by the maker. They were indorsed to this First National Bank; two of them were paid, and there now remains only a balance of $1,049.11 on the third and last one. It is insisted,

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

however, that to this sum should be added an allowance of $300 as a fee to the proctor of said bank. This allowance was denied by the commissioner. Sixth in priority out of the undistributed balance is reported eight different debts as follows: To Citizens' National Bank of Parkersburg $220.53; to the First National Bank of Cincinnati $548.08; to the Parkersburg Banking & Trust Company $109.10; to the Citizens' National Bank of Parkersburg $540.33; to the Citizens' National Bank of Parkersburg $435.46; to the Union Trust & Deposit Company of Parkersburg $488.33; to the First National Bank of Parkersburg $216.70; and to the Citizens' National Bank of Parkersburg $113.73. All of the foregoing debts in this class, except the last one, are represented by notes executed by the "Steamer Avalon and Owners," by its managing owner and master. The last one represents an overdraft in the steamer's regular checking account. The master, as seventh in order of payment, has reported as debts due to part owners to R. Wild $1,115.90, to J. L. Cramer $525.08 and $7.83, and to H. E. Cramer $471.47. Finally, he has reported certain claims as existing against the steamer which, because not shown to have been for the proper management and operation of the steamer, he determines are not maritime liens, and only payable after all the other liens in the preceding classes had been paid. Among the debts so reported in this last class is one for $4,440 to the Citizens' National Bank of Parkersburg, evidenced by two notes executed, one by L. Cramer, the other by L. Cramer and Jesse L. Cramer, and secured by a mortgage executed by these part owners on their twenty-six thirty-second interests in the steamer on April 9, 1906, duly recorded in the collector's office at the port of Wheeling. Exceptions are taken to said report on behalf of this claim, because it is not reported first in priority as against the balance of the fund undistributed, or at least as against twenty-six thirty-seconds thereof. Exceptions are taken by banks reported in the sixth class (second class as to the undistributed balance) to the allowance of the mortgage debt to the First National Bank of Chattanooga as prior to their claims. The banks in this class claim priority in this particular on the grounds that their debts were advances made to pay operating expenses of the boat. There is no dispute as to the validity and amounts due upon the several debts reported. The sole controversy is as to the proper order of priority in payment thereof.

Dorr Casto, for First Nat. Bank of Chattanooga, Tenn.
W. S. Blizzard, for First Nat. Bank of Cincinnati, Ohio.
V. B. Archer, for Citizens' Nat. Bank of Parkersburg, W. Va.

DAYTON, District Judge (after stating the facts as above). Did the commissioner err in reporting the debt due the First National Bank of Chattanooga as entitled to prior payment? I think not, for these reasons: This debt was incurred for the purchase by Cramer of the half interest held by the Chattanooga & Tennessee River Packet Company whereby he became sole owner of the steamer, and it was secured by a mortgage duly recorded in the collector's office in Chattanooga. At the time, the Avalon was registered at the port of Chattanooga, and it was its home port, the residence of the packet company, and it was plying on the Tennessee river. This was therefore the proper port in whose collector's office such mortgage had legally to be recorded. Two years afterwards, Cramer caused her to be registered at the port of Wheeling, W. Va., in the same New Orleans district, and entered her upon the Ohio river trade. Cramer's home residence was at Parkersburg, W. Va. It is insisted that, because the bank's mortgage was not recorded in the collector's office in Wheeling after re-registry of the boat had been made there, the lien of it was lost. I do not think so. The laws of the United States, as I understand them, make no such specific requirement, while they do require,

in case the registry of a boat is changed from one port to another, that the second registry record shall distinctly set forth the port of former registry. This should be sufficient, it seems to me, to put upon inquiry any one seeking security by mortgage to ascertain whether such prior mortgage had been recorded in the first port of entry, at least where both ports are in the same district. It is to be remembered that these mortgages are not maritime liens, and that they are not, and cannot be, governed by the rules prevailing as to real estate and fixed properties under state laws where state and county divisions are well defined, but have been regulated by federal statute in force since 1850 (Act Cong. July 29, 1850, 9 Stat. 440). This ruling seems to me to be clearly upheld in White's Bank v. Smith, 7 Wall. 646, 19 L. Ed. 211, where it is said:

"And in this connection we may also mention that in case of the sale of a vessel, which can only be to a citizen or citizens of the United States, and a new and permanent registry becomes necessary, the former certificate of registry must be delivered to the collector to whom application is made for the new registry, to be transmitted by him to the Register of the Treasury to be canceled; and in every such sale or transfer of a vessel there shall be some instrument in writing in the nature of a bill of sale, which shall recite at length the certificate of the former registry, otherwise the ship or vessel shall be incapable of being registered anew. 1 Stat. 294, § 14. And, as this bill of sale is recorded in the collector's office in which the new permanent registry is made, it affords information to any person examining it as to the former home port and collector's office in which the vessel had been previously registered, and where examination can be made for any bill of sale, mortgage, or other incumbrance upon or against the vessel.

"It will be seen, therefore, as the law now stands, that there can be very little difficulty on the part of a purchaser or mortgagee in ascertaining the true condition of the title of a vessel, as it respects written evidence of the same, or of incumbrances thereon, from an examination of the records of the collector's office at the several home ports of the vessel, as the records of the last home port refer to the preceding one, the last bill of sale incorporating into it a copy of the previous certificate of registry. In this respect, the system of recording in the collector's office possesses very great advantages over the filing of these instruments in the clerk's offices where the vendor or mortgagor happened to reside at the time, as no means exist, under this practice, by which the subsequent purchaser or mortgagee, by any diligence, could obtain knowledge of the actual condition of the title.

"We are aware that in the case of Potter v. Irish, 10 Gray (Mass.) 416, the court came to the conclusion, upon an examination of the acts on this subject, that bills of sale, mortgages, etc., under the act of 1850, in order to protect the title of the purchaser or mortgagee, should be recorded in the office of the collector of customs at the port of the last registry or enrollment, though not the home port of the vessel. And the court in the case of Chadwick v. Baker, 54 Me. 9, followed this decision. Our respect for the courts rendering these decisions has led us to examine the several statutes upon which this question depends with more than usual care, and, after the best consideration we have been able to give, we are obliged to differ with them. We think the better construction of these statutes leads to the conclusion that the home port was the one in the contemplation of Congress at which these instruments were to be recorded, and is the more appropriate one in furtherance of the object for which the act was passed."

See, also, Aldrich v. Ins. Co., 8 Wall. 491, 19 L. Ed. 473; Baldwin v. The Bradish Johnson, Fed. Cas. No. 798; The Carrie Brooks, Fed. Cas. No. 11,718; The Vigilancia, 73 Fed. 452, 19 C. C. A. 528; The Gordon Campbell (D. C.) 131 Fed. 963.

But this disposes of but one of the objections made to the allowance of priority given by the commissioner to this mortgage debt, and we must next consider the one especially urged by the banks having the eight claims reported next in priority to it. They claim precedence to it because they urge their claims to be true maritime liens for advances made for the operation of the vessel and expended for that purpose. The settlement of this question depends upon the facts involved. It is well settled that:

"One who lends money on request of the proper authority for the purpose of paying off maritime liens upon a vessel, and who looks to the vessel as his security, has a lien upon the vessel for such advances equal in dignity to the liens which he satisfies. But such advances not made on authority of one having the right to bind the ship does not give a lien. Nor does the lien arise on a mere personal loan of money or credit to the vessel owner, although such money or credit may be used by him for the ship's purposes.

"As the right of a lender of money to claim a lien is derivative through the lien holder, it follows that, in order to entitle himself to such a right, he must satisfy himself that the liens proposed to be paid are themselves valid and enforceable and that his funds are applied to that purpose."

26 Cyc. 764, 765, and authorities cited.

In this case the claims of these banks are sought to be established as maritime liens substantially alone upon the testimony of the ship's master that the sums loaned were used in the operation of the boat. There is no attempt made to show the individual parties to whom the sums were paid, the character of either the labor, material, or supplies furnished by them; nothing in short, to inform us as to whether the claims paid with these moneys were in themselves true maritime liens. There is no attempt to show that these banks made any effort, at the time these loans were effected, to see to the application of the money to the payment of maritime liens, as to which alone subrogation in their favor would be enforceable; but, on the contrary, it seems very clear that these loans were made in regular course of banking business to the "Steamer Avalon and Owners" without any care or attention as to how the money should be expended. Under these circumstances, these banks are not entitled to have their debts reported as maritime liens, and cannot claim precedence in payment over this mortgage debt due to the First National Bank of Chattanooga.

Finally, did the master err in not allowing to this Chattanooga bank the proctor's fee claimed by it under the terms of its note which provided that, if it was collected by an attorney by suit or otherwise, all fees and costs of collection were to be paid by the maker? It is insisted that this note was a Tennessee contract, and should be governed by the law of Tennessee, which upholds and enforces contracts of this kind. I cannot agree with this proposition. On the contrary, the note was clearly negotiable, governed solely by the commercial law, in construing which federal courts act independently of state court decisions. It is being enforced in this court, situate in West Virginia. While some of the states recognize and enforce contracts of this character, Virginia and West Virginia courts since 1833, when the question was decided in Toole v. Stephen, 4 Leigh, 581, have uniformly held such contracts to be usurious and unenforceable. I am entirely in sympathy with this ruling of these courts, and while, in

construing the commercial law of the country, I may not be bound to follow it as I have said, yet I fully concur in approving the sound principles upon which, in my judgment, it is based. This case seems to me to present a striking illustration of its justness. The proctor for this Chattanooga bank has very carefully, faithfully, and with decided ability defended the assaults made in the case against the priority of this claim, which had to be maintained if it was to be paid at all. It has required much labor, investigation, and study on his part, and no one acquainted with the circumstances and conditions can fairly deny that his services in the premises have been worth the $300 asked, yet, if it should be allowed, the bank, on its balance of less than $1,200, would be receiving more than 25 per cent. of its debt above the 6 per cent. interest it bears by law. Every dollar of this excess, usurious in fact, would be borne by other creditors, and not by the original borrower, now dead, with an insolvent estate. Those loaning money for profit must take risks like all others in business life, and efforts of this kind to protect them from such risks too often result in oppression of the borrower on the one hand, and subsequent creditors of his on the other, to merit the approval of justice and equity. This is especially so when such contracts are unrecorded and therefore unknown to those extending subsequent credit. See this question considered in Chestertown Bank v. Walker (C. C. A.) 163 Fed. 510.

There being no error in the commissioner's report finding this Chattanooga bank to be entitled to payment of its balance of mortgage debt without proctor fees in the fifth class prior to others as to the balance of the fund undistributed, it remains to be determined whether or not he erred in refusing to report the mortgage debt of $4,440 held by the Citizens' National Bank of Parkersburg a lien next in priority upon said undistributed balance after payment of the Chattanooga bank's debt. I think he did so err in not reporting said debt next in order on twenty-six thirty-seconds ($^{26}/_{32}$) of said balance, but not as to six thirty-seconds ($^{6}/_{32}$) thereof. This debt was secured by mortgage duly recorded in 1906 in the collector's office at Wheeling, the then home port of the Avalon, it having been re-registered there permanently the year before. This mortgage was executed by a part of the owners holding twenty-six thirty-seconds of the steamer, only upon the interests so held by them. As I have heretofore fully set forth, I do not believe the bank debts given by the commissioner priority to this mortgage one can be held to be maritime liens, but they must be held to be simple unsecured claims. This mortgage debt, while not a maritime lien, is a secured claim, and is entitled to priority over these unsecured ones.

The balance of the fund in the registrar's hands should be disbursed, first, to the payment of any unpaid balance of costs, including $250 now allowed to the receiver as claimed by him in full for his services as such; second, to the First National Bank of Chattanooga, Tenn., the balance in full of its debt, less registrar's commission; third, twenty-six thirty-seconds of the balance remaining, less registrar's commission, to the Citizens' National Bank of Parkersburg, to be credited upon its $4,440 mortgage debt, and the six thirty-seconds

remaining of such balance, less registrar's commission, ratably to the eight bank debts set forth in the commissioner's report in the sixth class. And decree may be entered accordingly.

In re SOUTHERN STEEL CO.

(District Court, N. D. Alabama, S. D. May 18, 1909.)

No. 7,977.

1. BANKRUPTCY (§ 63*)—ACTS OF BANKRUPTCY—CORPORATIONS—"ACT OF BANKRUPTCY."

A resolution adopted by the board of directors of a corporation authorizing an attorney to represent the corporation generally in any bankruptcy proceedings pending or that may be brought, and in his discretion to agree to the appointment of receivers, did not constitute an act of bankruptcy on the part of the corporation within Bankr. Act July 1, 1898, c. 541, § 3a (5), 30 Stat. 546 (U. S. Comp. St. 1901, p. 3422), nor did it authorize the attorney to commit such act in its behalf.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 63.*]

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

2. BANKRUPTCY (§ 63*)—ACTS OF BANKRUPTCY—CORPORATIONS.

An officer of a corporation cannot commit an act of bankruptcy in its name and behalf by admitting its inability to pay its debts and its willingness to be adjudged a bankrupt on that ground without express authority.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 63.*]

3. BANKRUPTCY (§ 482*)—ADMINISTRATION OF ESTATE—ATTORNEY'S FEES.

Where two petitions in involuntary bankruptcy were filed by different creditors against a corporation, one of which did not present grounds upon which it could legally be adjudged a bankrupt, and the adjudication was made on grounds alleged in the other, the attorneys in the latter are entitled to the fee allowed for filing the petition and procuring the adjudication.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 874, 897; Dec. Dig. § 482.*

4. BANKRUPTCY (§ 482*)—ADMINISTRATION OF ESTATE—ATTORNEY'S FEES.

Attorneys representing one of two sets of petitioning creditors in bankruptcy proceedings against a corporation having opposing interests, who at once on the appointment of receivers became their counsel and were allowed and paid compensation therefor, will be deemed to have elected as between the receivers and the creditors, and are not entitled to be allowed compensation as attorneys for the latter.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 482.*]

In Bankruptcy. On review of order of referee fixing attorney's fees for petitioning creditors.

Campbell & Johnston, for trustees.

Percy & Benners, for first petitioning creditors.

Ward & Rudulph, Lee J. Marx, Powell & Blackburn, and A. Leo Oberdorfer, for second petitioning creditors.

HUNDLEY, District Judge. On the 25th day of October, 1907, a petition on behalf of certain creditors named therein was filed in this

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

court praying that the Southern Steel Company be adjudged a bankrupt. In that petition, which is designated as the petition of the first petitioning creditors, Messrs. Percy & Benners appeared as counsel for petitioners. At the same time there was presented to me another petition for other creditors seeking to have the same corporation adjudged a bankrupt, and for these creditors, who are designated as the second petitioning creditors, Messrs. Ward & Rudulph, Lee J. Marx, Powell & Blackburn, and A. Leo Oberdorfer appeared as counsel. The referee, in fixing the amount of compensation for the attorneys for the various petitioning creditors fixed the amount at $2,500 for the attorneys for the first petitioning creditors, and $2,500 for the attorneys for the second petitioning creditors; making a total of $5,000 for all the attorneys for the petitioning creditors. This action of the referee is here presented for review on petitions filed by Percy & Benners, Ward & Rudulph, Lee J. Marx, Powell & Blackburn, A. Leo Oberdorfer, and the trustees in bankruptcy.

The questions now before the court are: First. Is the sum of $5,000 a reasonable and proper compensation to be paid to the attorneys for the petitioning creditors for preparing the petition and procuring the adjudication in bankruptcy? Second. Should the attorney's fee for petitioning creditors when allowed in this case be equally divided between the attorneys for the first petitioning creditors and the attorneys for the second petitioning creditors, or should the said fee be paid alone to the attorneys for the first petitioning creditors or alone to the attorneys for the second petitioning creditors?

The law in reference to the allowance of attorney's fees in bankruptcy to the petitioning creditors has been fixed by statute and has been construed by the courts. The decision of the Court of Appeals of the Seventh Circuit (In re Curtis, 4 Am. Bankr. Rep. 17, 100 Fed. 785, 786, 41 C. C. A. 61) upon this question has been approved by the Court of Appeals in this circuit (Smith v. Cooper, 9 Am. Bankr. Rep. 755, 120 Fed. 230, 56 C. C. A. 578), as the rule upon which such fees are to be fixed and determined. In the Curtis Case, supra, the court said:

"In the administration of an estate in bankruptcy the law permits the allowance of 'one reasonable attorney's fee for the professional services actually rendered * * * to the petitioning creditors in involuntary cases.' Act July 1, 1898, c. 541, § 64b, subd. 3, 30 Stat. 563 (U. S. Comp. St. 1901, p. 3447). * * * The attorney for the petitioning creditors is entitled to this reasonable fee as of right. Its allowance or disallowance is not matter of discretion. So, also, the amount to be allowed does not rest in mere discretion. The amount must in all cases be reasonable, to be determined upon evidence of the service performed and of its value, and, in the absence of evidence of its value, by the court from knowledge of its worth. The amount to be allowed rests in legal judgment and judicial discretion, but not in unrestrained discretion."

Basing the remuneration to be paid as a fee for the petitioning creditors upon the services performed by their attorneys in preparing the petition and in procuring the adjudication, it is the opinion of the court that the amount of $5,000, as fixed by the special referee herein, is reasonable and proper, and the conclusion of the referee in that respect is approved and affirmed.

The next question to be determined is, to which attorneys shall this fee be paid, or shall it be divided equally between the attorneys for the first petitioning creditors and the attorneys for the second petitioning creditors? At the time of the presentation of the petition for the first petitioning creditors the second petition was also presented, and the good faith in reference to the filing of the first petition was brought into question by the second petitioning creditors, and it was contended: First, that the petition filed by the first petitioning creditors was a collusive one with the bankrupt, the Southern Steel Company, for the purpose of permitting the bankrupt to secure the appointment of receivers of its own choice, who would conduct the business of the corporation not for the benefit of the creditors, but in reality for the benefit of the bankrupt corporation itself; and, second, that the averment of the act of bankruptcy in the first petition could not be sustained as matter of law, and was but a mere subterfuge on the part of the bankrupt corporation to permit it to secure the appointment of receivers of its own naming.

Upon the first proposition this court by a decree rendered on the 21st day of January, 1908, determined that upon the evidence then presented the contentions of the second petitioning creditors were sustained. Birmingham Coal & Iron Company v. Southern Steel Company (D. C.) 160 Fed. 212. From that decree no appeal was ever taken, and subsequent proceedings in this cause only tend to sustain the contention of the second petitioning creditors made at the time of the filing of their petition.

Upon the second proposition the only evidence to sustain the averment in the first petition that "the Southern Steel Company committed an act of bankruptcy in that it did admit in writing its inability to pay its debts, and its willingness to be adjudged bankrupt on that ground," was the proof that at a meeting of the board of directors of the Southern Steel Company in New York City on October 22, 1907, a resolution was adopted in words and figures as follows, to wit:

"Whereas, certain creditors have threatened to institute proceedings in voluntary bankruptcy against the company and thereby secure advantage in the appointment of temporary receiver, and, in order to avoid permitting them to secure this advantage, we deem it to the benefit of all interested that the assent of the company be given to the appointment of a temporary receiver, or receivers, in bankruptcy, if it becomes necessary.

"Now, therefore, be it resolved, that O. R. Hood, attorney for the company, be, and he hereby is, authorized and empowered to represent the company generally in any suit or suits, or bankruptcy proceedings, that are now pending, or that may be brought against the company looking to the placing of it in involuntary bankruptcy and to the appointment of the temporary receivers, and that he be, and is hereby, given full power and authority to exercise his discretion in agreeing in the name of and on behalf of the company in such a proceeding to the appointment of a temporary receiver or receivers, and to authorize and give its assent to all things necessary or expedient in connection therewith."

Subsequently, at Birmingham, Ala., O. R. Hood, as attorney for the Southern Steel Company, wrote the Sayre Mining & Manufacturing Company as follows:

"Birmingham, Alabama, October 24, 1907.

"Sayre Mining & Manufacturing Company, Birmingham, Alabama.

"Gentlemen: In regard to your claim against the Southern Steel Company, I beg to say that we are in a position where we cannot pay it. We regret to

make this statement and admission; under these circumstances we are forced to make the admission to you and all other concerned, that the Southern Steel Company is unable to pay its debts and is willing to be adjudged a bankrupt on that ground.

"Very truly yours,

Southern Steel Company,
"By O. R. Hood, Atty."

There can be but one conclusion from a reading of these resolutions, in connection with the other evidence in this case, and that is that their sole purpose and intention was to secure the appointment of a temporary receiver of its own selection for the estate of the bankrupt corporation. The vote of the corporation by its directors, even granting that the directors had full and complete authority to meet in New York City and adopt the resolutions herein set forth, was not an act of bankruptcy within the meaning of the statute, because in itself it was not a written admission by the corporation of its inability to pay its debts and its willingness to be adjudged a bankrupt on that ground. This is not such an unqualified admission as is required by the statute (Act July 1, 1898, c. 541, § 3a (5), 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422]). In re Baker-Ricketson Company (D. C.) 4 Am. Bankr. Rep. 605, 97 Fed. 489; In re Wilmington Hosiery Company (D. C.) 9 Am. Bankr. Rep. 579, 120 Fed. 179. But let us examine the resolution and see what it authorized Hood to do. First, it authorized him to represent the company generally "in any suit or suits or bankruptcy proceedings" now pending and that may hereafter be brought. Second, it authorized him to agree on behalf of the company to "the appointment of a temporary receiver or receivers and give its assent to all things necessary or expedient in connection therewith." Giving all the force this language implies, the purpose and authority delegated therein to Hood was to represent the corporation generally in securing a temporary receiver and in any suit or suits or bankruptcy proceedings. Granting that the corporation could delegate to an agent or attorney the power to commit the act of bankruptcy as that agent or attorney might determine (which, of course, it could not do), then, even in that event, the resolution falls far short of authorizing the commission of the act of bankruptcy sought to be proven. On this same date upon which Hood wrote this letter, E. T. Schuler, as vice president of the corporation, wrote the following letter, to wit:

"Birmingham, Oct. 24, 1907.

"Sayre Mining & Mfg. Co., Birmingham, Alabama.

"Gentlemen: I regret very much to state that the Southern Steel Company is unable to pay its debts and is willing to be adjudged a bankrupt on that ground.

"Yours truly,

Southern Steel Company,
"E. T. Schuler, Vice-President."

No evidence was offered to show that the corporation had authorized Schuler to write this letter. The letter was not within the powers and duties incident to the vice presidency of the corporation, and that an officer of a corporation has no authority to write a letter in the name of the corporation committing the corporation to an act of bankruptcy without express authority is too plain to need argument. Any other view of this question would be to hold, in effect, that an

officer of a corporation may throw it into bankruptcy as suits his will or caprice.

Thus it will be seen that the adjudication of the Southern Steel Company as a bankrupt could not have been legally or properly secured under the averments of bankruptcy as set forth in the petition of the first petitioning creditors and the evidence offered to sustain the same. With this condition of the record, when this cause was submitted for adjudication on the 21st day of January, 1908, by agreement of all parties in interest, all the cases were consolidated, and, inasmuch as the receivers had been appointed on the application of the first petitioning creditors, this court deemed it proper for the interests of all concerned to permit the petition of the first petitioning creditors to be amended so as to incorporate the acts of bankruptcy set up by the second petitioning creditors, in order to save the confusion and loss to creditors that might arise from the dismissal of the first petition under which the receivers were appointed, and upon this an adjudication was had; all parties in interest, including the bankrupt, agreeing in open court that the corporation should be adjudged a bankrupt. Thus, too, it will be seen that the work and services which in reality secured the adjudication in bankruptcy in this cause were those performed by the attorneys for the second petitioning creditors, rather than the attorneys for the first petitioning creditors; and if any fee shall be allowed for services in securing the adjudication it is right and proper that that fee should be allowed to the attorneys for the second petitioning creditors, rather than to the attorneys for the first petitioning creditors, since the second petitioning creditors alone presented grounds upon which the corporation could legally be adjudicated a bankrupt.

There is another reason why these attorneys for the first petitioning creditors, Messrs. Percy & Benners, are not entitled to share in the fee allowed by statute for petitioning creditors. On the filing of the first petition and the appointment of the receivers for the Southern Steel Company these attorneys, Messrs. Percy & Benners, became the attorneys, in part, for the receivers, and thereafter acted as such attorneys until the receivership was terminated and the assets of the bankrupt estate were placed in the hands of the trustees; and they are also of counsel for the trustees. As such attorneys for the receivers, Messrs. Percy & Benners received the sum of $6,000 as fees, and they are also entitled to and will receive fees as attorneys for the trustees. On the averments of the two petitions filed seeking to have the corporation adjudicated a bankrupt, there were necessarily positive litigated matters of both law and fact between the first and second petitioning creditors; and the receiver being an officer of the court and required to take in charge and preserve the estate of the bankrupt for the benefit of all parties in interest, impartially and in a disinterested manner, it follows that an attorney representing one of the parties to the litigated questions of law and fact pending between the two sets of petitioning creditors would be placed in an inconsistent attitude in being also an attorney for the receivers. Messrs. Percy & Benners evidently recognized this condition of affairs when they be-

came of counsel for the receivers immediately upon the appointment thereof and before the determination of the issues between the petitioning creditors, and their entering into such employment and accepting a fee therefor may be construed in law as a termination of their employment and services to the first petitioning creditors. A case directly in point with the question here presented is the case of In re T. E. Hill Company, 20 Am. Bankr. Rep. 73, 159 Fed. 73, 86 C. C. A. 263, decided by the Court of Appeals for the Seventh Circuit, in which the court says:

"It is the general rule that receivers are to select counsel not identified with the interests of one or the other party to the litigation (Beach on Receivers, § 262; Gluck & Becker on Receivers of Corp. § 47; In re Kelly Dry Goods Company [D. C.] 4 Am. Bankr. Rep. 528. 102 Fed. 747, 749); and for departure from this wholesome rule special circumstances and authorization are needful."

In the case of In re Kelly Dry Goods Company, supra, cited with approval by Judge Seaman, as Circuit Judge, the court says:

"It is the well-recognized rule in equity that the receiver shall engage counsel who stands independent of the parties to the ligitation (Beach, Rec. § 262), and the estate is not chargeable for services which may be given to the receiver by the attorney for either party during the continuance of such relation. So, in the case at bar, unless the service for which the charge was allowed was both necessary and independent in the sense of the rule referred to, it is not allowable as an expense of the receivership. The purpose of the appointment of a receiver in bankruptcy is one of mere temporary custody, and the duties are generally of the utmost simplicity. If complications arise in which the parties before the court have opposing interests, he should not take counsel of either; and, if under any circumstances the attorney of either party is engaged by him, there must at least be complete severance of all service and duty to the litigant party. Otherwise, any service rendered must be deemed either gratuitous or in the interest of the original client. Here the attorneys for whom the charge is made appear both of record and in fact for the petitioning creditors before and after the receivership, are on the petition for the adjudication in bankruptcy, on the application for a receiver, and subsequently appear for the creditors at the meetings held during the continuance and after the close of the receivership. Under such conditions, any service rendered must be referable to their engagement for their clients, and, if chargeable to the estate for any amount, are in that relation only, and upon special order of the court."

It is well to note the language of the court in this case. If "under any circumstances" the receiver engages the attorney of either party, there must be a complete severance from all duty to the party litigant. This severance took place immediately on the appointment of Percy & Benners by the receivers as attorneys within 24 hours of the filing of the petition. Under the rule laid down in the Kelly Case, supra, it would, of course, have been entirely proper for the trustees to have resisted the payment of the fee to Messrs. Percy & Benners as attorneys for the receivers on the grounds that they were also attorneys for the petitioning creditors, but this course was not pursued; and, while it is true that after the appointment of the receivers the court was advised that their appointment was not pleasing to these attorneys, yet they filed no objection thereto upon the records of this court, but proceeded immediately to represent them as counsel and to receive the sum of $6,000 as such counsel for the receivers. This action of Percy

& Benners was an election by them to represent the receivers rather than the petitioning creditors, and, having so elected and received remuneration therefor, they cannot now properly be allowed to obtain compensation as attorneys for petitioning creditors who were "parties before the court having opposing interests." Speaking of the employment of counsel in this dual capacity, Lacombe, Circuit Judge, well says, in the case of In re Strobel (C. C. A.) 20 Am. Bankr. Rep. 23, 160 Fed. 916:

"It would have been well had Congress in the bankrupt act expressly prohibited receivers from selecting as attorneys or counsel lawyers who had appeared for either the bankrupt or the petitioning creditor. Such selection affords a ready opportunity for chicanery, fraud, and perjury; and it would seem desirable for bankruptcy courts generally to adopt the wholesome rule in force in the Southern District of New York forbidding such selection, and to enforce such rule rigidly."

From what has been said above it is the opinion of the court that the attorneys for the second petitioning creditors are entitled to have and receive the sum of $5,000 as the one fee allowed attorneys for petitioning creditors in bankruptcy in this cause; and such order will now be made in accordance with this opinion.

NORTHERN S. S. CO., Limited, v. EARN-LINE S. S. CO.

(District Court, S. D. New York. March 30, 1909.)

SHIPPING (§ 176*)—RIGHTS OF CHARTERER—DETENTION OF VESSEL.

Where a vessel is detained by port authorities on account of the illness of her master and steward, and she is afterwards obliged to put into another port through this cause, the hire ceases for the time lost to the charterer.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 176.*

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

(Syllabus by the Judge.)

Convers & Kirlin, for libellant.
Horace L. Cheyney, for respondent.

ADAMS, District Judge. This action was brought by the Northern Steamship Company, Limited, to recover from the Earn-Line Steamship Company a balance of charter hire alleged to be due on the steamship Saltwell, which was in the employ of the respondent from December 17, 1904, at 3 p. m. to November 7, 1905, at 7 a. m. Certain payments were made, leaving £137.6.5, or $667.38, which it is alleged was improperly deducted from the hire and remained due. The respondent denies that the steamer was in its continuous service but avers that in the month of October, 1905, the steamer was in the port of Sagua, Cuba, under orders from the respondent to proceed to Progresso, after discharging her cargo; that the discharging was fully completed October 14, 1905, at 12 o'clock noon, but the steamer was then unable to proceed as ordered by the respondent, her master

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

and steward then being ill and incompetent and unable to perform their duties as officers of the vessel, in consequence of which the Public Authorities of Cuba refused to allow the steamer to leave the port of Sagua, until 3 o'clock October 17th, after a detention for a period of three days and three hours; that the steamer then instead of proceeding to Progresso, went into Havana, Cuba, for the purpose of obtaining medical treatment for the master and steward, who were still ill and unable to perform their duties, arriving there at 10 a. m. the 18th and remaining until 5 p. m. the 19th; that the steamer was consequently not in the service of the respondent while she was detained at Sagua and Havana; that the charter hire for the said period of four days and ten hours amounted to £103.5.10, and that the respondent by reason of these occurrences was obliged to pay certain port charges and other expenses amounting to $131.38, which it has withheld from the hire, which otherwise would have been due to the libellant on account of the charter hire; the respondent also alleges that it has deducted from the charter hire the sum of $34.01 for commissions on advances and other expenses. The respondent further alleges that all of the said charges, amounting to $165.39 have been properly deducted by it under the provisions of the charter party and it has paid to the libellant all of the hire due it, except the sum of $165.39 which it claims to offset against any claim of the libellant for the hire of the steamer.

The contract provided:

"16. That in the event of loss of time from deficiency of men or stores, breakdown of machinery, stranding, or damage preventing the working of the Vessel for more than twenty-four consecutive hours, the payment of hire shall cease until she be again in an efficient state to resume her service; but should the Vessel be driven into port or to anchorage by stress of weather or from any accident to cargo, such detention or loss of time shall be at the Charterers' risk and expense.

17. That should the Vessel be lost, freight paid in advance and not earned (reckoning from the date of her loss) shall be returned to the Charterers. The act of God, enemies, fire, restraint of Princes, Rulers and People, and all dangers and accidents of the Seas, Rivers, Machinery, Boilers and Steam Navigation, and Errors of Navigation, throughout this Charter Party, always mutually excepted."

The depositions show that the Saltwell arrived at Sagua October 2, with a cargo of coal, and that her discharging was completed at noon October 14th, but she did not leave for Progresso, her destination, until the 17th, owing to the illness of her master and steward. The illness of the latter was not of importance as far as his work was concerned as his duties were performed by the ship's cook. The Public Authorities of Cuba, however, refused to permit the vessel to sail until the illness of both men had been properly diagnosed.

It appears that the master became ill on the 11th of gastric or jungle fever, the result of a mosquito bite on the 9th. The vessel at the time was discharging her cargo, which was not interfered with by the illness. The vessel completed her discharge at Sagua at noon of the 14th. A day or two before the master had received instructions to proceed to Progresso but the health authorities refused to allow the vessel to sail until the fever from which both men were suffering

could be properly diagnosed. The vessel did not receive her clearance until the 17th at 4 p. m., when she sailed. She then put into Havana. The master deposed:

"After leaving Sagua the first port the vessel put into was Havana. On the 18th October at 4 a. m. the Steward became seriously ill again; his temperature going up to 103°. As I was also very feeble with a high temperature and showing no signs of improvement as expected, I considered it prudent for the benefit of all concerned to enter Havana and obtain medical assistance. I accordingly proceeded into the harbour at Havana arriving at 10 a. m. on the 18th October. (b) I was able at that time to navigate the vessel. (c) I required and received medical treatment at Havana, as also did the Steward, from the time of arrival until we sailed again at 4 p. m. on the 19th October."

The master also deposed that the voyage of the Saltwell was delayed by putting into Havana to the extent of 31 hours, and further:

"The reason and cause of the delay was the Steward and myself were suffering from a severe attack of fever in consequence of which the Port Authorities refused to allow the vessel to be cleared until the fever could be properly diagnosed. * * *

"There was delay in departure of the vessel from Sagua on account of the action of the Port Authorities as detailed in the last preceding answer. * * *

"The Port Authorities at Havana gave permission for the Saltwell to leave Sagua on the 16th October, 1905, in the afternoon. * * *

"The reason the vessel did not sail immediately" (from Sagua) "was because the Charterers' Agent did not get authority to clear the ship until the afternoon of the 16th October owing to the Custom's Offices being closed and the clearance papers were not obtained by the Charterers' Agent and handed to me until the 17th October at 4 p. m. at which hour the vessel sailed. * * *

"The Saltwell was not prevented at any time after her arrival at Havana by any Public Authority from proceeding immediately to Progresso. * * *

"Under the British Law the Saltwell was required when going to sea from a place in the United Kingdom of Great Britain to carry a Master, Chief and Second Officers, Chief and Second Engineers duly certificated which requirements were duly fulfilled. * * *

"The Saltwell usually carried as officers a Master, Chief & Second Officers and First, Second and Third Engineers. These officers were all that were necessary for the safe and proper navigation and operations of the vessel. * * *

"If any of the Officers or crew had been left ashore at either Sagua or Havana the ship would have been shorthanded. * * *

"It was not possible for the Saltwell to have proceeded from Sagua before the day and hour she actually did proceed owing to the action of the Port Authorities nor would it have been expedient for the steamship to have proceeded direct from Sagua to Progresso in view of the physical condition of the Master and Steward at the time in question. * * *

"The steamship Saltwell would have been shorthanded if the Master and Steward had been left ashore at Sagua or Havana and the Steamship had proceeded without them. * * *

"To the best of my knowledge, information and belief, proper officers could not have been obtained at either Sagua or Havana to take the positions made vacant by leaving the Master or Steward ashore."

From the foregoing it would appear that the steamer was not in condition to be of service to the charterer during the times mentioned and the situation is apparently governed by the terms of the charter party, quoted supra. See Tweedie Trading Co. v. George D. Emery Co. (D. C.) 146 Fed. 618, affirmed 154 Fed. 472, 84 C. C. A. 253.

There does not seem to be any question about the correctness of the figures and the libel is dismissed.

THE NORTH STAR.

(District Court, S. D. New York. April 9, 1909.)

SHIPPING (§ 166*)—INJURIES TO PASSENGER—EVIDENCE—DAMAGES.

Personal injury to a child through stumbling on a mat at an entrance to a saloon of a passenger steamer and wounding her forehead. She was in the charge of her mother and a nurse and in going carefully from the latter to the former met with the accident, which happened a little after 7 o'clock, on the 23d of August, 1907. A conflict of testimony with respect to the lighting of the cabin and passageways determined in favor of the libellant's contention that there was an absence of artificial light which rendered the passageway dark and unsafe and caused the accident. Also *held* that the caretakers of the child were not negligent and that there was no contributory negligence. The sum of $600, allowed to the libellant to compensate the child for her suffering and the remains of a scar.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 549, 551; Dec. Dig. § 166.*]

(Syllabus by the Judge.)

Davies, Stone & Auerbach, for libellant.
Carpenter, Park & Symmers, for claimant.

ADAMS, District Judge. This action was brought by the father, as guardian ad litem, of Evelyn Allen, an infant about 4 years of age, against the steamship North Star, to recover $5,000 for the injuries she sustained on or about the 23d of August, 1907, by reason of the saloons and passageways of the steamer being insufficiently lighted, whereby she stumbled over a mat at the exit from a passageway leading from the saloon to the promenade deck. The answer denies that there was any defect in the light and alleges that the accident happened through the child being left unattended and stumbling over a cocoanut mat placed at the entrance to the main saloon, striking her forehead upon the sill of the door, slightly bruising or cutting her forehead. It further alleges that no obstructions whatsoever were placed in any of the passageways or saloons of the vessel, and that the vessel nor any of her officers or crew was in any way responsible for the accident.

The testimony shows that the North Star was a well equipped modern steamer, making regular trips between New York and Portland. She had commodious cabins with facilities for fully lighting by electricity her cabins and the passages leading to them.

The mother of the infant and two other children, with two nurses, were returning on the steamer to New York from a summer sojourn in Maine on the way to their home in East Orange, New Jersey. When nearing New York, Mrs. Allen went outside of the cabin upon the starboard side of the vessel, to watch for her husband, whom she expected to meet her. She occupied a stool near an entrance to the cabin, her children being with her. One of the nurses was sitting in the passage leading to the outside in charge of a suit case, containing Mrs. Allen's valuables. The children at first were with their mother but a stir being created inside by a passenger's loss of some minor article of jewel-

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

ry, the children went in there and Evelyn remained with the nurse, the other two returning to the mother. Subsequently, a few minutes before the landing of the steamer, Evelyn also started to go to her mother, eight or ten feet distant, and before reaching her met with the accident.

The absent members of the family were expected in New York on the date mentioned at about 5:30 p. m., and the father, with his brother, went to the steamer's pier, No. 32 East River, to meet them. The steamer did not arrive on time and when she reached the vicinity of the pier, about 6:30 p. m., owing to a strong ebb tide, she was not at first able to make a landing, and drifted down the river to the vicinity of the Brooklyn Bridge. She was then assisted by two tugs and turning around proceeded to the pier, to which she was made fast and landed her passengers about 7:25 p. m. It was sunset about 6:47 o'clock and when the steamer was manœuvering it was growing dark. Where there was any obscuration of what light remained, it became quite dark, so that it was difficult to see anything on the floor of the cabin of the steamer, for example. The claimant of the steamer strenuously insists that the electric lights were turned on, while the libellant with equal positiveness asserts that while the navigation lights of the steamer were properly displayed, those within the vessel were neglected, with the result that the interior of the cabin and the passageways leading thereto were dark and unsafe.

The contention on the part of the libellant is principally supported by him, by his brother, by the child's mother and her nurse; also by an entirely disinterested witness, a passenger named Hughes, who said he was getting ready to go ashore when he heard the scream of the child, saw her being picked up from a position on the mat with her head against the sill of the door. He further said:

"It was dark, dark as twilight. * * * It was more light outside; it was dark inside, twilight. * * * You couldn't distinguish the fibre mat from the carpet or covering that was on the floor of the saloon; as a matter of fact, when I went over to help the child I stumbled against the mat."

This statement of the condition of affairs is supported to a certain degree by the libellant's other witnesses and there is very little to meet it on the part of the steamer. But two witnesses testified directly to the burning of the lights. One was a former steward of the vessel, who said they were lighted, but on the cross said he was merely testifying from the custom and his belief that he followed it on this occasion. The other was more specific, but his testimony cannot be believed in the face of the more convincing testimony of the libellant's witnesses. I conclude therefore that the lights were not burning and that the place of the accident was not properly illuminated.

The claimant contends that even if the conclusion just mentioned should be reached, the caretakers of this child were grossly negligent in allowing such an infant to roam about unattended on board of a steamship and that the accident to the child is entirely attributable to such negligence.

It is well settled that a child of four years of age is non sui juris (McGarry v. Loomis, 63 N. Y. 104, 106, 20 Am. Rep. 510) and in order to establish this contention, it is incumbent upon the claimant to show

some negligence, contributing to the accident, which can be imputed to the child. The claimant's allegation is that allowing the child to go from the mother to the nurse and back again was such negligence, but I am unable to see how that can be so. This was a well conducted quiet child. It does not appear that she did anything but walk back and forth in a reasonably careful manner. Any one might have stumbled over the mat under the circumstances. The testimony shows that Mr. Hughes, a man of discretion and experience, struck the mat with his foot and while no injury resulted to him, the fact is persuasive that any one, no matter how careful, might have met with some such accident as attended the child's stumbling over the mat. This contention should also be disposed of adversely to the steamer.

There remains to be determined the amount of damages recoverable for the child. The contention on the part of the libellant is that substantial damages should be allowed, while the claimant urges that the child's injuries were trivial. It appears that she received quite a severe cut above the left eye, which laid open the skin as far as its depth would permit.

The wound was described by an attending physician, a witness for the plaintiff, as follows:

"Q. So far as you recollect, describe the condition of the child with respect to any physical injuries which you may have observed at that time? A. Why, I observed a cut, a small sized wound on her forehead, which was approximately parallel to the left eyebrow, situated about an inch above the eyebrow, I should say about three-quarters of an inch in length and in depth extending down to the bone—to be more accurate, to part of the periosteum covering of the bone."

It was unquestionably very painful at the time, and doubtless continued so for several days, then left the child depressed and drowsy. The wound caused profuse bleeding at the time it was received and some subsequent, but not very severe, bleeding in the process of dressing. It left a slight scar which the libellant claims is permanent. One physician said "there would probably be some scar there." This physician was succeeded by another who testified that the child had suffered from shock and loss of blood, had not improved as he had wished, and from what he observed on September 11th, 1907, and thenceforward during six weeks, she was in a condition which was "due to the injuries which I observed she had evidences of on her forehead." This is about all the evidence the libellant produced with respect to the scar. The child was in court at the time of the trial, January 22, 1909, and I then examined her forehead and saw but slight remains of the scar although the marks of its existence were discernible.

It is also claimed that the child was in an anæmic condition from the injury but the evidence of such condition was not strong. It was vigorously disputed and I think, if it existed at all, it is quite doubtful if it remained for any length of time. She would naturally be pale and languid after the loss of a large quantity of blood, but as far as anything in the nature of a permanent injury of this kind is concerned, I think it may safely be concluded that there was none.

Altogether, considering the child's suffering from the pain and the

loss of blood, and making some allowance for the remains of the scar, I think the sum of $600 will be sufficient to remunerate her. I therefore allow a decree for the libellant for that amount.

HARRINGTON v. GREAT NORTHERN RY. CO.

(Circuit Court, N. D. Iowa, W. D. April 19, 1909.)

No. 469.

1. REMOVAL OF CAUSES (§ 107*)—MOTION TO REMAND—TIME FOR MAKING.
Under Judiciary Act March 3, 1875, c. 137, § 5, 18 Stat. 472 (U. S. Comp. St. 1901, p. 511), which provides that, if it shall appear to a Circuit Court that a cause brought therein or removed thereto is not within its jurisdiction, it shall proceed no further therein but shall dismiss or remand the same, such court has the right to determine whether or not a cause has been properly removed to it immediately upon the filing of the record therein either by the removing defendant or the plaintiff, and to make such orders as such determination may require.
[Ed. Note.—For other cases, see Removal of Causes, Dec. Dig. § 107.*]

2. REMOVAL OF CAUSES (§ 86*)—PROCEEDINGS FOR REMOVAL—PETITION IN STATE COURT.
A petition for removal may allege the citizenship of the parties regardless of the allegations of the plaintiff's pleading, and where its allegations show the requisite citizenship to authorize the removal they are to be deemed true unless controverted by the plaintiff.
[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 170; Dec. Dig. § 86.*]

3. REMOVAL OF CAUSES (§ 107*)—PROCEEDINGS FOR REMAND—ISSUES OF FACT.
A motion to remand is properly determinable on the facts appearing on the face of the record, but, where it controverts allegations of fact in the petition for removal necessary to sustain the jurisdiction of the court, it may by the practice of the court be treated as a plea to the jurisdiction and the parties required to take evidence on such issues.
[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 230; Dec. Dig. § 107.*]

On Motion to Remand to State Court.

S. D. Riniker and Simon Fisher, for plaintiff.
J. L. Kennedy and James P. Shoup, for defendant.

REED, District Judge. This action was commenced January 15, 1909, in the district court of Iowa in and for Lyon county by the plaintiff, as administratrix of the estate of Coder Harrington, deceased, to recover of the defendant railway company damages in the sum of $25,000 for its alleged negligence in operating one of its trains in said Lyon county which caused the death of said deceased. In the petition it is alleged that plaintiff is a resident of Nebraska, that she had been duly appointed administratrix of the estate of the deceased by the district court of Lyon county, Iowa, but it is not alleged of what state she is a citizen, or, in fact, that she is a citizen of any of the United States. The defendant in due time, and on February 2, 1909, filed in said state court a petition in due form and a sufficient bond for the

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

removal of the cause to this court, and alleged in such petition that the plaintiff at the time of the commencement of the action was, and still is, a citizen and resident of the state of Iowa, and that the defendant at such times was a corporation created by and existing under the laws of Minnesota, and was not a resident or corporation of Iowa. The state court approved the bond and ordered that the cause be removed to this court. The next term of this court to be holden after the cause was so removed is to begin on May 25, 1909, and defendant has not yet filed the record of the cause in this court. The plaintiff, however, has filed a copy of the record, and moves to remand the cause upon the ground alone that plaintiff, when the action was commenced and the petition and bond for removal filed, was a citizen and resident of the state of Nebraska, and the defendant a Minnesota corporation.

The defendant contends that it has until the first day of the next term of this court to be holden after the removal of the cause in which to file the record and have the cause docketed therein (sections 3 and 7 of the judiciary act of March 3, 1875, c. 137, 18 Stat. 471, 472 [U. S. Comp. St. 1901, pp. 510, 511]), as amended by that of 1887–88, c. 373, 24 Stat. 554, 555 (U. S. Comp. St. 1901, pp. 582, 579), and that until such time the motion to remand cannot rightly be considered. A contention of this character was sustained in Kansas City & Topeka Ry. Co. v. Interstate Lumber Co. (C. C.) 36 Fed. 9, but was denied in Thompson v. Railway Company (C. C.) 60 Fed. 773; and this later ruling will be followed by this court. Upon the filing of the proper petition and bond in the state court for the removal of a cause the jurisdiction of the state court ceases, and that of the Circuit Court at once attaches if the cause is a removable one; and the Circuit Court should, upon the record being filed in that court, promptly determine upon the motion of the plaintiff, and due notice thereof to the removing defendant, whether or not the cause is a removable one and is properly removed from the state court, and, if it is not, remand it to that court, in order that unnecessary delays or other injuries to the plaintiff may be avoided because of the attempt to wrongfully remove the cause. If a cause has been properly removed, it may be that the removing defendant should not be forced to a trial upon the merits until the next term of the Circuit Court after the removal, or if that should convene within 20 days, then not until 20 days have elapsed after the removal; a question, however, that it is not necessary to now determine. But that the Circuit Court has the right under section 5 of the act of 1875 to determine whether or not a cause has been properly removed to it immediately upon the filing of the record in that court, either by the removing defendant or the plaintiff, and make such provisional or other orders as may be necessary to protect the rights of the parties if the cause has been properly removed, and to remand it if it has not been, is not doubted.

The plaintiff appears specially, and moves to remand the cause upon the ground that it was improperly removed from the state court, for the reason that at the time the action was commenced and the petition for removal filed she was a citizen and resident of Nebraska, and the defendant a corporation of Minnesota. If this is true, the cause should

be remanded, for the jurisdiction of this court "is founded only on the fact that the action is between citizens of different states," and the plaintiff has timely objected to the removal, and has not invoked the action of this court upon any other question than that of its jurisdiction of the person of the plaintiff. In re Moore, 209 U. S. 490, 28 Sup. Ct. 585, 706, 52 L. Ed. 904; Western Loan & Savings Ass'n v. Boston, etc., Mining Co., 210 U. S. 368, 28 Sup. Ct. 720, 52 L. Ed. 1101.

The motion to remand, however, only challenges such jurisdiction as appears upon the face of the record; and the record for this purpose is the petition for removal, and that of the plaintiff in which she states her claim or cause of action against the defendant. The petition for removal plainly states the requisite citizenship and other facts essential to show the jurisdiction of this court of the subject-matter of the controversy, and the right of the defendant to remove the cause from the state court, for it alleges the plaintiff to be a citizen of Iowa, and the defendant a corporation of Minnesota. The allegation of the plaintiff in her petition that she is a resident of Nebraska is not the equivalent of an allegation that she is a citizen of that state; but if she had so alleged, or that the defendant was a corporation of Iowa, that would not preclude the defendant from alleging and showing that plaintiff was in fact when the suit was commenced, and the petition for removal filed, a citizen of Iowa residing in the Northern district thereof, and that defendant was then a corporation of Minnesota. Texas & Pacific Ry. Co. v. Cody, 166 U. S. 606–609, 17 Sup. Ct. 703, 41 L. Ed. 1132.

The allegations of the petition for removal as to the citizenship of the parties are to be deemed true unless controverted by the plaintiff. If so controverted, an issue of fact is raised which is to be determined in such manner as the court may direct. Wetmore v. Rymer, 169 U. S. 115–119, 121, 18 Sup. Ct. 293, 42 L. Ed. 682. In the motion to remand the plaintiff does controvert the allegation of the petition for removal, and distinctly avers that at the time the suit was commenced in the state court and the petition for removal filed therein she was a citizen and resident of the state of Nebraska and the defendant a corporation of Minnesota. These facts should properly have been presented by a plea to the jurisdiction of the court over the person of the plaintiff, upon which issue could have been joined and the facts determined in the usual manner. But the practice in this district is that, when a formal motion to remand is filed, which also controverts the allegations of proper facts upon which the right of removal is claimed to exist, the motion will not be overruled, but will be ordered to stand also as a plea to the jurisdiction of the court, and the parties required, unless they shall agree upon the facts, to take their evidence upon such plea in the form of depositions, or in such other manner as the court may order. McGuire v. Great Northern Ry. Co. (C. C.) 153 Fed. 434.

The order, therefore, will be that the motion to remand shall stand as a plea to the jurisdiction of this court over the person of the plaintiff, and that unless the parties shall agree upon the facts in writing, or upon the time of taking the testimony upon such plea, defendant shall take its testimony in support of its petition to remove the cause

by deposition, and file the same with the clerk of this court within 15 days after this order; that plaintiff shall then take her testimony by deposition in opposition thereto, and file the same with the clerk of this court within 30 days from the filing of this order; and defendant may then take its rebuttal, if any, and file the same with the clerk by the first day of the next term of this court.

It is ordered accordingly.

THE SCOW NO. 1.

(District Court, E. D. New York. April 5, 1909.)

1. SHIPPING (§ 3*)—REGULATION OF VESSELS CARRYING PASSENGERS—POWER OF CONGRESS.

All vessels carrying passengers within the jurisdiction of the United States are subject to regulations prescribed by Congress, even if the waters navigated are entirely within a state.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 2; Dec. Dig. § 3.*]

2. SHIPPING (§ 16*)—REGULATION OF PASSENGER VESSELS—OFFENSES AGAINST NAVIGATION LAWS.

Where a scow temporarily equipped for the purpose and in tow of a tug carried a picnic party of 350 persons without being provided with life-preservers as required by the regulations of the board of supervising inspectors, adopted pursuant to Rev. St. § 4492 (U. S. Comp. St. 1901, p. 3058), she is not relieved from liability for the penalty thereby provided by the fact that she was furnished to the party without charge except for expenses.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 30; Dec. Dig. § 16.*]

William J. Youngs, U. S. Atty. (William P. Allen, of counsel), for libelant.

Joseph Fettretch, for defendant.

CHATFIELD, District Judge. An information has been filed against Scow No. 1, for proceeding, in tow of the tugboat Turtle, across the waters of Great South Bay on the 21st day of August, 1907, with some 350 passengers, without having a life-preserver or float for each passenger, as required by the rules and regulations adopted, as amended, by the board of supervising inspectors in the month of January, 1907, being section 22, p. 77, of said regulations, and reading:

"Barges carrying passengers on any routes shall have a life-preserver or float for each and every person allowed to be carried." See section 4492, Rev. St. (U. S. Comp. St. 1901, p. 3058).

The claimant has appeared and answered, denying the violation and liability, and as well alleging that Scow No. 1 was not a barge for the carrying of passengers, within the meaning of the law referred to, and therefore not subject to its provisions.

The facts are not in dispute, and from them it appears that the tugboat was properly licensed and equipped with life-preservers in

compliance with the law and requirements; that neither the tugboat nor the barge is used generally in the passenger business, but that for this particular occasion the tug and barge, which is in reality a freight scow, were chartered to a Sunday school for the purpose of a picnic at a point upon the south side of Great South Bay, which thus necessitated a trip across the bay and back; and that the compensation received by the claimant was $30, intended to represent the actual cost of placing seats upon the scow, and furnishing awnings, together with the wages of the men and the coal consumed. No tickets were issued by the claimant, nor was any passage fee charged, but the boat was furnished to the Sunday school, and 350 passengers carried, while but 15 life-preservers were on the boat.

It is unnecessary to enlarge upon the disaster which might have resulted if any accident requiring the use of boats or life-preservers had occurred. The examples are many, and the necessity for regulations with relation not only to boats in the passenger-carrying business, but to boats used for more or less charitable purposes, is admitted by every one. Many of the most distressing instances of great loss of life have been in connection with such expeditions as Sunday school picnics and children's parties at theaters and other public places. The hardship that may be involved to the charitable and well disposed in complying with requirements providing precautions which may be entirely unnecessary (if nothing occurs) cannot be weighed in the balance with the tremendous loss of life which may result through the natural feeling that the law was not aimed at people of such good intentions and good character. Nevertheless, no amount of respect for the law and willingness to abide by it, where no hardship is involved, could restore those who might be lost or injured if the possible accident should occur.

It has been well established in many cases, including The Hazel Kirke (C. C.) 25 Fed. 601; The Garden City (D. C.) 26 Fed. 766; The City of Salem (D. C.) 37 Fed. 846; The Oyster Police Steamers of Maryland (D. C.) 31 Fed. 763; and Hartranft v. Du Pont, 118 U. S. 225, 6 Sup. Ct. 1188, 30 L. Ed. 205—that all vessels carrying passengers within the jurisdiction of the United States (under either the interstate commerce clause or the admiralty provisions of the Constitution) are liable to the regulations provided by statute.

Section 4400, Rev. St. (U. S. Comp. St. 1901, p. 3015), relating to the entire fifty-second title of the Revised Statutes, within which all of the sections referred to herein are comprised, provides that all steam vessels navigating any waters of the United States, which are common highways of commerce or open to general or competitive navigation, shall be subject to the provisions of the title. It is evident that Congress there exercised jurisdiction over interstate and foreign commerce by vessel and over admiralty or maritime jurisdiction of the United States such as extends over the waters of Great South Bay, even if the particular act involved takes place or must take place entirely within the boundaries of the state of New York. The case of United States v. Banister Realty Co. (C. C.) 155 Fed. 583, sets forth the authorities, and they need not be recited.

Reference has been made to the cases of The Gretna Green (D. C.) 20 Fed. 901, and United States v. Guess (D. C.) 48 Fed. 587. But in the first case, the decision seems to have turned upon the fact of protecting interstate commerce on the Ohio river, and that the barges were not engaged in such commerce; while in the Guess Case, the wife and certain friends of the owner were being transported upon the vessel, and they were not held to be passengers within the true sense of the term. In other words, they were partners in the transaction, so far as regulation by the public was concerned. But in the case at bar, the hardship involved cannot overbalance the necessity for care in such matters.

A violation of the statute, if disaster followed, must necessarily be severely punished. If the excursion happily proceeds without accident, the matter may be less serious, and it is suggested that an application to the Secretary of the Treasury, under the provisions of section 5292 of the Revised Statutes (U. S. Comp. St. 1901, p. 3604), would be the proper procedure. The discretion of the Secretary of the Treasury could safely be trusted in such matters, and furnish a much safer guide than could be afforded by excepting charitable or casual excursions from the scope of the law. If the claimant in the present case, instead of disputing jurisdiction, should lay the matter before the proper authorities, he probably will find full justice and avoid opening the door to those who desire to be put to as little expense as possible in protecting life, even in matters as to which Congress has deemed it necessary that such protection should be afforded.

A decree of condemnation may be presented.

THE LUCILLE.

(District Court, S. D. Alabama, S. D. April 17, 1909.)

No. 1,204.

1. COLLISION (§ 73*)—VESSELS MOVING AND AT REST—PRESUMPTION AND BURDEN OF PROOF AS TO FAULT.

   The fact of a collision between a vessel anchored, or at rest upon the water, or aground, and a moving vessel, being shown, the burden of proof is upon the one moving to show that it was free from fault, and it must repel the presumption of its negligence or suffer the damages incurred.

   [Ed. Note.—For other cases, see Collision, Cent. Dig. § 103; Dec. Dig. § 73.*]

2. COLLISION (§ 70*)—PRECAUTIONS FOR PREVENTING COLLISIONS—VESSELS MOORED.

   A vessel, when properly moored out of the usual track of moving vessels, is under no legal duty to maintain a watch nor to exhibit any light to warn approaching vessels of danger, unless the local harbor regulations require it.

   [Ed. Note.—For other cases, see Collision, Cent. Dig. § 99½; Dec. Dig. § 70.*]

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

3. COLLISION (§ 133*)—SUITS FOR DAMAGES—DAMAGES.

Where a launch, sunk while moored in a collision with a steamer through the fault of the latter, was so injured that it was not deemed practicable to repair her, and her market value could not be shown, damages may be fixed by taking the cost of her construction and making deduction for her deterioration and the value of the parts saved.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 287; Dec. Dig. § 133.*]

In Admiralty. Suit for collision.

Rickarby & Bonner and Goodwyn & McIntyre, for libelant.

Fitts & Leigh, Roach & Chamberlain, and Inge & Armbrecht, for claimant.

TOULMIN, District Judge. The fact of collision between a moored vessel and one moving being shown, the burden of proof is upon the one moving to show that it was free from fault; and it must repel the presumption of its negligence or suffer the damages incurred. The Brady (D. C.) 24 Fed. 300; The City of Augusta (D. C.) 30 Fed. 844; Spencer on Marine Collisions, § 94, p. 225; Id. § 120, p. 257; The Virginia Ehrman, 97 U. S. 309, 24 L. Ed. 890; The Oregon, 158 U. S. 186, 15 Sup. Ct. 804, 39 L. Ed. 943; Inland & S. Coasting Co. v. Tolson, 139 U. S. 559, 11 Sup. Ct. 653, 35 L. Ed. 270.

The situation of a vessel at rest upon the water, but not anchored, is analogous to a vessel at anchor, and the situation of a vessel aground is analogous to that of a vessel at anchor or moored, and the duty of avoiding it is wholly upon the vessel in motion. Spencer on Marine Collisions, §§ 116, 117, 120, and numerous authorities cited on page 257.

A vessel, when properly moored out of the usual track of moving vessels, is under no legal duty to maintain a watch, nor to exhibit any light to warn approaching vessels of danger, unless the local harbor regulations require it. There is no established maritime rule requiring such warning by vessels so situated. Shields v. Mayor, etc. (D. C.) 18 Fed. 748; Hadden v. The J. H. Rutter (D. C.) 35 Fed. 365; L'Hommedieu v. The Mischief (D. C.) 39 Fed. 510; The Granite State, 3 Wall. 311, 18 L. Ed. 179; The Bridge-Port, 14 Wall. 116, 20 L. Ed. 787. And no local harbor regulations have been shown to exist. Spencer on Marine Collisions, § 38.

While it would have been prudent for the position of the launch to have been designated by a light on her own account as well as on account of other boats making a landing, I find from the evidence that the want of such light was not the cause of the collision. I think the evidence shows that the launch was not wrongfully where she was, and, as she was struck by a vessel in motion, the burden of proof is upon the latter to show herself without fault. Considering all the evidence, my opinion is that this burden is not sustained. The steamboat must therefore be held liable.

The question of damages is the main controversy in this case. It is the one most difficult for me to determine, owing to the kind and character of the evidence submitted on the subject. If the launch

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

was not a total loss, but was capable of being repaired and restored to the condition in which she was at the time the collision occurred, the damages should be the cost necessary to repair and restore her to that condition. There is evidence that it was practicable to so repair and restore her, and that such repairs could have been made at a cost of $25, $50, $75, or $100, in the opinion of the four witnesses respectively testifying on the part of the respondents, three of whom were officers of the steamboat Lucille; but the testimony of these witnesses was vague and indefinite, and showed that it rested on no certain or definite grounds for their estimates. It was based on a casual view of the launch. There was no thorough or careful examination of her. While there was no survey of the launch (as there should have been) the libelant, who hauled her out of the water, carefully examined her and specified wherein she was damaged, testified: That she was practically a total loss; that her injuries were such that they could not have been repaired at reasonable cost; that the repairs would have cost more than, or at least as much as to build a new boat; that the opinions of all the carpenters and builders that he had to make estimates on her were to that effect; and that in fact her damaged condition was such as to amount to a total loss. The names of these carpenters and builders were not given. Their testimony was not produced, and no reason for its absence shown.

These facts, coupled with the natural bias of a witness in his own behalf, with certain allegations of fact contained in the libel which are not sustained by libelant's evidence, and other circumstances shown by the evidence, incline me to believe that the libelant's testimony of the absolute worthlessness of his boat after the collision, and the extent of his loss, is much exaggerated. If the injuries were such as amounted to a total loss, the rule of damage is her market value at the time of her destruction, if she had any market value. The Granite State, 3 Wall. 313, 18 L. Ed. 179; The Baltimore, 8 Wall. 386, 19 L. Ed. 463; The Mobila (D. C.) 147 Fed. 882. In ascertaining the market value of a vessel destroyed in a collision, the best evidence is, in general, the evidence of competent persons, who knew the vessel and the state of the market, and who testify as to its market value. While there is no criterion of market value furnished, and hence difficulty in fixing such value (as is the case here), a resort to other modes of ascertaining it is allowable. Evidence of the cost of construction is admissible; but such cost is not of itself conclusive of her actual value at the time of the collision. The whole cost should not be given as damages in assessing damages on a total loss, but evidence of the cost with deductions for deterioration may be properly resorted to in determining the value. Leonard v. Whitwell (D. C.) 19 Fed. 547; The City of Alexandria (D. C.) 40 Fed. 697; The Mobila (D. C.) 147 Fed. 882.

Libelant testified that the launch cost, in her construction, some four or five months prior to the collision, about $2,200. He claims $1,700 in his libel, thereby, I think, impliedly admitting that she was not worth what she cost, or that she had deteriorated. He testified that he saved the engine, which cost him $850, and the dynamo, which

cost $150 or $160. He said the dynamo was damaged and was of little value—real or estimated value not shown. The evidence showed that the pilot house, 20 folding chairs, some of the glass windows, and other material, such as the paddle wheels, the hull, hog chains, etc., constituting a part of the launch, were also saved. The estimated value of the last-named articles was not given, but they must have been of some value, if only as "fire wood," as claimed by the libelant, or as "junk," or for other uses.

Allowing $500 as a deduction from the cost of the boat for deterioration in her value, from the remainder deduct the value of the engine ($850) and of the dynamo ($150), aggregating $1,000, it leaves $700. There being no evidence or estimate of the value of the dynamo, I take the lowest estimate of its cost, $150. There being no evidence or estimate of the value of the other property saved, I deduct $250, which I consider sufficient to cover the same, whether its real value be more or less.

Let a decree be entered for $450.

In re SANGER et al.

(District Court, N. D. West Virginia April 30, 1909.)

1. BANKRUPTCY (§ 340*)—PREFERENCES—BURDEN OF PROOF.

Where a lien is claimed under a trust deed executed within four months prior to the grantor's adjudication in bankruptcy, the burden is ordinarily on the objecting creditors to show that the bankrupts were insolvent at the time the deed was executed, that it created a preference in favor of the secured creditor, and that he had reasonable cause to believe that a preference was intended.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 340.*]

2. BANKRUPTCY (§ 340*) — PREFERENCES — BURDEN OF PROOF — PRIMA FACIE CASE.

Claimant, a sister-in-law of one of the bankrupts, claimed that she loaned sums of money to them at different times without taking any obligation therefor, and without being able to recall the dates of the loans. Less than a month before the voluntary bankruptcy petition was filed, she secured from the brother-in-law and his partner a negotiable note which did not disclose her connection, and which was secured by a deed of trust in general terms to any holder thereof. *Held*, that such facts established a prima facie case of both claimants' knowledge of the bankrupt's insolvency and their intention to give her a preference, and that the burden was therefore on her to show that the transaction was in good faith and without knowledge of such purpose or intention.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 340.*]

In Bankruptcy. On petition to review decision of referee.

C. E. Morris, for petitioner Grace Woods.
Wm. G. Caldwell and W. E. Krupp, for creditors.

DAYTON, District Judge. On September 23, 1908, the two bankrupts executed a negotiable note, payable to their own order two years after date, with interest payable semiannually at the Dollar

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

Savings & Trust Company, Wheeling, W. Va., indorsed the same in blank on the back thereof, and on the same day executed a deed of trust upon certain personal property to a trustee to secure the payment of said note, or any renewals thereof, to any one who might become the holder thereof. This trust deed was recorded on the 23d day of September, 1908. On the 21st day of October, less than 30 days following, the bankrupts filed their petition in involuntary bankruptcy. In the adjudication of their matters Grace Woods has presented this note and trust deed to the referee, claiming that she is entitled to first lien upon the personal property embraced in said deed of trust. The referee has declined to allow this claim as a first lien upon such property, and this petition is filed to review his action in thus denying.

The pretensions of the claimant are that, at various times in the year preceding the execution of this note and deed of trust, she loaned three several sums of $100 and an additional sum of $150 to one of these bankrupts, which entered into and was used in the confectionery business of the two, and, while she says little about it in her own testimony, the bankrupt W. S. E. Sanger states that this money was loaned from time to time with the understanding that security would be given therefor, and that when the last sum of $150 was so loaned immediate security was demanded. This last loan was made apparently in June, 1908, when this bankrupt says that he spoke to a lawyer to prepare the security, and it is intimated that the delay from then until the 23d day of September, 1908, when the trust was in fact executed, was solely the fault of this attorney, who appears as trustee in the deed of trust. Grace Woods and the wife of the bankrupt W. S. E. Sanger are twin sisters, and Mrs. Sanger has testified that the money was borrowed at her instance, but paid to Sanger himself.

It is insisted on behalf of the claimant that the burden is upon the objecting creditors to show that, notwithstanding the trust deed was executed within four months prior to the adjudication in bankruptcy: First, that the bankrupts at that time were insolvent; second, that it secures to Mrs. Woods a greater percentage of her debt than is secured to any other creditor of the same class; and, third, that Mrs. Woods must have had reasonable cause to believe that a preference was thereby intended. And it is confidently asserted that the evidence wholly fails to show that she had such knowledge at the time of the insolvent condition of the bankrupts.

These three propositions so asserted, under ordinary circumstances, are sound and are upheld by a multitude of authorities, but it seems to me a clear distinction is to be drawn as to the burden of proof in such cases between strangers asserting such claims and the assertion thereof by near relatives. In this case a sister-in-law on several different occasions loaned sums of money, without, it would seem, taking any note or obligation therefor at the time, and without being able even to recall the dates of such loans; but less than one month before a voluntary petition in bankruptcy is actually filed by the brother-in-law secures from him and his partner a negotiable note,

which in no way discloses her connection with the debt, and the same is secured by a deed of trust, in general terms to any holder thereof. It seems to me that such facts in themselves constitute prima facie evidence of knowledge both of the insolvency and the intention of the bankrupts to give her a preference over other creditors, and that, so establishing a prima facie case of knowledge, the burden is upon her, by satisfactory proof, to show that the transaction was in good faith and without knowledge of such purpose and intention.

I, therefore, can find no error in the decision of the referee, and the same will be in all respects affirmed.

In re SHAFFER.

(District Court, N. D. West Virginia. April 30, 1909.)

BANKRUPTCY (§ 407*)—DISCHARGE—FALSE FINANCIAL STATEMENT.

Bankr. Act July 1, 1898, c. 541, § 14b, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3427), as amended by Act Cong. Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 (U. S. Comp. St. Supp. 1907, p. 1026), denies a discharge to a bankrupt who has obtained property on credit from any person on materially false statements in writing, made to such person to obtain such property on credit. *Held* that, where a creditor relied on a bankrupt's statement, which was materially false in fact, in selling him goods on credit, the bankrupt was not entitled to a discharge, though the mistake was made in good faith and was not intentional.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 729; Dec. Dig. § 407.*]

In Bankruptcy. Upon application for discharge.

J. Hop. Woods, for bankrupt.
Douglass & Steptoe, for creditors.

DAYTON, District Judge. The sole ground of opposition to the discharge asked for here is based upon the amendment of February 5, 1903, to Bankr. Act July 1, 1898, c. 541, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3427), incorporated in section 14 of chapter 3 (Act Feb. 5, 1903, c. 487, 32 Stat. 797 [U. S. Comp. St. Supp. 1907, p. 1026]), which denies a discharge to a bankrupt "who has obtained property on credit from any person upon a materially false statement, in writing, made to such person for the purpose of obtaining said property on credit."

It seems that on the 14th day of October, 1904, the bankrupt, being then engaged in the mercantile business, applied to the Koblegard Company, the objecting creditor, to purchase goods on credit, and signed on that day a printed statement entitled as follows:

"The following is a true and correct statement, and is made to the Koblegard Co., especially for their benefit, and as a basis of credit for any goods they may ship us."

In this statement items of assets aggregating $10,350 in value are set forth, and liabilities to the amount of $2,536.33. Goods to the

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

amount of $330.79 were purchased by the bankrupt of this company on that day, payable within 60 days thereafter, and afterward on the 3d day of December, in the same year, an additional bill of $98.46 was purchased. On the 20th day of January, following, Shaffer filed his voluntary petition in bankruptcy, and in his schedule listed $8,290 of assets and $8,668.53 of debts. His assets were found upon adjudication to be comparatively worthless, and a dividend of a little more than 10 per cent. was realized by the creditors. Prior to this time, on December 2, 1904, he paid to the Koblegard Company $230.79 on the $330.79 original purchase of goods, and gave his check for the remaining $100, which, however, was protested and not paid. Criminal proceedings were instituted in March, 1906, against Shaffer, based upon the charge that he had obtained these goods under false pretense, which, being tried before a jury, resulted in his acquittal. On his application being made for a discharge, an objection was made thereto, and this court referred the matter to a referee to report the facts. This the referee has done, and has reported the bankrupt not entitled to a discharge.

The signing and delivery of the statement to the Koblegard Company is admitted by the bankrupt, but he insists that after the goods were purchased, but before separation and delivery, a member of this company called him back and caused him to make and sign the statement. He further testifies that at the time he informed this member of the company that the statement was not a full and complete one. So far as the items of assets contained therein are concerned, there is no dispute, it being agreed that in this particular the statement was substantially correct. The contest is wholly over the accuracy of that part relating to the liabilities. It subsequently turned out that at the time this statement was made the bankrupt was indebted something over $11,000, as shown by the list of outstanding debts which he admitted upon the examination before the referee and creditors in the bankruptcy proceeding. In extenuation and justification of the discrepancy existing between his statement to the Koblegard Company, as to these liabilities, and the evidence given by him before the referee, he now insists that at the time this statement was given his property, in effect, had been inherited by him in connection with his mother, brother, and sisters from his father's estate, which was unsettled, substantially held in common, and that he was unacquainted with the actual condition of the accounts relating thereto existing between him and the other members of the family. Further extenuating facts relied upon by him are that for six months from February until September, just prior to the making of this statement to the Koblegard Company, he had been dangerously sick with typhoid and pneumonia, during which time he had been wholly unable to attend to his business, and in fact had no knowledge of its true condition, and verily believed at the time he made such statement that it was true and correct; and that he did not ascertain his true condition until afterward, when it was revealed to him by counsel whom he consulted. It may be added that the whole proceeding shows pretty clearly that Shaffer was illiterate, in-

experienced, and incompetent to properly care for a mercantile business.

If it were a matter of discretion with me, I frankly confess that the extenuating circumstances in this case would lead me to grant this discharge; but, upon careful investigation of the law governing the matter, I am constrained to reach the conclusion that I am not permitted, under the circumstances, to do so. This special provision of the bankrupt act has no counterpart in any of the prior bankruptcy laws of this country. Under the construction that has been given to it, the objecting creditor has to establish two things: First, that the bankrupt obtained property on credit; second, that he made to the person from whom he obtained it a materially false statement, in writing, for the purpose of so obtaining it. The good but mistaken faith with which such statement is made cannot be taken into consideration. The statement must be materially false. In fact, it is not necessary that it should be intentionally false. A creditor must rely upon it when parting with his property, and, if he did so rely upon it and it was materially false in fact, it is sufficient to defeat a discharge. If the creditor did not rely on it, or if the debtor did not make the statement for obtaining the property on credit, it will not bar a discharge, no matter how false the statement may be. It may be pleaded by the creditor selling the goods, or by any other person entitled to oppose the discharge. Loveland on Br. (3d Ed.) 809, § 280a; In re Scott (D. C.) 126 Fed. 981; In re Harr (D. C.) 143 Fed. 421; In re Peterson, 10 Am. Bankr. Rep. 355; In re Goodhile (D. C.) 130 Fed. 782; In re Dresser (D. C.) 144 Fed. 318; In re Pincus (D. C.) 17 Am. Bankr. Rep. 331, 147 Fed. 621.

That the statement made in this case, as to this bankrupt's liabilities, was materially false, although it may not have been intentionally so, it seems to me is clearly shown; that the Koblegard Company relied upon and extended credit on account of such statement, I think is also clear. If it was not relied upon, no possible explanation of the conduct of the member of the company who, according to Shaffer's own statement, called him back, after he had selected the goods, to make such statement, can be conceived from the circumstances. If he had not intended that his company should rely upon such statement, and if he did not procure such statement from Shaffer of his financial condition for the purpose of ascertaining and determining whether or not he was entitled to credit, it would have been wholly unnecessary, and there would have been no reason for his securing this statement at the time and under such circumstances.

The authorities touching this matter are so uniform and strong that, notwithstanding any sympathy I may have for the unfortunate condition of the bankrupt, I am constrained to deny the discharge.

In re BONER.

(District Court, N. D. West Virginia. April 30, 1909.)

1. BANKRUPTCY (§ 408*)—DISCHARGE—WITHHOLDING ASSETS.
Where a bankrupt, when he made a general assignment, several months before bankruptcy, turned over to the assignee property which the bankrupt believed to be sufficient to pay all his debts, it was no ground for refusing him a discharge that from 11 to 20 months prior to the filing of the petition he indulged in certain improvident transactions, and did not turn over to his assignee $1,000, rent of a farm owned by the bankrupt's father, which the bankrupt was permitted to receive as a gift from the father.
[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 408.*]

2. BANKRUPTCY (§ 177*)—PRIOR TRANSACTIONS—INSOLVENCY PROCEEDINGS.
The bankruptcy law does not attempt to supervise insolvency proceedings under state laws, undertaken and carried out more than four months prior to the institution of bankruptcy proceedings, nor to inquire into the assignments and transfers of the bankrupt's property not made within such period.
[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 177.*]

In Bankruptcy. On an application for a discharge.

D. B. Evans and E. D. Leach, for bankrupt.
Charles C. Newman, for creditors.

DAYTON, District Judge. In the early part of February, 1903, the bankrupt, a farmer in Marshall county, wholly inexperienced and clearly incompetent to engage in the mercantile business, purchased a stock of goods in Moundsville at the price of $6,000, half of which he paid in cash and for the balance he gave his notes. He carried on this business in the loosest and most reckless way for something like eight months, without proper books of accounts, and without apparently any reasonable idea of the condition of his affairs. Then on the 19th day of October of that year he made a general assignment of all his property to a trustee for the benefit of his creditors. It is shown by the record that his father was a man of large means, and prior to this time had allowed his son to control a farm, owned by the father, and receive its rents and profits, although title thereto remained in the father. It is shown, further, that the bankrupt's wife had and disposed of some property in her name. It seems that the trustee in this general assignment did not take possession of all the property so assigned to him; at least, he did not collect and take into possession the rents due from the farm above referred to, and so far as the record discloses no effort was made on the part of Boner's creditors to sequester or take into possession through a receiver or judicial proceeding the bankrupt's property. It may be assumed as pretty clearly shown that the bankrupt at this time supposed that he had ample assets to pay his debts and considerable over; that he turned over to the assignee what he confidently believed would be sufficient property to pay all his debts. Having done this in a spirit of either reckless despair or deliberate purpose, he started out on several months of

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

travel and dissipation, completely ignoring and absenting himself from his business, and apparently losing all interest in and what knowledge he had thereof. On the 3d day of September, 1904, nearly a year after, he filed his petition in bankruptcy, was adjudicated bankrupt, and his assets, as then scheduled by him, were duly administered. He applied for discharge within the year after adjudication, to which strenuous opposition has been made by creditors, and for various reasons the hearing of the same has been delayed until this time.

The substance of the specification of objections to the discharge are that he knowingly and fraudulently lost, disposed, and squandered in drunkenness and indulgence and in other vices large sums of money belonging to his estate, between the time when he purchased the stock of goods in February, 1903, and the 19th day of October, 1903, the day when he made his general assignment, and received during those periods of time various sums of money from parties which he did not account for and give over to the assignee in his deed of assignment; second, that while engaged in the mercantile business during these eight months he failed to keep books of account from which his financial condition might be ascertained; third, that he made, during such period of time, a materially false statement, in writing, to the Bradstreet Company, a commercial agency, as a basis of credit; fourth, that he concealed certain large sums of money, while he was so engaged in business, for the purpose of defrauding his creditors, and especially the sum of $1,000, the proceeds of the rent of the farm, and which he has not accounted for to said assignee in said assignment to his creditors. The application for discharge was referred to a referee, who has found that Boner is not entitled to it for a single reason, to wit, that he failed to turn over the $1,000 then in his possession to the assignee in the general assignment at the time it was made, and that his failure to do so was a concealment from the creditors as he was insolvent.

A thorough, careful consideration of all the evidence, facts, and circumstances involved in this matter convinces me that the finding of the referee cannot be upheld, and that this bankrupt is entitled to his discharge. As I have stated, I think the statement may be taken as true that the bankrupt, when he made this general assignment and afterwards, turned over to the assignee therein property which he believed to be amply sufficient to pay off all his debts. The $1,000 arising from the rent of the farm was his only by the sufferance and gift of his father, and he may very well have considered it no part of his estate. All the transactions complained of in the conduct of his business occurred between February and October, 1903, anywhere from 11 to 20 months prior to the filing of his petition in bankruptcy, and so far as disclosed by the testimony, while certainly the bulk of his property passed into the hands of his assignee under the general assignment, no proceeding has been instituted to secure from such assignee a settlement of his accounts as such. While the bankrupt was reckless, improvident, and utterly incompetent, apparently, to manage this mercantile business, I cannot believe that these transactions on his part were indulged in with any purpose of defrauding his

creditors, or, in anticipation of bankruptcy proceedings, to conceal his property.

It is to be borne in mind that the bankruptcy law does not undertake to inquire into the assignments and transfers of a man's property made more than four months prior to the institution of its proceeding. Nor does it attempt, nor can it attempt, to supervise the course and conduct of insolvency proceedings under state laws, undertaken and carried out more than four months prior to the institution of the bankruptcy proceeding. It may have been the plain duty of the assignee in the assignment to have followed and collected more closely the assets of Boner's estate assigned to him. It may have been the duty of the creditors so secured to have more closely attended to the collection of these assets, through the intervention of a state court and receiver, or by an application then in involuntary bankruptcy against their debtor; but as both have failed in this particular in their duty, and as Boner was permitted for a long period previous to control and dissipate a part of his estate, under the impression that enough had been turned over by him to satisfy his creditors, the fault between assignee, creditor, and debtor is at least mutual. So far as the record discloses, at the time that Boner filed his petition in bankruptcy, he concealed none of his assets that he then had; nor is it apparent that four months prior to that time he had fraudulently transferred or concealed any of his property.

Under the circumstances I think he is entitled to his discharge, and the order to that effect may be entered.

COLE et al. v. THOMPSON et al.

(Circuit Court, N. D. West Virginia. April 30, 1909.)

1. TRUSTS (§ 81*)—RESULTING TRUST—RELATION OF GRANTEE.

Where a person invested with title to land without having paid a consideration is the wife, son, or near relative of the grantors, or one to whom the purchaser has placed himself in loco parentis, there is no resulting trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 115–118; Dec. Dig. § 81.*]

2. TRUSTS (§ 82*)—CONVEYANCE TO HUSBAND—ADVANCEMENT TO WIFE.

A conveyance to a son-in-law by absolute deed, as an advancement to the wife, does not create a trust in her favor.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 119, 120; Dec. Dig. § 82.*]

3. TRUSTS (§ 82*)—DEED OF ADVANCEMENT—CONSTRUCTION.

A deed conveyed certain land to C., who was the grantor's son-in-law, and declared that the land was given to the grantee as an advancement of the distributive interest of his deceased wife's children in the estate of the grantors in any future division thereof, to be valued at $3,000, advanced to the infant sons and the only heirs at law of said deceased daughter out of the grantor's estate. *Held*, that the deed did not create a trust of the land in the grantee for the benefit of such sons.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 119, 120; Dec. Dig. § 82.*]

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

4. TRUSTS (§ 88*)—DEED OF ADVANCEMENT—PROOF BY PAROL.
A deed or advancement absolute on its face may be shown by parol to have been in fact a trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 130–133; Dec. Dig. § 88.*]

5. TRUSTS (§ 357*)—CONVEYANCE BY TRUSTEE—RIGHTS OF CESTUI QUE TRUST.
Where a trustee, holding under a deed absolute on its face and not disclosing a trust, conveys to an innocent purchaser, the cestui que trust cannot disturb the title of such purchaser, but must follow the proceeds of the sale as the trust fund in the hands of the trustee.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 539–552; Dec. Dig. § 357.*]

In Chancery.

In consideration of love and affection, on June 17, 1898, J. P. Ashcraft and wife conveyed to William C. Cole, in fee simple, 97½ acres of land in Wetzel county, W. Va., reserving, however, one-sixteenth part of the oil within and thereunder and one-half of all money thereafter paid for gas produced from said land, as also the rental for that year under the oil and gas lease, but not longer. A private right of way was also reserved over said land for the use and benefit of another tract of 62½ acres, conveyed by the grantors on the same day to Media E. Maple. The closing paragraph of the deed recites: "The grantee in this deed is a son-in-law of the grantors the surviving husband of Jennie Cole, deceased, who was a daughter of grantors and said 97½ acres of land is hereby given and conveyed to the grantee as an advancement of the distributive interest of said Jennie Cole's heirs in the estate of the grantors in any future division or distribution of the grantors' estate to and among their heirs, the 97½ acres of land hereby given and conveyed is to be estimated and conveyed at three thousand dollars advanced to Glancy Cole and Edwin Cole, infant sons and only heirs-at-law of said Jennie Cole, deceased, out of grantors' estate." This deed was properly executed, acknowledged, and recorded.

By deed of general warranty, bearing date December 11, 1900, William C. Cole sold and conveyed to Josiah V. Thompson, Margaret J. McClelland and Charles H. Gorley the Pittsburg or river vein of coal thereunder with necessary mining rights and privileges, and Gorley by deed, dated April 6, 1906, conveyed to said Thompson his undivided interest therein. These two deeds duly executed have been admitted to record.

On the 28th day of November, 1908, these infant children, by their next friend, instituted this suit in the circuit court of Wetzel county, W. Va., against Josiah V. Thompson, Margaret J. McClelland, and Charles H. Gorley. By their bill they allege themselves to be the infant children of William C. Cole and Jennie Cole, deceased, set forth the conveyance to their father of the 97½ acres, which they charge he, the said William C. Cole, held only the legal title to for their benefit as "fully shown by an inspection of said deed." They set forth the deed of Cole to Thompson, McClelland, and Gorley; also Gorley's deed for his undivided interest to Thompson, and charge that their father, William C. Cole, has departed this life intestate, leaving said infant plaintiffs his sole children and heirs-at-law, whereby they became vested with the legal title, as well as the equitable title to said land. They deny that Cole had any right to convey the coal to the defendants, allege said deeds made by him to them and by Gorley to Thompson to be clouds upon their title, and the prayer of the bill is that they may be set aside and canceled as such clouds.

This cause was removed by the defendants from said circuit court of Wetzel county into this court, by reason of their nonresidence in the state, and they have now entered their demurrer to the plaintiffs' bill.

Hall & Hall, for plaintiffs.

U. N. Arnett, Jr., and Waitman H. Conaway, for defendants.

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

DAYTON, District Judge (after stating the facts as above). The decision of this demurrer, it will be seen, must depend solely upon the construction of the deed from Ashcraft and wife to Cole. On the one hand, it is insisted that this deed on its face shows simply a conveyance to Cole the father of the legal title to the land to be held by him in trust for his infant children, the grandchildren of the grantors. On the other hand, it is insisted that it was an absolute conveyance in fee simple to Cole with no trust of any kind created thereby. In determining the true construction to be arrived at, it will be borne in mind that no restrictions upon the right to convey how and to whom they pleased existed as against the grantors; that this deed is a conveyance, and not a contract to convey or a covenant to stand seised. It is executed, not executory, binds the estate, and not the person, and conveys both legal and equitable estate to the grantee. It has been held that: When one pays for land, and the title is made to a stranger, the presumption is that he who paid intended to own; but if the person invested with title is the wife, son, or near relative, or one to whom the purchaser has placed himself in loco parentis, there is no resulting trust. Also that a conveyance to a son-in-law by deed absolute, as an advancement to his wife, does not create a trust in her favor. In such case the father has right to dispose of his property as he will. In making an advancement to his daughter he may well determine that the property may be best vested in her husband with absolute title and the right of disposition trusting to him to see to its application to their joint enjoyment. In a case like this it was not only reasonable but natural for these grandparents to assume that the father could and would best conserve the interest of these infants by being vested absolutely with the property. During their minority they would be subject to his control, and he would be chargeable with the cost of their maintenance and protection.

That motives of this character actuated the execution of this absolute deed is clear from its terms, for it would have been just as easy by specific terms to have constituted a trust in favor of these infants if any such had been intended. The legal principles governing are well settled by very many authorities, among which may be cited: Noe v. Roll, 134 Ind. 115, 33 N. E. 905; Lewis v. Stanley, 148 Ind. 351, 45 N. E. 693, 47 N. E. 677; Heath v. Carter, 20 Ind. App. 83, 50 N. E. 318; Thompson v. Thompson, 18 Ohio St. 73; Acker v. Priest, 92 Iowa, 618, 61 N. W. 235; Higbee v. Higbee, 123 Mo. 287, 27 S. W. 619; Roberts v. Coleman, 37 W. Va. 143, at page 156, 16 S. E. 482; Kyle v. Conrad, 25 W. Va. 760, at page 776; Hamilton v. Steele, 22 W. Va. 348; Harris v. Elliott, 45 W. Va. 245, 32 S. E. 176; Rogers v. Rogers, 52 S. C. 388, 29 S. E. 812; Mosely v. Mosely, 87 N. C. 69.

But it has been repeatedly held that a deed absolute upon its face may be shown by evidence to have been a trust. As to whether this can be done in regard to a deed of advancement of this character the authorities differ. In South Carolina, in Rogers v. Rogers, supra, it is held:

"Where a father-in-law conveyed land to a son-in-law as an advancement to his daughter, parol evidence is inadmissible to prove an express trust in favor of the daughter."

I am inclined to think that the law in West Virginia, as laid down in such cases as we have above cited, does not agree with this South Carolina ruling, but would establish such trust by full, clear, and satisfactory evidence as between the parties privy thereto, but not otherwise.

In case a deed absolute upon its face and not disclosing a trust should, after conveyance by the grantee to an innocent purchaser of the trust subject, be shown to have in fact created such trust, the cestui que trust, by universally conceded principles, would be allowed to pursue the trust fund arising in the hands of its trustee; but he would not be permitted to disturb the conveyance to and title of the innocent purchaser in and to the trust subject itself, as sought to be done in this case. No effort is here made to pursue such fund in the hands of the grantee Cole for the simple reason that he is charged to be dead and his property to have vested in the infant plaintiffs as his sole heirs at law. The bill charges no fraud upon the defendant purchasers of the coal underlying the land or any knowledge of the existence of any trust in favor of the infant plaintiffs other than that disclosed by the deed itself. This, as I have above said, in my judgment, establishes no such trust, but, on the contrary, strongly refutes the idea that any such was originally contemplated or created.

The demurrer must be sustained.

ANDRUS v. BERKSHIRE POWER CO.

HUGHES v. SAME.

(Circuit Court, D. Connecticut. April 21, 1909.)

Nos. 1,207, 1,209.

COSTS (§ 32*)—ALLOWANCE IN EQUITY—WHO IS PREVAILING PARTY.

Where a complainant was denied a mandatory injunction by a court of equity to compel the removal of a dam as prayed for, and although the court offered him the right to prove and recover his damages for flowage in the pending suit he refused to do so and prosecuted an appeal, which was unsuccessful, except that the appellate court gave him the same right, reversing the decree for that purpose, he is not entitled to recover costs incurred prior to the time when, after remand, he avails himself of such right.

[Ed. Note.—For other cases, see Costs, Dec. Dig. § 32.*

Right to costs in equity, see note to Tug River Coal & Salt Co. v. Brigel, 17 C. C. A. 368.]

In re Decree Following Mandates.

C. Walter Artz and Henry H. Townshend, for complainants.

Gross, Hyde & Shipman, for defendant.

PLATT, District Judge. The cases are respectively Andrus (1,207) and Hughes (1,209) against the Berkshire Power Company. To tell the whole story about them would be tiresome. The parties know it all, and the curious can follow the path, if they begin with (C. C.) 145

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

Fed. 47, and then go to 147 Fed. 78, 77 C. C. A. 248. Having read those cases, the outsider will know something about the Andrus Case. He can then go to (C. C.) 158 Fed. 219, and to (C. C. A.) 165 Fed. 1005, and may then consider himself introduced to the Hughes Case.

The mandates are now before me. The general nature of the decrees to be entered is easily ascertained, and the only real contention is about the costs. It is not customary to decide such a question at this time, and for that reason nothing will appear in the decrees about costs. What I am about to say is intended to indicate the attitude of the court, so far as the writer controls, and to explain why certain clauses of the suggested decrees filed by the plaintiffs cannot be passed in the form presented.

We will look at the Andrus Case a moment. The writer tried that case in open court to accommodate the plaintiff's counsel who, having his choice, selected it from a batch of three, as the one in which he thought he saw the easiest path to victory. The burden of his song during the trial was a cry for injunctive relief. He wanted a dam taken down which the defendant had built at Canaan, Conn. The maintenance of the dam meant a continuing trespass upon his client's meadow lands which formed a part of the river bank in Sheffield, Mass. It was (as he thought) wrongfully erected without his client's permission, and must come down. The defendant vigorously opposed his contention. At the close of the evidence the court informed the plaintiff and his counsel that in its opinion they were not entitled to the kind of injunctive relief which they so insistently demanded. They had come into a court of equity, however, and the court would gladly extend such aid to the injured as lay within its power. A master would be appointed to ascertain the plaintiff's damage, and having found it, the court would order the dam removed, if the amount were not paid within a reasonable time; or, if he preferred the plaintiff could go out of court and retain his right to a recovery of his damages at law. The offer of further chancery aid was briefly considered and then respectfully refused. The plaintiff and his counsel, with the true trading instinct, preferred to take chances on appeal from the refusal of mandatory injunctive relief. They took the chances, and lost twice; first in the Court of Appeals, and then in the Supreme Court. They are now back here asking for the original favor offered, which at the offering was treated as a stone, but which at this late day has evidently become in their estimation a substance capable of digestion and possible nutrition.

The costs become a matter of contention, because the decision of the Circuit Court of Appeals, although in fact an affirmance of the decision of this court, is in form a reversal. The plaintiff had his day in this court on the question of getting his damages through equity when the offer was made and refused as above recited, and it was an act of unusual kindness on the part of the Court of Appeals to give him another day. I do not know why they treated him so kindly; it may be that in the hurry of the moment the fact that the offer had been made was overlooked, or it may have been simply judicial friendliness. I cannot see that it was in any sense a right

which belonged to him. It is certain that the defendant did not find any fault with the original offer, and, in truth, their position demanded the acceptance by them of the offer, since their objection to the mandatory injunctive relief was based upon New York City v. Pine, 185 U. S. 93, 22 Sup. Ct. 592, 46 L. Ed. 820, which furnishes the basis for the equitable relief which was extended to the plaintiff. None of the costs incurred in an attempt to enforce mandatory injunctive relief were necessary to the obtaining of the relief formerly offered, refused, and now requested. I am, therefore, of the opinion that in the final adjustment the plaintiff will be entitled to no costs up to this stage of the proceedings, except those which may have accrued in the clerk's office in the regular way for the entry and continuance of the case, and that the defendant will be entitled to the costs to which it has been put by reason of the plaintiff's effort to obtain mandatory injunctive relief.

The record in the Hughes Case speaks for itself, and the same view as to costs applies thereto.

As I understand the law, the master will not be obliged to remain within the jurisdiction while listening to evidence, if convenience demands that he go elsewhere, and he has ample power in the way of calling for books and papers. If trouble ensues, he can easily come to the court for help.

It is thought that enough has been said so that the views of the court will be understood by all. The decrees can be easily prepared in accordance herewith.

GRIFFITH v. BERKSHIRE POWER CO.

(Circuit Court, D. Connecticut. April 21, 1909.)

No. 1,208.

REFORMATION OF INSTRUMENTS (§ 19*)—GROUNDS OF REFORMATION—MUTUAL MISTAKE OF FACT.

Complainant contracted to convey the right of flowage over his land by a dam to be built by defendant of a stipulated height for the sum of $2,500. It was clearly shown by the evidence that when the contract was made both parties were of opinion that the dam would in no event cause the flooding of more than 12 acres of complainant's land, but when built it was found that it caused the flooding of much more than that amount. *Held*, that complainant was entitled to have the contract reformed on the ground of mutual mistake so as to apply only to the 12 acres intended, leaving him the right to recover damages for the additional flowage.

[Ed. Note.—For other cases, see Reformation and Instruments, Cent. Dig. § 75; Dec. Dig. § 19.*]

In Equity. On amended bill.

See, also, 158 Fed. 219.

C. Walter Artz, Henry F. Parmelee, and Henry H. Townshend, for complainant.

Gross, Hyde & Shipman, for defendant.

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

PLATT, District Judge. Exhibit A, which the complainant now asks to have reformed on the testimony before the court, sets forth, in substance, that Griffith owned "certain lands" bordering on the Housatonic river, in Sheffield, Mass., and Roraback or his nominees expected to build a dam across the river at Canaan, Conn.; that Roraback or his nominees might require by reason of said dam to overflow "certain lands" of the said Griffith. It was therefore agreed between Griffith and Roraback:

"That after the completion of said plant and the overflow of the lands of said Griffith in the manner hereinbefore set forth, the said Roraback or his nominees shall pay or cause to be paid to the said Griffith the sum of $2,500 in full payment and liquidation of all damages which shall be occasioned to the said Griffith by reason of the erection of said dam and the flowing perpetually of his land; provided, however, that said dam shall not exceed eight feet in height above the mean level of the flow of the Housatonic river."

It was further provided that, if said sum was not paid within 30 days after "such flowing of said land," the right to "flood the lands in the manner hereinbefore set forth" shall end and terminate, and the parties causing the flooding shall be considered trespassers. If it was paid, Griffith was to give a good deed of such right to flow. It was signed, executed, and recorded on December 1, 1904.

The testimony shows plainly that on that date both Roraback and Griffith were of the opinion that in no possible contingency could the raising of the dam at Canaan to a height not exceeding 8 feet above mean level cause the flooding of over 12 acres of said Griffith's lands. As a matter of fact, it was found after the dam was completed that the number of acres of the Griffith land which was flooded was very largely in excess of 12 acres. The complainant insists that the certain lands mentioned in said agreement were those below a point on the Konkapot river opposite the clump of trees about 28 rods below Griffith's farm bridge, and did not include over 12 acres of the farm.

If Roraback knew that the raising of the dam would flood said lands much in excess of 12 acres, and kept that knowledge from Griffith, it is clear that the agreement would have been fraudulently obtained. Such an allegation appears in the original bill, and, if it were supported by proof, the entire controversy in this and the companion cases would have gone the complainant's way long ago. There is no scintilla of evidence to support the allegation, and counsel so admitted in the earlier stages of this general controversy. The mistake of fact is admitted, however, on all sides.

There is nothing to the point that the present defendant is an innocent purchaser for value. From the day of Roraback's first appearance on the Massachusett's shores of the Housatonic river up to this moment, the connection between himself and the defendant has been such as to make them jointly responsible for all that has been done.

On the evidence, the agreement must be reformed in accordance with the prayer of the bill. Mr. Griffith's own story shows plainly his reason for jumping at the $2,500 settlement. While he and Roraback were discussing the appraisal question, the latter went out to

inquire as to the character of Curtis, an engineer proposed by Griffith as one of the appraisers. While waiting for Roraback to come back, Griffith and Collins talked the matter over. They were afraid that when the closing of the dam had set the water back on Griffith's land all the evil effects of undersoaking would not be at first appreciated, and that an appraisal at such a time might be inadequate. For that reason Griffith thought it better to clinch the bargain then and there, and did so. He displayed the proverbial acumen of the Yankee farmer and got what looked to be the long end of the bargain. But it must not be forgotten that both parties were bargaining on a supposed maximum flowage of 12 acres. If there had been even a floating suspicion in Griffith's mind that the actual flooding would be very much in excess of the number of acres under discussion, it is impossible that Exhibit A would have been signed. His smartness in the trade he thought he was making ought not, however, to be charged against him in reaching the justice of the real transaction. Having reformed the contract, the only real question is whether he ought to be sent to a law court to get the $2,500 due him for the 12 acres; but inasmuch as he requests the aid of the equitable arm of this court to find out what his additional damage is, and to grant him the appropriate relief with respect thereto, and as it will lessen expense and save another suit to include what has already been bargained for, the matter may proceed as he requests.

Let the master be appointed.

MAYER v. KARAGHUESIAN.

(Circuit Court, S. D. New York. February 2, 1909.)

REMOVAL OF CAUSES (§ 86*)—PETITION—ALIENS.

A removal petition by an alien, failing to allege that he is a nonresident of the state, is fatally defective.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 170, 173; Dec. Dig. § 86.*]

On Motion to Remand.

Morchauser & Haysradt, for plaintiff.
Bertrand L. Pettigrew, for defendant.

NOYES, Circuit Judge. The petition for removal is wholly insufficient, in that it fails to allege that the defendant is a nonresident of this district. The allegations that he is an alien, and not a citizen of the state of New York, are quite consistent with his residence here.

The motion to remand is granted, and an order may be entered accordingly.

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

ÆTNA INDEMNITY CO. v. FARMERS' NAT. BANK OF BOYERTOWN, PA.

(Circuit Court of Appeals, Third Circuit. April 20, 1909.)

No. 40, October Session, 1908.

1. INSURANCE (§ 285*)—FIDELITY INSURANCE—BOND OF BANK CASHIER—MISREPRESENTATIONS AS TO PREVIOUS ALLEGED DISHONEST CONDUCT.

Where, in the application to an indemnity company by a bank for a bond indemnifying such bank against loss by reason of the dishonesty or bad faith of the cashier, a certificate by the officers of the bank that the cashier, who had been in the service of the bank for a number of years, had at all times, so far as known, faithfully and satisfactorily performed his duties, and to the best of said officers' knowledge and belief had given satisfaction in his personal conduct and in the performance of his duties, and had kept and rendered his accounts correctly and without default, no reason being known why his bond should not be renewed, the assurances so given are material, and if untrue to the knowledge of the officers of the bank, or if made without proper effort on their part to inform themselves thereon, the bond is invalid, and cannot be enforced.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 657; Dec. Dig. § 285.*]

2. INSURANCE (§ 668*)—FIDELITY INSURANCE—AVOIDANCE OF CONTRACT FOR MISREPRESENTATION—JURY QUESTION.

Statements in a certificate made by the president of a bank to a bonding company with an application on which the company executed a bond indemnifying the bank against loss or damage resulting from the dishonesty of its cashier, and in a second certificate for a renewal, that the cashier had previously "faithfully and satisfactorily performed his duties," and had "given satisfaction in his personal conduct, * * * and kept and rendered his accounts correctly and without default," although to the knowledge of the president and directors he had previously allowed a customer to make large overdrafts contrary to instructions and similar to subsequent overdrafts by the same customer which were made the basis of action on the bond, did not constitute knowing and fraudulent misrepresentations which avoided the bond as matter of law, where there was ground for the belief on the part of the officers that such acts were merely errors of judgment and not dishonest, as they afterward proved to be, and the fact that they retained the cashier in his position tended to show that they did so believe.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1735; Dec. Dig. § 668.*]

3. INSURANCE (§ 285*)—BOND OF BANK CASHIER—WARRANTY AS TO PREVIOUS CONDUCT—BREACH OF WARRANTY—KNOWLEDGE WHEN NOT MATERIAL.

Where a fact is warranted to be true, it is material; and it does not matter, therefore, ordinarily whether or not the party had knowledge. Its truth is affirmed, and, if it turn out to be otherwise, a contract based upon it is invalid, at least where it is so stipulated. Where, therefore, in a bond indemnifying a bank against the dishonesty and bad faith of a cashier, it was warranted that he had discharged his duties in good faith (mere negligence or error of judgment not being considered) and with honesty so far as the bank had knowledge, if this was not true, there was a breach of warranty by which the bond, those being its terms, would be avoided.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 657; Dec. Dig. § 285.*]

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

4. INSURANCE (§§ 285, 668*)—QUALIFIED WARRANTY, AS FAR AS THERE IS KNOWLEDGE—KNOWLEDGE BY OFFICERS OF CORPORATION—JURY QUESTION.

But where the warranty was not absolute, but qualified, so far as the party, a bank, had knowledge, and by a further clause in the bond the knowledge required to avoid was the knowledge of the board of directors or of an executive officer, such as the president, who was receiving a salary and was active in the affairs of the corporation, it must have been known to the president or board of directors that the cashier was in fact dishonest; and whether they so knew, or whether they ought to have known, that the acts of the cashier were dishonest, was for the jury.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1735; Dec. Dig. §§ 285, 668.*]

5. INSURANCE (§ 285*)—AVOIDANCE OF CONTRACT FOR BREACH OF WARRANTY—FIDELITY INSURANCE.

A warranty by an employer corporation in a fidelity bond indemnifying it against loss by the dishonesty of an employé that such employé has while in the service of the employer discharged his duties in good faith and with honesty "so far as the employer has knowledge," although it appears that he had not in fact done so, does not invalidate the bond, unless it is shown that the officers, whose knowledge was by the bond made that of the corporation, had knowledge of such fact when the bond was executed.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 657; Dec. Dig. § 285.*]

6. INSURANCE (§ 332*)—FORFEITURE FOR BREACH OF CONDITION SUBSEQUENT—FIDELITY INSURANCE.

A provision in a fidelity bond indemnifying a bank against dishonesty of its cashier that it should be void if the bank failed to promptly notify the insurer in case any act of dishonesty came to its knowledge did not become operative because the officers or directors of the bank learned of acts of the cashier which were in fact dishonest if they were not known to be so at the time.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 875, 875½; Dec. Dig. § 332.*

Fidelity insurance, see note to American Credit Indemnity Co. v. Wood, 19 C. C. A. 273.]

7. TRIAL (§ 279*)—INSTRUCTIONS—EXCEPTIONS.

The ground of an exception to an instruction or the refusal of an instruction must be stated at the time in order that the court shall have its attention directed to the error alleged to have been committed and may correct it.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 690; Dec. Dig. § 279.*]

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

Gustavus Remak, Jr., for plaintiff in error.

Albert Moise and Alexander Simpson, Jr., for defendant in error.

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

ARCHBALD, District Judge. This was an action by the Farmers' National Bank of Boyertown, Pa., on a bond given by the Ætna Indemnity Company to indemnify the bank for loss or damage by reason of the dishonesty of its employés, the particular loss which was the basis of the action being occasioned by the delinquencies of Morris L.

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

Hartman, the cashier, with respect to transactions with one D. C. Hillegass, a customer of the bank, who had dealt with it extensively for a long number of years. The bond was originally given April 30, 1906, for the term of one year, but was continued in force for another by a renewal receipt, upon payment by the bank of the required premium. The items of loss claimed by the bank consisted of overdrafts allowed by Hartman to Hillegass, and worthless bonds accepted from him as collateral, after positive instructions by the directors not to do so. The jury gave a verdict for the bank for $17,766.40, made up of overdrafts subsequent to the date of the bond, amounting to $11,721.07, and $5,500 of bonds, which have been spoken of, with $545.33 of interest added. The indemnity company deny liability, and claim that a verdict should have been directed on the ground that the bond was invalid, because it was obtained, as was the renewal, by material misrepresentations, and also because of a breach of warranty, by which, by express stipulation, it was to be avoided; or, if this is not sustained, that proper instructions were not given touching these questions. Particular items of loss are also contested because of the failure of the bank, within a reasonable time after their occurrence, to give notice of the practices of the cashier which are set up, the dishonest character of which, as it is said, was manifest, the indemnity company, by the terms of the bond, being relieved as the result from liability for losses thereafter arising. Not altogether consistently with this, it was maintained at the trial that the acts of the cashier were not dishonest, but were merely mistakes of judgment, against which the company did not indemnify. But except incidentally, by way of argument—that that which was not considered dishonest at the time is not to be considered dishonest now, the bank otherwise being affected with notice, and the bond avoided—this seems to have been abandoned. The questions which are so presented will be taken up in their order.

The bond in suit is one of high class indemnity, demanded by modern business standards, and is not simply against embezzlement or misappropriation, but for the larger liability for dishonesty or bad faith of employés, by which financial loss is experienced. As with respect to all agreements of such character, the utmost good faith is called for in obtaining it, and misrepresentation in a material point is ground for avoidance. Application for the bond in suit, although made by the cashier, was authorized by the bank, and the bond was issued directly to it, as was the renewal, the bank in each case paying the premium, and the obligation thus being of its own procuring. Attached to the application was a so-called "employer's certificate," executed by the president on behalf of the bank, wherein it was stated that the applicant, the cashier, had been in the service of the bank for 20 years, and had "at all times, so far as known, faithfully and satisfactorily performed his duties"; and that his accounts were last examined April 7, 1906—about three weeks before that—by the national bank examiner, and found correct to date in every particular. At the time of the renewal, a year later, there was also a further certificate, similarly executed by the president, to the effect that, for the year then ending, Hartman had been continuously engaged in the serv-

ice of the bank, and to the best of his [the president's] knowledge and belief had given satisfaction in his personal conduct and in the performance of his duties, and had kept and rendered his accounts correctly and without default, and that no reason was known why his bond should not be renewed; that his accounts had been supervised and checked, and were last examined and audited March 14, 1907, by the examining committee, by whom they were found to be correct. It is contended that both the president and the directors had knowledge at the time of practices by Hartman, in the interest of Hillegass, which were at variance with these statements, in the face of which there can be no recovery.

There can be no question that the assurances so given were material, and that the bond was obtained and renewed on the strength of them. If, therefore, they were untrue to the knowledge of the officers of the bank, or were made without proper effort on their part to inform themselves, the bond is not enforceable. It cannot be denied that the practices indulged in by the cashier, of which complaint is made, by which loss occurred, were known to the president, and some, if not all, of the directors; and they now realize their dishonest character, and that they ought not to have countenanced or condoned them. There is evidence, for instance, that in April, 1906, not long prior to the procuring of the bond and the giving of the first certificate, Hartman, in violation of the rules of the bank and the instructions of the directors, had permitted Hillegass to make large overdrafts, running into thousands of dollars, which, in the shape of dishonored notes and checks, he carried in his drawer among his cash items, not entering them on the books, as he should, and thus concealing them from the directors, in the same way that he did the subsequent overdrafts, which, on the ground of dishonesty, are the subject of the present action; and that, when this was discovered, Hartman was not only admonished but censured by the whole board, and expressly ordered not to let it happen again, nor accept anything from Hillegass for the future, except actual cash or certified checks—directions, the disregard of which resulted in the losses sued for; also that, contrary to the instructions of the directors, he had taken from Hillegass, as security for overdrafts, $10,000 worth of bonds of the same kind and character as the $5,500 worth which he later accepted for the same purpose, the loss on which also formed a part of the verdict. It is admitted that he should have been discharged for this, as soon as it was discovered; from which it is maintained that the certificate on which the bond was originally secured, as well as the one on which it was renewed and extended—that he had "faithfully and satisfactorily performed his duties," according to the one; and had "given satisfaction in his personal conduct * * * and had kept and rendered his accounts correctly and without default," according to the other—not only was not true, but could not have been affirmed with any regard for the facts as known to the directors, amounting to misrepresentation, which avoided the bond as well as the renewal.

But whatever argument of this kind could legitimately have been drawn from the evidence, and however the jury would have been jus-

tified in finding according to it, we are not prepared to say that it was so preponderantly one way that but one view could be taken of it, requiring the direction of a verdict for the defendant, as contended. Take the $10,000 bond transaction, for instance. While the directors, no doubt, were a good deal staggered by this when it was discovered, and expressed themselves pretty freely with regard to it, yet, to a certain extent, they ratified it in the end, by taking the bonds as collateral for a loan, which, even as the best way out of a bad bargain, they hardly would have done had they considered the conduct of Hartman as positively dishonest. Capable of explanation, as it was, as a matter of bad judgment merely, and evidently so regarded by the directors at the time, however differently they may now view it, they are relieved from the charge of having made a willful misstatement in the certificate, as argued. And the same is to be said as to the overdrafts allowed to Hillegass, which led up to this. It is true that they were kept off the books, and so concealed from the knowledge of the directors, which might well have aroused their suspicions and raised doubts in their minds as to the honesty of Hartman when it was discovered. And, looking back at the transaction, now that Hartman has confessed, and after they have become aware how, in other respects, the books were manipulated to cover up the way Hillegass was being favored, they may be prepared to admit that he ought to have been discharged on the spot, in which we agree with them; yet, the question being one of alleged misstatement and bad faith, we must look at it as it appeared at the time, and according to what was then known, and not as we now see and appreciate it, as to which the fact that the directors kept the cashier in his position goes to show that they did not regard his conduct as seriously reprehensible. It is to be remembered that the avoidance of the bond is asserted on the ground of misrepresentation knowingly made, amounting to fraud; as to which, it is not enough that the officers of the bank might, or even ought, to have realized what the conduct of Hartman amounted to. The fact is that they did not, as they all with one accord declare; and however their denial may have been drawn out under the leading of counsel, the jury have believed it, and we are not prepared to say that they were not entitled to do so. The certificates in question, undoubtedly, are strong; stronger by far than we know that they should have been; but no stronger than was held, in Fidelity Company v. Courtney, 186 U. S. 382, 22 Sup. Ct. 833, 46 L. Ed. 1193, not to invalidate a similar certificate, also given to obtain a fidelity bond, on the proof of equally questionable practices by a bank officer. In line with what is there said, Hartman having satisfied the directors, for the time being, as to what he had done, which was accepted and passed over, the certificate, that he had faithfully and satisfactorily performed his duties and given satisfaction personally—which referred, as it is to be noted, to his honesty, and not to his competency—was fulfilled to all intents and purposes. One of the defenses, indeed, set up at the trial, as already stated, was that, in all the things complained of, Hartman did not act dishonestly, as he must have, to entitle the plaintiff to recover, but only through incompetence, or by mistake of judgment, for proof of

which the knowledge and acceptance by the directors of what he did was relied on; a position entirely at variance with the one now taken, that it was so manifestly dishonest that they were bound to recognize it. Nor does this commit us to the converse. It does not follow, in other words, that, if what Hartman did before the giving of the bond was not dishonest or in bad faith, the same conduct afterwards must be similarly regarded. It is not claimed by the bank that his acts were not dishonest. They were; only the directors did not realize it, not knowing the facts in all their fullness, as they do now—thus freeing the certificate from being intentionally misleading. Nor can the assurances on which the bond was procured be regarded as recklessly given, thereby having the same avoiding effect as if made knowingly. Cooper v. Schlesinger, 111 U. S. 148, 4 Sup. Ct. 360, 28 L. Ed. 382. They were not made without regard for the truth, in other words, nor in the face of knowledge, but only under a mistaken view of the facts, or without complete acquaintance with them, or at least they are capable of this construction; which relieves them from any such imputation.

It is said, however, that the instructions of the court on this branch of the case were inadequate, if not misleading, in that the knowledge which would avoid the bond was limited to that which the president and directors thought was dishonest; and also in not squarely affirming certain points which asked the court to charge that, if Hartman had not faithfully and satisfactorily performed his duties, as stated in the certificates, or that, if the president had knowledge of acts of omission or commission in the dealings of Hartman with Hillegass, and they were done or omitted in bad faith, the verdict must be for the defendant. But the subject was fully covered in the general charge, and it is of no consequence, therefore, that the exact instructions asked for were not given—if, indeed, they could have been without error—the court having the right to choose its own way of disposing of the matter, provided that it did so correctly. "If the directors had knowledge," as it is there said, "of the transactions of Hartman, and they were of the same character as those which occurred after the bond went into effect on which they are claiming, and they knew them to be dishonest, they had no right to apply to the indemnity company, and, if they did apply and falsely stated the condition of affairs, they would have no right to recover. But it will be your duty to say," referring the question to the jury, "whether or not Hartman was acting dishonestly before the bond went into effect, and, if he was, whether the directors knew it; and if they did not know it, and the transaction was straightened out and securities taken for it—although they afterwards found them worthless—and the directors did not see enough of it or understand it sufficiently to regard it as dishonest, they could not be charged with having deceived the defendant company, and the bond would be good for any loss subsequently sustained during its life by reason of Hartman's dishonesty." This was an accurate presentation of the law applicable to the subject, to which no exception was or could be taken; in addition to which there was an affirmance of the defendant's seventeenth point to the effect that, if

the jury believed from the evidence that the officers and directors of the plaintiff company had knowledge before the date of the bond of acts and conduct on the part of the cashier which they considered a failure by him to discharge his duty as an employé in good faith and with honesty, the verdict should be for the defendant. Assuming, as we must, that the jury was guided by these instructions, it does not matter that points covering the same ground, however unexceptionable, were not referred to. Nor was there any error in qualifying the answers of the court to the fourteenth and fifteenth points, so as to confine them, so far as concerned the transactions referred to, to that which the directors considered to be dishonest, it being essential, as we have seen, that knowledge of the dishonesty of the cashier should be brought home to them; and an affirmance without this qualification would not have been justified. Much less could the court affirm the fourth, fifth, and sixth points, that the defendant was entitled to a verdict from the mere knowledge of the president, before the certificates were given or the bond executed, of acts of omission or commission on the part of Hartman which the jury thought were done or omitted in bad faith, regardless of the consideration that there may have been nothing at the time which so characterized them or disclosed that there was any such motive back of them.

It is said, however, that it is warranted in the bond that "each em-employé named in the schedule has while in the service of the employer discharged his * * * duties in good faith (mere negligence or error of judgment not being considered) and with honesty so far as the employer has knowledge"; and that, this not being true as to Hartman, there was a breach of warranty, by which, by its terms, the bond was avoided. Where a fact is warranted to be true, it is made material, and it does not matter, therefore, ordinarily, whether or not the party had knowledge. Its truth is affirmed, and, if it turn out to be otherwise, the contract based upon it is invalid, at least where so stipulated; and this would be the fate of the bond in suit if that was all there was to it. But it will be observed that the warranty here is not absolute, but qualified, "so far as the employer has knowledge"; and by a subsequent section:

"(20) In case the employer be a corporation, the knowledge of its board of directors or trustees, or of any executive officer, such as a president, vice-president, cashier, or assistant cashier of a bank, and corresponding officers of a savings bank or trust company, who shall receive a salary from the corporation and be active in its affairs shall be deemed to be the knowledge of the employer."

The knowledge, therefore, which would avoid, in a case such as the one in hand, must be that of the board of directors, as a board, and not individual members of it; or, if the knowledge of an executive officer, such as president, is relied on, he must receive a salary and be active in the corporate affairs. It may be that the latter qualification, from the connection, would more correctly apply to the officers of savings banks and trust companies only, and is not to be extended in other corporations to such general executive officers as a president. But if the matter is in doubt, it is to be resolved against the defendant, the bond in form being of its own making, however it may have orig-

inated. Upon this basis the knowledge of the president, whatever it was, is excluded in the present instance, there being nothing to show that he was active in the affairs of the bank within the meaning of the bond, and it not being pretended that he received a salary. This is not very material, the directors knowing pretty much all that was known to the president; but knowledge of president or directors having in any event to be shown, the same thing is to be said of it as was said with regard to the alleged misrepresentations. There was evidence from which knowledge might possibly have been found, but it was by no means so conclusive that a verdict could have been directed. The same argument is made here, as there, as to the allowance and concealment of overdrafts by Hartman, and the acceptance of bonds which proved worthless. It could not be asserted with any regard to the facts, as it is said, that he had performed his duties with honesty and in good faith to the knowledge of the board, in the face of the censure which they administered, and the admission now made that they ought to have discharged him. But the views with regard to this have been expressed above, and do not need to be enlarged upon. The cashier was not known to be dishonest, however much it may be that he ought to have been. Nor does censure necessarily imply bad faith, comporting equally as it does with neglect or incompetence. Indeed, as already intimated, the continuance of Hartman in his position goes to prove that, notwithstanding what had occurred, the directors still had confidence in him. And in response to the argument that they ought to have known of his dishonesty, which they had merely to look into the books to discover, it may be pointed out that he had so manipulated his accounts that even the bank examiner was deceived, and it could hardly be expected that the directors would be any better able to unravel them. It is to be remembered always that the question is not whether the acts referred to were in fact dishonest, as to which indeed there can be no controversy, notwithstanding that the defendant, as already stated, to avoid responsibility, endeavored to persuade the jury otherwise; but whether the directors knew, or ought to have known, that this was their character, as to which it is sufficient to say that this, as it had to be, has been disposed of by the jury.

But it is further said that it was expressly covenanted by the bank that if, at any time during the term for which the bond was given or any continuance thereof, there should come to its knowledge the fact that any employé for whom the indemnity company was bound was dishonest or had done anything in bad faith, and not through mere negligence or error of judgment, the bank would promptly notify the company of the fact, the failure to do which should relieve it from liability for loss thereafter arising. And it having come to the knowledge of the directors, as early as April 20, or possibly April 23, 1907, that Hartman was allowing Hillegass to overdraw his accounts in a way that is now charged to have been dishonest, and that he had also taken from Hillegass the $5,500 worth of bonds which proved worthless, recovery of which is sought upon the same basis, nothing in the way of overdrafts after that is collectible, the officers of the bank having failed to notify the indemnity company of these facts as they covenanted, until

demand was made upon the bond, on May 21, 1907, some 28 days afterward. It may be conceded that this was too late to meet the requirement of promptness if the case turned on that. National Surety Company v. Long, 125 Fed. 887, 60 C. C. A. 623; Ætna Indemnity Company v. Crowe Coal Company, 154 Fed. 545, 83 C. C. A. 431. But it is clear that it does not. The position of the defendant with respect to this, is much the same as with regard to that which has been already disposed of, of which it is merely a variation; that is to say, the acts of the cashier having come to the knowledge of the directors, regardless of whether they appreciated their dishonest character, the bank is bound by it. The same fallacy appears in this as in the rest of the argument. The contention is that, knowing the facts, the directors were bound to recognize the dishonesty involved in them, and cannot be heard to say that they did not. But this has been fully answered. They could not, of course, close their eyes to palpable bad faith, and maintain that they did not know when everything was so plain that they were bound to. But that is not this case. The conduct of Hartman was not so manifestly wanting in honesty that this could be said of it. No doubt it was bad banking, and ought to have been so seen, as it was not. But his acts, while derelict, were possibly referable to incompetency or bad judgment, which to that extent would extenuate them. The test being how they appeared at the time, they were not so clearly and positively dishonest that the failure of the directors to realize this and notify the surety was a breach of the covenant which relieved it from loss afterwards. Nor are the instructions on this branch of the case open to the criticism made of them. The distinction attempted to be drawn between dishonesty and bad faith, even if substantial, was not made at the trial, and cannot therefore be insisted on. Neither was any exception taken to that part of the charge—or at least no sufficient one—where it is claimed that this distinction was disregarded, and the dishonesty of which the directors were required to notify the indemnity company improperly limited to that which was known to involve the bank in loss. It may be that the exception "to the instructions as to the $6,350.40 accruing between April 20, 1907, and May 1, 1907," was intended to reach this, but it was altogether too indefinite to do so. As has been many times ruled, the ground of an exception must be stated at the time, in order that the court shall have its attention directed to the error alleged to have been committed and correct it. Merchants' Insurance Company v. Buckner, 110 Fed. 345, 49 C. C. A. 80. And here there is nothing but the broad suggestion that the defendant was not satisfied with the instructions complained of. Assuming that the court may have understood the part of the charge intended to be covered there is no intimation of the legal objection to it, without which it was not sufficient. The instructions given having thus in effect been acquiesced in, and no point having been put to the court expressing the defendant's conception of the law applicable to the covenant to notify, if any error was committed—which we do not concede—the defendant is not in a position to take advantage of it.

Finding, therefore nothing in the record, which requires correction, the judgment is affirmed.

RICHMOND COAL CO. v. COMMERCIAL UNION ASSUR. CO., LIMITED, OF LONDON, ENGLAND.

(Circuit Court of Appeals, Ninth Circuit. May 10, 1909.)

No. 1,622.

INSURANCE (§ 669*)—FIRES—PROXIMATE CAUSE—ACTION—INSTRUCTIONS.

A fire policy exempted against loss caused directly or indirectly by earthquake, or when the property is endangered by fire in neighboring premises, or unless fire ensues, and in that event for the damage by fire only or by explosion of any kind. Plaintiff's property was destroyed by fire following the San Francisco earthquake, and the court charged that if the earthquake directly or indirectly caused the fire in one of several specified places in the city, and any one or more of such fires so caused spread by flame, spark, or heat and burned uninterruptedly from building to building or from block to block until any one or more of them reached and destroyed plaintiff's property, then the jury should find for defendant, their determination being limited to the origin of the fires by which plaintiff's property was destroyed, and if the fires by which it was destroyed, no matter at what point or from where they started, were caused by the earthquake, plaintiff could not recover. The court also charged that if the fire originating on premises named ensued on an explosion, and such fire destroyed plaintiff's property, then plaintiff was entitled to recover, unless plaintiff's property was destroyed directly or indirectly by the earthquake; but if the earthquake was the proximate and efficient cause of the fire, defendant would not be liable, though the means by which the earthquake caused the fire was an explosion. *Held* erroneous as eliminating the question whether the fires which were started by the earthquake extended "at once" to the insured property, and whether there were new and intervening causes between fires and the burning of the property, such as explosion, back-fire, dynamiting, and the course or force of the wind.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 669.*]

Gilbert, Circuit Judge, dissenting.

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

For opinion below, see 159 Fed. 985.

E. B. Young and L. A. Redman, for plaintiff in error.

T. C. Van Ness, for defendant in error.

Alfred Sutro, amicus curiæ.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. This action was brought by the plaintiff in error against the defendant in error upon a policy of fire insurance issued by the defendant insuring the plaintiff against all direct loss or damage by fire on certain coal stored on the premises situated at the northwest corner of Howard and Spear streets, in the city of San Francisco, the policy, however, containing the provision that the insurance company—

"shall not be liable for loss caused directly or indirectly by invasion, earthquake, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire, or when the property is endangered by fire in neighboring prem-

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

ises; or (unless fire ensues, and, in that event, for the damage by fire only,) by explosion of any kind, or lightning, but liability for direct damage by lightning may be assumed by specific agreement hereon."

The trial resulted in a verdict for the insurance company.

No question is made upon the evidence, the case being brought here upon objections of the plaintiff to the instructions given the jury, which are, in part, as follows:

"The defendant has admitted that the plaintiff's loss resulted directly or immediately from fire, the peril insured against; but it contends that the proximate or efficient cause of the loss was earthquake, notwithstanding the insured property was burned. Upon this issue I instruct you that if you find from the evidence that the loss was proximately, either directly or indirectly, caused by earthquake, your verdict, notwithstanding the insured property was destroyed by fire, should be in favor of the defendant; but if, upon the other hand, you find from the evidence that fire and not earthquake was the proximate or efficient, as well as the direct, cause of the loss, your verdict should be for the plaintiff. By proximate cause is meant a cause which naturally, by continuous sequence, unbroken by a new cause, produces a result; the proximate cause of an effect is not necessarily the cause which is nearest to—that is, immediately or directly produces—the effect; but it is the efficient dominant factor in the production or bringing about of the effect. The nearest or immediate cause of an effect may be merely an instrument of the dominant or efficient cause. * * * The law does not inquire into the cause of a proximate cause. When the proximate cause of an effect has been ascertained, the law ceases to make further inquiry, and ascribes the result exclusively to such cause. While the proximate cause of an effect frequently is, and generally may be, the nearest cause, yet mere distance in time or space is not the exclusive factor in the determination of the question whether or not a given cause is proximate or remote. Other elements are involved, any one of which may be of such a character as to subordinate the element of distance. The proximate cause of an effect is the cause to which the effect is attributed by the rational judgment of mankind. Your inquiry, therefore, in this case should be whether or not the earthquake of April 18, 1906, was the predominating and operating cause of the fire which burned the property of the Richmond Coal Company. The question is, not what cause was nearest in time or place, but what was the cause which set the other causes, if any there be, in operation? The causes, if any there be, which were merely incidents or instruments of a superior or controlling agency, are not the responsible ones, though they may be nearer in time and place, and, if you believe from all the evidence in this case that the earthquake caused the fire which spread to and burned the property of the plaintiff, it will be your duty to render a verdict in favor of the defendant insurance company and against the plaintiff coal company, no matter how many buildings or blocks such fire may have burned through or consumed before it reached the plaintiff's property. * * * If you find and believe from the evidence in this case that the earthquake of April 18, 1906, caused, directly or indirectly, in the city and county of San Francisco, a fire in the vicinity of Fourth and Natoma streets; or a fire in the vicinity of Third and Minna streets; or a fire in the vicinity of Third and Howard streets; or a fire in the vicinity of First and Mission streets; or a fire in the vicinity of Market and Fremont streets, in what has been testified to as Mack & Company's drug store; or a fire on Fremont street, between Howard and Mission streets, in what was known as the Martel Power Company's plant; or a fire at No. 117 Steuart street, in the place known as 'Alice's'; or a fire at No. 48 Steuart street, between Market and Mission streets, in what was known as 'Brown's Store'; and that those fires, or any one or more of them so caused, spread by flame, spark, or heat, and burned uninterruptedly from building to building, or block to block, until they, or any one or more of them, reached and destroyed plaintiff's property located and situated on the northwest corner of Howard and Spear streets—then I charge you that it is your duty, and you must be governed by what the evidence shows, to return a verdict in favor of the

defendant insurance company and against the plaintiff coal company. * * * The single thing for your determination in this case, without regard to either of the parties, is the origin of the fires by which plaintiff's property was destroyed. If the evidence has established that the fires by which plaintiff's property was destroyed, no matter at what point, or from where they started, were caused by the earthquake of April 18, 1906, you must, without hesitation, render your verdict in favor of the defendant insurance company."

The question in the case being whether the earthquake was the proximate cause of the loss sued for, is it true, as matter of law, that, if the earthquake started the great fire which followed it, it necessarily constituted the proximate cause of the loss in the burning of every building or other thing to which such fires spread, without regard to the time elapsing between such starting of the original fires and the time of the burning of the particular building or thing in question, or its distance from the places where such starting of the fires occurred? It is a matter of common knowledge that the major portion of a great city cannot be destroyed, even by fire, in a single day, and that, in the nature of things, in an effort to stop such a great conflagration as that which destroyed almost all of the business section and much of the residence portion of San Francisco, there will be intervening events, such as explosions, back-firing, and dynamiting, and that the course of the flames may be changed by windstorms and other natural causes. The instructions complained of take no note of any of those things.

The case of Insurance Company v. Tweed, 7 Wall. 44, 19 L. Ed. 65, was based upon a policy of insurance by which certain cotton in a warehouse was insured against fire, the policy containing an exception against fire which might happen "by means of any invasion, insurrection, riot or civil commotion, or any military or usurped power, explosion, earthquake, or hurricane." In that case the Supreme Court said:

"The only question to be decided in the case is, whether the fire which destroyed plaintiff's cotton happened or took place by means of the explosion; for, if it did, the defendant is not liable by the express terms of the contract. That the explosion was in some sense the cause of the fire is not denied, but it is claimed that its relation was too remote to bring the case within the exception of the policy. And we have had cited to us a general review of the doctrine of proximate and remote causes as it has arisen and been decided in the courts in a great variety of cases. It would be an unprofitable labor to enter into an examination of these cases. If we could deduce from them the best possible expression of the rule, it would remain after all to decide each case largely upon the special facts belonging to it, and often upon the very nicest discriminations. One of the most valuable of the criteria furnished us by these authorities is to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened of itself sufficient to stand as the cause of the misfortune, the other must be considered as too remote. In the present case we think there is no such new cause. The explosion undoubtedly produced or set in operation the fire which burned the plaintiff's cotton. The fact that it was carried to the cotton by first burning another building supplies no new force or power which caused the burning. Nor can the accidental circumstance that the wind was blowing in a direction to favor the progress of the fire towards the warehouse be considered a new cause. That may have been the usual course of the breeze in that neighborhood. Its force may have been trifling. Its influence in producing the fire in the Alabama warehouse was too slight to be substituted for the explosion as the cause of the fire."

The explosion in that case, as stated by the same court in the subsequent case of Scheffer v. Railroad Company, 105 U. S. 249, 251, 26

L. Ed. 1070, "took place in the Marshall warehouse, which threw down the walls of the Alabama warehouse—the one insured, situated across the street from the Marshall warehouse—and by this means, and by the sparks from the Eagle Mill, also fired by the explosion, facilitated by the direction of the wind, the Alabama warehouse was burned." Yet the Supreme Court held, in Scheffer v. Railroad Company, that the Tweed Case "went to the verge of the sound doctrine in holding the explosion to be the proximate cause of the loss of the Alabama warehouse." And it did so, the court said, because the fire extended at once from the Marshall warehouse, where the explosion occurred, and because no new or intervening cause appeared.

In the case of Milwaukee & St. Paul Railway Company v. Kellogg, 94 U. S. 469, 24 L. Ed. 256, the sparks from a steam ferryboat had, through the negligence of its owner, the defendant, set fire to an elevator, and the sparks from the elevator had set fire to plaintiff's sawmill and lumber yard, which were from three to four hundred feet from the elevator. The court was requested to charge the jury that the injury sustained by the plaintiff was too remote from the negligence to afford a ground for a recovery. Instead of this, the court submitted to the jury to find—

"whether the burning of the mill and lumber was the result naturally and reasonably to be expected from the burning of the elevator; whether it was a result which, under the circumstances, would naturally follow from the burning of the elevator; and whether it was the result of the continued effect of the sparks from the steamboat, without the aid of other causes not reasonably to be expected."

The Supreme Court affirmed that ruling, and, in commenting on the difficulty of ascertaining in each case the line between the proximate and the remote causes of a wrong for which a remedy is sought, said:

"It is admitted that the rule is difficult of application. But it is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

In the case of Insurance Co. v. Boon, 95 U. S. 117, 24 L. Ed. 395, the action was to recover upon an insurance policy upon goods, wares, and merchandise destroyed by fire in October, 1864, in a store at the city of Glasgow, Mo. The policy contained the following exceptions:

"It is hereby declared that the company shall not be liable to make good any loss or damage by fire which may happen or take place by means of any invasion, insurrection, riot or civil commotion, or of any military or usurped power."

The policy had reference to conditions prevailing in Missouri during the Civil War. The city of Glasgow was attacked on the 15th of October, 1864, by an armed force of Confederates, under military organization, who surrounded and attacked the city. It was defended by the Union forces, but when it became apparent that the city could not be successfully defended, in order to prevent the military stores deposited in the city hall from falling into the possession of the Confederate forces, the city hall was set on fire, and it, with its contents,

was destroyed. Without other interference, agency, or instrumentality, the fire spread to the building next adjacent to the city hall, and from building to building through two other intermediate buildings to the store containing the goods insured, and destroyed them. During the time and until the fire had consumed such goods, the battle between the contending forces continued, and no surrender had taken place, nor had any of the Confederate forces entered the city. The court, referring to the law applicable to such a case, said:

"The conclusion is inevitable that the fire which caused the destruction of plaintiff's property happened or took place, not merely in consequence of, but by means of, the rebel invasion and military or usurped power. The fire occurred while the attack was in progress, and when it was about being successful. The attack, as a cause, never ceased to operate until the loss was complete. It was the causa causans which set in operation every agency that contributed to the destruction."

And, in referring to the case of Milwaukee Railway Co. v. Kellogg, supra, the court said:

"The inquiry must always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury."

The court held that, by reason of the events being so linked together as to form one continuous whole, the fire was excepted from the risks undertaken by the insurers.

In the case of The G. R. Booth, 171 U. S. 450, 19 Sup. Ct. 9, 43 L. Ed. 234, these facts appeared: The steamship G. R. Booth was discharging her cargo at a dock in New York; part of it consisted of a number of cases of detonators. While she was being unladen, one of the cases exploded, making a large hole in the side of the ship, in the No. 4 hold, in consequence of which sea water rapidly entered the No. 4 hold and passed through into No. 3 hold, where there was a cargo of sugar belonging to the libelant, damaging the sugar. The bill of lading contained a proviso that:

"The ship or carrier shall not be liable for loss or damage occasioned by the perils of the sea or other waters * * * by collision, stranding or other accidents of navigation, of whatsoever kind."

In the District Court the libel of the owner of the sugar was dismissed. The Circuit Court of Appeals certified the facts to the Supreme Court, and asked for instructions upon the following question:

"Whether the damage to libelant's sugar caused by the sea water which entered the ship through the hole made in her side by the explosion, without her fault, is a 'loss or damage occasioned by the perils of the sea or other waters,' or by an 'accident of navigation of whatsoever kind,' within the above-mentioned exceptions in the bill of lading."

The Supreme Court answered the question in the negative, saying in the course of its opinion:

"In the case at bar, the explosion of the case of detonators, besides doing other damage, burst open the side of the ship below the water line, and the sea water rapidly flowed in through the opening made by the explosion, and injured the plaintiff's sugar. The explosion, in consequence of which, and through the hole made by which, the water immediately entered the ship, must be considered as the predominant, the efficient, the proximate, the responsible cause of the damage to the sugar, according to each of the tests

laid down in the judgments of this court, above referred to. The damage to the sugar was an effect which proceeded inevitably, and of absolute necessity, from the explosion, and must therefore be ascribed to that cause. The explosion concurred, as the efficient agent, with the water, at the instant when the water entered the ship. The inflow of the water, seeking a level by the mere force of gravitation, was not a new and independent cause, but was a necessary and instantaneous result and effect of the bursting open of the ship's side by the explosion. There being two concurrent causes of the damage —the explosion of the detonators, and the inflow of the water—without any appreciable interval of time, or any possibility of distinguishing the amount of damage done by each, the explosion, as the cause which set the water in motion, and gave it its efficiency for harm at the time of the disaster, must be regarded as the predominant cause. It was the primary and efficient cause, the one that necessarily set the force of the water in operation; it was the superior or controlling agency, of which the water was the incident or instrument. The inflow of the sea water was not an intermediate cause, disconnected from the primary cause, and self-operating; it was not a new and independent cause of damage; but, on the contrary, it was an incident, a necessary incident and consequence, of the explosion; and it was one of a continuous chain of events brought into being by the explosion—events so linked together as to form one continuous whole."

In the light of these decisions of the Supreme Court, we think the court below went much too far in instructing the jury, as it specifically did, that if they should find and believe from the evidence—

"that the earthquake of April 18, 1906, caused, directly or indirectly, in the city and county of San Francisco, a fire in the vicinity of Fourth and Natoma streets; or a fire in the vicinity of Third and Minna streets; or a fire in the vicinity of Third and Howard streets; or a fire in the vicinity of First and Mission streets; or a fire in the vicinity of Market and Fremont streets, in what has been testified to as Mack & Company's drug store; or a fire on Fremont street, between Howard and Mission streets, in what was known as the Martel Power Company's plant; or a fire at No. 117 Steuart street, in the place known as 'Alice's'; or a fire at No. 48 Steuart street, between Market and Mission streets, in what was known as 'Brown's Store'; and that those fires, or any one or more of them so caused, spread by flame, spark, or heat, and burned uninterruptedly from building to building, or block to block, until they, or any one or more of them, reached and destroyed plaintiff's property located and situated on the northwest corner of Howard and Spear streets—then I charge you that it is your duty, and you must be governed by what the evidence shows, to return a verdict in favor of the defendant insurance company and against the plaintiff coal company. * * * The single thing for your determination in this case, without regard to either of the parties, is the origin of the fires by which plaintiff's property was destroyed. If the evidence has established that the fires by which plaintiff's property was destroyed, no matter at what point, or from where they started, were caused by the earthquake of April 18, 1906, you must, without hesitation, render your verdict in favor of the defendant insurance company."

The contract of insurance here involved has a further important provision. In enumerating excepted losses, it is provided that the insurance company shall not be liable for losses caused by explosion *of any kind,* unless fire ensue, and, in that event, for the damage by fire only. Fire was the peril insured against, but when there was an explosion, the company, wishing to limit its liability to the damage by fire and exclude damage by the explosion, provided for a loss by explosion of any kind, providing a fire ensued, and then for the damage by the fire only. Where it has been ascertained that the proximate cause of a fire has been an explosion, the inquiry must stop there; it cannot go further and inquire as to the proximate cause of the proxi-

mate cause, for, as said by the Supreme Court in Scheffer v. Railroad Co., supra, "such a course of possible or even logical argument would lead back to that 'great first cause least understood' in which the train of all causation ends."

Notwithstanding this clear limitation of the inquiry, the court below instructed the jury as follows:

"On this subject I instruct you that if you find that the fire originating on those premises ensued upon an explosion or explosions of any kind, and you also find that the fire was the one that destroyed the plaintiff's insured property, then your verdict should be for the plaintiff, unless you find that the destruction of such property was directly or indirectly caused by earthquake. If, as I have already explained to you, the earthquake was the proximate, efficient cause of the fire, the defendant will not be liable, even though the means by which the earthquake caused such fire was an explosion."

As a matter of course, the earthquake did not, and could not have, directly set the coal on fire. At most it created conditions from which fires were or may have started, possibly by the crossing of wires, or the upsetting of lamps or stoves, in various places in the city more or less remote from the insured coal. Under the specific instructions referred to, the jury, in determining whether the earthquake was the proximate or remote cause of the fire that injured the subject of the action, could not be controlled by, nor, indeed, give any consideration to, the circumstances whether or not any of the fires that were started, or may have been started, by the earthquake, extended "at once" to the insured property, as in the Tweed Case, or within any period of time which would serve as a reasonable connection between them, nor as to whether there were any new or intervening causes between the fires that were started or may have been started by the earthquake, and that which caused the loss sued for, such as explosion, back-firing, dynamiting, the course or force of the winds, if any such occurred, nor, in short, any of the "attending circumstances" referred to by the Supreme Court in the cases hereinbefore mentioned—all of which, in our opinion, were proper matters for the consideration of the jury in determining whether fire or fires started by the earthquake were the proximate cause of the damage to the insured coal.

For the reasons stated, the judgment is reversed, and the cause remanded to the court below for a new trial.

GILBERT, Circuit Judge (dissenting). In my opinion, the instructions which were given to the jury and to which exceptions were taken present a clear, logical, and correct exposition of the law upon the issues in the case. Each sentence and each proposition contained in it will stand the test of the most critical scrutiny. Indeed, I do not understand that the majority of this court hold otherwise. The error in the instructions which in their opinion requires the reversal of the judgment does not consist in the things that were said, but in the things that were left unsaid. It is held that the instructions were fatally defective for the reason that the court omitted to give consideration to the question whether or not the fires which were started by the earthquake extended "at once" to the insured property, and to the question whether there were new and intervening causes between those

fires and the burning of that property, such as explosion, back-firing, dynamiting, and the course or force of the wind.

Considering, first, the suggestion that consideration should have been given to intervening causes, I inquire what should have been said and why should anything have been said on that subject? We have no evidence that any such causes intervened to disturb the causal relation between the fires which were started and the destruction of the insured property. In the Tweed Case the court said that the mere accidental circumstance that the wind was blowing in a direction to favor the progress of the fire toward the insured warehouse could not be considered a new cause. There is no suggestion anywhere in the record in this case that there was back-firing or dynamiting or that there was a wind. There was no request for an instruction on those subjects, nor was any specific exception taken to the charge for want of such instruction. None of the evidence in the case is before us. In the bill of exceptions it is recited as follows:

"Evidence was then introduced by defendant which was sufficient to justify the verdict in every aspect of the instructions given by the court as herein set forth, and such instructions were in all respects pertinent to the evidence."

When instructions to a jury are challenged in an appellate court, that court is bound to assume, in the absence of evidence to the contrary, that the charge was appropriate to the testimony in the case. This court has so held in accord with the general rule. Yates v. United States, 90 Fed. 57, 32 C. C. A. 507; Southern Pacific Co. v. Arnett, 111 Fed. 849, 50 C. C. A. 17. In Carpenter v. Ewing, 76 Cal. 488, 18 Pac. 432, the Supreme Court of California held that where none of the evidence is brought up in the record, and there is nothing to show its purport or tendency, it will be presumed that it was such as to justify the instructions. The court said:

"The settled rule is that, where the record contains no part of the evidence, the judgment will not be disturbed on account of instructions alleged to be erroneous, unless it appears that such instructions would have been erroneous under every conceivable state of facts."

That doctrine has been reaffirmed in several later decisions of that court. So far, therefore, as our power to deal with these instructions is concerned, the case is precisely the same that it would be if we had before us in a bill of exceptions positive and uncontradicted evidence that there was no explosion and no dynamiting or back-firing between the points where the various fires referred to in the instructions were located and the insured property, and that from the moment when those fires were started until the time when the loss insured against occurred there was no unusual wind and no new intervening cause to affect the uninterrupted continuous progress of the fires. Will it be contended that under such a state of facts the instructions which were given in this case would have been inappropriate?

Again, I inquire why should the court below have taken into consideration the question whether the fires proceeded "at once" toward the insured property? If it is meant that the defendant in error could not avail itself of the exception against liability for loss from fires started by earthquake unless such fires produced immediate destruc-

tion of the insured property, then the plaintiff in error was entitled to a peremptory instruction in its favor, for it is obvious that a fire which proceeded by burning uninterruptedly the intervening blocks in its course could not "at once" burn the insured property. It is true that in the Scheffer Case the court, in referring to the ground of the decision in the Tweed Case, said that explosion had been held to be the proximate cause of the loss because the fire extended "at once" from the warehouse where the explosion occurred, and because there was no new or intervening cause between the explosion and the burning of the insured property, and that, if a new force or power had intervened sufficient to stand of itself as the cause of the misfortune, the other must be considered as too remote. What is there in the present case to show that one or more of the fires which are referred to in the instructions as having been started by earthquake did not proceed at once to burn the intervening property until it reached the insured property, and what evidence is there of the intervention of any new power or force sufficient of itself to stand as the cause of the misfortune? The court below instructed the jury in entire harmony with the doctrine of the Tweed Case as it is explained in the Scheffer Case, and charged them that if they found that the fires were caused by earthquake, "and that such fire or fires thereafter spread to and burned uninterruptedly from building to building, or from block to block, until they reached and destroyed the property insured, that then the insurer was not liable."

In the opinion of the majority of the court attention is directed to a paragraph of the instructions, which is quoted, on the relation of explosion to the question of liability under the policy. The relevancy of that instruction to the assignment of errors which are relied upon here is not apparent, for no exception was taken to it. It is true that error is assigned to the refusal of the court to give a certain instruction requested by the plaintiff in error on the subject of explosion, but in that refusal it would seem that the majority of this court have found no error. In that conclusion, in view of the terms of the policy, I concur.

WILLIAMSON v. MAJORS.

(Circuit Court of Appeals, Fifth Circuit. May 10, 1909.)

No. 1,772.

1. GAMING (§ 49*)—DEALING IN FUTURES—GAMBLING TRANSACTIONS.

Evidence *held* to require a finding that plaintiff's transactions in cotton with defendant were gambling transactions and must have been so understood by both parties.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. § 102; Dec. Dig. § 49.*]

2. GAMING (§ 34*)—GAMBLING IN FUTURES—RECOVERY OF PAYMENTS.

Shannon's Code Tenn. § 3159, declares void all contracts founded in whole or in part on a gambling or wagering consideration, and section 3166 provides that any sale, contract, or agreement for sale of cotton for future delivery, where either of the contracting parties is simply dealing

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

for the margin or on the prospective rise or fall in price of the article or thing sold, or where either has no intention of making actual delivery or receiving the property in specie, shall be deemed gaming. *Held*, that under such section money lost on future contracts may be recovered by the loser, whether the wagering contract refers to prices in a foreign market or the parties acting as agents advance money in aid of wagering contracts on future prices of commodities, knowing them to be such.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. § 72; Dec. Dig. § 34.*]

3. GAMING (§ 2*)—GAMBLING CONTRACTS—VALIDITY—WHAT LAW GOVERNS.
Where a cross-bill was filed to foreclose a deed of trust on real property in Mississippi in a suit pending in that state, and such deed was given to secure a debt contracted by means of wagering transactions in cotton, whether the deed of trust was enforceable must be determined according to the laws of Mississippi.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. § 2; Dec. Dig. § 2.*]

4. GAMING (§ 2*)—GAMBLING CONTRACTS—VALIDITY—WHAT LAW GOVERNS.
Ann. Code Miss. 1892, § 1120, makes it a criminal offense for any person to deal in futures, and section 2117 declares that a contract for the purchase or sale of a commodity of any kind to be delivered at a future date, the parties not intending that the commodity shall be actually delivered in kind, shall not be enforced, nor shall any such contract be a valid consideration for any promise or undertaking. *Held*, that under such section a deed of trust on land in Mississippi, which was void in Tennessee, where it was executed, because given to secure losses on gambling transactions in cotton, was also void in Mississippi.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. § 2; Dec. Dig. § 2.*]

5. GAMING (§ 41*)—SECURITIES FOR LOSSES—CANCELLATION.
Under Ann. Code Miss. 1892, § 2116, providing that money lost on wagers may be recovered by suit, equity will grant relief to a complainant by the cancellation of a deed of trust, the consideration for which was losses in gambling transactions in cotton.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. § 84; Dec. Dig. § 41.*]

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

McLaurin, Armstead & Brien and Tim E. Cooper, for appellant.

Saunders, Dufour & Dufour, Smith, Hirsch & Landau, Charles Scott, and Woods & Scott, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge. The original bill in this cause was exhibited by the appellant, H. C. Williamson, in the chancery court of Bolivar county, Miss., in January, 1905, and the cause was removed by the defendant to the Circuit Court of the United States, in which court the defendant answered the bill and also filed a cross-bill for a foreclosure of the deed of trust. On final hearing, the court dismissed the original bill, and granted the relief prayed for by the cross-bill.

The complainant in his original bill averred that the defendant, Bettis Majors, was in the city of Memphis engaged in keeping a house for dealing in futures, as the professional representative of Hayward, Vick & Co., and afterwards of T. J. Majors & Co.; that the complainant

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

began to speculate in the purchase of futures in cotton with the said Hayward, Vick & Co., and afterwards with the firm of T. J. Majors & Co.; that it was not the intention of any of the parties that any of the commodities purchased should be actually delivered in kind and the price paid; that it was the intention of the parties to speculate only on the rise and fall of the market. The bill states that after the complainant had lost $5,700 in cash, which he had put up as margins, complainant notified Bettis Majors that he would not furnish any more money or deal further in such future contracts; that the defendant Majors insisted that complainant should continue to speculate by the purchase and sale of futures, and exhibited to complainant telegrams from his father instructing him to advise his customers to buy cotton, as the price of same would advance to 20 cents per pound; that Bettis Majors agreed, if the plaintiff would execute a mortgage on his Bolivar county plantation, that he would carry his future contracts until the United States Bureau Report should come out; that thereupon, upon the 6th day of February, 1904, complainant executed a deed of trust whereby he conveyed to A. T. Ball, trustee, the plantation in Bolivar county, Miss., to secure a promissory note for $30,295, dated that day, due on January 1, 1905, payable to the said Bettis Majors at his office in Memphis, Tenn. The consideration for the note was the margins on such future contracts as the complainant then had or might thereafter purchase; that as soon as Majors got this security, in violation of his promises to carry such future contracts until the Bureau Report came out, without consulting the complainant, he closed out his future contracts, involving complainant in a great loss; that, after such violation of his agreement by the said Bettis Majors, complainant learned that T. J. Majors and Bettis Majors, by reason of the telegrams and representations as to what the future price of cotton would be, were inducing the public to buy through them as brokers, and were, as a matter of fact, secretly unloading their own purchases upon the public and were "bucketing" the sales of their customers. Complainant also averred that after Majors got the note and deed of trust, knowing that the complainant was engaged in the business which required him to meet and deal with a number of business men in transactions of importance, he annoyed, harassed, and vexed complainant in reference to said margins claimed to have been lost by him, and has endeavored to embarrass complainant in the transaction of his business, and to injure his credit and financial standing; that he had sent letters to complainant with repeated demands that he should pay said losses so fraudulently claimed against complainant; that he endeavored to sell the note, and was claiming that the same was a correct and valid transaction; that, in conversation in the presence of others, Majors admitted that said obligations were not legal obligations and were not enforceable. The bill further avers that, under the laws both of Tennessee and Mississippi, said note and deed of trust were illegal, void, and not enforceable, and the prayer of the bill was that the same might be delivered up and canceled.

The defendant Bettis Majors by his answer denies that the firm of Hayward, Vick & Co. were keepers of a bucket shop, but conducting a

legitimate business in the city of Memphis in the purchase and sale of cotton, grain, provisions, etc. He denies that the contracts referred to in the bill were made without the intent of the parties to the contract that the commodity bought and sold should be delivered in kind and the price paid. The defendant denies all invitations and inducements on his part to the complainant to engage in the purchase or sale of cotton futures, and denies that any representations were made as to what the future price of cotton would be. He denies that he made any promises to carry for complainant said contracts until the Bureau Report should come out. He denies that he ever violated any agreement with the complainant. He denies all fraudulent dealings charged in the bill. He denies that he ever presented any fraudulent claim to the complainant. He denies that under the laws of the states of Tennessee and of Mississippi the said note and deed of trust are void or unenforceable. He denies that the same were given in any gambling transaction. The answer then proceeds to state that Hayward, Vick & Co., and T. J. Majors & Co., successors to the first firm, were members of the New Orleans and New York Exchanges. That all contracts for the purchase of cotton were made upon one or the other of said exchanges, same having been bought in New York by J. H. Parker and Co., or in New Orleans by Hayward, Vick & Co., who were correspondents of T. J. Majors & Co. Defendant avers that no orders were given to buy or sell cotton in Memphis, but that all orders were given to be executed in New York or New Orleans. That all said contracts contemplated the actual delivery of the property bought or sold. That on February 6th there was a difference in price of cotton which the complainant bought, by reason of which the complainant was indebted $30,295, and being unwilling to sell his cotton sought to borrow the money from capitalists in Memphis, and, being unable to do so, requested the defendant to pay to Hayward, Vick & Co. and J. H. Parker & Co. the said sum of $30,295, and, to secure complainant, executed the deed of trust and note described in the bill. That in consideration thereof the defendant agreed to advance complainant the further sum of $10,000. That complainant, being unwilling to put up further margins, Hayward, Vick & Co., under the rules of the respective exchanges, sold the cotton, entailing a loss of $40,991.75. That for said amount T. J. Majors & Co. were liable to Hayward, Vick & Co. and J. H. Parker & Co., and that the defendant, at the request of the complainant, advanced his own money to settle such claim; thereupon complainant executed his note for $40,991.75, and delivered the same to the defendant. That said note was actually executed after the defendant had paid to Hayward, Vick & Co. and J. H. Parker & Co. the amount thereof, and that complainant voluntarily dated the note back as of the 6th day of February, 1904, and voluntarily inserted in said note the stipulation that it was secured by the said deed of trust which had been executed on the 6th day of February, 1904. The answer sets up the statutes of Tennessee, and claims that the same are void, as violative of certain provisions of the federal Constitution.

The defendants also filed a cross-bill by which, in effect, they aver that complainant owed Majors $30,295 on the 6th day of February,

1904, and on that day executed a note for said sum, and deed of trust on the property in Mississippi securing the same. That afterwards the complainant became further indebted to the defendant Majors in the sum of $10,696.75, making in the aggregate $40,991.75. That Williamson executed a note for said sum, but refused to return the note for $30,295, or to execute a second deed of trust to secure the note for $40,991.75, but inserted in the note a stipulation that it was secured by said deed of trust.

By the cross-bill the cross-complainant avers the validity of said deed of trust, and that it secured not only the $30,295 note, but also the $40,991.75, and cross-complainants pray the foreclosure of the said deed of trust for the payment of said note.

As to salient facts, the record shows:

In December, 1903, and in the early months of 1904, Bettis Majors, the appellee, managed and conducted in the city of Memphis a broker's establishment for the buying and selling of cotton futures in the New Orleans and New York Cotton Exchanges. In December, 1903, the establishment was operated for Hayward, Vick & Co., but afterwards in January it was operated for T. J. Majors & Co. as the successors of Hayward, Vick & Co. T. J. Majors, as the father of Bettis Majors, was interested in the firm of Hayward, Vick & Co., and was the senior member of the firm of T. J. Majors & Co., composed of T. J. Majors and the appellee, Bettis Majors.

The appellant, H. C. Williamson, was a real estate agent in the city of Memphis, and was not engaged in buying or selling cotton, but in December of 1903 commenced to speculate in cotton futures, dealing with the establishment operated by the appellee, and thus ostensibly through the firms of Hayward, Vick & Co. and T. J. Majors & Co. At first his speculations were successful, but after, his losses were large. He testifies that, after he had paid $5,700 in, he desired to retire with the loss he had sustained, but that the appellee advised and insisted that he should continue in the speculations and put up cash for margins to protect the future contracts he had made. He further shows that negotiations resulted in Williamson's agreeing to give a note to protect his future contracts, and a deed of trust on his plantation in Mississippi to secure the same, and accordingly on the 6th of February, 1904, he executed a deed of trust on his plantation situated in Bolivar county, Miss., to secure a promissory note of $30,295, due and payable January 1, 1905, to Bettis Majors, at his office in Memphis, Tenn., the consideration alleged being money loaned, but the real consideration was indebtedness on the future contracts for the purchase of cotton then claimed to be standing in Williamson's name.

The deed of trust contains the following stipulation:

"The real subject-matter of this contract, namely, security, being wholly located in the state of Mississippi, this deed of trust and the notes thereby secured shall, without regard to the place of contract or payment, be construed and enforced in accordance with the laws of the state of Mississippi, where the money loaned is to be used, and with reference to the laws of which state the parties to this instrument are now contracting, and this instrument and all notes secured hereby are to be construed as if it and the notes which it secures had been signed in the state of Mississippi, and said notes had been made payable there, it being the intention of all the parties that such construction should be had."

Bettis Majors testifies as follows:

"In the early part of December, 1903, Mr. Williamson gave me some orders to buy or purchase some cotton on the New Orleans and New York Cotton Exchanges. Of course, the order was given to me as manager for Hayward, Vick & Co., or to one of my employés, and we did buy the cotton for him on the exchanges, and he made considerable money on his purchases, and then after the firm changed to T. J. Majors & Co. he continued to purchase cotton, and he owed the firm of T. J. Majors Company about twelve thousand dollars, I think it was on a Friday—I don't remember the date, but I called him for it, and he said to me, 'I cannot put up that money this afternoon, but I will have it by Monday, about seven thousand dollars, and I will bring that around.' I said to him, 'Mr. Williamson, I cannot carry your cotton as a firm; I cannot use the firm's money for that purpose, but I will, individually, carry your cotton for you until Monday; then you bring the money in.' He said he had other collateral which he thought he could take to the bank or some one, I don't know who, and get more money on it on Monday. He did deposit some money with me—I think it was Monday—I don't remember the exact amount; I think it will be shown by those receipts you have on exhibit there. I carried the cotton. The market continued to decline, and I carried his loss till he owed me thirty thousand two hundred and ninety-five dollars. He offered to give me a trust deed for this money on his plantation down in Mississippi. * * *

"Well, Mr. Williamson got from Mr. Caldwell one of his trust deeds or mortgages, and he came down to my office and copied from the one that Mr. Caldwell had originally made, the one which we have here on exhibit. He gave the note for thirty thousand two hundred and ninety-five dollars; drew that himself; and a few days afterwards, I sent it out to his house to get it acknowledged. I wanted it acknowledged before a notary. I sent it out to him, and he acknowledged it at his home. During that conversation with Mr. Caldwell, Mr. Williamson asked me if I would carry his cotton for him, ten thousand dollars more, or I would let him have ten thousand dollars more. I agreed to let him have ten thousand dollars if he needed it. He said that he wanted to carry the cotton until the census report came out. I said, 'Mr. Williamson, I will give you ten thousand dollars more to carry that cotton on, whether it will carry you to the census report or not. I cannot tell, because I don't know what the market is going to do.' Well, I did let him have the ten thousand dollars additional. I think the day before the census report came out the market had declined enough to wipe out this ten thousand dollars and more. Mr. Williamson came into my office and I told him that I could not carry this cotton any further for him, so he said, 'Well, in order to protect yourself, close it out.' I said to Mr. Bomer: 'You close this cotton out.' Mr. Bomer did close the cotton out for Mr. Williamson.

"Q. Was Mr. Williamson present at the time the cotton was closed out? A. He was.

"Q. Was it done according to his transactions? A. It was.

"Q. Now, Mr. Majors, is this the trust deed? A. Yes.

"Q. Given you at the time by H. C. Williamson to which you refer in your testimony? A. Yes, sir.

"Q. In whose handwriting is that trust deed? A. In Mr. Williamson's.

"Q. I will ask you to file that deed of trust as Exhibit "A" to your depositions? A. Yes, sir.

"Q. I see the note, Mr. Majors, is for forty thousand nine hundred and ninety-one dollars and seventy-five cents, instead of for thirty thousand two hundred and ninety-five dollars; will you please state whether or not the note was ever executed for the thirty thousand two hundred and ninety-five dollars, and, if so, what became of that note? A. Yes, there was a note given for thirty thousand two hundred and ninety-five dollars; that note was destroyed by Mr. Williamson when he gave the one for forty thousand nine hundred and ninety-one dollars, covering the full amount of his indebtedness to me.

"Q. That was done, the second note of forty thousand nine hundred and ninety-one dollars and seventy-five cents was made, after you had closed out his trades on the exchange, as per his instructions? A. Yes, sir.

"Q. I think this note which I handed you is dated February 6th, and is for forty thousand nine hundred and ninety-one dollars and seventy-five cents. Will you please state how that happened to be dated as of that date? A. Well, it was dated back on the same date that the thirty thousand two hundred and ninety-five dollar note was given."

The following partial list of purchases and sales of cotton for alleged future delivery, taken seriatim from one of the undisputed exhibits, shows the character and somewhat of the scope of Williamson's dealings with the establishment operated by Bettis Majors for Hayward, Vick & Co. and T. J. Majors & Co.:

Bought.		Sold.	
Dec. 3	100 March	Jan. 1	100 March
Dec. 9	100 March	Jan. 4	100 March
Dec. 23	100 August	Jan. 11	100 August
Dec. 23	100 August	Jan. 11	100 August
Dec. 24	100 August		100 August
Dec. 29	100 August	Jan. 11	100 March
Jan. 2	100 July	Jan. 11	100 July
Jan. 5	100 July	Jan. 11	100 July
Jan. 5	100 May	Jan. 11	100 May
Jan. 6	100 March		100 March
Jan. 14	100 March	Jan. 15	200 March
	100 March		100 May
	100 May	Jan. 18	200 March
Jan. 15	200 March	Jan. 22	200 May
Jan. 16	200 May	Jan. 11	200 May
Jan. 21	200 May	Jan. 22	100 July
	100 July	Jan. 23	300 March
	200 March	Jan. 25	100 May
	100 March	Jan. 25	100 May
Jan. 22	100 May	Jan. 26	200 August
Jan. 22	200 August	Jan. 27	200 March
Jan. 23	100 May	Jan. 25	200 August
Jan. 24	200 August	Jan. 27	100 August
Jan. 26	200 May	Jan. 27	500 March
Jan. 25	300 August	Jan. 30	400 March
Jan. 26	500 March	Jan. 30	100 July
Jan. 25	200 March	Jan. 26	300 August
Jan. 26	200 May	Jan. 27	500 March
Jan. 28	200 March	Jan. 30	100 May
Jan. 29	200 March	Feb. 1	100 May
Jan. 28	100 July		100 May
Jan. 28	100 May		100 May
Feb. 1	100 May		100 May
Jan. 30	100 May	Feb. 3	300 March
	200 May		500 May
Feb. 3	100 March		200 May
			100 May
	200 March	Feb. 12	400 May
	800 May	Feb. 12	400 May
Jan. 30	200 May	Feb. 12	100 May
	200 May	Feb. 12	100 May
Feb. 1	200 May	Feb. 12	200 May
	200 May	Feb. 12	100 May
	300 May	Feb. 12	100 May
Feb. 2	100 March	Feb. 12	100 May
	200 March	Feb. 12	200 March
Feb. 3	300 May	Feb. 12	100 March
	200 May	Feb. 8	100 May
	100 May	Feb. 9	100 August
	300 August	Feb. 9	200 August

Statements were made from time to time and, as they illustrate the business carried on, samples are given, to wit:

Statement.

Purchase and sale of 100 B/C in July, N. O. for account and risk of H. C. Williamson,
City.
C. B. Johnson & Co., Memphis.
(Stationers)

1/5	Bought 100 July N. O.		$ 14 03
1/11	Sold July N. O.		14 64
	Difference 61 points @ $5.00		305 00
E. & O. E.		Telegrams	
	Hayward, Vick & Co.	Brokerage	10 00
	Net profit		295 00

Per B.
Memphis, Tenn., 1/11, 1904.

Memorandum.

Memphis, Tenn., 1/25, 1904.

H. C. Williamson, City.
We have made the following transactions for your account and risk:
Bot. 2 Mch. N. O. curb.....1531
T. J. Majors & Co.
Successors to Hayward, Vick & Co.
Yours truly, Hayward, Vick & Co.
Per.....

All orders for the purchase or sale of any article are received and executed with the distinct understanding that actual delivery is contemplated, and that the party giving the orders so understands and agrees. It is further understood that on all marginal business the right is reserved to close transactions when margins are running out without further notice, and to settle contracts in accordance with rules and customs of exchange where order is executed.

The evidence shows that nearly all of Williamson's purchases and sales were made through and on the Cotton Exchanges of New Orleans and New York, and in accordance with the rules of said exchanges, under which actual delivery is said to be contemplated, and may, by a member of the exchange, be exacted (whether by an outsider is not clear); but, as a matter of fact, under the said rules, delivery is rare, the general practice being to take profits or pay losses as the prices vary. And under the said rules a ringing-out process is provided, which is a sort of clearing house for the day's transactions, wherein and whereby purchases and sales are transferred and eliminated, with the possible, if not probable, result that an outside dealer's contract is with his own broker, and thus the same person be the buyer and seller, as was practically the case when Bettis Majors, as he testifies, closed out Williamson's holdings.

There was much evidence bearing on the question as to whether the Memphis establishment managed by Bettis Majors was or not a bucket shop; and on the allegation that each and every order of Williamson to buy or sell cotton futures was executed on the exchange and strictly according to rule, and as to the impeccability of the rules of the New Orleans Cotton Exchange in the matter of actual delivery of all products sold therein and thereon—as to all of which, and under our view of the other issues, no finding need be given here.

From what has been recited, it is clear that, in his buying and selling cotton futures, Williamson, who was in the real estate business and not in the cotton business, had no intention to actually buy or sell cotton, but was merely speculating on the rise and fall of the cotton market, intending to settle by receiving or paying differences, in fact, gambling in cotton futures, and it seems clear that Bettis Majors knew all about it. Certainly, from a mere inspection of Williamson's orders, he ought to have known it. Under the evidence, to assume his ignorance of Williamson's gambling would be a reflection on his intelligence. Knowing the nature of Williamson's dealings in cotton futures, he facilitated, if not encouraged him, furnished credit and money to carry on the same, and, finally, took the transactions off his hands by "closing out" as to Williamson and "taking them over" to himself.

In Embrey v. Jemison, 131 U. S. 343, 9 Sup. Ct. 778, 33 L. Ed. 172, Mr. Justice Harlan, for the court, says:

"Whether the validity of the original contract for the purchase of future-delivery cotton must depend upon the New York statute or upon the Virginia statute, it is not important to determine; for, if such contract, as alleged, is a wagering contract, it is void under the law of either state. The plea makes a case of money advanced by the plaintiff's firm solely for the purpose of carrying 'cotton futures,' for which he or they contracted, when, according to the averments of the rejected plea, neither party contemplated the purchase or delivery in fact of cotton, and when it was understood that any settlement in respect to such purchases should be exclusively upon the basis of one party paying to the other only the difference between the contract price and the market price of said cotton futures, according to the fluctuations in the market. If this be not a wagering contract, under the guise of a contract of sale, it would be difficult to imagine one that would be of that character. The mere form of the transaction is of little consequence. If it were, the statute against wagers could easily be evaded. The essential inquiry in every case is as to the necessary effect of the contract and the real intention of the parties. * * *

"In Irwin v. Williar, 110 U. S. 499, 508, 510, 4 Sup. Ct. 160, 28 L. Ed. 225, the general subject of wagering contracts was carefully considered, and, in the opinion delivered by Mr. Justice Matthews, we expressed approval of the doctrine as announced by Mr. Benjamin, observing that generally, in this country, all such contracts are held to be illegal and void as against public policy. It was there said: 'It makes no difference that a debt or wager is made to assume the form of a contract. Gambling is none the less such because it is carried on in the form or guise of legitimate trade.' Referring to the decision in Rountree v. Smith, 108 U. S. 269, 2 Sup. Ct. 630, 27 L. Ed. 722, it was further said: 'It is certainly true that a broker might negotiate such a contract without being privy to the illegal intent of the principal parties to it which renders it void, and in such a case, being innocent of any violation of law, and not suing to enforce an unlawful contract, has a meritorious ground for the recovery of compensation for services and advances. But we are also of the opinion that when the broker is privy to the unlawful design of the parties, and brings them together for the very purpose of entering into an illegal agreement, he is particeps criminis, and cannot recover for services rendered or losses incurred by himself on behalf of either in forwarding the transaction.' In the present case, according to the averments in the plea of wager, the plaintiff was the broker who effected the purchases of future-delivery cotton. He was privy to the unlawful design of the parties; represented one of them in all the transactions; and advanced the money necessary to carry, and for the express purpose of carrying, these cotton 'futures' on account of the defendant. His position, therefore, was not that of a person merely advancing money to or for one of the parties to a wager,

without having himself any direct connection with the making or execution of the contract of wager itself. He was, in every sense, particeps criminis."

We find nothing in Bibb v. Allen, 149 U. S. 481, 13 Sup. Ct. 950, 37 L. Ed. 819, or in Board of Trade of the City of Chicago v. Christie Grain & Stock Co., 198 U. S. 236, 25 Sup. Ct. 637, 49 L. Ed. 1031, cited by appellee, nor in any other Supreme Court decision brought to our attention, in conflict with or even modifying Embrey v. Jemison, supra, and that case must influence the decision of the main issues in this case; but in view of the pleadings, and considering that the transactions complained of were in Tennessee, that the present case is now pending in the Circuit Court of the United States in Mississippi, and relief is asked under the laws of the last-named state, it is proper, if not necessary, to further consider the questions involved under Tennessee and Mississippi laws.

"Section 3159, Shannon's Code of Tennessee, declares void all contracts founded in whole or in part on a gambling or wagering consideration; and section 3166 of the same Code provides that:

"Any sale, contract or agreement of sale of bonds, stock, cotton, grain or other produce, property or commodity, article or thing for future delivery, where either of the contracting parties, buyer or seller, is simply dealing for the margin or on the prospective rise or fall in price of the article or thing sold, or where either of the contracting parties have had no intention or purpose of making actual delivery or receiving the property or thing in specie, shall be deemed and it is hereby declared gaming."

These statutes have been construed by the Supreme Court of the state of Tennessee in McGrew v. City Produce Exchange, 85 Tenn. 573, 4 S. W. 38, 4 Am. St. Rep. 771, Dunn v. Bell et al., 85 Tenn. 582, 4 S. W. 41, and Allen v. Dunham, 92 Tenn. 258, 264, 21 S. W. 898.

In these cases, among other things, it was held that money lost on future contracts may be recovered by the loser; that it makes no difference if the wagering contract be made in reference to prices in a foreign market over which the parties have no control, or that parties acting as agents advance money in aid of wagering contracts on future prices of commodities knowing them to be such; that stockbrokers are responsible as principals, and the statute of 1883 which makes future contracts void if either party intends them as wagers is fully recognized.

The parties to the present transaction lived and contracted in Tennessee, and it would seem that under the Tennessee statutes the transactions were clearly gaming transactions, and therefore that the note given by Williamson to Majors, the consideration of which was for losses that Williamson had made speculating in cotton, should be held void.

This present suit is one in the state of Mississippi for the foreclosure of a deed of trust on a plantation in that state to secure the abovementioned note, wherein the parties have stipulated, as hereinbefore recited, that the same should be construed and enforced in accordance with the laws of the state of Mississippi. As to the force and effect of this agreement, see Pritchard v. Norton, 106 U. S. 124, 1 Sup. Ct. 102, 27 L. Ed. 104; Liverpool & Great Western Steam Co. v. Phenix

Ins. Co., 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788; Osborne v. Railroad Co., 147 U. S. 248, 13 Sup. Ct. 299, 37 L. Ed. 155; Pinney v. Nelson, 183 U. S. 144, 22 Sup. Ct. 52, 46 L. Ed. 125.

Irrespective of this agreement, we are of opinion, as the real property to be affected lies in the state of Mississippi and the suit is one pending in the courts of that state, the deed of trust must ex necessitate be construed and effect given to it in accordance with the laws of the state of Mississippi. De Vaughn v. Hutchinson, 165 U. S. 566, 17 Sup. Ct. 461, 41 L. Ed. 827, citing United States v. Crosby, 7 Cranch, 115, 3 L. Ed. 287, Brine v. Insurance Co., 96 U. S. 627, 24 L. Ed. 858.

The Mississippi Annotated Code of 1892 provides as follows:

"1120. If any person shall deal in contracts commonly called 'Futures,' or shall, by himself or his agent, directly or indirectly buy or sell any 'future' contract, he shall be guilty of a misdemeanor, and, on conviction, shall be fined not less than fifty dollars nor more than five hundred dollars, and be imprisoned in the county jail not more than three months.

"1121. If any person shall buy or sell commodities of any kind, to be delivered at a future day, without agreeing and intending that the commodities are to be actually delivered in kind, and the price paid, he shall be guilty of a misdemeanor, and, on conviction, shall be punished as prescribed in the last section."

"2117. A contract for the purchase or sale of a commodity of any kind to be delivered at a future day, the parties not intending that the commodity is to be actually delivered in kind and the price paid, shall not be enforced by any court; nor shall any contract of the kind commonly called 'futures' be enforced, nor shall a contract in this section mentioned be a valid consideration, in whole or in part, for any promise or undertaking."

These statutes indicate beyond question that dealing in future contracts, not intending that the commodity in question is to be actually delivered in kind or the price paid, is deemed gambling and contrary to the public policy of the state of Mississippi, and that has been the construction given to them by the Supreme Court of the state.

The original act on the subject passed on March 7, 1882, was entitled "An act to prohibit the sale and purchase of futures in the state of Mississippi." The first section of this said act provided that "it would be unlawful to deal in contracts commonly called 'Futures,'" etc.; and the second provided that:

"No money advanced for the purchase of futures nor any agreement for the payment of any sum for such purchases could be enforced in any court of the state.

Under this statute the case of Lemonius v. Mayer, 71 Misc. 514, 14 South. 33, was decided, in which it was held that the statute applied not only to contracts for futures made within the state but also to contracts for futures made without the state, sought to be enforced therein.

The language of the act of 1882 having been slightly changed by the codification of 1892, the future contract question was again before the Supreme Court in Violett et al. v. Mangold (Miss.; decided May 14, 1900) 27 South. 875, in which the Supreme Court of the state, in affirming judgment holding the note sued on to be void as based on losses in dealing in futures, said:

"Calhoon, J. Wilkins v. Riley, 47 Miss. 306, and Clay v. Allen, 63 Miss. 426, have no similarity to the case in hand. Looking through the gossamer

disguise here, it is glaringly apparent that the promissory note sued on is based on an account for losses in dealings in futures. We uphold the public policy of the state. Ann. Code 1892, §§ 1120, 1121, 2117; Lemonius v. Mayer, 71 Miss. 514, 14 South. 33."

It thus appears that the note and deed of trust given by Williamson to Bettis Majors are void on general principles (Embrey v. Jemison, supra), void in Tennessee where executed, and void in Mississippi, where the property involved is situated, as against the laws and public policy of that state; and it follows that the decree appealed from must be reversed.

As to the relief to be granted, we are clear that the appellee is entitled to none, and his cross-bill should be dismissed.

As to the relief asked by complainant below, to wit, the cancellation of the deed of trust given by him to secure the note based on losses in dealing in "futures," there is more difficulty. He is in pari delicto, and courts of equity are loth to relieve parties in such cases; the general rule being to apply the maxim, "He who comes into equity must come with clean hands," and "In pari delicto potior est conditio defendentis."

We find, however, that section 2116, Code Miss., provides that money lost on wagers can be recovered by suit, and that there is a line of authority, English and American, to the effect that courts of equity will grant relief in gaming contracts on the ground of public policy. We have not the English cases at hand, but in Rucker v. Wynne et al., 2 Head (Tenn.) 617, and Johnson v. Cooper, 2 Yerg. (Tenn.) 524, 24 Am. Dec. 502, both well considered, the English authorities are reviewed and shown to support the doctrine.

And we find the following in Story's Eq. Jur. § 302:

"In regard to gaming contracts it would follow, a fortiori, that courts of equity ought not to interfere in their favor, but ought to afford aid to suppress them, since they are not only prohibited by statute, but may justly be pronounced to be immoral, as the practice tends to idleness, dissipation, and the ruin of families. No one has doubted that under such circumstances a bill in equity might be maintained to have any gaming security delivered up and canceled."

See, also, 20 Cyc. p. 954, and cases there cited.

These authorities satisfy us that the complainant below should have the relief he prays for.

The decree of the Circuit Court is reversed, and the cause is remanded with instructions to enter a decree in accordance with the views herein expressed.

CITIZENS' SAVINGS BANK v. CITY OF NEWBURYPORT.

CITY OF NEWBURYPORT v. CITIZENS' SAVINGS BANK.

(Circuit Court of Appeals, First Circuit. May 12, 1909.)

Nos. 783, 784.

1. BILLS AND NOTES (§ 123*)—NOTES OF CITY—SIGNING BY OFFICER.
Notes of a city were in the form of a promise by the city to pay "to the order of J. V. Felker, City Treas.," and, when negotiated, the notes were indorsed in blank, "J. V. Felker, City Treas." *Held*, that the treasurer's name was only used to give the notes currency, and that they became payable to bearer under the law merchant, and passed by delivery.
[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 447; Dec. Dig. § 188.*]

2. COURTS (§ 312*) — FEDERAL COURTS — CHOSES IN ACTION—ASSIGNMENT—NEGOTIABLE NOTES.
The rule applied that notes of a city payable to bearer are excepted from Judiciary Act Aug. 13, 1888, c. 866, 25 Stat. 433 (U. S. Comp. St. 1901, p. 508), declaring that an assignee of a chose in action cannot sue in a federal court unless his assignor could have done so, whether the notes were first negotiated to a citizen of a state other than that of the maker or not.
[Ed. Note.—For other cases, see Courts, Cent. Dig. § 868; Dec. Dig. § 312.*]

3. MUNICIPAL CORPORATIONS (§ 60*) — ORDINANCES — POWERS OF SUBSEQUENT CITY COUNCIL.
An ordinance declaring that a finance committee shall be appointed at the commencement of each municipal year to negotiate all loans to the city which may be authorized by the city council could not deprive a subsequent council of its right to pass an order authorizing the city treasurer, with the approval of the finance committee, to borrow from time to time sums not exceeding $160,000 in anticipation of taxes.
[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 60.*]

4. MUNICIPAL CORPORATIONS (§ 908*)—LOANS—PROCEEDINGS OF CITY COUNCIL.
Defendant council on January 1, 1906, ordered that the city treasurer, with the approval of the finance committee, borrow, in anticipation of taxes, a sum not exceeding $160,000, evidenced by notes of the city to be discounted, etc. On January 9th the finance committee gave the mayor authority to approve for the finance committee all notes of the city duly negotiated on any loan made for or in the city's behalf, and at the same meeting voted that the mayor and city treasurer be authorized to negotiate notes under the order of the city council passed January 1, 1906, from time to time as required. *Held*, that the first vote was general, and was therefore superseded by the second, which covered everything required by the council's order of January 1st, so that notes executed by the mayor and city treasurer and approved by the mayor for the finance committee were valid obligations of the city.
[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1896; Dec. Dig. § 908.*]

5. COURTS (§ 372*)—FEDERAL COURTS—RULES OF DECISION—DECISION OF STATE COURTS.
The rule applied that where, in an action on city notes, defendant claimed that the city was not liable because the notes sued on constituted an overissue, but the facts concerning such defense were not known to plaintiffs when they purchased the notes and they did not appear on the face thereof, plaintiffs' right to recover in a federal court was not a question of local law, but of general law concerning the rights of bona fide holders

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

of commercial paper, concerning which the federal courts are not bound by local decisions.

[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.]

6. MUNICIPAL CORPORATIONS (§ 948*)—NOTES OF CITY—OVERISSUE—BONA FIDE PURCHASERS—DEFENSES.

A city treasurer, with the approval of the city's finance committee, was authorized to borrow sums in anticipation of taxes, not exceeding $160,000. The committee then voted that the mayor and city treasurer should negotiate notes in accordance with such provision, whereupon notes were executed payable to bearer, each of which was numbered and was accompanied by a statement of the treasurer certifying that the total amount borrowed under such authorization, including the note certified, was an amount within that authorized. The city, however, maintained no independent register of the notes, so that there was no method by which a purchaser could ascertain whether there was an overissue, either as to the extent of the loan or with respect to the gross amount of the notes. *Held*, that the fact that some of the notes constituted an overissue was no defense as against a bona fide holder.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 948.*

Bona fide purchasers of municipal bonds, see note to Pickens Tp. v. Post, 41 C. C. A. 6.]

7. MUNICIPAL CORPORATIONS (§ 948*)—DISCOUNT—PROCEEDS—DISPOSITION.

A purchaser of notes executed by a municipal corporation is not bound to follow a check given therefor and see that the proceeds are not used to pay a note of the city which was an illegal issue and had been deposited in the bank in which the check was deposited, for collection.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 948.*]

8. MUNICIPAL CORPORATIONS (§ 948*)—ORDINANCES—STATUTORY PROVISIONS.

There being no statutory provision corresponding to a city ordinance providing that no money shall be drawn out of the city treasury except on the written order of the mayor addressed to the treasurer and countersigned by the city clerk, a bona fide holder of negotiable paper issued by the city is not required to assure himself that a warrant has issued in accordance with such provision before accepting payment through the bank which he has employed for its collection.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 948.*]

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

Edward F. McClennen (Brandeis, Dunbar & Nutter, on the brief), for Citizens' Savings Bank.

*Robert G. Dodge (Saltonstall, Dodge & Carter and Mr. Withington, City Sol., on the brief), for City of Newburyport.

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

PUTNAM, Circuit Judge. These two writs of error arose out of certain purchases by the Citizens' Savings Bank of what were apparently promissory notes of the city of Newburyport. Suit was brought

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

by the bank, and in that suit the city filed an account in set-off, the details of which we will refer to hereafter.

Questions of jurisdiction are raised. The bank's declaration contains seven counts, four of which are directly on promissory notes. The other three are of a mixed character, apparently seeking to recover the money advanced by the bank, going back of the notes in case they are held to be void. These counts we need not consider, in view of the conclusion we have reached as to the preceding counts. The notes declared on were in the form of a promise by the city to make payment "to the order of J. V. Felker, City Treas.," and the same, when negotiated, were indorsed in blank, "J. V. Felker, City Treas." Although, under some circumstances, with such a signature it might be held that Felker was personally liable on the notes, yet it is plain his name was used only to give the notes currency; and it is settled in the federal courts that his indorsement has no other effect. Falk v. Moebs, 127 U. S. 597, 8 Sup. Ct. 1319, 32 L. Ed. 266. Therefore, the notes in suit were in substance the same as though they had been made payable to the city of Newburyport in terms, and indorsed by it in blank before they were negotiated. By the law merchant this makes them notes payable to bearer, which pass by delivery without any indorsement or any form of assignment.

The jurisdictional inhibition of Act Aug. 13, 1888, c. 866, 25 Stat. 433 (U. S. Comp. St. 1901, p. 508), does not reach notes payable to bearer and made by a corporation; and these notes were payable to bearer by the law merchant, and were made by a corporation; that is, the city of Newburyport. Lake County v. Dudley, 173 U. S. 243, 250, 19 Sup. Ct. 398, 43 L. Ed. 684. The exception from the inhibition of the statute is not limited by any of its terms to a case where the notes are first negotiated to a citizen of a state other than the state of which the quasi corporation is a citizen; and, by the very nature of the statutory provision on this particular point, it could not be, because, if it were, it would be mere surplusage. On the whole, the settled practice of the federal courts is against the contention of the city on this proposition as to the jurisdiction of the Circuit Court.

The notes sued on were issued in accordance with section 6, c. 27, of the Revised Laws of Massachusetts, as follows:

"Sec. 6. Cities and towns may by a majority vote incur debts for temporary loans in anticipation of the taxes of the municipal year in which such debts are incurred, and expressly made payable therefrom by such vote. Such loans shall be payable within one year after the date of their incurrence, and shall not be reckoned in determining the authorized limit of indebtedness."

The ninth section of the same chapter gives directions with reference to certain methods of issuing municipal loans, which require that the bonds or notes or scrip shall be signed by the municipal treasurer, and, if issued by a city, countersigned by its mayor. It also provides that the notes shall carry interest payable semiannually, and shall be sold at not less than par. This, however, relates to the permanent indebtedness of the municipality, and not to the specific class of notes in question here, which are governed entirely by the sixth section.

with which all the municipal proceedings and notes involved here comply strictly on their face.

The notes on which the verdict was rendered for the plaintiff bear the numbers 796, which is for $25,000, and 797, 798, and 799, each of which is for $10,000; and all of them bear date April 13, 1906. They were all negotiated with another note of the same form for $25,000, and of the same date, but of an earlier number, 795. The total of the five notes, as will be seen, was $80,000. They were negotiated in one lot, at Boston to Blake Bros. & Co. of that city. We are not aware whether the record shows that these notes were purchased by Blake Bros. & Co. for themselves and subsequently sold to the plaintiff, or whether they were bought at the outset for the plaintiff. It is of no importance to this case how this may have been. The negotiations were covered by three letters, given in the record and explained therein as follows:

"[On letter paper entitled 'City of Newburyport, Office of City Treasurer and Collector of Taxes, City Hall, Newburyport, Mass.,' and containing an imprint of the city seal.]

"April 9, 1906.

"Messrs. Blake Bros. & Co., Boston, Mass.

"Gentlemen: Would be pleased to receive your lowest offer to discount City of Newburyport note or notes aggregating $80,000, to be dated Apl. 13, 1906, on six months time. Your bid to be received on or before eight o'clock, Wednesday evening, April 11th, 1906.

"Very truly yours, J. V. Felker, City Treas."

"Office of Blake Brothers & Co., 48 State Street.

"Boston, April 11, 1906.

"J. V. Felker, Esq., City Treasurer, Newburyport, Mass.

"Dear Sir: Referring to your letter of the 9th inst., we will discount notes of the city of Newburyport to the amount of eighty thousand dollars ($80,000), said notes to be dated April 13, 1906, and payable in six months in Boston, at the rate of four and fifty-four one-hundredths per cent ($4\frac{54}{100}$ %) per annum.

"Our bid is made subject to our being satisfied that the loan is legally issued, that we are furnished all papers necessary to show the same, and is for the whole amount, $80,000, and not for any part thereof.

"In case our bid is accepted, we will advise you as to what denominations we would like, and the notes are to be payable or indorsed to our order.

"Kindly send us a list of the bid and bidders, and oblige.

"Yours very truly, Blake Bros. & Co."

"Newburyport, Mass., April 11, 1906.

"Messrs. Blake Bros. & Co., Boston, Mass.

"Gentlemen: Your offer to discount the notes of the city of Newburyport of $80,000, dated Apl. 13, 1906, on six months time at a rate of $4\frac{54}{100}$% per annum is hereby accepted.

"Kindly telephone me as early as convenient tomorrow forenoon what denominations you would like them. I will deliver them on Thursday forenoon.

"Yours very truly, J. V. Felker, City Treas."

The $80,000 specified in these letters covered note 795 for $25,000, already referred to. We are not aware that the record shows where it is. As, however, the question in this case is really one of overissue, it is not impossible that that note is entitled to priority over those in suit. The computation of the defendant at one place makes the overissue $18,475, and at another $18,000. Which of these two is correct is not important. If the transaction with Blake Bros. & Co.

was that of a sale in one lump of $80,000 of notes, the matter is divisible in the eyes of the law, and only the last two notes of $10,000 each would in any event be lost to the plaintiff, after securing to note 795 its apparent priority. In view of the fact that the defendant contends that, unless the plaintiff can recover specifically on the notes in question, it cannot recover in an action of the nature of one for money had and received, or in any other action for any part of the cash paid out for the notes, and as such is apparently the law, it would be an injustice so gross to compel the parties holding the notes here to make an entire loss of $80,000 for an overissue of the amount stated, less than $19,000, that we are of the opinion that, if it were necessary to resort to such an application of the law, the law would hold the transaction divisible, and due priority secured, and that the breaking up of the notes as they were in fact broken up, with the numerical order given them which was given them, would render such a division practical, and would point out the way in which it could be accomplished; so that, in any event, nothing would be lost except the two notes last in numerical order of $10,000 each. However, the conclusion we have reached does not render it necessary for us to follow this view of the matter to its conclusion, and we refer to it only that it may be understood that it has not been overlooked.

The next thing in the order of statement is an ordinance of the city of Newburyport, established in 1869, a part of which is as follows:

"There shall be appointed at the commencement of each municipal year, a committee on finance consisting of the mayor, one member of the board of aldermen and five members of the common council, which committee shall negotiate all loans to the city which may be authorized by the city council, and shall report the same to the city treasurer."

This provides that the committee on finance should negotiate all loans; but, in view of the following order, this ordinance becomes immaterial, because it cannot be maintained that an ordinance of one city council can deprive a subsequent city council of its right to exercise the inherent powers vested in it by the laws of the state, according to the various circumstances as they arise from time to time. Therefore, we turn to the following order of the city council and votes of the committee on finance. The order was as follows.

"In City Council,
"City of Newburyport, Mass., January 1, 1906.

"Ordered, that for the purpose of procuring a temporary loan to and for the use of the city of Newburyport in anticipation of the taxes of the present municipal year, the city treasurer is hereby authorized and directed to borrow from time to time, with the approval of the committee on finance, a sum or sums in the aggregate not exceeding one hundred and sixty thousand dollars, with renewals thereof; and to execute and deliver the note or notes of the city therefor, payable within one year from the time the loan is made, with interest thereon, or discounted at a rate not exceeding six per cent. per annum. The said debt or debts incurred by a loan or loans to the city under this order are to be paid from the said taxes of the present municipal year."

It is not questioned that this order was duly passed by the authoritative boards of the city, and duly approved by the mayor, and that the proceedings so far were strictly in accordance with the law. By the

ordinance this committee was to negotiate the loans, but by the order the treasurer was to borrow; and he thus became the actor, the committee only approving.

On January, 9, 1906, the committee on finance passed this vote:

"In Committee on Finance, January 9, 1906.

"Ordered, that his honor the mayor be authorized to approve, for the committee on finance, all notes of the city of Newburyport duly negotiated on any loan made for or in behalf of the city."

The committee also passed at the same meeting on January 9, 1906, the following:

"Voted that the mayor and city treasurer be authorized to negotiate notes under the provisions of the order of the city council passed January 1, 1906, from time to time as may be required."

Very considerable discussion has been made by the parties with reference to the first of the above votes in regard to the approval of the city's loans in general, while the greater importance of the second vote of the same date, concerning the negotiation of the particular notes in suit, has been apparently overlooked. The first vote is of a general character, which, according to the ordinary rules of construction, was in part superseded by the second, which was of a limited character, with specific relation to notes of the issue in litigation here. We need not, therefore, further regard the first of the two votes if the second covers everything required by the order of the city council of January 1, 1906; and we find that it does.

Each note on which the plaintiff was allowed to recover, aside from the amount named and the serial number, bore the same date, and was of the same form, as the note for $25,000 here given. Each was accompanied with the same papers. Thus the notes as they were negotiated were not only apparently approved for the committee on finance by the mayor, but they were signed on behalf of the city by both the city treasurer and the mayor, in strict accordance with the second vote of that committee of January 9th. It will be seen also that, with each note, there went copies of the order of January 1, 1906, of the proceedings showing its proper adoption, and of the vote of the committee on finance authorizing the mayor to approve all notes, and a certificate from the city treasurer showing that each note was within the limit of $160,000 specified in the order. The note for $25,000 and the papers we have named were all thus connected, and were as follows:

"$25,000. Newburyport, Mass., April 13th, 1906.

"For value received, the city of Newburyport, by its treasurer, promises to pay J. V. Felker, City Treas., or order, twenty-five thousand dollars, in six months without grace, at the First National Bank of Boston.

"J. V. Felker, City Treasurer.
"W. F. Houston, Mayor."

"Approved for Committee on Finance.
"W. F. Houston, Mayor."

"No. 796.
[Indorsed on back:] "J. V. Felker, City Treas."

"In City Council,
"City of Newburyport, Mass., January 1st, 1906.

"Ordered, that for the purpose of procuring a temporary loan to, and for the use of the city of Newburyport, in anticipation of the taxes of the present municipal year, the city treasurer is hereby authorized and directed to borrow

from time to time, with the approval of the committee on finance, a sum or sums, in the aggregate not exceeding one hundred and sixty thousand dollars, with renewals thereof, and to execute and deliver the note or notes of the city therefor, payable within one year from the time the loan is made, with interest thereon or discounted at a rate not exceeding six per cent. per annum. The said debt or debts incurred by a loan or loans to the city under this order are to be paid from the said taxes of the present municipal year."

"In Common Council, January 1, 1906.

"Order adopted by yea and nay vote. Yeas 18, nays 0, absent 0, and sent up for concurrence. J. Herman Carver, Clerk."

"In Board of Aldermen, January 1, 1906.

"Order adopted in concurrence by a yea and nay vote. Yeas 7, nays 0, absent 0. George H. Stevens, City Clerk."

"Approved, January 1, 1906. W. F. Houston, Mayor."

"A true copy:

"[Seal.] Attest: George H. Stevens, City Clerk."

"City of Newburyport, April 13, 1906.

"I hereby certify that the total amount borrowed under the above authorization, including Note No. 796 of this date, is One hundred ten thousand dollars.

"J. V. Felker, Treasurer."

"In Committee on Finance, January 9th, 1906.

"Ordered, that his honor the mayor be authorized to approve for the committee on finance, all notes of the city of Newburyport duly negotiated on any loan made for and in behalf of the city.

"Attest: George H. Stevens, Clerk of the Committee."

A question is made with reference to the effect of the approval for the committee on finance by the mayor alone. We need not, however, rest on this approval, because the other vote of the committee of January 9th, which relates exclusively to the issue of the notes in suit, fully protects them. The vote of the city council authorized and directed the city treasurer to borrow. Therefore, as we have said, he was the actor. He, however, was to borrow with the approval of the committee. The committee provided by its second vote that the city treasurer be authorized to negotiate notes under the provisions of the order of January 1, 1906, from time to time as might be required. Thus, so far as the committee had jurisdiction, it, by one stroke, gave the city treasurer, coupled with the mayor, authority to issue the notes to the limit named. It thus approved the entirety once for all. The committee might or might not have linked the mayor with the city treasurer. It was under no obligation to do so, but it did. As this approval by the committee was a matter touching the authority of the treasurer, the holders of the notes are entitled to find that authority wherever they can; and the reference to the other vote of the 9th of January, appearing on the notes when issued, was, for the reasons we have stated, a harmless and needless matter. Thus, so far as the approval of the committee is concerned, the record is complete, and the case comes down to the only fair question raised by it, and that is the matter of the overissue. This question, again, comes down to the other question, whether the certificate of the city treasurer on each note, formally stating the amount of notes previously issued, together with the other matters appearing on the face of the papers, are sufficient under the circumstances to meet this defense.

After citing numerous decisions of the Supreme Judicial Court of Massachusetts, the defendant's brief makes the following statement, which seems to be the substance of the defense:

"It is clear from these cases that a Massachusetts municipality is not liable on notes executed by its treasurer unless the treasurer acts in pursuance of an authority especially conferred upon him by vote of the town, or, in case of a city, by the city council, and unless the conditions and limitations of his authority are strictly observed. His authority is not enlarged by his own statements concerning the matter, nor by any custom to act without authority."

At the outset we are met by a proposition of the defendant that this question of overissue is purely one of local law, and that, therefore, under the Massachusetts decisions, the notes were invalid. If the sole question here was one merely of authority on the part of the city treasurer, and if all the facts concerning the same were known to the purchasers of the notes when the title was acquired, it might be a local one in the ordinary sense of the expression; but the facts not being exhibited on the face of the notes, and not being known to their holders at the time the title to them was acquired, the question is not one as to which it is necessary to examine the local decisions. The statute of the United States on this topic is found in section 721 of the Revised Statutes (U. S. Comp. St. 1901, p. 581) to the effect 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." It has long been held by the Supreme Court that special local laws do not apply to all phases of commercial paper in the hands of innocent bona fide holders; and the reason for this is plain. Commercial paper is governed by the law merchant, and the law merchant is a part of the private international law; and, commercial paper being intended to circulate into the hands of citizens of different states and nonresidents, it is not always possible to apply peculiar local law with justice. In Watson v. Tarpley, 18 How. 517 (decided at the December term, 1855) 15 L. Ed. 509, the Supreme Court refused to apply even a local statute intended to fix rules for protest and notice with reference to nonacceptance or nonpayment of commercial paper. That tribunal has gone so far as to hold that a case like this at bar falls within the ordinary line of decisions as to commercial paper, and not within the line of decisions as to the legal authority of local officials. The last declaration is stated in Presidio County v. The Noel-Young Bond & Stock Company, 212 U. S. 58, 73, 29 Sup. Ct. 237, 53 L. Ed. ——, where the highest court in Texas had adjudged invalid the precise issue of bonds which the Supreme Court afterwards held to be valid. Therefore, we need not pursue further this proposition in defense.

The defendant admits that it is clearly established by many cases in the federal courts that, when the authority of a municipality to issue bonds or notes is made conditional on the existence of certain facts, and where the Legislature or the city council has, expressly or by implication, authorized certain officers to determine whether those facts exist, their recitals that the facts do exist are conclusive in favor of bona fide purchasers. In the earlier cases in the Supreme Court reliance

was evidently placed very largely on express authority of the kind just referred to. As, for example, it was said that, where certain officers were authorized to canvass votes at a certain election preliminary to issuing bonds, their canvass, and their certificate in due form of the result, were effectual. But, going on from one period to another, the Supreme Court has been more and more prone to recognize an implied authority in this direction. Yet the practice in this particular has not gone beyond what natural justice requires. It is within the power of municipal corporations, by establishing an independent registry or otherwise, to protect themselves almost absolutely against overissues by its own officers. Here there was no such independent registry, and no method by which the purchaser of the notes of the city could ascertain with certainty whether there was any overissue, either as to the extent of the loan which the statute authorizes in anticipation of taxes, or with respect to the gross amount of the notes which the statute permitted. The effect of such a registry, if duly established, is shown in Merchants' Bank v. Bergen County, 115 U. S. 384, 391, 392, 6 Sup. Ct. 88, 29 L. Ed. 430, where there were no recitals, but there was an independent public record of the county open to inspection.

In Daviess County v. Dickinson, 117 U. S. 657, 6 Sup. Ct. 897, 29 L. Ed. 1026, relied on by the defendant, there was only a certificate by a judge of the county court indorsed on the back of each bond, as to which the opinion said, at page 664 of 117 U. S., at page 901 of 6 Sup. Ct. (29 L. Ed. 1026), that neither the statute nor the vote of the people nor the order of the county court empowered him to make it, or even to determine whether the county had exceeded the power conferred upon it. The opinion added: "An officer's certificate of a fact which he has no authority to determine is of no legal effect." However, we have no occasion to refer in this connection to any decision except that of Presidio County v. Noel-Young Bond & Stock Company, 212 U. S. 58, 29 Sup. Ct. 237, 53 L. Ed. —, which we have already cited as the last pronouncement on this topic. There the amounts sold were excessive. Although, under the statute, the county commissioners' court was to determine the amount of the loan, "the act provided that the bonds should be signed by the county judge, countersigned by the county clerk, and registered by the county treasurer, before being delivered." It contained no provision giving authenticity to the signatures of these officers, or providing that they should certify the facts in reference to the amount of the issue, or make any certificate whatever. Yet their signatures were held to be conclusive in favor of innocent purchasers of the bonds. We are unable to determine, in this essential matter of the form of an express or implied authority in favor of a recital, between that case and the case at bar, where the city treasurer was authorized to negotiate the notes in connection with the mayor, and where the notes themselves were signed, as we have shown, by both the city treasurer and the mayor, and were accompanied with a vote of the city council fixing a limit to the issue, and by a certificate of the treasurer that it had not been exceeded, the whole accompanying the note, and constituting, when negotiated, but a single paper or instrument. Therefore we are of the opinion that the judgment of the

circuit court in favor of the plaintiff for the amount of the four notes sued on was without error.

This leaves only the question of the city's count in set-off. Passing by a demurrer filed by the plaintiff, which we do not find it necessary to consider, we perceive again that the decision of the Circuit Court in instructing the jury to return a verdict for the plaintiff on this set-off was without error. It seems that the city treasurer issued a note, dated November 13, 1905, for $80,000, which was payable on April 13, 1906, the same day on which the notes in suit were given. The various votes accompanying this note, and the proceedings exhibited on the paper attached to it, were in all respects the same as with regard to those in suit, excepting only the dates. There was a like vote of the city council, and the signatures and certificate were all in the same form. The vote of the city council was passed on January 2, 1905, and the issue authorized was the same, $160,000. The note of November 13, 1905, was, as we have said, signed by the mayor, as well as by the city treasurer; and there was a like certificate by the city treasurer showing there was no overissue; and there were two votes of the committee on finance of January 12, 1905, in all respects except the date the same as the two votes of January 9, 1906. The entire note of November 13, 1905, was an illegal overissue by the treasurer. He used the check received for the notes in suit to take up, on the same day that they were negotiated, the note of November 13, 1905, at the bank where it was deposited for collection. The city maintains that this note was an unlawful note, and that the use of the check referred to was an application of it by the city treasurer for an unlawful purpose. Of course, however, there was here no obligation resting on Blake Bros. & Co., or the Citizens' Savings Bank, whichever it was, to follow the check which Blake Bros. & Co. gave the city treasurer, or otherwise to see to the application of the proceeds, as sometimes happens with reference to trust funds. It might have been otherwise if the check had been repaid directly to the plaintiff; but the bank into which it was paid, though in one sense the plaintiff's agent, was an independent institution. Therefore, the only question, as it seems to us, which can be raised by the city, arises from the fact that the note of $80,000 of April 13, 1906, belonged when paid to the plaintiff, the Citizens' Savings Bank; so that, if the note was not a valid note in its hands, it received funds of the city to which it was not entitled. This, of course, involves again the same questions which we have discussed. Some attempt is made by the defendant to differentiate the circumstances by reason of the fact that, when the note of November 13, 1905, was issued, the amount of taxes remaining uncollected was less than the amount of this note together with the previous notes which had been issued and remained unpaid. We are unable to see any essential distinction arising on this account. The defendant, however, further refers to a provision of the Ordinances of the City, as follows:

"Sec. 5. No money shall be drawn out of the city treasury except on the written order of the mayor addressed to the treasurer, and countersigned by the city clerk."

There is no statutory provision corresponding to this ordinance, and the ordinance is therefore a mere regulation by the city of its own af-

fairs. This is a common provision in the ordinances of cities; but, unless there is a statutory requirement of that nature, we never have understood that any innocent holder of negotiable paper of any municipality is required to assure himself that a warrant has issued in accordance with such a provision before accepting payment through the bank which he has employed for its collection.

The judgment of the Circuit Court is affirmed, with interest; and the Citizens' Savings Bank recovers its costs of appeal.

COMMERCIAL UNION ASSUR. CO., Limited, v. PACIFIC UNION CLUB.

(Circuit Court of Appeals, Ninth Circuit. May 3, 1909.)

No. 1,618.

INSURANCE (§ 421*)—POLICY—INSTRUCTIONS—LOSS—PROXIMATE CAUSE—"CAUSED DIRECTLY OR INDIRECTLY BY EARTHQUAKE."

A fire policy insured plaintiff's property against all direct loss or damage by fire, except as otherwise provided in the policy; one of the exceptions being against loss caused directly or indirectly by earthquake. The property located in San Francisco was wholly destroyed by fire on April 19, 1906, but the insurer pleaded that the loss would have been prevented by the use of the city's water supply had not such use been rendered unavailable by the breaking of the city's water mains by an earthquake shock on the preceding day. *Held*, that the loss was not "caused directly or indirectly by earthquake," within the exception, and that the fire, and not the earthquake, was the proximate cause thereof.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 421.*]

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

T. C. Van Ness, for plaintiff in error.

Pillsbury, Madison & Sutro, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. This was an action upon a policy of fire insurance issued by the plaintiff in error to the defendant in error insuring certain described property "against all direct loss or damage by fire except as" thereinafter otherwise provided; one of which subsequent provisions being that the company should not be liable "for loss caused directly or indirectly by earthquake."

It is not denied that the property insured, which was situated in the city of San Francisco, was subsequently, and during the life of the policy, totally destroyed by fire on the 19th of April, 1906. Basing its defense upon the exemption provision mentioned, the insurance company set up in its amended answer, in effect, that the loss in question would have been prevented by the use of the water supply of the city had not its use been prevented by the breaking of the water mains by an earthquake shock or shocks occurring on the preceding day, to wit, April 18th, from which it is argued by its counsel that the earthquake, and not the fire, was the proximate cause of the loss

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

sustained by the defendant in error. The ruling of the trial court against that contention constitutes the sole question presented by this writ of error.

We are of the opinion that the point is without merit. The insurance was against all direct loss or damage by fire, with the exception that for such loss—that is to say, loss by fire—"caused directly or indirectly by earthquake" the company should not be liable. What did the parties mean by this express language of their contract? Is it at all reasonable to suppose that, when the company stipulated for exemption for loss by fire "caused directly or indirectly by earthquake," it meant that it should not be liable for any loss or damage by fire which could be prevented by the use of the water supply of the city in the event its use be prevented by the breaking of the water mains by an earthquake shock or shocks? As well might it also be said that the company meant that it should not be liable for any loss or damage by fire which could be prevented by the use of the fire department of the city of San Francisco in the event its use be prevented by the destruction of its apparatus, or the killing or disabling of its men or horses by an earthquake shock or shocks. If such was the meaning of the language employed in the policy, and such meaning had been expressly stated in it, can it be thought for a moment by any one that the insured would have accepted and paid for the policy in question? We think not. And, if not, is any court justified in so construing the policy as to make it mean what the parties cannot be fairly said to have agreed to? Certainly not.

The true rule for the construction of such instruments is thus stated by the Supreme Court in Peters v. Warren Insurance Company, 14 Pet. 99, 108, 10 L. Ed. 371:

"If there be any commercial contract which, more than any other, requires the application of sound common sense and practical reasoning in the exposition of it and in the uniformity of the application of rules to it, it is certainly a policy of insurance; for it deals with the business and interests of common men, who are unused to deal with abstractions and refined distinctions."

No question of water supply appears to have entered into the contract in question. It contains no clause imposing any obligation on the insured in respect to water, or specifying any consequences to result from a lack of such supply by the city or any other third party. We can understand, of course, that a failure to keep a supply of water on hand by one who is obligated to do so may subject that one to damages for the wrong in favor of the aggrieved party; but we cannot understand how a nonexistent supply of water can be either the moving cause of a fire, or a link in any chain of moving causes.

We think the court below was right in its ruling that the matters set out in the amended answer constitute no defense to the action.

The judgment is affirmed.

NORWICH UNION FIRE INS. SOCIETY OF NORWICH & LONDON ENG., v. PACIFIC UNION CLUB.

(Circuit Court of Appeals, Ninth Circuit. May 3, 1909.)

No. 1,619.

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

T. C. Van Ness, for plaintiff in error.
Pillsbury, Madison & Sutro, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

PER CURIAM. The facts in this case are identical with those in the case of Commercial Union Assurance Company v. Pacific Union Club (No. 1,618, just disposed of) 169 Fed. 776, on the authority of which case the judgment is affirmed.

ALLIANCE ASSUR. CO., LIMITED, OF LONDON, ENG., v. PACIFIC UNION CLUB.

(Circuit Court of Appeals, Ninth Circuit. May 3, 1909.)

No. 1,620.

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

T. C. Van Ness, for plaintiff in error.
Pillsbury, Madison & Sutro, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

PER CURIAM. The facts in this case are identical with those in the case of Commercial Union Assurance Company v. Pacific Union Club (No. 1,618, just disposed of) 169 Fed. 776, on the authority of which case the judgment is affirmed.

ROBNETT v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. May 10, 1909.)

No. 1,607.

1. PUBLIC LANDS (§ 38*) — APPLICATION TO PURCHASE — STONE AND TIMBER LANDS—PERSONAL EXAMINATION.

Act Cong. June 3, 1878, c. 151, 20 Stat. 89 (U. S. Comp. St. 1901, p. 1545), provides for the sale of stone and timber lands and section 2, declares that the applicant shall file a written statement designating the land he desires to purchase; setting forth that the same is unfit for cultivation and valuable chiefly for timber and stone; that it is uninhabited, contains no mining or other improvements except for ditch or canal purposes, where any such do exist, save such as were made by or belong to the applicant, nor, as deponent verily believes, any deposit of gold, silver, etc.; that deponent has made no other application under the act; that he does not apply to purchase for speculation, but in good faith to appropriate it to his own exclusive use and benefit. *Held* not to require the applicant to make his initial statement on knowledge derived solely from personal observation, and hence statements under the blank forms furnished by the Land Department that the applicant had personally examined the land applied for

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

and that he knew from his own personal knowledge that it was unfit for cultivation, uninhabited, etc., were improper.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 82; Dec. Dig. § 38.*]

2. PERJURY (§ 13*) — SUBORNATION OF PERJURY — STONE AND TIMBER ENTRY — PERSONAL KNOWLEDGE OF APPLICANT.

Since Act Cong. June 3, 1878, c. 151, § 2, 20 Stat. 89 (U. S. Comp. St. 1901, p. 1545), providing for applications for the purchase of stone and timber lands, does not require that applicant's initial statement shall be based on a personal examination of the lands, nor that he shall state from his personal knowledge that the land is unfit for cultivation, etc., subornation of perjury could not be based on a charge that defendant induced an applicant to purchase such lands to falsely swear in his initial application that he had personally examined the land and stated from personal knowledge that the same was unfit for cultivation.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. § 61½; Dec. Dig. § 13.*]

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

The indictment in this case was founded on the act of Congress approved June 3, 1878, c. 151, 20 Stat. 89 (U. S. Comp. St. 1901, p. 1545), entitled "An act for the sale of timber lands in the states of California, Oregon, Nevada, and in Washington Territory," as amended and extended to all the public land states by Act Aug. 4, 1892, c. 375, 27 Stat. 348 (U. S. Comp. St. 1901, p. 1547), and consisted of two counts, upon the first of which the plaintiff in error was convicted. That count charged him with willfully and corruptly suborning one George Ray Robinson to swear falsely in a certain affidavit introduced in evidence as the government's Exhibit 7, and thereby to commit perjury, before the register of the United States Land Office at Lewiston, Idaho. The affidavit is as follows:

"4–537.

"This affidavit can be made only upon the personal knowledge of applicant derived from his own personal examination of the land.

"Timber and Stone Lands—Sworn Statement.

"(To be made in Duplicate.)

"Land Office at Lewiston, Idaho,
"(Date) March 31, 1903.

"I, George Ray Robinson, of Lewiston, county of Nez Perce, state of Idaho, desiring to avail myself of the provisions of the act of Congress of June 3, 1878, entitled 'An act for the sale of timber in the states of California, Nevada and in Washington Territory,' as extended to all the public land states by act of August 4, 1892, for the purchase of the N. ½ N. W. ¼, N. ½ N. W. ¼, of section 26, township 29 N., of range 3 E. B. M., in the district of lands subject to sale at Lewiston, Idaho, I do solemnly swear that I am a native citizen of the United States, of the age of 27, and by occupation electrician; that I have personally examined said land, and from my personal knowledge state that said land is unfit for cultivation, and valuable chiefly for its timber; that it is uninhabited; that it contains no mining or other improvements, nor, as I verily believe, any valuable deposit of gold, silver, cinnabar, copper, or coal; that I have made no other application under said acts; that I do not apply to purchase the land above described on speculation, but in good faith to appropriate it to my own exclusive use and benefit, and that I have not, directly or indirectly, made any agreement or contract, or in any way or manner, with any person or persons whomsoever, by which the title I may acquire from the government of the United States may inure in whole or in part to the benefit of any person except myself, and that my postoffice is Lewiston, Idaho.

"[Signed] George Ray Robinson.

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

"I hereby certify that the foregoing affidavit was read to affiant in my presence before he signed his name thereto; that said affiant is to me personally known (or has been satisfactorily identified before me by ————), and that I verily believe him to be the person he represents himself to be; and that this affidavit was subscribed and sworn to before me this 31st day of March, 1903. [Signed] J. B. West, Register.

"Note.—Every person swearing falsely to the foregoing affidavit is guilty of perjury and will be punished as provided by law for such offense. In addition thereto the money that may be paid for the land is forfeited, and all conveyances of the land or of any land or of any right, title or claim thereto, are absolutely null and void as against the United States."

The perjury assigned is that, in having so sworn that he had personally examined the land described in the affidavit, Robinson swore falsely.

Forney & Moore and Geo. W. Tannahill, for plaintiff in error.

Robert T. Devlin, William R. Harr, and C. H. Lingenfelter, U. S. Dist. Atty., for the United States.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge (after stating the facts as above). The statute upon which the indictment is founded provides that surveyed public lands of the United States not included within military, Indian, or other reservations, valuable chiefly for timber but unfit for cultivation, and which have not been offered at public sale according to law, may be sold to citizens of the United States or persons who have declared their intention to become such, in quantities not exceeding 160 acres to any one person or association of persons, at the minimum price of $2.50 per acre, and that lands valuable chiefly for stone may be sold on the same terms as timber lands; provided, that nothing in the act contained shall defeat or impair any bona fide claim under any law of the United States, or authorize the sale of any mining claim or the improvements of any bona fide settler, or lands containing gold, silver, cinnabar, copper, or coal, or lands selected by the states under any law of the United States donating lands for internal improvements, education, or other purposes, and with a further provision not necessary to be stated.

The second and third sections of the act of June 3, 1878, c. 151, 20 Stat. 89, 90 (U. S. Comp. St. 1901, pp. 1545, 1546), are as follows:

"Sec. 2. That any person desiring to avail himself of the provisions of this act shall file with the register of the proper district a written statement in duplicate, one of which is to be transmitted to the General Land Office, designating by legal subdivisions the particular tract of land he desires to purchase, setting forth that the same is unfit for cultivation and valuable chiefly for its timber or stone; that it is uninhabited; contains no mining or other improvements, except for ditch or canal purposes, where any such do exist, save such as were made by or belong to the applicant, nor, as deponent verily believes, any deposit of gold, silver, cinnabar, copper, or coal; that deponent has made no other application under this act; that he does not apply to purchase the same on speculation but in good faith to appropriate it to his own exclusive use and benefit, and that he has not directly or indirectly made any agreement or contract in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the government of the United States, should inure in whole or in part to the benefit of any person except himself; which statement must be verified by the oath of the applicant before the register or the receiver of the land office within the district where the land is situated; and if any person taking such oath shall swear falsely in the premises, he shall be subject to all the pains and penalties of perjury, and

shall forfeit the money which he may have paid for said lands, and all right and title to the same; and any grant or conveyance which he may have made, except in the hands of bona fide purchasers, shall be null and void.

"Sec. 3. That upon the filing of said statement as provided in the second section of this act, the register of the land office shall post a notice of such application, embracing a description of the land by legal subdivisions, in his office, for a period of sixty days, and shall furnish the applicant a copy of the same for publication, at the expense of such applicant, in a newspaper published nearest the location of the premises, for a like period of time; and after the expiration of said sixty days, if no adverse claim shall have been filed, the person desiring to purchase shall furnish to the register of the land office satisfactory evidence, first, that said notice of the application prepared by the register as aforesaid was duly published in a newspaper as herein required; secondly, that the land is of the character contemplated in this act, unoccupied and without improvements, other than those excepted, either mining or agricultural, and that it apparently contains no valuable deposits of gold, silver, cinnabar, copper, or coal; and upon payment to the proper officer of the purchase money of said land, together with the fees of the register and the receiver, as provided for in case of mining claims in the twelfth section of the act approved May tenth, eighteen hundred and seventy-two, the applicant may be permitted to enter said tract, and, on the transmission to the General Land Office of the papers and testimony in the case, a patent shall issue thereon; provided, that any person having a valid claim to any portion of the land may object in writing to the issuance of a patent to the lands so held by him, stating the nature of his claim thereto; and evidence shall be taken, and the merits of said objection shall be determined by the officers of the land office, subject to appeal, as in other land cases. Effect shall be given to the foregoing provisions of this act by regulations to be prescribed by the Commissioner of the General Land Office. * * *"

In the case of Williamson v. United States, 207 U. S. 425, 28 Sup. Ct. 163, 52 L. Ed. 278, the Supreme Court decided, among other things, that an indictment under this act of Congress, for the subornation of perjury, relates to the verified statement provided for in its second section, and not to the making of the final proofs in respect to the land, and that any regulations of the Land Department undertaking to add to the requirements of the statute are invalid.

A comparison of Exhibit 7 above set out, which constitutes the alleged perjury of Robinson, and which was introduced in evidence over the objections and exceptions of the defendant, with section 2 of the act of June 3, 1878, shows that the requirement that the applicant for the land should state in his sworn statement that he had personally examined the land applied for, and further state that from his personal knowledge it was unfit for cultivation, uninhabited, and valuable chiefly for its timber, is certainly not expressly found in the statute.

The question whether an applicant for entry under this statute may make the initial statement therein provided for upon knowledge or information other than that of personal observation came before the Circuit Court of Appeals for the Seventh Circuit in the case of Hoover v. Salling, 110 Fed. 43, 49 C. C. A. 26, where that court, in holding that he may, said:

"It will be noted that the statute requires no residence upon the land by the applicant either at the time or subsequently; nor does it require him, either presently or in the future, to utilize the land, by either cutting the timber or quarrying the stone. There is in the statute no purpose nor requirement, in these respects, such as the homestead laws embody. The purpose of the act seems to have been of an entirely different character. It was based manifestly upon the possibility that much of the timber and stone on these lands would

not be needed for years to come, though, with the passage of time, their value would increase; and it was meant that the opportunities thus afforded for increased valuation should not be monopolized by a few, but should be open equally to all, so that the increment, whatever it was, might be shared widely by the people of the United States. The act was, in a sense, an attempt to widely distribute and popularize the ownership of these lands. We cannot conceive that Congress meant, in the promotion of such a purpose, to shut out citizens of the United States who lived at great distances, or were physically incapacitated to explore the woods, or citizens who, for any reason, could not personally inspect the lands. The invitation was to all, wheresoever they resided, and whatsoever their means of acquiring information, who could comply with the procedure laid down by the statute. This procedure embraced, first, a statement, verified by oath, of the character of the lands, the right of the applicant to enter, and the purpose of his proposed entry; and then, after notice, a hearing either ex parte or upon contest—but in either event a hearing—at which, and before allowance of the application, the statement must be supported by satisfactory proof. It is clear to us, in view of this, that the statement is meant simply as an initial paper—the claim or pleading—upon which the machinery of the land office is to be set in motion. The statement is not accepted as proof, and it does not perform the office of proof; that must come at the hearing. It is in the nature of a petition to the Land Department, setting forth all the material facts upon which action is invoked, and is, in this general respect, analogous to verified petitions, or bills, in courts of chancery."

It is, of course, true that the Land Department cannot by any rule or regulation declare what shall constitute a crime, or make that a crime which by statute is not such. The subornation of perjury charged in the indictment in question relates to the statement of the applicant in respect to his personal examination of the land and his personal knowledge of the matters specified in the statute. Such statement in regard to his personal examination and personal knowledge was required only by the blank forms furnished by the Land Department. It was not even required by the rules and regulations adopted by that department, as will be seen from the circular from the General Land Office set out in the margin of the opinion of the Supreme Court in the Williamson Case, at page 19.

We are therefore of opinion that under the ruling of the Supreme Court in the case of Williamson v. United States, 207 U. S. 425, 28 Sup. Ct. 163, 52 L. Ed. 278, neither the personal examination of the land applied for by Robinson, nor his personal knowledge concerning it, was required, and hence that the indictment charges no crime against the plaintiff in error.

Accordingly the judgment is reversed, and the cause remanded with directions to the court below to dismiss the indictment.

NIVEN v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. May 3, 1909.)

No. 1,668.

1. ALIENS (§ 57*)—"LANDING FROM VESSEL."

Act March 3, 1903, c. 1012, § 18, 32 Stat. 1217, declares that it shall be the duty of the owners, officers, and agents of any vessel bringing an alien to the United States to adopt due precautions to prevent the "landing" of any such alien "from such vessel" at any time or place other than

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

that designated by the immigration officers, and any such owner, etc., who shall land or permit to land any alien at any other place shall be guilty of a misdemeanor. *Held*, that the words "landing from vessel" as so used means "to go ashore," the landing being complete the moment the vessel is left and the shore is reached.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 57.*]

2. ALIENS (§ 57*)—STATUTES—SAILORS.

Act Cong. March 3, 1903, c. 1012, § 18, 32 Stat. 1217, prohibiting the officers, owners, and agents of any vessel from permitting any alien to land therefrom at any time or place other than that designated by the immigration officers, does not apply to seamen landed and placed in a hospital because of illness who were unable to return to their home port with the vessel as intended.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 57.*]

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

James M. Ashton, for plaintiff in error.

Elmer E. Todd, U. S. Atty., and Charles T. Hutson, Asst. U. S. Atty.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. This case was submitted in the court below upon an agreed statement of facts, from which statement these, among other, facts appear:

The plaintiff in error was master of the British steamship Wyneric, which ship arrived in the port of Tacoma on the 26th day of December, 1905, from the port of La Boca, Panama, having on her articles as an ordinary seaman one William Hall. At the time of the arrival of the ship at Tacoma 15 men of her crew, including Hall, were ill with malarial fever. The master had the crew examined by two competent physicians, one of whom was Dr. McCutcheon, superintendent and physician in charge of the Fannie Paddock Hospital in Tacoma, and the other Dr. Shugg, physician and surgeon in the United States Marine Hospital Service. By the advice of these two physicians these 15 sick seamen, including Hall, were sent from the ship to the Fannie Paddock Hospital for treatment. After examination, Dr. Shugg certified to the Commissioner of Immigration that Hall had "consumptive tendency very marked, affecting ability to earn a living." Thereupon the officers of the immigration service served upon the master of the ship (the defendant to this action) a notice containing a quotation of section 18, c. 1012, of the act of Congress approved March 3, 1903, 32 Stat. 1217, entitled "An act to regulate the immigration of aliens into the United States," and rule 13 of the immigration regulations of date August 26, 1903, which provides that, at least 24 hours in advance of the intended time of sailing, the master, agent, owner, or consignee of any vessel shall notify the immigration office at the port of departure, and directing the master to prevent the landing of Hall, among others, "until his right to do so has been determined by the duly qualified immigration officer or immigration officers." Thereafter the master requested permission to discharge Hall from the service of the

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

vessel on the ground that he was not in a condition to perform his duties as a seaman, and, after further examination of Hall, the master was notified that by reason of Hall's consumptive tendency he had been excluded from admission to the United States, and that he, the master, must return him to the port from which he came. After a subsequent examination, from which it again appeared that Hall was unable to go to sea on account of his sickness, the latter was by the master and the British vice consul at Tacoma discharged from his service as sailor on the Wyneric, and left in the hospital in charge of the vice consul as a distressed British seaman. The vessel then proceeded on a voyage without Hall, and without any other provision for returning him to his own country having been made. The vice consul made two attempts to send Hall away on British vessels as an ordinary seaman, but he refused to engage himself in that capacity on account of his physical disability; and, after the second refusal, the vice consul notified the superintendent of the Fannie Paddock Hospital that he would cease to afford relief, Hall having forfeited all claim to be sent home. Hall was then discharged from the hospital and disappeared. Upon these facts the master, having subsequently returned to Tacoma, was charged by an information filed against him in the court below with the commission of a misdemeanor under and pursuant to the provisions of section 18, c. 1012, Act March 3, 1903, 32 Stat. 1217, which section is as follows:

"That it shall be the duty of the owners, officers, and agents of any vessel bringing an alien to the United States to adopt due precautions to prevent the landing of any such alien from such vessel at any time or place other than that designated by the immigration officers, and any such owner, officer, agent or person in charge of such vessel who shall land or permit to land any alien at any time or place other than that designated by the immigration officers shall be deemed guilty of a misdemeanor, and shall, on conviction, be punished by a fine for each alien so permitted to land of not less than one hundred nor more than one thousand dollars, or by imprisonment for a term not exceeding one year, or by both such fine and imprisonment, and every such alien so landed shall be deemed to be unlawfully in the United States and shall be deported as provided by law."

This act of Congress was under the consideration of the Supreme Court in the cases of Taylor v. United States, 207 U. S. 120, 28 Sup. Ct. 53, 52 L. Ed. 130, and United States v. MacDonald, 207 U. S. 120, 28 Sup. Ct. 53, 52 L. Ed. 130. In the case of United States v. MacDonald the trial court quashed the indictment, which disclosed that the alien alleged to have been permitted unlawfully to land was a seaman; and in the case of Taylor v. United States, Judge Wallace dissented from the judgment of the Circuit Court of Appeals for the Second Circuit, from which court the case was taken to the Supreme Court, on the ground that the statutory provision under which the defendant was indicted should not be construed as embracing sailors who are bona fide members of a ship's crew. The Supreme Court affirmed the MacDonald Case, and reversed the Taylor Case, and, in considering and construing section 18 of the act of March 3, 1903, said:

"The phrase which qualifies the whole section is, 'bringing an alien to the United States.' It is only 'such' officers of 'such' vessels that are punished. 'Bringing to the United States,' taken literally and nicely, means, as a similar

phrase in section 8 plainly means, transporting with intent to leave in the United States and for the sake of transport; not transporting with intent to carry back, and merely as incident to employment on the instrument of transport. So again, literally, the later words 'to land' mean to go ashore. To avoid certain inconveniences, the government and the courts below say that sailors do not land unless they permanently leave the ship. But the single word is used for all cases, and must mean the same thing for all, for sailors and other aliens. It hardly can be supposed that a master would be held justified under this section for allowing a leper to wander through the streets of New York on the ground that, as he expected the passenger to return and his expectations had been fulfilled, he could not be said to have allowed the leper to land. The words must be taken in their literal sense. 'Landing from such vessel' takes place and is complete the moment the vessel is left and the shore reached. But it is necessary to commerce, as all admit, that sailors should go ashore, and no one believes that the statute intended altogether to prohibit their doing so. The contrary always has been understood of the earlier acts, in judicial decisions and executive practice. If we reject the ambiguous interpretation of 'to land,' as we have, the necessary result can be reached only by saying that the section does not apply to sailors carried to an American port with a bona fide intent to take them out again when the ship goes on, when not only there was no ground for supposing that they were making the voyage a pretext to get here, desert, and get in, but there is no evidence that they were doing so in fact. Whether this result is reached by the interpretation of the words 'bringing an alien to the United States,' that has been suggested, or on the ground that the statute cannot have intended its precautions to apply to the ordinary and necessary landing of seamen, even if the words of the section embrace it, as in Church of the Holy Trinity v. United States, 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226, does not matter for this case. We think it superfluous to go through all the sections of the act for confirmation of our opinion. It is enough to say that we feel no doubt when we read the act as a whole. A reason for the construction adopted below was found in the omission of the word 'immigrant' which had followed 'alien' in the earlier acts. No doubt that may have been intended to widen the reach of the statute, but we see no reason to suppose that the omission meant to do more than to avoid the suggestion that no one was within the act who did not come here with intent to remain. It is not necessary to regard the change as a mere abbreviation, although the title of the statute is 'An act to regulate the immigration of aliens into the United States.' "

We think the decision of the Supreme Court from which we have quoted is conclusive of the present writ of error and requires a reversal of the judgment, which adjudged the plaintiff in error guilty of the misdemeanor denounced by section 18 of the act of March 3, 1903.

The judgment is reversed and case remanded.

NEW YORK PRODUCE EXCHANGE BANK v. HOUSTON et al.

(Circuit Court of Appeals, Second Circuit. April 14, 1909.)

No. 214.

1. BANKS AND BANKING (§ 148*)—PAYMENT OF FORGED CHECKS—NEGLIGENCE OF BANK—ESTOPPEL OF DEPOSITOR.

Failure of a bank depositor to examine his account and give the bank prompt notice of his objections to the payment of forged checks is no defense to the depositor's right to recover the money so paid from the

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

bank, if the bank's officers, before paying the checks, by the exercise of reasonable care could have detected the forgeries.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 438–452; Dec. Dig. § 148.*]

2. BANKS AND BANKING (§ 148*)—FORGED CHECKS—PAYMENT—RIGHTS OF DEPOSITOR—ESTOPPEL.

Where a bank was negligent in paying certain forged checks, the depositor would not be estopped by his own negligence from claiming the amount so paid, unless such negligence was directly connected with the forgeries.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 442–444; Dec. Dig. § 148.*]

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

John A. & A. S. Mapes (J. E. Kelly, of counsel), for plaintiff in error.

J. Parker Kirlin and Charles R. Hickox, for defendants in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. The plaintiffs, who had the usual drawing account with the defendant bank, brought suit to recover the sum of $13,702, alleged to be the balance due when the account was closed. The bank defended on the ground that it had paid out on the plaintiffs' account three checks which represented this amount, viz., August 3, 1905, for $4,102, August 9, 1905, for $4,726.12, and August 29, 1905, for $4,873.88. The plaintiffs are an English firm, and the signature given the bank for drawing checks on their account was a rubber stamp, "p. p. R. P. Houston Company," with the name of H. C. Rowlands, their representative, written below. Rowlands' signature to the checks in question was forged by the firm's cashier. By agreement with the bank the plaintiffs' bank book was settled monthly; the bank returning the checks paid and a certificate of the balance on hand. The plaintiffs did not discover the discrepancy until Tuesday, September 5th, the 4th being Labor Day and the 3d Sunday. An examination of their books then showed that on July 25th the cashier had failed to make a deposit entered on the stub of the check book of $1,348.31; that without the knowledge of the plaintiffs he had the bank book settled out of the usual course August 11th; that on August 29th he kept a check for $8,473.87 to the order of Brown Bros., instead of having it certified by the bank and delivered; and, finally, that on August 31st, the plaintiffs' representative having signed a check with the figures "$261.50" in the lower left-hand corner, the line for the written figures being blank, the cashier inserted the figure "3" before the figures "261.50," and filled up the blank with the words "three thousand two hundred and sixty-one and 50/100ths dollars." This was the only occasion on which the plaintiffs' representative ever signed a blank check, and he did it because the check was presented to him when he was hurrying to a committee meeting, for which he was late.

The plaintiffs made no claim either for the deposit of $1,348.31 not made July 25th, or for the sum of $3,000, the amount by which the

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

check of August 31st was raised. The cashier destroyed the forged checks when they were returned by the bank, so that the only evidence about these signatures on the trial was a statement in an affidavit made by him that he made the signatures as like the genuine as possible. The defendant offered no testimony. The court was clearly right in refusing to direct a verdict for the defendant, and, as we have no power to review his refusal to set aside the verdict as against the evidence, the exceptions on these grounds are without merit.

The only other exceptions relied on were taken to the court's answers to the jury when they returned for further instructions:

"Juror No. 7: Your honor, we want to find out whether we can bring in a verdict that we find both sides guilty of negligence.

"The Foreman: If we have a right to compromise. If we have a right to give the plaintiff one check—one forged check.

"The Court: Well, if you all agree that there was fault on the part of the defendant in cashing these forged checks, then (if you understood the charge correctly) any want of care on the part of the plaintiff to affect it at all must have reference to the act of forgery or payment of the checks, not reference to some other thing collateral to it. It must bear right on that matter. If you find that the bank officers were guilty of want of care in the matter that the law imposes upon them, you are not to consider the transaction relative to the thirteen hundred and some odd dollars, if you find that the bank officers were lacking in care, because that would be remote—collateral. The only want of care on the part of the plaintiff that you can take into consideration at all, if the bank officers were wanting in care, would be something that goes right to the matter of forgery, and in discussing that you want to inquire what that act was, if you find any. It is for you to say whether there was any that related to that specific thing.

"The Foreman: Supposing some of the jurors consider the bank more negligent in the first case, paying the first check, than in the others following, would we have a right to bring in a verdict for one or two—or about that amount?

"The Court: In order to find that way, you must find from the evidence that there was a difference in care on the part of the bank officers. Was there any difference in care on the part of the bank officers? Was there any difference in the want of care by the bank officers as to the first or the second or the third check? Whether they did not stand exactly alike as to their care as to each check? Was there a want of care as to all of the checks? Did the plaintiff do anything at all whereby he is estopped of a right to recover of the bank specifically as to one check or any of them?

"Juror No. 7: We seem to all stand that we think that both sides are guilty of negligence, both in fault.

"The Court: Do you find the plaintiff guilty of want of care as to these checks?

"Mr. Kelly: I must object to that.

"The Court: I am not asking you to answer that question to me, but to yourselves. What is the plaintiff guilty of with reference to the forgery? Their want of care must relate to that act, or did the plaintiff do something that misled the bank in that matter?"

The federal law is settled for this court in the case of Leather Manufacturers' Bank v. Morgan, 117 U. S. 96, 6 Sup. Ct. 657, 29 L. Ed. 811. It was a case of raised checks having genuine signatures, and went up from this circuit. The trial judge directed a verdict for the plaintiffs, which was reversed on the ground that the case should have gone to the jury. It was held that the sending of his bank book for settlement is a demand by the depositor to know what his balance is; that it is his duty to examine it, and the vouchers returned, or to have them

examined, within a reasonable time, and to make any objections he has. If his failure in this respect deprives the bank of an opportunity to take steps for its own protection, which it would have taken had such notice been given, the depositor may be estopped from questioning the conclusiveness of the settlement. This proposition, however, was made to depend upon the assumption that the bank had been guilty of no negligence. Mr. Justice Harlan said, at page 112 of 117 U. S., and page 663 of 6 Sup. Ct. (29 L. Ed. 811):

"Of course, if the defendant's officers, before paying the altered checks, could by proper care and skill have detected the forgeries, then it cannot receive a credit for the amount of those checks, even if the depositor omitted all examination of his account."

The case was so understood by the Circuit Court of Appeals for the Sixth Circuit in First National Bank v. Fourth National Bank, 56 Fed. 967, 971, 6 C. C. A. 183, 188; Judge Sage saying:

"However, counsel for plaintiff did not cite that case for the application above named, but to call attention to the fact that the Supreme Court decided, first, that if the bank had been guilty of negligence it would have been liable, notwithstanding the depositor's failure to examine the pass books and vouchers; and, second, that as the depositor's clerk had no power to bind him by raising the checks he had no power to charge him with the imputed knowledge of the fact that they had been raised. The court did hold that, if the officers of the bank could by proper care and skill have detected the forgeries before paying the raised checks, the bank would be the loser, even if the depositor made no examination of his account. Certainly, because in that state of fact the negligence of the bank's officers would have been the proximate cause of the loss."

We think the instructions of the trial judge were all that the defendant was entitled to. If the bank were negligent, the plaintiffs would be estopped from claiming against it only by their own negligence directly connected with the forgeries. The bank was bound to know its depositors' signature, and was under a duty not to pay out their money on some other signature. No doubt, if the plaintiffs had discovered the cashier's misappropriation of the deposit of $1,348.31 July 25th, when their book was settled August 1st, the subsequent thefts would have been prevented; but this in no way excused the bank for lack of care in paying out this money on a forged signature. In the same way, if the plaintiffs had discovered the payment of the forged checks of August 3d and 9th, when their bank book was settled out of the usual course August 11th, the check of August 29th would never have been forged. But these considerations were only relevant in case the bank had been guilty of no negligence; and, the jury having found for the plaintiffs for the full amount claimed, we must presume that they did find the bank negligent, or, if not, that the plaintiffs' conduct was not such as to estop them from making claim. The law as to the two alternatives was fully explained in the charge.

The judgment is affirmed, with costs.

THE DICTATOR.

THE TRANSFER NO. 7.

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

No. 174.

COLLISION (§ 60*)—TUGS WITH TOWS MEETING—FAULT AS CAUSE OF COLLISION.

A tug coming out from Newtown creek with a barge in tow on her side, and starting up East river to the east of Blackwells Island, *held* justified in taking the west side of the channel by the presence of other tugs and tows on the Brooklyn side; and a collision between her tow and a transfer tug passing down also with a tow *held* due solely to the fault of the latter, which had no lookout and failed to observe or to answer the signals of the up-bound tug until too late to avoid the collision, the latter being as near as possible to the west side of the channel, and having repeatedly signalled for passing starboard to starboard.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 73-77; Dec. Dig. § 60.*]

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

The following is the opinion of the District Court by Adams, District Judge:

This action was brought by the owner of the barge Acme which was in tow of the Dictator on the Dictator's starboard side, against that tug and also against the New York, New Haven & Hartford Railroad tug Transfer No. 7 to recover for damages caused by collision with the tow of the lighter. The collision was with the tug itself but it appears here that No. 7, with a carfloat on her port side, was coming down the channel between Blackwells Island and Brooklyn, and the Dictator with the Acme in tow had come out from Newtown Creek, her tow being also on the port side, and was bound up the same channel. The collision, according to the great preponderance of testimony, happened about opposite Third or Fourth Street on the Brooklyn side and slightly to the eastward of the rocks which are a continuation of Blackwells Island. That excludes the Man-of-War rock because this collision was a little above that.

Quite a large damage was done here, it is claimed to have been some $2,600 and the case has been very strenuously and ably conducted on both sides. The question for me to determine is whether one or both of these tugs is in fault.

I have followed the case quite closely. I was somewhat confused in the beginning and in fact confused to the end by the pleadings, No. 7 contending that the Dictator was showing a light which indicated a crossing course, that is, that she would go across the river; while the Dictator contends it was a case of green to green after she had turned her course up the River.

My impression from all the testimony is that the Dictator's view of the matter should be sustained. It seems to me that the Dictator, in passing or attempting to pass, chose the left hand side—passing starboard to starboard—and that has been very gravely criticised and perhaps with some force. Of course the law requires that vessels should pass the other way, that is, port to port, and the Dictator initiated passing starboard to starboard contrary to the dictates of the law. The question is whether that is the cause of the collision or whether she was justified in adopting such a course. She seeks to sustain her proceeding by the fact that there were some tugs and tows operating around the Long Island Railroad floats so that she says she was forced to the western side of the channel. And it has been shown that there were such tugs operating at that point, and I think that she was forced to adopt a course on the western side of that channel.

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

No. 7, in coming down, was in a position somewhat to the westward of the center of the channel. She was without a lookout. She did not see very well what was going on, confessedly the master in the pilot house could not see over the cars on his port side excepting at the forward end of them. He says, and I have no doubt it is true, that he could see over those cars some distance ahead anything that was not too close, but that anything close at hand would be obscured by the cars. But there was no lookout there to aid him. The lookout went on duty apparently just before the collision or if he was there, according to his own story, he did not see anything of the approach of the Dictator until shortly before the vessels came together. Therefore the master of the No. 7 was navigating in the dark, excepting as regards a boat at some distance ahead of him and excepting what might be on his starboard hand. I do not see why after the Dictator got turned around and on her course up river she should not have been seen, and I do not see why she was not justified in taking a course over to the left hand side of the channel.

There was another New York & New Haven Transfer No. 1, with two carfloats one on each side, coming down the river in advance of the No. 7. There was very little distance between them, it has been estimated I think about 250 feet between the tows, the No. 7 being somewhat further to the westward.

The first signal that was given by the Dictator was not answered by No. 7 but was answered by No. 1 and they agreed—if it can be considered as an agreement, because it is claimed by the Dictator that the signal was not designed for No. 1, that it was designed for No. 7. However that may be, it was an agreement for a starboard passage. No. 7 did not see the Dictator at that time and apparently did not hear her whistle. I do not know why, but the absence of a lookout is very significant as an explanation. The master of No. 7—who was only an extra man, and although he had a master's papers, had apparently had very little experience as a master—was in this case acting only as an extra man, one who is put on in case of emergency or deficiency of help and but for a short time. While I do not mean to say he was not generally competent yet I cannot avoid concluding that in view of what happened he was incompetent in some respects, either in attention or knowledge of what should be done, because when the Dictator blew and continued to blow signals of two whistles they should have been heard and observed by the master of No. 7. Although the state statute requires boats to navigate in the middle of the river, and that rule applies to the river up as far as Blackwells Island, in this case it could not apply as far as Blackwells Island because the rocks there prevented its being obeyed. The rocks extend down for some distance, a half a mile or more, from the end of the Island. The Dictator chose to navigate in the channel on the eastern side of the Island and there was no reason why she should not have gone there. Having concluded to take that course she turned up the river so that she was then showing her green light to Transfers No. 7 and No. 1 coming down the river and seeing their green lights. Under those circumstances she blew a signal of two whistles and worked over somewhat nearer the rocks so that at the time of the collision it is said she was only 50 or 60 feet away from them and the Acme, after she broke loose from the Dictator and before she was recovered by the tug actually did strike the rock. Therefore, it appears that the Dictator could not have gone any further than she did on that side. The only question is whether she had any right to go there at all.

I do not think that the state statute should prevail here because, although in terms it extends to Blackwells Island, these rocks were an extension of Blackwells Island and were such an extension as to force the Dictator to determine considerably before she got to Blackwells Island whether she would go one way or the other and when she got up to the rocks she was obliged to follow the channel she was in. With respect to the narrow channel rule of course she was violating that rule, she was on the wrong side of the channel. But, as I say, I believe she was justified in going there because of the peculiar condition which existed around the float bridges of the Long Island Railroad Ferry slips on the Brooklyn side. The tugs there were occupying those slips and maneuvering around there with floats and the Dictator, in going up the river, would have been very much embarrassed by the presence of those tugs and tows that were maneuvering there, and would also have been

embarrassed by the presence of No. 1 on the left hand side of the channel. I doubt very much if there was room for her to pass between No. 1 and No. 7. The channel is not very wide there, it has been stated that it is 500 or 600 feet but I think that is not enough, it is probably 800 or 1,000 feet at least; so that there was not really a great deal of room there after the Dictator got in that channel.

As regards the fault of this collision, No. 7 was undoubtedly in fault, according to her own admission. She had no lookout and her master could not see over her cars anything that was very near—although that may not have any bearing on this collision because he could see over them at a distance and if closer at hand he could see on the starboard side.

There has been some criticism made on the whistle of the No. 7 and that has been denied. I do not pay much attention to that. I think the whistle was probably all right. The difficulty was that the No. 7's whistle was not used until almost the last minute and then the signal was one blast, which was manifestly impossible to be obeyed at that time.

The Dictator was navigating according to her view in the best way to avoid these various vessels which occupied the other side of the channel and, while she was technically violating the narrow channel rule I do not think that violation was the cause of this collision. I think it was altogether brought about by the neglect of No. 7 to see what the Dictator was trying to do and to pay attention to conform her navigation to what was obviously a safe way of passing in view of all the circumstances.

I therefore allow a decree against the No. 7 and dismiss the libel as to the Dictator.

James T. Kilbreth, for appellant.
Alexander & Ash, for the Dictator.

Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. Decree affirmed, with costs.

PRICE v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. May 3, 1909.)

No. 1,660.

COURTS (§ 405*)—CIRCUIT COURT OF APPEALS—MODE OF REVIEW—STATUTES. Act Cong. June 30, 1906, c. 3934, § 3, 34 Stat. 815 (U. S. Comp. St. Supp. 1907, p. 798), provides that an appeal shall lie from all final judgments and decrees of the United States Court for China to the United States Court of Appeals for the Ninth Circuit, and thence to the Supreme Court of the United States in the same class of cases as those in which appeals and writs of error are permitted to judgments of such Court of Appeals in cases coming from District and Circuit Courts of the United States, and that such appeals or writs of error shall be regulated by the procedure governing appeals within the United States from the District Courts to the Circuit Courts of Appeal and from the Circuit Courts of Appeal to the Supreme Court of the United States, respectively, so far as the same shall be applicable, and that the courts are empowered to hear and determine appeals and writs of error so taken. *Held*, that such act recognizes a distinction between cases at law and in equity and admiralty, and that a judgment from such court erroneously brought to the Circuit Court of Appeals by appeal, instead of by writ of error, should not be reviewed, though the record contained all the essential elements of a record brought up by writ of error.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 405.*]

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

Appeal from the United States Court for China.

See, also, 156 Fed. 950, 85 C. C. A. 247, 15 L. R. A. (N. S.) 1272.

Jernigan & Fessenden, Wm. S. Fleming, and Bert Schlesinger, for appellant.

Robert T. Devlin, U. S. Atty.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. This cause comes here from the United States Court for China, established by Act Cong. June 30, 1906, c. 3934, 34 Stat. 814 (U. S. Comp. St. Supp. 1907, p. 797), the third section of which act is as follows:

"That appeals shall lie from all final judgments or decrees of said court to the United States Circuit Court of Appeals for the Ninth Circuit, and thence appeals and writs of error may be taken from the judgments or decrees of the said Circuit Court of Appeals to the Supreme Court of the United States in the same class of cases as those in which appeals and writs of error are permitted to judgments of said Court of Appeals in cases coming from District and Circuit Courts of the United States. Said appeals or writs of error shall be regulated by the procedure governing appeals within the United States from the District Courts to the Circuit Courts of Appeal, and from the Circuit Courts of Appeal to the Supreme Court of the United States, respectively, so far as the same shall be applicable; and said courts are hereby empowered to hear and determine appeals and writs of error so taken."

In the recent case of Toeg v. Suffert (decided February 1, 1909, C. C. A.) 167 Fed. 125, we said:

"It is apparent upon a reading of this section that it was the intention of Congress to recognize the distinction between cases at law and cases in equity and admiralty, and to provide that the mode of procedure by which the appellate jurisdiction of this court may be invoked shall conform in all respects to the statutes and rules of court governing appeals and writs of error from district and circuit courts. The statute is not unlike the statute which was construed in Chase v. United States, 155 U. S. 489, 15 Sup. Ct. 174, 39 L. Ed. 234. The case could have been brought only to this court upon writ of error."

The appeal in that case was accordingly dismissed.

In the present case it is insisted that, although the procedure is in the record designated as an appeal, yet that the record contains all of the essential elements of a writ of error, and that consequently the mere misnomer should not deprive the appellant of his right to have his case reviewed.

An examination of the record shows that a bill of exceptions was presented by the defendant in the court below and settled by the trial judge, and that an assignment of errors was likewise presented by the defendant, along with a petition for an "allowance of appeal * * * for the reasons specified in his assignments of error herein," and praying that the transcript, papers, and proceedings be sent to this court, upon which proceedings the court below made an order allowing an appeal and directing a "certified transcript of the record, testimony, exhibits, and all proceedings herein be forthwith transmitted to said United States Circuit Court of Appeals of the Ninth Judicial Circuit." The record further shows a citation admonishing the appellee to "appear at this court within 30 days from the date of this writ, pursuant to an appeal filed in the clerk's office of the United

States Court for China, wherein S. R. Price is the defendant," issued in the name of the Chief Justice of the United States, signed by the judge of the United States Court for China, and attested by the clerk of that court, and that a deposit of money was made with the clerk of the court in lieu of a bond for costs in the appellate court.

We are not authorized to abolish the distinction between a writ of error and an appeal, and, as in this case no writ of error was in fact issued, we have no jurisdiction of the suit. Ex parte Ralston, 119 U. S. 613, 614, 7 Sup. Ct. 317, 30 L. Ed. 506; Mussina v. Cavazos, 6 Wall. 355, 356, 18 L. Ed. 810; Bondurant v. Watson, 103 U. S. 278, 26 L. Ed. 447.

The appeal is dismissed.

DENNING WIRE & FENCE CO. v. AMERICAN STEEL & WIRE CO. OF NEW JERSEY.

(Circuit Court of Appeals, Eighth Circuit. April 10, 1909.)

No. 2,866.

1. PATENTS (§ 6*)—SUBJECT OF PATENTS—FUNCTIONS OF MACHINE.
   The mere function or operation of a machine or other device, as distinguished from the machine or device itself, is not patentable.
   [Ed. Note.—For other cases, see Patents, Cent. Dig. § 5; Dec. Dig. § 6.*]

2. PATENTS (§ 7*)—SUBJECT OF PATENTS—PROCESSES.
   A patent cannot cover generally any and every means or method for producing a given result.
   [Ed. Note.—For other cases, see Patents, Cent. Dig. § 6; Dec. Dig. § 7.*]

3. PATENTS (§ 6*)—SUBJECT OF PATENTS—MACHINES.
   While the principle of a machine or device and the mode of its operation are required to be set out in the specification of a patent therefor, they cannot be made the subject of a patent, but only the machine or device itself is patentable.
   [Ed. Note.—For other cases, see Patents, Cent. Dig. § 5; Dec. Dig. § 6.*]

4. PATENTS (§ 6*)—SUBJECT OF PATENTS—"FUNCTIONS OF MACHINE."
   The phrase "functions of a machine," as used in the patent law, defined as that power or property of the machine of acting in the specific manner designed or intended by its construction; in other words, that which the machine is designed to do, as distinguished from the machine itself, and from the product of its action on something external to itself.
   [Ed. Note.—For other cases, see Patents, Cent. Dig. § 5; Dec. Dig. § 6.*
   For other definitions, see Words and Phrases, vol. 6, p. 5229; vol. 8, p. 7748.]

5. PATENTS (§ 157*)—CONSTRUCTION—GENERAL RULES.
   A patent is a contract, and the rules for the construction of contracts generally control in its interpretation; and when its terms are plain, and the intention of the parties clearly manifest therefrom, they must prevail; but if its expressions are ambiguous, or its validity or any claim is doubtful, that construction will be given which will sustain rather than destroy the patent.
   [Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 229, 230; Dec. Dig. § 157.*]

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

6. PATENTS (§ 42*)—PATENTABILITY—COMBINATION PRODUCING NEW RESULT.
A new combination of old elements or devices whereby a new and useful product is produced or an old product is attained in a more efficient and economical way may be protected by a patent.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 49; Dec. Dig. § 42.*]

7. PATENTS (§ 328*) — VALIDITY AND INFRINGEMENT — MACHINE FOR MAKING WIRE FENCE.
The Bates patent No. 577,639, for a machine for making woven wire fence, is not invalid on the ground that its claims are for a mode of operation or principle or function of a machine, but is for the machine itself, designed to produce a certain described fabric; nor are the claims so broad as to include any and every machine for making this same fabric, but it is for a new and novel combination and discloses invention.
[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

8. PATENTS (§ 237*)—INFRINGEMENT—"MECHANICAL EQUIVALENT."
The term "mechanical equivalent," as used in the patent law, means that each of the ingredients comprising the invention covers every other ingredient which in the same arrangement of the parts will perform the same function, if that was well known as a proper substitute for the one described in the specification at the time of the patent.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 374, 375; Dec. Dig. § 237.*
For other definitions, see Words and Phrases, vol. 5, p. 4461.]

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

For opinion below, see 160 Fed. 108.

Thomas A. Banning (Grimm, Trewin & Moffitt and Banning & Banning, on the brief), for appellant.

Thomas W. Bakewell and Paul Bakewell (Charles MacVeagh, on the brief), for appellee.

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

PER CURIAM. The Circuit Court rendered a decree which sustained claims numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 19, 27, and 35 of letters patent No. 577,639, issued on February 23, 1897, to Albert J. Bates, for improvements in wire-fence machines, and adjudged that machines made in accordance with the specifications of letters patent No. 788,305, issued on April 25, 1905, to Joseph M. Denning, were infringements thereof. The Denning Wire & Fence Company appealed from that decree, and its counsel by brief and oral argument have presented every fact and rule of law that learning, ability, and ingenuity could discover to sustain its appeal. Every position of the court has been reviewed in the light of the objections to it which have thus been urged upon our consideration, and our conclusion is that the decree below was right and that it must be sustained. The opinion of Judge Henry T. Reed in the court below so logically and clearly states this case, and the reasons why the decree was rendered, that it is approved and adopted as the opinion of this court. It reads in this way:

"Reed, District Judge. Congress has enacted, in substance, that any person who has invented or discovered any new and useful art, machine, manufacture,

or composition of matter, or any new and useful improvements thereof, not known or used by others before his invention or discovery, may, upon compliance with the law, obtain a patent therefor; that before he shall receive such patent he shall make written application for the same, and file therewith in the Patent Office a written description of the invention, and of the manner of making and using it, in such full, clear, and exact terms as to enable any person skilled in the art or science to which it appertains to make, construct, compound, and use the same; and, in case of a machine, he shall explain the principle thereof, and the best mode in which he has contemplated applying that principle, so as to distinguish it from other inventions, and shall particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention; that, when the nature of the case admits of drawings, the applicant shall furnish the same, which shall be filed in the Patent Office as a part of the specifications, and a copy of the specifications shall be annexed to the patent, if issued, as a part thereof. Rev. St. § 4883 (U. S. Comp. St. 1901, p. 3381) et seq.

"The granting of the patent is presumptive evidence of its validity, and of the novelty of the invention. Smith v. Goodyear Co., 93 U. S. 486–498, 23 L. Ed. 952; Cantrell v. Wallick, 117 U. S. 689–695, 6 Sup. Ct. 970, 29 L. Ed. 1017.

"The grounds of the alleged invalidity of the several claims of this patent may be stated and considered in the order in which they are presented in the brief of defendant's counsel.

"The first ground so presented, and it applies to all the claims involved, is: 'That they are functional; that the mechanism is described by the work that it does; that the claims are not limited to any particular or specific mechanism, but are worded broad enough to include all kinds of devices and mechanisms for doing the work and performing the functions specified.' This in reality specifies two distinct and separate grounds, upon each of which the validity of these claims is challenged, viz.: (1) That the claim is only for the functions of certain mechanism, and not for the mechanisms or combinations thereof; and (2) that if they are for a combination of the mechanisms mentioned, then they are so broad as to include every and any kind of mechanism or combinations thereof for making wire fence, and cannot therefore be upheld.

"Elaborate and forceful arguments, with many citations of authorities, are presented by counsel of the respective parties in support of and against these and the other grounds urged against the validity of these claims of this patent. Only brief reference to some of them can be made without unduly extending the opinion.

"That the mere function or operations of a machine, or other device, as distinguished from the machine or device itself, are not the subject of a patent, is well settled. Corning v. Burden, 15 How. 252, 14 L. Ed. 683; Burr v. Duryee, 1 Wall. 531, 17 L. Ed. 650; Westinghouse v. Boyden Power Brake Co., 170 U. S. 537–557, 18 Sup. Ct. 707, 42 L. Ed. 1136; National Hollow B. B. Co. v. Interchangeable B. B. Co., 106 Fed. 693–708, 45 C. C. A. 544. And a patent covering generally any and every means or method for producing a given result cannot be upheld. O'Reiley v. Morse, 15 How. 62, 14 L. Ed. 601; Leroy v. Tatham, 14 How. 156, 14 L. Ed. 367; The Telephone Cases, 126 U. S. 531–534, 8 Sup. Ct. 778, 31 L. Ed. 863.

"Whether or not a given case falls within the general rules thus stated depends of course upon its own facts. The first question then is, What are the functions of a machine or other device, that are not the subject of a patent? In Corning v. Burden, 15 How. 252, 14 L. Ed. 683, Mr. Justice Grier, in stating the distinction between a process and a machine, said:

" 'The term "machine" includes every mechanical device or combination of mechanical powers and devices to perform some function and produce a certain effect or result. But where the result or effect is produced by chemical action, by the operation or application of some element or power of nature, of one substance to another, such modes, methods, or operations are called "processes." A new process is usually the result of a discovery; a machine, of invention. * * * But the term "process" is often used in a more vague sense in which it cannot be the subject of a patent. Thus we say that a board is undergoing the process of being planed, grain of being ground, iron of be-

ing hammered or rolled. Here the term is used subjectively or passively as applied to the material operated on, and not to the method or mode of producing that operation, which is by mechanical means, or the use of a machine, as distinguished from a process. In this use of the term it represents the function of a machine, or the effect produced by it on the material subjected to the action of the machine. But it is well settled that a man cannot have a patent for the function or abstract effect of a machine, but only for the machine which produces it.'

"In Le Roy v. Tatham, 14 How. 196, 14 L. Ed. 367, the claim of the patent involved was as follows: 'What we claim as our invention is the combination of the following parts, to wit, the core and bridge or guide piece, the camber, and the die, when used to form pipes of metal under heat and pressure in the manner set forth, or in any other manner substantially the same.' The Circuit Court charged that this patent was not one for the combination of the different parts of the machinery described, but was one for bringing a newly discovered principle into practical application, by which a useful article of manufacture is produced, and wrought pipe made as distinguished from cast pipe. Held, that this was a wrong construction of the patent, as it was for the combination of machinery only; and whether or not the alleged newly developed property of lead used in the formation of pipes might have been patented if claimed as described, without the intervention of machinery, was not in the case. In the course of the opinion it is said:

" 'The word "principle" is used by elementary writers on patent subjects, and sometimes in adjudications of courts, with such a want of precision in its application as to mislead. It is admitted that a principle is not patentable. A principle, in the abstract, is a fundamental truth, an original cause, a motive; these cannot be patented, as no one can claim in either of them an exclusive right. Nor can an exclusive right exist to a new power, should one be discovered in addition to those already known. Through the agency of machinery, a new steam power may be said to have been generated. But no one can appropriate this power exclusively to himself under the patent laws. The same may be said of electricity, and of any other power in nature, which is alike open to all, and may be applied to useful purposes by the use of machinery. In all such cases, the processes used to extract, modify, and concentrate the natural agencies constitute the invention. The elements of the power exist; the invention is not in discovering them, but in applying them to useful objects. Whether the machinery used be novel, or consist of a new combination of parts known, the right of the inventor is secured against all who use the same mechanical power, or one that shall be substantially the same. A patent is not good for an effect, or the result of a certain process, as that would prohibit all other persons from making the same thing by any means whatsoever.'

"Burr v. Duryee, 1 Wall. 531, 17 L. Ed. 650, was a suit for an alleged infringement of the original and reissued letters patent for an improvement in machinery for making hat bodies. The original patent was held valid, but not to have been infringed by defendant's. The specification of the reissued patent describes the machine much as it was described in the original, and continues, 'The said mode of operation invented * * * is embodied in the following description,' and the claim is modified to conform to the description. Pages 567–576. The reissued letters patent was held void. In the course of the opinion Mr. Justice Grier, at page 570, says:

" 'The law requires that the specification should set forth the principle and the several modes in which the patentee has contemplated the application of that principle, or character, by which it may be distinguished from other inventions, and shall particularly point out the part, improvement, or combination which he claims as his own invention or discovery. We find here no authority to grant a patent for a principle or mode of operation, or an idea, or any other abstraction. A machine is a concrete thing consisting of parts, or of certain devices and combination of devices. The principle of a machine is properly defined to be its mode of operation, or that peculiar combination of devices which distinguish it from other machines. A machine is not a principle or an idea. The use of ill-defined abstract phraseology is the frequent source of error. * * * Because the law requires a patentee to explain the mode of operation of his peculiar machine, which distinguishes it from others,

it does not authorize a patent for a "mode of operation" as exhibited in a machine. * * * The specification of this reissued patent, instead of describing, first, the machine and the several devices, which exhibit its peculiar mode of operation in order to produce the desired effect, and stating what the patentee claims as his peculiar invention, commences by describing "a mode of operation" as the thing intended to be patented, and uses these words, "The said mode of operation, * * * is embodied in the following description of the mode of application." The claim is for the mode of operation, substantially as herein described. We have no leisure for a further development of this novel form of patent, or how, by the use of general and abstract terms, the specification is made so elastic that it may be construed to claim only the machine, or so expanded as to include all previous or future inventions for the same purpose. * * * In this case we have an attempt to convert an improved machine into an abstraction, a principle or mode of operation, or a still more vague and indefinite entity often resorted to in argument—an idea.'

"In Westinghouse v. Boyden Power Brake Co., 170 U. S. 537–557, 18 Sup. Ct. 707, 716, 42 L. Ed. 1136. Mr. Justice Brown, after reviewing the prior decisions, said: 'Where the process is simply the function or operative effect of a machine, the cases are conclusive against its patentability; but where it is one which, though ordinarily and most successfully performed by machinery, may also be performed by simple manipulation, such, for instance, as the folding of paper in a peculiar way for the manufacture of paper bags, or a new method of weaving a hammock, there are cases to the effect that such a process is patentable. * * * But this case does not call for an expression of our opinion upon this point, nor even upon the question of whether the function of admitting air directly from the train pipe to the brake cylinder be not patentable (as held by the Court of Appeals), since there is no claim made for this in this patent, and the whole theory of the specification and claims is based upon the novelty of the mechanism.' It is then held that the claim is not infringed by defendant's patent.

"In National Hollow B. B. Co. v. Interchangeable B. B. Co., 106 Fed. 693–708, 45 C. C. A. 544, the specifications upon which claims 1, 2, and 7 of the second Hiens patent there involved, rest, describe the means of producing the so-called 'camber,' or the compression member of the brake beam, as 'The turning of the nuts upon the ends of the tension rod, or member of the beam, thereby causing the compression member to arch or curve, and thus produce the desired adjustible elasticity or resilience in the beam.' In speaking of this, the court, at page 708 of 106 Fed. and page 559 of 45 C. C. A., says: 'The camber or resilience in the beam is one of the products or functions of the air-brake beam of the first patent; not, indeed, the ultimate function which that beam was created to perform—the function of stopping cars—but nevertheless a function of that device, because it may be produced by the use of that combination by simply turning the nuts upon the ends of its tension rods. Now, the function or result of the operation of a machine or combinaton is not patentable, and therefore the camber in the beam (its spring or resilience) could not be monopolized by means of a patent. The means, the mechanical device, by which that camber was produced, and that alone, was capable of protection by such a franchise.' There, the attempt was to monopolize the function or operation of a device acting upon, or within, itself, and not a device or machine designed to act upon something external to itself.

"Other cases are to the same effect; and the rule deducible from the authorities is that, while the principle of a machine or device and the mode of its operation are required to be set forth in the specifications, these are not the subject of a patent, but only the machine or device itself may be patented. True, in some of them it is said that the result of the operations of a machine is not the subject-matter of a patent; but the word 'result' is obviously so used to express the thought that the effect or result of the operations of a machine may not be exclusively appropriated to prevent others from accomplishing the same results by substantially different means. Le Roy v. Tatham, 14 How. 156–174, 14 L. Ed. 367; O'Reiley v. Morse, 15 How. 62–119, 14 L. Ed. 601; Mitchell v. Tilghman, 19 Wall. 392, 22 L. Ed. 125; Robinson on Patents, § 147.

"To say broadly that the effect or result of the operations of a machine may not be patented is at least inaccurate, for if the result of such operations upon some object, apart from the machine itself, is to produce a new and useful article of manufacture not before known, that product may be the subject of a patent apart from the machine which produces it.

"The most usual signification of the word 'function' is: 'The fulfilment or discharge of a set duty or requirement; exercise of a faculty; that power of acting in a specific way which appertains to a thing by virtue of its special constitution.' Century Dictionary.

"An exact definition of the phrase 'functions of a machine,' that will apply in all cases arising under the patent law, may not be readily formulated; nor is it advisable that it should be attempted, for it is impossible to foresee the combinations of elements that may be made to produce new results. Westinghouse v. Boyden Power Brake Co., 170 U. S. 537–557, 18 Sup. Ct. 707, 42 L. Ed. 1136. But for present purposes it may be said to be that power or property of the machine of acting in the specific manner designed or intended by its construction; in other words, that which the machine is designed to do, as distinguished from the machine itself, and from the product of its action upon something external to itself.

"Are these several claims of this patent in question for the 'functions of a machine,' as so understood, or are they for a machine that is endowed with certain functions? This is to be determined from the language of the several claims, considered in connection with the specifications and drawings which are a part thereof. The specifications are as follows:

" 'Be it known that I, Albert J. Bates, * * * have invented certain new and useful improvements in wire-fence machines, of which the following is a full, clear, and exact description such as will enable others skilled in the art to which it appertains to make and use the same:

" 'The invention relates to the manufacture of woven-wire fences; and the general object in view is to make by machinery, at one operation, in continuous lengths, a complete fencing or fence fabric, consisting of a plurality of longitudinal strand-wires having transverse stay-wires or braces spanning the spaces between the strand-wires, and secured thereto, so as to connect them together, and strengthen and support them.

" 'This style of fencing is not new, and it has already been proposed to make the same by machinery at one continuous operation, but in doing so the transverse stay-wires corresponding to the spaces between the strand-wires have been divided into sets or groups, the individual wires of which correspond only to alternate spaces between the strand-wires, and these sets or groups have been fed in and secured to the strand-wires alternately, so that in the completed fencing the stay-wires are not continuous across the fabric, but are so located and arranged that at any given point of the fencing only alternate spaces between the strand-wires are crossed, the other spaces not being crossed by the stay-wires, and the longitudinal wires not being connected at all at that point.

" 'It is the particular object of the present invention to provide a machine that will make this kind of fencing, so that in the completed fabric all the longitudinal wires, or as many as may be desired, will be connected together by transverse stay-wires that are practically continuous and in line with one another, and this I accomplish by feeding all the stay-wires in simultaneously and in line with one another crosswise of the strand-wires, and securing them to the strand-wires and to one another, thereby producing a fencing of superior strength, rigidity, and effectiveness and of a greatly improved appearance; and the invention consists in a machine organized and having its elements combined as hereinafter claimed and as contained in the machine herein illustrated and described as the best embodiment of the invention at this time known to me.'

"Accompanying the specifications and forming a part thereof are twenty-four drawings representing different parts of the machine. These parts, and their combinations with each other to form the completed machine, the manner in which they are designed to act together and upon the wire fed into the machine to produce a completed fence fabric, are described with much detail, and illustrated by appropriate references to the different drawings.

After so describing the several parts, the construction of the machine, and the manner of its operation, the specifications continue:

" 'In the following claims I do not wish to be understood as limiting myself as to the details of construction of the individual elements going to make up the several parts or combinations of the machine herein illustrated and described, as I regard the invention as of a character to admit of variations of these details within considerable limits without departing from its spirit or scope. For example, the details of the coilers, the cutters, the feeding and take-up mechanisms, and other parts may be differently constructed so long as the organization, relative arrangement, and combinations are preserved, and the framing of the machine, the gearing, etc., are features that admit of a wide range of modification within the skill of the designer and machine-constructor.

" 'Having thus described the invention, what I claim, and desire to secure, is:

" '(1) In a wire-fence machine, the combination of mechanism for intermittently feeding a plurality of longitudinal strand-wires, mechanism for intermittently feeding a plurality of stay-wires simultaneously and transversely of the strand-wires, mechanism for cutting off suitable length of the stay-wires to span the space between the strand-wires, and mechanism for simultaneously coiling the adjacent ends of the lengths of the stay-wires around the strand-wires.'

"The other claims vary somewhat in their phraseology, and some are repetitions to some extent of others; but each is for a combination 'in a wire-fence machine' of mechanisms designed to act together and upon wire fed into the machine so as to guide it through the same and to different parts thereof, cutting, intercoiling, and transforming it into a completed fence fabric as it passes through and emerges from the machine.

"A patent is a contract between the government and the patentee, whereby the latter is granted the exclusive right to make, use, and vend his invention for a specified time, after which such right is to inure to the benefit of the public. Seymour v. Osborne, 11 Wall. 516–533, 20 L. Ed. 33. And the rule for the construction of contracts generally controls in its interpretation, and when its terms are plain, and the intention of the parties clearly manifest therefrom, they must prevail. If its expressions are ambiguous, or its validity or any claim thereof is doubtful, that construction will be given to it which will uphold, rather than that which will strike down and destroy, the patent. National Hollow B. B. Co. v. Interchangeable B. B. Co., 106 Fed. 693–701, 45 C. C. A. 544; Jewell Filter Co. v. Jackson, 140 Fed. 340–343, 72 C. C. A. 304.

"The specifications are a part of the patent (Rev. Stat. § 4884 [U. S. Comp. St. 1901, p. 3381]); and the claims will be considered in connection with such parts of the specifications as are applicable thereto in determining their meaning. With these principles in mind, what is the meaning of these several claims? The patentee says:

" 'Having thus described the invention, what I claim and desire to secure is:

" 'In a wire-fence machine, the combination of (1) mechanism for intermittently feeding a plurality of strand-wires; (2) mechanism for intermittently feeding a plurality of stay-wires simultaneously and transversely of the strand-wires; (3) mechanism for cutting off suitable lengths of the stay-wires to span the spaces between the strand-wires; and (4) mechanism for simultaneously coiling the adjacent ends of the lengths of the stay-wires around the strand-wires.'

"The others are in substantially the same form. Standing alone, the claims are plainly for a combination of four groups of mechanisms into a 'wire-fence machine'; but the machine itself, and its principle and mode of operation are not, and cannot be, accurately described without the aid of drawings or a model, and an attempt to do so would be unavailing. The specifications, however, and the drawings which are a part thereof, particularly describe, and plainly show, a machine the principles and mode of operation of which, and the several elements composing the same, are exactly described and clearly set forth with much detail; and the plain meaning of the language of the several claims in connection with the specifications applicable to each is a distinct claim for a machine that, when built and operated in the manner described and pointed out, will produce a wire-fence fabric, and is not a claim

for a 'mode of operation,' a 'principle', or a function of a machine or any part thereof, apart from the machine itself.

"Are the several claims so broad as to include any and every kind of a machine for making a woven wire-fence fabric, such as is described? This question has been carefully considered, and it must suffice to say that they are not. The specifications clearly describe the several component parts, and their combination to form a new machine; and the claims are only for the combination of the mechanisms, or their substantial equivalents, within the scope of the organization as described, to do the work that this machine is designed to do.

"It will be observed that none of the claims contain the words 'substantially as described,' or words of similar import; and it is urged that this omission, in connection with the paragraph immediately preceding the claims, shows the intention of the patentee to make the claims so broad as to include all other means of making a woven wire fence. Many authorities are cited to show the purpose of the use of such words in the claims. They are doubtless used to limit the claims to substantially the descriptions set forth; or, if the description should be lacking in perspicuity, they may permit such latitude in construction as will conform the part substantially to that described. If necessary to save the patent, these words will be construed into the claim. Hobbs v. Beach, 180 U. S. 383–400, 21 Sup. Ct. 409, 45 L. Ed. 586. But it is said that this will not be done when it appears that their omission is intentional, and for the express purpose of making the claim so broad as to include every other device or means for accomplishing the same result. But the specifications upon which these several claims rest are so explicit that neither the use nor the omission of these words can affect the meaning of these claims. The conclusion, therefore, is that the first ground urged against the validity of the claims is not tenable.

"The second ground is that the devices and mechanisms called for in each claim are only the devices and mechanisms of the old barbed wire fence machines in plural instead of singular relation, and are mere multiplication of such devices which involve no invention, but only mechanical knowledge and skill in arranging such mechanisms. Many machines for barbing wire were in use at the time of the issuance of the Bates patent, and the patents for a number of them have been offered in evidence by the defendant. All of them are, as their names indicate and their construction shows, machines for placing barbs upon fence wire. The wire so barbed is a single strand, or two strands twisted together as one in the form of a cable, and the barbs are coiled around the strand, or intercoiled with it when it consists of more than one wire, to hold the barbs in place. In most, if not all, of these machines, the main strand of wire is fed forward from a spool of wire into, and is drawn through, a tube, and the wire for the barb is fed in a like manner through a tube transversely to the main strand and fastened to or coiled around the main wire in different ways, then cut and pointed, to form the barb, and thus make a completed strand of barbed wire. Cuts of such wires and the manner of making them are shown and described in the Cases of the Barbed Wire Patent, 143 U. S. 275, 12 Sup. Ct. 443, 450, 36 L. Ed. 154. Many, and perhaps all, of the devices and mechanisms used for making the barbed wire may be used in making the woven wire, or meshed wire fence fabric, shown in the patents of Bates and of the defendant in this suit. As evidencing the presence in the barbing wire machines of the sets of mechanisms which the Bates patent calls for, defendant refers to the Putnam reissued patent, No. 9,485, of November 30, 1880, and the Baker patent, No. 249,735, of November 22, 1881, as sufficiently illustrating the general features of the mechanisms in use in the barbing-wire machines, and quotes from the Putnam patent the first and second claims thereof. The second embraces both, and is as follows:

"'(2) In a machine for making barb fence wire by a continuous operation, the combination, with mechanism constructed and arranged to automatically feed forward the main wire at stated intervals, and mechanism constructed and arranged to automatically feed forward the cross or barb wire across the main wire at stated intervals, of mechanism for coiling the barb wire about the main wire, and mechanism for cutting off the barb wire, and for fasten-

ing the coil barb wire to the main wire, in connection with guides for the wire, substantially as described.'

"It is true that this calls for groups of mechanisms for automatically feeding the main and cross wires, and for guiding, coiling, and cutting the same as the claims of the Bates patent do; but it by no means follows that the combinations are the same. If this proves anything, it is only that such mechanisms were old and well known at the time of these earlier patents, and that their combinations into the various barbing wire machines were patentable inventions. Bates does not claim to have invented originally any of these mechanisms, and claims only to have arranged and invented a new combination of them different from any before known for making a product entirely different from that which they made, or could make, viz., a completed wire-fence fabric, just as Putnam and Baker and others combined them into machines for barbing separate strands of wire. It requires no citation of authorities to show that a new combination of old elements or devices, whereby a new and useful product is produced, or an old product is attained in a more efficient and economical way, may be as securely protected by patent as a new machine or other device, or a new composition of matter. Seymour v. Osborne, 11 Wall. 516–542, 543, 20 L. Ed. 33; Hailes v. Van Wormer, 20 Wall. 353, 22 L. Ed. 241; National Hollow B. B. Co. v. Interchangeable B. B. Co., 106 Fed. 693–707, 45 C. C. A. 544.

"The distinction between a fence wire and a wire fence is as broad as the distinction between a fence board and a completed board fence; and a machine for placing the barbs upon a wire may be as different from one for making a completed wire-fence fabric as the strand of wire is different from the completed wire fence, or the board is different from the completed board fence, or, in fact, from any structure into which the wire or the timber may be erected. A comparison of the specifications of the Putnam and other barbing wire machine patents with those of the Bates patent shows that the combinations of the old mechanisms into the barbing wire machines are as different from those of the Bates machine as a single strand of barbed wire, of whatever kind, is different from the woven wire, or meshed wire, fence fabric that Bates describes, and which his machine is designed to, and does, produce. In none of the barbing wire machines is a combination of mechanisms shown for the purpose for which Bates combined them, nor do they, nor can they, perform the same functions that the Bates combination performs. It is true that they feed the strand-wires forward, and the wire for the barbs across the main wire, and coil it around or intercoil it with the main wire; but there is no combination of mechanism for feeding the barb wire across an intervening space between several strand-wires distant from each other, and binding and sustaining them in that position, unless it be the Ayers & Decker machine of 1876, not patented, which will be referred to later. For instance, the Root patent, No. 237,129, of February 21, 1881, is for an improved machine for winding barbed fence wire, and relates to a new method of applying barbs to a strand composed of two wires around which the barb is wound. The strands are fed through two tubes which converge to form a single strand composed of two wires side by side, in close proximity; and the barbs are wound around one, and then around both. It relates simply to the method of applying the barbs, and is differentiated only from the Ayers & Decker patent, No. 235,331, of December 14, 1880, in the method of applying the barb, which is for the same purpose, and interwinds the barb with the two wires twisted to form a cable strand.

"It is undoubtedly true that merely bringing together old elements found in older machines in the same, or a kindred art, to effect the same result, is not patentable invention. But the converse is equally true, that if a new combination or organization of old elements is such that the combination produces a new mode of operation, and a new product or beneficial result, this is patentable invention, though all of the constituents of the new combination were well known and in common use before that combination was made. The new result, however, must be the product of the joint and co-operating action of all of the old elements as combined in the new machine, and not merely the aggregate of different results each the separate product of one of the con-

stituent elements. Hailes v. Van Wormer, 20 Wall. 353, 22 L. Ed. 241; Pickering v. McCullough, 104 U. S. 310, 26 L. Ed. 749.

"In showing the existing state of the art at the time of the Bates patent, defendant produced and put in evidence two cuts, and a model of a machine used in 1876, 1877, and 1878 by Ayers & Decker, of Bushnell, Ill., for barbing wire. That such a machine was used by them in those years, and until they were restrained from using it at the suit of Washburn, Moen & Co., in the Circuit Court of the United States for the District of Illinois in 1878, is not disputed. The cuts above referred to are reproduced from exhibits used in evidence in that suit, and the model is one prepared by the defendant for use upon this hearing from the testimony in this case relative to its construction. The cuts and model show the method of barbing a single wire, and, by the addition of like devices, show the method of barbing two and three strands at a distance from, and parallel to, each other.

"In the case of the two and three parallel strands, the barb or cross wires were cut the requisite length by hand and placed across the intervening space between the strand-wires, and were then wound around the strand-wires to sustain them in their relative positions, and the ends of the cross-wires turned outwards to form the barbs. There is much testimony in regard to this machine, and especially the kind of fence made with it, and the method of wrapping the cross-wires around the strand-wires. That a three-strand barbed-wire fence was made is not doubted, but whether the cross-wires were laid in line with each other across the strands and their meeting ends intercoiled with a single coiler containing two lugs or fingers, or were alternated in zigzag or staggered form, is in much dispute. Much of the testimony upon this question relates to matters occurring nearly 30 years before the witnesses gave their testimony, most of whom had but little interest in the matter at the time, and would not be likely to charge their memories therewith. Without reviewing the testimony, it must suffice to say that it is of that character which fails to convince beyond reasonable doubt that Ayers & Decker made a three strand wire fence with the cross or stay wires in alignment. The Barbed Wire Patent, 143 U. S. 275–284, 12 Sup. Ct. 443, 450, 36 L. Ed. 154.

"In June, 1876, Mr. Decker, of the firm of Ayers & Decker, made application for a patent upon his mesh fencing, and he described it as one in which the stay-wires were arranged in zigzag or staggered form only. This is persuasive evidence that that was the only style of fence that he or his firm then manufactured. But if it were conceded that the Ayers & Decker machine was made and used in the manner contended by the defendant, it is so radically different from the Bates machine that the conclusion is that it does not anticipate that machine. The product of this machine was simply the aggregate of the separate products of each of the elements used to feed forward the separate strand-wires parallel to and at a distance from each other, when the cross-wires were then laid by hand across the strand-wires and fastened to hold them in position and form the barbs. Old elements were used and operated separately for feeding forward the several strand-wires, and the cross-wires were then placed in position by hand to produce the two and three strand-wire fence, while Bates combined the old elements so that they acted jointly, and in co-operation with each other to feed forward the three strand and cross wires simultaneously, cut and coil the cross-wires, and then completed the fence fabric.

"It would serve no useful purpose to refer in detail to others of the many barbing wire machine patents offered in evidence by the defendant, and point out the difference between each and the Bates patent. A careful examination of each of them leads to the conclusion that none of them anticipates the Bates patent, and that none is intended to perform the same function, or does or could in fact perform the same, or produce the same product that the Bates machine is designed to, and does in fact, produce.

"The third ground is that the several claims are but simple changes in the prior patents of square-mesh fence-making machines, especially of the Edenborn patent, which changes involve no invention, but only mechanical skill in view of the old barbing wire fence machine.

"This is but a repetition of the second ground modified to apply to the patents of the square-mesh fence machines, especially the Edenborn patent. No. 558,787, of April 21, 1876. In argument, the patent of Page & Lamb, No.

414,844, of November 12, 1889, and of Land, No. 455,406, of July 7, 1891, are referred to as sufficiently illustrating these machines, and embodying all of the claims of the Bates patent involved in this suit, combined in substantially the same form. The features that distinguish the first two patents from that of Bates are that in both of them the desired number of strand or longitudinal wires are fed forward a predetermined distance and stopped; a single wire is then fed across the strand-wires continuously, and wound around each while they are at rest until all of the strands are wound; the cross-wire is then cut, and the completed fabric moved forward the requisite distance for the next cross-wire, and the operation of winding the cross-wire around the strand-wires is repeated. Instead of using a single continuous cross-wire, Bates combined mechanisms for feeding several cross-wires in line across the intervening spaces between the strand-wires, simultaneously with the feeding of the strand-wires, and for cutting the cross-wires of sufficient length to cover such spans, then stopping both strand and cross wires while the coiling fingers engage and coil the ends of the cross-wires around the strand-wires, when the completed fabric is then fed forward and the operation repeated. It is obvious that this requires different mechanisms and an entirely different mode of operation from that for feeding a single continuous wire across the strand-wires while they are at rest, and then winding it around those strands; and that the operation of the Bates machine is much more rapid than that of the others, permits of the use of stronger and more efficient stay-wires, and winds them more securely upon the strand-wires. The Edenborn patent also feeds forward the several strand-wires, stops them, and then feeds the stay-wires across them while the strand-wires are at rest, but in alternate, or zigzag or staggered, form, and not in a continuous line. Edenborn himself was a skilled mechanic of large experience in the manufacture of wire-fence material, and applied for his patent only a short time before Bates applied for the patent in suit. The estimate that Edenborn placed upon his own patent as compared with that of Bates is shown by the payment of his company to Bates by his direction of the sum of $80,000 for the patent in suit, and that of the fence that it is designed to manufacture. This, at least, is persuasive evidence that Edenborn did not then regard the Bates machine patent as an infringement of his, or that it was simply the result of the knowledge and skill of the mechanic in arranging the old elements.

"It requires the combination and joint co-operation of devices for feeding forward simultaneously at least three strand-wires and two stay-wires transversely to them, for guiding the stay-wires across the spaces between the strand-wires, and for cutting, coiling, and intercoiling the ends of the stay-wires around the strand-wires, to complete the Bates machine and illustrate its principle and mode of operation. The width of the fence fabric it is desired to produce may then be increased to any desired extent by adding one each of these several devices in the same relation to each other as in the original combination, and one stay-wire for each strand-wire that it is desired to add to the fence. The addition of such other devices may be only the work or skill of the constructor of the machine, but a combination of devices for feeding simultaneously the strand and cross wires, guides for the stay-wires across the spaces between the strand-wires, and for cutting the stay-wires and coiling and intercoiling them around the strand-wires, is not shown in any of the prior patents or machines used for barbing wire or making mesh-wire fence. That the machine is one of great utility and went into immediate use, and practically supplanted all prior machines for making mesh-wire fencing, cannot be doubted under the evidence upon that question.

"Finally, it is urged that defendant does not infringe the complainant's patent in any particular. It may be admitted that the several claims in question of the Bates patent must be limited to the devices or means described in the specifications, or to their substantial equivalents. Lake Shore & M. S. Ry. Co. v. National Car Brake Shoe Co., 110 U. S. 229–237, 4 Sup. Ct. 33, 28 L. Ed. 129; Westinghouse v. Boyden Power Brake Co., 170 U. S. 557, 18 Sup. Ct. 707, 42 L. Ed. 1136; National Hollow B. B. Co. v. Interchangeable B. B. Co., 106 Fed. 693–710, 45 C. C. A. 544.

"The term 'mechanical equivalent,' as used in the law of patents, means that each of the ingredients comprising the invention covers every other ingredient

which, in the same arrangement of the parts, will perform the same function, if that was well known as a proper substitute for the one described in the specifications at the time of the patent. Imhaeuser v. Buerk, 101 U. S. 647–656, 25 L. Ed. 945; National Hollow B. B. Co. v. Interchangeable B. B. Co., 106 Fed. 693–710, 45 C. C. A. 544.

"The defendant in his first patent, No. 772,405, of October 14, 1904, describes his invention as one that 'relates to the manufacture of wire fence in which the main longitudinal strands of wire are connected at regular intervals by cross-wires, or the "stay-wires," as they are usually called,' and says: '* * * The machine is designed to manufacture the type of fence partially illustrated in Fig. 8, in which the longitudinal strands * * * are connected by stay-wires extending from strand to strand and closely wound about the strands. At the outer strands this is a simple coil, but at the intermediate strands the connection is in the form of a peculiar knot, the form of which is due to the fact that, prior to coiling, the stay-wires are fed across the ends of the coilers both on the same side of the strand-wires. The knot so formed takes a very firm grip on the strand-wire, and, irrespective of the crimp taken in it, tends to hold the stays securely in position. The machine is arranged to feed, cut off, and coil simultaneously as many stay-wires as there are spaces between strand-wires in the fence to be made. It also feeds forward the finished fence, crimps the main strands at each stay-wire intersection, and rolls the completed fence web on a reel.' Reference is then made to the drawing for a detailed description of the machine. The fence described is exactly that described in the Bates patent, with the exception of the knot in the coil of the stay-wires around the intermediate strand-wires. Having thus described the invention, the claims are:

"'(1) In a wire-fence machine, the combination of mechanism for intermittently feeding a plurality of longitudinal strand-wires, mechanism for simultaneously and intermittently feeding a plurality of stay-wires transversely and so as to cross each other in pairs, both lying on the same side of the strand-wires, a cut-off for the several stay-wires, and coilers to knot them around the strand-wires.'

"The second and third are substantially the same, and the others, 15 in number, describe the mechanisms or devices which are combined to form the machine.

"For convenience of comparison, the first claim of the Bates patent is here repeated:

"'(1) In a wire-fence machine, the combination of mechanism for intermittently feeding a plurality of longitudinal strand-wires, mechanism for intermittently feeding a plurality of stay-wires simultaneously and transversely of the strand-wires, mechanism for cutting off suitable lengths of the stay-wires to span the spaces between the strand-wires, and mechanism for simultaneously coiling the adjacent ends of the lengths of the stay-wires around the strand-wires.'

"The only difference between these claims is that in the defendant's machine the stay-wires are fed in upon the same side of the strand-wires, and the coilers are to knot the adjacent ends of the stay-wires around the intermediate strand-wires, while in the Bates machine the stay-wires are fed in upon opposite sides of the strand-wires, and there is no knot in the coils. True, the combinations need not necessarily be the same; but a comparison of the specification and of the models of the two machines exhibited upon the hearing show beyond any doubt that the combinations in the two machines are the same, and that the devices for feeding the strand and cross wires and for coiling the ends of the stay-wires around the strand-wires are identical, except that which forms the knot mentioned in the defendant's claims, and that only one of the stay-wires is fed in on the opposite side of one of the outer strands. The only difference, therefore, in the devices of the two machines and in their modes of operation is in those for cutting the stay-wires, and for releasing them from the grooves into which they are guided and held in position while their ends are cut and coiled or knotted around the strand-wires. A reference to the drawings and models of the two machines is necessary to a correct understanding of these devices.

"The doctrine of mechanical equivalents applies to a patent for a combination of old elements as well as to a patent for any other invention; but whether or not one device is the equivalent of another is usually a question of fact, which it is sometimes difficult to determine. In Gill v. Wells, 22 Wall. 1–29, 22 L. Ed. 699, it is said:

" 'Questions of the kind usually arise in comparing the machine of the defendant in a suit for infringement with that of the plaintiff, and the rule is that, if the defendant omits entirely one of the ingredients of the plaintiff's combination without substituting any other, he does not infringe, and if he substitutes another in the place of the one omitted which is new or which performs a substantially different function, or even if it is old but was not known at the date of the plaintiff's patent as a proper substitute for the omitted ingredient, he does not infringe. By an equivalent in such a case it is meant that the ingredient substituted for the one withdrawn performs the same function as the other, and that it was well known at the date of the patent securing the invention as a proper substitute for the one omitted in the patented combination. Hence it follows that a party who merely substitutes another old ingredient for one of the ingredients of a patented combination is an infringer if the substitute performs the same function as the ingredient for which it was substituted, and was well known at the date of the patent as a proper substitute for the omitted ingredient.'

"It will be observed that the only difference between the cutting devices of the Bates and defendant's machine is that in the Bates machine the movable cutter bar is drawn towards the stationary bar by the two eccentric levers at each end thereof, cutting the stay-wires as the blades of the cutters pass each other, while in the defendant's machine the movable bar is pivoted at one end to a crossbar, and the other end is drawn towards the stationary bar by means of a lever at that end, the cutters passing closely upon the sides of the cut-off plates cutting the stay-wires after they have passed through the openings in those plates. There is no substantial difference in the method of operating the movable cutter bar of each machine. The swinging movement of the bar pivoted at one end, by the lever at the other end, is the substantial equivalent of the movement of the other by the eccentrics at each end, and each performs exactly the same function, viz., the passing of the cutter blades upon the movable and stationary bars to sever the stay-wires. The feeding of the stay-wires through the cut-off plates, so called, in defendant's machine, is identical with that of the Bates machine, in which the stay-wires are fed through perforations in the cutter blades upon the stationary bar. The same is true of the guides in each machine for conducting the stay-wires across the spaces between the strand-wires. The guiding plates of defendant's machine are the exact equivalents of the spring-hinged plates of the Bates machine, the only difference being that in defendant's machine there is but one groove upon the inner surface of one of the plates, and that may be in either, or there may be a groove in each plate, while in the Bates machine there is a groove in each of the plates, or one in either will perform the same function. In the defendant's machine the movable plates are moved to and from the stationary plate by means of a lever actuated by a cam and springs, while in the Bates machine a spring-hinge upon the plates presses the movable plate upon, and holds it to, the stationary plate. No element of the Bates machine, therefore, is omitted from that of the defendant, without substituting an equivalent therefor.

"There is one difference, however, in the operations of these devices in the two machines for opening the guides. In the Bates machine the movable plates open and close on their hinges, as a door opens and closes upon its hinges, by the pressure of the stay-wires upon them in the forward movement of the fence fabric after it is completed, while in defendant's machine the movable plates are moved away from the stationary plates by levers, which open the guides and release the stay-wires after the fence fabric has been completed. The movement of the fence alone does not perform this function in defendant's machine, for if the plates were not opened by means of the levers the movement of the fence fabric may wreck the plates. It is true that this movement of the levers is actuated by the tension of springs, and thus the plates

are separated, while in the Bates machine the direct action of the springs closes or brings the plates together to form the guides; while in the defendant's machine it separates the plates and opens the guides through the intermediary of the levers. It was well known, however, at the time of the Bates patent that springs, levers, and weights were used to produce pressure, and that one was a substitute for the others for this purpose. Bates utilized the pressure of the fence fabric in its movement forward to separate the guide plates and release the stay-wires from their confinement. The defendant applies the pressure produced by the tension of the springs in the operation of the machine for the same purpose, and in substantially the same way, and by substantially the same means. Morley Machine Co. v. Lancaster, 129 U. S. 263–289, 9 Sup. Ct. 299, 32 L. Ed. 715; Hobbs v. Beach, 180 U. S. 383–399, 401, 21 Sup. Ct. 409, 45 L. Ed. 586; Machine Co. v. Murphy, 97 U. S. 120, 24 L. Ed. 935. In the last named case it is said:

" 'The correct rule being that, in determining the question of infringement, the court or jury, as the case may be, are not to judge about similarities or differences by the names of things, but are to look at the machines or their several devices or elements in the light of what they do, or what office or function they perform, and how they perform it, and to find one thing is substantially the same as another, if it performs substantially the same function in substantially the same way to obtain the same result, always bearing in mind that devices in a patented machine are different in the sense of the patent law when they perform different functions or in a different way, or produce a substantially different result. Nor is it safe to give much heed to the fact that the corresponding device in two machines organized to accomplish the same result is different in shape or form the one from the other, as it is necessary in every investigation to look at the mode of operation or the way the device works, and at the result, as well as at the means by which the result is attained.'

"The authorities concur in holding that the substitution of an equivalent of a thing in the sense of the patent law is the same as the thing itself; so that if two devices do the same work in substantially the same way and accomplish substantially the same result, they are the same, even though different in name, form, and shape. With this principle in mind, it seems clear that both the cutting device and that for opening the guides, used by the defendant, are the substantial equivalents of those of the Bates machine for the same purpose.

"The knotting feature of defendant's coiling device may differentiate it to that extent from the Bates device. But this is an immaterial difference only as it in no way changes the functions of the machine as a whole, and accomplishes no result substantially different from that of the Bates machine. Morley v. Lancaster, and Hobbs v. Beach, above.

"If defendant desires to use that feature of its coiler alone, it may do so, but it cannot escape infringement by building it upon the Bates coiler without complainant's consent. Cantrell v. Wallick, 117 U. S. 689–694, 6 Sup. Ct. 970, 29 L. Ed. 1017; Hobbs v. Beach, above.

"Defendant's second patent is for a machine to manufacture a wire fence, the longitudinal strands of which are composed of two or more strands twisted in the form of a cable and plain cross or stay wires connecting them at regular intervals. It is not claimed by the defendant that this is a material difference from the first machine, and upon the argument at the bar it was distinctly stated by its counsel that nothing was claimed for this feature of the machine. It need not therefore be considered.

"Other reasons are urged in behalf of defendant why its machine does not infringe that of Bates, but they seem to be fully answered in National B. B. Co. v. Interchangeable B. B. Co., 106 Fed. 693. 45 C. C. A. 544. The conclusion, therefore, is that the complainant is entitled to a decree as prayed, and one may be prepared accordingly."

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

DEY TIME-REGISTER CO. v. W. H. BUNDY RECORDING CO.

(Circuit Court, N. D. New York. March 12, 1909.)

No. 7,174.

1. PATENTS (§ 167*) — CONSTRUCTION — LIMITATION OF CLAIMS BY SPECIFICATIONS.

Claims of a patent are to be construed in the light of the specifications, and while, when plain and specific, they cannot be extended, they may be limited thereby, and a claim is not to be defeated because it is broad in its language, when it is limited by the specifications and is susceptible of limitation.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 243; Dec. Dig. § 167.*]

2. PATENTS (§ 136*)—CONSTRUCTION—MISTAKEN LIMITATION OF CLAIMS.

The remedy for a mistaken limitation in the claims of a patent is by a reissue and not by construction.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 198; Dec. Dig. § 136.*]

3. PATENTS (§ 328*)—INFRINGEMENT—TIME-RECORDERS—"REGULAR RECORDS"—"IRREGULAR RECORDS."

The Dey patent No. 786,011, claims 35, 54, 60–64, inclusive, for an improvement in workmen's time-recorders, which consists generically in adding to the prior clock-controlled time-recorder, having automatically actuated time-printing mechanism, automatic time-controlled "means adapted to print regular records in a certain color and irregular records in a certain other color";—regular records being those made when a workman enters or leaves at the regular time, and irregular records those made when he enters or leaves before or after the regular time—are limited to means by which the record itself, that is, the impression of the figures or letters which record the time, is printed in different colors, and are not infringed by a machine by which all records of time are printed in the same color, but which indicates an irregular record by an extra mark printed in a different color, especially in view of the limitations imposed on the patent by the prior art, which includes means for printing extra characters.

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

4. PATENTS (§ 226*)—INFRINGEMENT—IDENTITY OF RESULT.

Patents cover the means employed to effect results, and to be an infringer one must not only reach the same result, but he must reach it by the same or substantially equivalent means.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 357; Dec. Dig. § 226.*]

In Equity.

Suit to restrain alleged infringement of certain claims of United States letters patent No. 786,011, dated March 28, 1905, for new and useful improvements in time-recorders, and which letters patent were issued to John Dey and Alexander Dey.

Kerr, Page, Cooper & Hayward, for complainant.

Parsons, Hall & Bodell, for defendant.

RAY, District Judge. The alleged invention disclosed and claimed in the patent in suit relates to time-recorders, and, says the patent:

"While as to some of its features the invention may be applied to various classes of printing or recording machines, the invention is more particularly

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

directed to certain improvements in time-recorders adapted for recording the times of entering or leaving a factory or other establishment of the individuals employed therein."

The patent further says:

"One of the objects of the invention is to provide means in a workman's time-recorder whereby records of different classes are made in marks of different colors or otherwise characteristic of the classes.

"Another object thereof is to provide means whereby the operations of the machine are placed beyond the control of the workman at all times."

The patent contains 66 claims, of which claims 35, 54, 60, 61, 62, 63, and 64 only are in issue here. The claims of the patent are preceded by the following statement:

"As many changes could be made in the above construction, and many apparently widely different embodiments of our invention could be made without departing from the scope thereof, we intend that all matter contained in the above description or shown in the accompanying drawings shall be interpreted as illustrative and not in a limiting sense. We desire it also to be understood that the language used in the following claims is intended to cover all of the generic and specific features of the invention herein described, and all statements of the scope of the invention which, as a matter of language, might be said to fall there-between."

The claims in issue read as follows:

"(35) A clock-controlled time-recorder having automatically-acting time-printing means adapted to print regular records in a certain color and irregular records in a certain other color. * * *

"(54) A clock-controlled time-recorder having automatically-actuated time-printing means adapted to print regular records with an impression of a certain color, and irregular records with an impression of a certain other color. * * *

"(60) A time-recorder including, in combination, time-controlled printing mechanism, means for taking impressions from said printing mechanism upon a record-surface, and means whereby the impressions made by said printing mechanism during different predetermined intervals are made in different colors.

"(61) A time-recorder including, in combination, time-controlled printing mechanism, means for taking impressions from said printing mechanism upon a record-surface, and automatic time-controlled means adapted to cause the impressions made by said printing mechanism during different predetermined intervals of time to appear in different colors.

"(62) In a time-recorder, in combination, time-controlled printing mechanism, means for taking impressions from said printing mechanism upon a record-surface, and automatic means whereby said impressions of different classes are made in colors distinctive of said classes.

"(63) In a time-recorder, in combination, time-controlled printing mechanism, means for taking impressions from said printing mechanism upon a record-surface, and automatic time-controlled means adapted to cause such impressions of different classes to appear in colors distinctive of said classes.

"(64) In a time-recorder, in combination, time-controlled printing mechanism, means for taking impressions from said printing mechanism upon a record-surface, and automatic means whereby irregular records formed by said impressions are made in a certain color and regular records in a certain other color."

The patent in suit does not purport to cover, show, or describe a time-recorder complete in all its details, but only so much thereof as will show and illustrate the parts mentioned in the 66 claims of the patent.

Claims 35 and 54 call for a clock-controlled time-recorder having automatically-acting time-printing means and automatically-actuated time-printing means respectively. Claim 35, in addition, says that such time-printing means must be "adapted to print regular records in a certain color, and irregular records in a certain other color." Claim 54, in addition to calling for a time-printing means, states that same must be adapted to print regular records with an impression of a certain color, and irregular records with an impression of a certain other color. It seems to me clear that if regular records are printed in a certain color, as, for instance, blue, and irregular records are printed in a certain other color, as, for instance, red, the regular records are printed with an impression of the color blue, and irregular records are printed with an impression of the color red, which is another color. The difference between automatically-acting time-printing means and automatically-actuated time-printing means has not been explained to the court, and it is not sufficiently acute to distinguish any substantial difference between claim 35 and claim 54. Regular records are those made by the workman when he enters and records his time of entry at the regular hour for commencing work, or when he departs and records his time of leaving at the regular hour of departure. Irregular records are those made by the workman when he enters late and records his time of arrival, or when he departs out of the regular time for departure, and records his time of leaving. The workman records in figures or characters the hour and minute of his arrival or the hour and minute of his departure. Whether the printing devices are such as will make figures or such as will indicate the hour and minute by other characters is immaterial; to be a record within the meaning of these claims the marks made on the card must indicate the hour and minute of arrival or departure, as the case may be.

It would not satisfy claims 35 and 54 to provide an automatically-actuated or acting printing mechanism or device or means which, without recording the time, hour, and minute of arrival or departure, would simply, by some mark, indicate that the workman had entered late or departed early; that is, out of the regular time. But may not the claims be satisfied by and do they not include, broadly construed, such printing means which record the time of arrival or departure, as the case may be, regular or irregular, all in one color, and also indicate by an impression of some added character, made in some other color, the fact that such record of such irregular time is a record of irregular time?

The word "adapted," as used in these claims, evidently refers to the fact that prior clock-controlled time-recorders having automatically-acting time-printing means are not calculated to or so constructed as to print the time or impress the characters indicating the time, when recording irregular time, on the card or paper in a color different from the imprint or impression thereon recording the regular time. It was the purpose to add to the old clock-controlled time-recorder having automatically-actuated time-printing means such means, acting in conjunction therewith, as would print irregular time in a different color from the regular time, or to so modify and change the print-

ing means and mechanism that this could be done by one and the same machine. In other words, the said printing means are, by changes or additions, or both, "adapted" to print "records" of the different classes, "regular time" or "irregular time," in different or distinctive colors; that is, in such colors as will distinguish the one class of recorded time from the other class of recorded time. The verb "adapt" means:

"To make suitable; make to correspond; fit or suit; proportion. (2) To fit by alteration; modify or remodel for a different purpose. * * * (3) To make by altering or fitting something else; produce by change of form or character."

"Adapted" means "fit or suitable." Century Dictionary. The claim may include an entirely new time-recorder, but the claims imply such changes in the old form of construction that the time-printing means are so constructed as to print the records in the manner indicated.

Each workman has a card upon which he prints all his time, regular or irregular. Should we provide by law that all records of warranty deeds shall be made, or written, or printed, in a certain color, and all quitclaim deeds in some other, or "a certain other color," would the law be satisfied or complied with by writing or printing the records of both in the same colored ink and then adding at the head of each record of each deed some plain and distinctive mark or sign in a distinctive and different colored ink indicating and showing that the one was the record of a warranty deed and the other a record of a quitclaim deed? Clearly not. The "records" are evidently the figures, or signs, or symbols, or characters showing the time of entry and departure. Marks indicating that a workman arrived late and departed early, only, are not records of his time within the meaning of these claims or specifications.

What is intended is emphasized by the specifications, not only by the language already quoted, "whereby records of different classes are made in marks of different colors or otherwise characteristic of the classes," but by the following contained therein, viz.:

"More specifically, other objects of the invention are to provide a mechanism whereby a relative motion is provided between the surface on which the records are made and the means which produce the impressions in different colors; to provide means whereby this relative motion is automatically controlled by a clock mechanism; to provide a mechanism whereby a relative motion is produced by the manual recording operations performed on the machine, said mechanism being rendered operative by a clock-controlled mechanism; to provide a mechanism whereby the relative movement between the record-surface and the means for making impressions in different colors is rendered operative or controlled with the time-printing mechanism; to provide a locking mechanism whereby the relative motion between the record-surface and the means for making impressions in different colors is placed beyond the control of the individuals whose times are recorded upon the machine; to provide a locking mechanism whereby the relation between the record-surface and the means for making impressions in different colors thereon is substantially unaffected by vibration or jarring, and to provide means for indicating visually the condition of the mechanism. * * *

"In order to render clearer the general nature of our invention, it may here be noted that in the use of apparatus of the nature of time-recorders the impressions made upon the recording-surface may in general be divided into two classes, namely, those made within the proper hours and those made without such hours, the latter denoting the early leaving or tardy arrival of a workman. Although an examination of the figures would show in which class

each record was made, nevertheless it would be of value if means could be provided whereby these entries could be more readily distinguished. In order to attain this and other desirable results, it is proposed to so arrange the mechanism as to stamp the impressions of the two classes above indicated in distinctive colors. In accordance with one feature of the invention, a time-controlled printing mechanism is combined with means for making impressions therefrom upon a record-surface, and means whereby the impressions made during different intervals of time are made with different inks. For example, if a time-recorder should be so set as to give an impression in red if made before 12 or after 1, and in green between the hours of 12 and 1, assuming that the lunch hour extends over that period of time, an impression upon the time-record of an employé would indicate at a glance that he had left work before the time set, or was tardy upon his return, without the necessity of examining the figures. In accordance with this illustrative embodiment, it is proposed to accomplish this desirable result by means of a lateral shifting of the ribbon relative to a type-bearing member, so as to bring different portions thereof or separate ribbons of varying colors into operative position. It will readily be seen that if a practical and efficient mechanism of the above type were provided, the same might be so arranged as to print any overtime work done by the laborer in a color which is distinctive with relation to the record of that done within the regular working hours. The advantage of this feature, whereby the fact that a workman is entitled to extra pay is shown at a glance without the necessity for examining the figures upon the card, will be readily appreciated.

"The means whereby the impressions made upon the record-surface during different intervals of time are printed in different inks may be greatly varied in construction. In accordance with one feature of the invention, this mechanism is so constructed that a relative motion is produced between the record-receiving surface and the means whereby the impressions are made in different inks. In accordance with the embodiment of the invention herein shown, the means whereby the impressions are made in different inks are shifted with relation to the record-surface, the shifting operations being effected at predetermined intervals under control of the clock mechanism whereby the time-printing wheels are controlled. In accordance with this embodiment of the invention also, a single time-printing mechanism is employed, and the means for making impressions therefrom in different colors comprises devices for supplying inks of different colors, the ink-applying devices being shifted with relation to both the time-printing mechanism and the record-surface. In accordance with one feature of the invention, the means for supplying inks of different colors consists of a ribbon mechanism, and in the particular embodiment of the invention illustrated the ribbon mechanism comprises a single ink ribbon having different side-by-side longitudinal portions thereof supplied with inks of different colors, and the ribbon-carrying mechanism is so mounted that it may be shifted laterally with relation to both the printing-wheels and the record-surface. In accordance with one feature of the invention also, the means whereby a relative movement is effected between the record-surface and the means for making impressions in different colors is controlled or rendered operative by the clock mechanism; but the actual shifting movement is produced automatically when the machine is actuated in the ordinary way to perform the recording operations. In accordance with one feature of the invention also, means are provided whereby the shifting mechanism is under positive control at all times and is locked to prevent movement either by design of the workman or by accidental or incidental vibration or jarring at any other time than that for which the machine is set. * * *

"The operation of the above-described embodiment of our invention is as follows: Assuming the parts to be in normal condition, with the red ribbon opposite the printing-wheel, 1, as shown in Fig. 3 of the drawings, and with a notch, 55, upon the disk, 47, in such position as to be nearly opposite the wiper-arm, 48, a slight further movement of the clockwork will permit the latter part to fall into the notch, 55, this falling being accomplished by virtue of the weight of the parts connected with arm, 54, or by a suitable spring, if desired. The several parts are so adjusted that this movement takes place at the time at which it is desired to change the color of the impressions made

by the instrument. For example, if the lunch hour is from 12 to 1, and it is thus desired that an impression made before 12 shall be in red ink, whereas after 12 is in green ink, this movement will take place not later than and substantially at 12 o'clock. * * * This movement will cause the shifting of the ribbon and of the mechanism upon which it is mounted by means of the sliding of the ribbon-bar and the sleeves affixed thereto upon the spindles within the same. In this manner the green ribbon is brought opposite the printing-wheel, and the impression made by the movement of the hand-lever causing this shifting will be in green, thus indicating that the same is made after 12, and that the time of leaving of the workman was satisfactory. With the parts in this condition any desired number of impressions may be made without changing the color thereof or affecting the ribbon-shifting mechanism. * * * This movement causes the movement of swinging lever, 35, to a position in which the point of wedge-shaped member, 40, is slightly inside the edge of knife-edge, 41, and accordingly any impression made after this movement will result in the reshifting of the ribbon so as to bring the red color into operative position by an operation which is the reverse of that above described. Any impression made after this point will accordingly be made in red ink, the same indicating that the machine has been used after the hour set for the return of the workman, or, in other words, that the user thereof was tardy. * * *

"For example, if a workman arrives at 1 minute after 1, assuming the lunch hour, as hereinbefore indicated, the mechanism is in condition to print in red, thus showing the tardy arrival of the workman. If a backward movement of the wheel were unrestricted, however, it might be possible to so swing or jar the instrument as to cause the minute wheel to print the hour of 1 o'clock, which would appear to indicate the fact that the workman arrived on time, although the impression would nevertheless be made in red. Such a contradictory state of affairs is prevented by the ratchet-teeth, 80, which, coacting with the pins, 78 and 79, prevent a rearward movement of the minute wheel after the same has arrived in a position to set the ribbon-shifting mechanism in operative condition. * * *

"Thus the ribbon may be caused to shift at a reasonable time before the morning work hour and again at that time, so as to print the records of the arriving workmen in green color. Throughout the morning work hours—as, for example, from 7 to 12—the mechanism will be in such condition as to print in red the time when used, and the ribbon may be reshifted at the hour of 12, so as to again print in green for the outgoing workmen. * * * It will also be seen that the mechanism may be constructed so as to cause a change in color of the impression made exactly at the desired minute or fraction of a minute without the necessity for any fine adjustment of the parts."

The words "whereby records are made" are significant, and imply the actual making of a record; that is, the recording of the time. However, such records are made "in marks of different colors" or marks "otherwise characteristic of the classes" of records, meaning by classes "regular" and "irregular" records of time. Can we read the words of the specifications, "whereby records of different classes are made in marks of different colors or otherwise characteristic of the classes," to mean that the records are or may be made in different colors or in any other manner which will characterize the different classes of records; that is, distinguish the one class from the other class, irrespective of the color of the record itself? Must the record itself—that is, the signs or figures constituting the record of the time, the marks constituting the record—be such that they, of themselves, will show by distinctive form, shape, or color the class to which the record belongs, or is it sufficient that all the records are printed in the same colored ink, that all of the marks are of the same color, and that the one class is distinguished from another class by some separate

character or symbol printed in company with the record of a particular entry showing that such entry is irregular? The records are made "in marks" or by the use of marks, but these marks of one class of records are "of different colors" from the colors of the other class, or, if not of different colors, then the marks constituting the records must be "otherwise characteristic of the classes"; that is, the "marks" constituting the records of the one class must be different from the "marks" constituting the record of the other class.

Claims in a patent may be explained by a reference to the specifications, and the specifications as well as the prior art may limit the broad language of a claim, but the specifications cannot be used to broaden a plain and specific claim. We are not to defeat a claim because it is broad in its expressions or language, when the specifications limit it and it is susceptible of limitation. The claims are to be construed in the light of the specifications, but they cannot be extended thereby. Patents are to be liberally construed so as to secure to the inventor the real invention he intends to secure, and technical defects and inaccuracies will not defeat this result. "As set forth" or "substantially as described" are words always read with the claims as if contained therein, but, if one thing is claimed and another thing is described in the specifications, or if the claim in its language is narrow and limited, in material matters or matters not merely descriptive, it cannot be broadened by the specifications. A patentee may describe a broad and generic invention, as of a machine; but if he does not claim it, but claims some lesser or different thing, he must be deemed to have surrendered to the public that which he has not claimed. So the words of claims are to be given a reasonable and not a technical or exact meaning which would defeat the intent. But the plain and clear meaning of the terms employed cannot be varied by construction, which must be in conformity to the self-imposed limitations contained in the claims, if any. The remedy for mistaken limitations in the claims of a patent are by reissue and not by construction. Keystone Bridge Co. v. Phœnix Iron Co., 95 U. S. 274, 278, 24 L. Ed. 344; McClain v. Ortmayer, 141 U. S. 419, 425, 12 Sup. Ct. 76, 35 L. Ed. 800; Coupe v. Royer, 155 U. S. 565, 576, 577, 15 Sup. Ct. 199, 39 L. Ed. 263; White v. Dunbar, 119 U. S. 47, 7 Sup. Ct. 72, 30 L. Ed. 303; Burns v. Meyer, 100 U. S. 671, 672, 25 L. Ed. 738; Universal Brush Co. v. Sonn, 154 Fed. 665, 83 C. C. A. 422; Roemer v. Peddie, 132 U. S. 313, 317, 10 Sup. Ct. 98, 33 L. Ed. 382; Phœnix Caster Co. v. Spiegel, 133 U. S. 360, 369, 10 Sup. Ct. 409, 33 L. Ed. 663; Wagner T. Co. v. Wyckoff, 151 Fed. 585, 591, 81 C. C. A. 129; Wollensak v. Sargent, 151 U. S. 221, 14 Sup. Ct. 291, 38 L. Ed. 137; McCarty v. Lehigh V. R. Co., 160 U. S. 110, 16 Sup. Ct. 240, 40 L. Ed. 358; Lehigh V. R. Co. v. Mellon, 104 U. S. 112, 26 L. Ed. 639; Bates v. Coe, 98 U. S. 31, 25 L. Ed. 68; Western E. Mfg. Co. v. Ansonia Brass & C. Co., 114 U. S. 447, 5 Sup. Ct. 941, 29 L. Ed. 210; Howe Mach. Co. v. National N. Co., 134 U. S. 388, 10 Sup. Ct. 570, 33 L. Ed. 963.

Turning from the specifications to claims 35 and 54, which are for the time-recorder as a whole, they call explicitly for means "adapted

to print regular records in a certain color and irregular records in a certain other color." The records themselves are to be printed in colors, and the irregular records, if any there be upon the card or slip, are to be printed in a color different from that of the regular records. It seems to me that the language or terms used in these claims is plain and specific and not open to construction, except so far as necessary to ascertain what "regular records" and "irregular records" are. The specifications tell us that, as will be seen from the following:

"The invention relates to time-recorders," and "is more particularly directed to certain improvements in time-recorders adapted for recording the times of entering or leaving a factory, or other establishment, of the individuals employed therein."

Also:

"Records of different classes are made in marks of different colors," etc.

And:

"In order to render clearer the general nature of our invention, * * * the impressions made upon the recording-surface may in general be divided into two classes, namely, those made within the proper hours and those made without such hours, the latter denoting the early leaving or tardy arrival of a workman. Although an examination of the figures would show in which class each record was made, nevertheless it would be of value if means could be provided whereby these entries could be more readily distinguished. In order to attain this and other desirable results, it is proposed to so arrange the mechanism as to stamp the impressions of the two classes above indicated in distinctive colors. * * * For example, if a time-recorder should be so set as to give an impression in red if made before 12 or after 1, and is green between the hours of 12 and 1, assuming that the lunch hour extends over that period of time, an impression upon the time-recorder of an employé would indicate at a glance that he had left work before the time set, or was tardy upon his return, without the necessity of examining the figures. * * * For example, if the lunch hour is from 12 to 1, and it is thus desired that an impression made before 12 shall be in red ink, whereas after 12 it is in green ink, this movement will take place not later than and substantially at 12 o'clock. * * * In this manner the green ribbon is brought opposite the printing wheel, and the impression made by the movement of the hand lever causing this shifting will be in green, thus indicating that the same is made after 12, and that the time of leaving of the workman was satisfactory. * * * Any impression made after this point will accordingly be made in red ink, the same indicating that the machine has been used after the hour set for the return of the workman, or, in other words, that the user thereof was tardy. * * * Thus the ribbon may be caused to shift at a reasonable time before the morning work hour and again at that time, so as to print the records of the arriving workmen in green color. Throughout the morning work hours, as, for example, from 7 to 12, the mechanism will be in such condition as to print in red the time when used, and the ribbon may be reshifted at the hour of 12, so as to again print in green for the outgoing workmen. In this manner the mechanism may be formed so as to act in accordance with any desired hours of work and any number of notches, as, for example, an extra notch for evening work may be formed upon the disk."

It is evident that the time of entry and departure of each workman is to be recorded, and that this time so recorded is the record; that when two or more have so entered or departed we have "records"; that, assuming the work hours of the forenoon are from 7 to 12 o'clock, the workman who enters and records his time after 7 has made an "irregular record," as has the one who leaves and records his time be-

fore 12, while those who enter within the "reasonable time" fixed for entering before 7, and record their time, have made "regular records," as have those who leave after 12 and before 1 and record their time of leaving.

It is, of course, true that a workman may record the fact that he was too late, irregular, in entering, or too early, irregular, in leaving, by a mark on the record sheet intended to so indicate, but this would not be a time-record or record of time within the intent and meaning of these claims and specifications. This alone, if unaccompanied by a registry of the hour and minute of entry or departure, would be of no particular consequence—give no aid in fixing or determining the actual time the employé had worked.

It has been noted that "records of different classes are made in marks of different colors or otherwise characteristic of the classes." The specifications also say:

"It may be noted that the term 'mark' is used throughout this specification and in the following claims in a broad sense as denoting any perforation, impression, distortion, or discoloration of a receiving-surface whereby a record is made. It may also be noted that by 'printing mechanism' is meant any means for forming a mark as above defined, and 'impression' means the mark made as distinguished from the surface upon which it is made."

Neither the word "mark" nor "marks" appears in either of the claims in issue here. However, records are made "in marks of different colors," or records are made "in marks"; otherwise, if so made as to be characteristic of the classes, that is; I take it, so as to plainly distinguish the one class of records from the other. In either case there must be a record of the time "in marks," which marks recording the time are "characteristic" of the classes of time, regular and irregular, and this imposes the necessity of having the "marks" used to record the regular time, and which indicate the time, different in color, size, or shape from those marks used to record irregular time. In short, it is not necessary under all the claims of this patent to print the time in figures. The time may be printed or recorded by perforations in the card or slip, or by pictures, or by printing regular time in small figures and irregular time in large figures. But the marks must indicate and show the time, not merely the fact that a workman was late in entering or early in leaving. However, the claims in issue here do not relate to or include such modes of printing or recording the time. Each and every one of the claims in issue demands and is limited to means adapted to print regular records in one color and irregular records in some other color, as (claim 60), "means for taking impressions from said printing mechanism upon a record-surface, and means whereby the impressions made by said printing mechanism during different predetermined intervals are made in different colors"; or (claim 61) "means adapted to cause the impressions made by said printing mechanism during different predetermined intervals of time to appear in different colors"; or (claim 62) "means for taking impressions from said printing mechanism upon a record-surface, and automatic means whereby said impressions of different classes are made in colors distinctive of said classes"; or (claim 63) "means for taking impressions from said printing mechanism upon

a record-surface, and automatic time-controlled means adapted to cause such impressions of different classes to appear in colors distinctive of said classes"; or (claim 64) "means for taking impressions from said printing mechanism upon a record-surface, and automatic means whereby irregular records formed by said impressions are made in a certain color and regular records in a certain other color." These "means" are all "in a time-recorder," and combined with "printing mechanism" and the "impressions" or "records," as the case may be, as to these claims, are made by the printing mechanism in two classes, regular and irregular records, as we have seen, each class in a different color. Printing mechanism is means for forming a "mark," and "impression" means the mark made, while mark includes "perforation, impression, distortion, or discoloration of a receiving surface" whereby a record may be made.

There is no doubt in my mind that each of the claims in issue here calls for means that will make a record of the workman's regular time in one color, as green, and a record of his irregular time in another color, as red, in marks, figures, or characters showing the time of entry and departure, and that a separate and distinct mark, not indicating either the hour or the minute or both, but simply the fact that the figures or marks which accompany it is a record of irregular time, which accompanies a record of the workman's time made all in one color, does not answer to either claim in issue, and that a time-recorder adapted to make such a record only does not infringe either claim in issue, even when such distinct and separate mark accompanying the time record itself is of a different and distinct color. Machines of that class are covered, if at all, by other claims of the patent in suit. This is made definite and certain by other claims, as claim 33, which reads:

"A clock-controlled time-recorder comprising time-printing mechanism adapted to print records of different classes in distinctive impressions."

Claims 65 and 66 read:

"(65) A time-recorder, including, in combination, time-controlled marking devices, means for producing records therefrom, and means whereby records of different classes are made by marks having distinguishing characteristics.

"(66) A time-recorder, including, in combination, time-controlled marking devices, means for producing records therefrom, and means whereby records of regular and of irregular character are made by marks having distinguishing characteristics."

In all these claims different colors for different classes of records are not demanded or suggested. In claims 65 and 66 we find the words "marks" and "marking," and when we turn back to the specifications we find that these claims are for devices which make marks by perforations, distortions, etc., and that these claims are also for those devices where the records are made, not "in marks of different colors," but in marks or impressions "otherwise characteristic of the classes." These claims not only omit all reference to color and differences of color in the record, but specify that the different classes of records are made by marks having "distinguishing characteristics"; that is, any sort of marks recording time where the marks recording

regular time differ substantially and plainly from those recording irregular time.

Defendant's Time-Recorder.

The defendant's time-recorder does not have the mechanism of the patent in suit claimed thereby. There is no pretense that it does. But it does have a two-colored ribbon. This is not shifted laterally or for the purpose of making an irregular record in a color different from that of a regular record. Defendant's time-recorder does not print or impress on the card or slip or other recording-surface the regular time of the workman in one color and his irregular time in another color. It is not adapted to do that, and is not capable of doing it. It was not designed for such work. The time, regular or irregular, is and must be all printed in one and the same color. The record of the workman's time is all in the same color. In the record itself there is nothing to indicate that an entry of time is regular or irregular, except as we inspect the figures made we find that they of themselves show that the workman was either late in entering or early in leaving, as 7:30 would indicate 30 minutes late in arriving, and 11:20 would indicate 40 minutes early in leaving. These would be irregular records. All time-recorders do this where figures are used. To catch the eye and indicate at a glance that the record on the card contains irregular records, or records of irregular time, the defendant's device has an added independent character actuated only when the workman records out of regular time, as a dash or a star, which strikes the red part of the ribbon at the same time the type which prints or impresses the time strikes the other part of the ribbon, and thus both make marks side by side on the recording surface, and this extra or added mark indicates at a glance that that particular entry of time which it accompanies is irregular.

The purpose of both the complainant's device and defendant's device is to indicate to the employer and employé, without reading the particular entry of irregular time, that it is such an entry. It is useful to the employer in his bookkeeping, or in figuring up at the end of the week or day the amount of wages due each workman, or the actual number of hours the employé has worked To illustrate: The working hours are from 7 a. m. to 12 m. and from 1 p. m. to 6 p. m., 10 hours in all, and the employer is paying $3 per day, or 30 cents per hour. When the card or slip of the workman is turned in at the end of the week and his actual time is to be figured and the amount earned ascertained, it is necessary, if irregular time is indicated on the record only by the figures or characters made in the usual course, all of one size, form, or color, to look at each entry, which takes time and patience. The reader of the card might fail to note entries of irregular time. But with all irregular entries made in a different colored ink from the regular entries, the reader of the card sees at a glance whether or not the workman is entitled to full time and full pay for the work. If there are no records on the card in red, the color used to designate irregular time, the bookkeeper enters $18 on a mere glance at the card. If there be records on that card in red, then the bookkeeper inspects those only, and makes the proper deduction from the

total for the week, or $18. It is self-evident that a red star or red bar by the side of an irregular entry or record, and in the same space or square with it, will indicate the same facts and give the bookkeeper substantially the same aid. Such a mark calls attention to each irregular entry. The one mode of indicating "irregular records" on the face of the recording sheet is the substantial equivalent of the other mode, inasmuch as both indicate that the particular record entry is irregular time. But the means for making the records indicating such irregular time are different, and the manner in which such records are pointed out on the record surface is different in the two time-recorders. The work actually done by the two machines is different, and the respective operations of the two in doing the work differ substantially and materially. Complainant's machine actually prints or records the time of each workman in different colors if he has made time of the two classes, regular and irregular. It prints or records his regular time in one color, and his irregular time in another and a distinctive color. The complainant's machine was intended and designed to do that very thing, and was therefore "adapted" to accomplish that particular result. The Dey patent in issue here so explicitly declares. Mechanical devices were added and changes made so as to do that particular thing. These added mechanical devices, described in the patent at great length and with great particularity, and made the subject of a great number of claims, the defendant does not have or use, as he does not do that work or accomplish that result or intend so to do. The ultimate object or purpose of doing that particular thing is readily understood, but the ultimate purpose is not what the machine accomplishes. Says the specification:

"The invention is more particularly directed to certain improvements in time-recorders adapted for recording the times of entering or leaving a factory or other establishment of the individuals employed therein. * * * One of the objects of the invention is to provide means in a workman's time-recorder whereby records of different classes are made in marks of different colors," etc.

The claims in issue deal with means for making "records of different classes in marks of different colors" only, as we have seen. The way to do this particular thing is pointed out, and new and improved mechanical means for doing it are provided, added to a time-recorder, and specifically claimed. These defendant does not have, or use, or require. The defendant has not "adapted" its machine to do such work or to accomplish such result.

The very function of complainant's time-recorder is to print or record the regular time in marks of one color and the irregular time in marks of another color and a distinctive color, or to record the regular time, irrespective of color, in marks or characters distinctive of that class of records, and irregular time in characters distinctive of that class of records, and separate and distinct claims have been framed and inserted in the patent in suit to recover both species of marks. The one set of claims relates to the color of the impressions recording the time, the other to the form of the impressions recording the time. If defendant, in recording time, uses marks characteristic of the classes, viz., figures of one color to record regular time, and figures

of the same color with a red dash or dot by their side to record irregular time, the red dash or dot being used and added as a mark to make those figures characteristic of the class to which they belong, and thereby infringes claims 65 and 66, clearly he does not infringe the claims in issue, each and every one of which calls for records of time made in different colors to designate the class to which each belongs, and demands that the figures or characters recording the time be in colors distinctive of the classes; that is, that those showing regular time be made in one color and that those showing irregular time, if any, be made in another and a distinctive color. The claims in issue contain this self-imposed limitation, and the claims cannot be extended by construction. See cases before cited.

The following elements of claims 60 to 64, inclusive, are not found in defendant's time-recorder: Claim 60, "means whereby the impressions made by said printing mechanism during different predetermined intervals are made in different colors"; claim 61, "means adapted to cause the impressions made by said printing mechanism during different predetermined intervals of time to appear in different colors"; claim 62, "means whereby said impressions of different classes are made in colors distinctive of said classes"; claim 63, "means adapted to cause such impressions of different classes to appear in colors distinctive of said classes"; and claim 64, "means whereby irregular records formed by said impressions are made in a certain color, and regular records in a certain other color."

The following elements of claims 54 and 35 are not found in defendant's machine, viz., "automatically-actuated time-printing means adapted to print regular records with an impression of a certain color, and irregular records with an impression of a certain other color" (claim 54), and "automatically-acting time-printing means adapted to print regular records in a certain color and irregular records in a certain other color" (claim 35). There is no equivalent, as defendant's time-recorder is not adapted to do the work required and cannot do it. The function of complainant's means, referred to, is to print the two classes of records of time in marks or figures of some kind, the one class in one color and the other class in another or different color. The function is not to point out or indicate to the employer, or to his bookkeeper, or to the employé, the fact that the record made in the one color is of one class and the record made in the other color is of the other class. Such is the ultimate purpose or object of having the means referred to perform the function pointed out, but such purpose in having the means perform its work is not the function of the means employed.

But even did the time-recorder of the defendant accomplish or produce the same precise result as complainant's recorder, infringement would not be made out. To be an infringer, one must do more than reach the same result. Westinghouse v. Boyden Power Brake Co., 170 U. S. 537, 569, 18 Sup. Ct. 707, 42 L. Ed. 1136; Burr v. Duryee, 1 Wall. 531, 572, 17 L. Ed. 650; Miller v. Eagle Manufacturing Co., 151 U. S. 186, 201, 14 Sup. Ct. 310, 38 L. Ed. 121.

In Westinghouse v. Boyden Power Brake Co., 170 U. S. 569, 18 Sup. Ct. 723 (42 L. Ed. 1136), the court, speaking by Mr. Justice

Brown, who always speaks with accuracy and clearness and precision in patent cases, says:

"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. * * * 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 another."

In Burr v. Duryee, 1 Wall. 531, 572, 17 L. Ed. 650, the court said:

"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.'"

In Miller v. Eagle Manufacturing Co., the court, at page 201 of 151 U. S., page 316 of 14 Sup. Ct. (38 L. Ed. 121), said:

"It is not the result, effect, or purpose to be accomplished which constitute invention, or entitles a party to a patent, but the mechanical means or instrumentalities by which the object sought is to be attained; but a patentee cannot so split up his invention for the purpose of securing additional results, or of extending, or of prolonging the life of any or all of its elemental parts. Patents cover the means employed to effect results. Rubber Tip Pencil Co. v. Howard, 20 Wall. 498, 507, 22 L. Ed. 410; Fuller v. Yentzer, 94 U. S. 288, 24 L. Ed. 103."

To infringe even a pioneer or primary patent, the defendant must accomplish substantially the same result by substantially the same means, operating in substantially the same way, and equivalent means, known to be such at the date of the patent, are the same as the means specifically described.

The patentees, Dey & Dey, may have been the first to conceive the idea of applying the old idea of printing words or figures representing one thought in characters larger than those used to print words or figures representing another thought, so that at a glance they would be distinguished the one from the other, to a time-recorder in recording different classes of time. They may have been the first to produce means for doing this precise thing in a time-recorder. They may have been the first to conceive the idea of so printing or recording time in a time-recorder by printing regular time in blue, or green, or black, and irregular time in red or purple, but they could not patent or monopolize these ideas. They could patent means for making their conception of practical value and application. See cases cited. "Patents cover the means employed to effect results." Rubber Tip Pencil Co. v. Howard, 20 Wall. 498, 507, 22 L. Ed. 410; Fuller v. Yentzer, 94 U. S. 288, 24 L. Ed. 103, cited and approved in Miller v. Eagle Pencil Mfg. Co., 151 U. S. 201, 14 Sup. Ct. 310, 38 L. Ed. 121. It follows that the defendant cannot be held to be an infringer in making, using, and selling a recorder which gives to the user thereof the same information by means of a sign or symbol as does complainant's by actually printing the record in red or some other distinguishing color,

it appearing that defendant's recorder has other means for producing and printing or impressing the sign on the record, sheet, or card, which operate in a different way and produce a different record or result, even if that result serves the same ultimate purpose as does complainant's device or machine. In complainant's recorder the clock brings certain mechanism into position, so that at regular hours for recording when the workman presses the handle or lever whereby he records his time the red ribbon or red part of the ribbon is brought in front of the type wheel, and, as the hammer strikes. the type makes a record in red on the record sheet or card. The clock itself so moves the mechanism that at regular hours for recording time the red ribbon is not brought before the type wheel when the workman records his time. The same type wheel and type make the regular record that make the irregular record. In defendant's time-recorder there is no mechanism for moving the ribbon for the purpose of indicating irregular time, and the type wheel and type thereon always strike the ribbon used for recording regular time. In this recorder there is a distinct mechanism operated by the clock connected with an arm carrying an independent character, which is actuated at irregular hours for recording time, only, by the hand of the operator as he presses the handle or lever for recording his time. This character strikes the red line of the ribbon only.

Prior Art.

But the prior art weighs heavily against the complainant's contention that the defendant infringes the claims in issue. Two colored ribbons were no novelty. In analogous arts it was not novel or new to print one part of a record in one color, one word or more, and the other parts in another color, or to so print or impress words or figures on a recording surface. There are many books printed in that way more than a hundred years old. Extra characters printed by the side of words to call attention thereto, or under same to emphasize it, were common. In time-recorders the regular time was printed by hour and minute printing wheels, and the mechanism was also provided with shiftable printing type for printing a. m. and p. m. in connection with the figures, so as to indicate forenoon and afternoon records, both made in precisely the same numerals. See patent to Larrabee, No. 726,546, dated April 28, 1903, for "workman's time-recorder." The defendant has improved this mechanism, as he had the right to do, and has substituted a two-colored ribbon, as he had the right to do, and added a character or substituted a character to indicate irregular time in place of a. m. and p. m., as he had the right to do. Substantially the same thing is shown in patent to J. C. Wilson, No. 543,416, dated July 23, 1895, for "time-recording apparatus." Of course, advance has been made in this particular branch of the art, but I can see no difference in principle between impressing a. m. or p. m. on the record sheet by the side of the time record by means of an independent type to designate or distinguish morning records from afternoon records, and impressing a bar or other character in the same place by means of an independent arm or printing wheel, or whatever is used to carry it, to designate or distinguish late or irregular time from regular time.

The mechanic skilled in the art would make modifications in the mechanism, of course, but he would be fully competent for the undertaking. As early as 1895, in a patent to W. L. Bundy, No. 552,232, for "workman's time-recorder," dated December 31, 1895, in addition to the numerals, it was desired to have the record show whether the figures were made as the workman came in or went out. We find in that patent the following, which speaks for itself:

"Upon the plate, 28, an 'In' and 'Out' scale is mounted and 86 is a pointer secured to a lifting-bar, 87, journaled in said plate and of angular outline, so that, when rotated, its inner end will actuate the arm, 88, pivoted upon the shaft, 6, and swing the extension, 89, so that the sign, symbol, or other character thereon will be upon the printing line, and in line with the characters upon the time and number wheels, so that the platen will then print an additional sign or character upon the paper tape, which, for instance, will indicate that the record made was that of the exit of the workman, in which case the pointer will stand at 'Out.' When it stands at 'In' no record of this sign or symbol will be printed.

"In Fig. 25 a part of a strip of paper, 40, is shown, and the record thereon indicates that workman No. 48 came in at 6 o'clock and 55 minutes, went out at 11 o'clock and 59 minutes, and returned in again at 12 o'clock and 58 minutes, the star, m, or other sign, symbol, or other character used indicating, by the fact of its impression appearing upon the paper, that each and every record in which it appears is the record of that workman going out or leaving the shop or factory."

In patent to Bundy, No. 453,230, of June 2, 1891, for "workman's time-recorder," we have a device of the same kind fully shown and described.

Whether defendant would use a two-colored ribbon or a one-colored ribbon was a mere matter of selection or choice. If he makes his extra mark by the side of a single entry to indicate it is irregular, as, for instance, 7:15, or 15 minutes late, and makes the impression of such character in the same color as the time impressions, which would be the prior art and nothing more in everything except the mere purpose of using the added character, he will have done everything necessary to indicate or point out the fact that such entry is of irregular time. If he makes such impression of the extra mark in red, it will the more readily catch the eye. The red will emphasize the characterization. This is the only object or purpose defendant can have in making this impression in red. The character that tells the story is there, whether it be in the one color or the other, and it obviates the necessity of reading any record except those having this distinguishing mark. Not so with complainant in printing the record of irregular time in red. It must print the irregular time in red, or some color other than that used for regular time records, or it has nothing whatever to distinguish the one class of records from the other.

The Dey patent did not monopolize in the time-recorder art the idea of printing or impressing letters or characters in a certain specific color so as to readily distinguish the record made from others printed in another color. If the Deys provided new and novel means for doing this thing and those means are covered by the claims in issue, and the defendant has adopted those means or their substantial equivalent, it infringes, otherwise not. It is not contended that the means employed are, as a whole, the same or substantial equivalents, unless

it be in the elements of a cam and a two-colored ribbon. These are two of the elements of complainant's means only. The invention of the patent in suit does not reside in either of these elements. The cam was old, and the two-colored ribbon was old. A slight change in the cam of the Larrabee patent was all that was necessary to adapt it to shift the ancillary character so as to differentiate regular from irregular time records. There may be invention in transferring a well-known thing from one structure to another to meet a new and novel exigency and adapting it to its new use in such situation.

In Rinsche patent of July 24, 1900, No. 654,181, for a "calculating machine" which, amongst other things, records figures and the totals thereof, we have the two-colored ribbons whereby we may record the figures in one color and the totals in another, as red, a distinctive and distinguishing color, for the purpose of distinguishing the one from the other at a mere glance. Says the patent:

"Printing the total in a distinguishing color. In Figs. 36, 37, and 38 I have shown means whereby, whenever a total is taken in the machine, the impression on the strip or sheet of paper will be in a different color or have some distinguishing characteristic to identify it as a total or the sum of the numbers in the machine, and the mechanism for accomplishing this consists, briefly stated, in arranging an inking ribbon of different color in juxtaposition to the ribbon ordinarily employed for regular operations of the machine. * * *

"The advantage of having the total printed in a distinguishing color from amounts or items of which it is composed will be readily appreciated. In machines of this character with which I am familiar the total is printed in the same color as the items, and there is nothing to distinguish the total from the items except perhaps a space. In the construction I have described herein the operator is not required to perform any other than the usual operation of operating the total-key, which total-key, when operated automatically, effects a change in the inking device for the type, so that the total when struck will be printed in a color different from that employed with respect to the printing of the different items."

Here the different colored ribbons are automatically shifted laterally, and all the operator has to do is to press the total key. This is also done in the Baird patent of 1904, No. 759,848, "ribbon mechanism for calculating machines." The two-colored ribbon and shifting devices were old in typewriters. But Dey & Dey were not the first to introduce the two-colored ribbons into a time-recorder. In the Connell patent of February 26, 1895, No. 534,858, for "workman's time-recorder," we find:

"Back of the strips, 6, and in front of the printing surface, 4a, are ink ribbons, 9 and 10, to give impressions of different colors, say black and red. These ink ribbons are well shown in Fig. 7, and are supported by a vertical rod or bar, 11, having a lower crosshead, 12, and an upper crosshead, 13, around which the ribbons pass. At one end of each ink ribbon is an elastic strip, 14, which keeps the ink ribbons under sufficient tension. The upper end of the rod, 11, is supported in a sliding plate, 15, having slot and pin connection, 16, with the clock frame, and which is adapted to be moved by a lever, 17, pivoted at 18.

"By shifting the ink ribbon supports through means of the lever, either ink ribbon may be brought in front of the slots or openings, 6, of the plate, 4, so that either color may be printed upon the surface 4a."

It is said by plaintiff's expert that this was inoperative, but I do not find it so. Whether the ribbon is long or short is immaterial;

when worn out another is substituted, and this is the case with any colored ribbon in any machine.

The two ribbons of different colors and the means for shifting them were claimed. At the will of the workman he could have printed forenoon records in one color and afternoon records in another, or regular time in one color and irregular time in another color.

The prior art, and I have not gone into it extensively, shows that Dey & Dey were far from pioneers. They were, so far as I have discovered, the first to actually record the time by a time-recorder in two different colors, one class of time in one color and the other class of time in another color, by automatic time-controlled means adapted to cause the impressions recording the time and made by the printing mechanism to appear in one color during one predetermined period of time and in another color during another predetermined period of time; but they were not the first to print or record time, by a time-recorder, in two different colors, thereby distinguishing one class of time from another, and they were not the first to distinguish the record of one class of time from the record of another class of time by a mark or symbol printed or impressed on the recording surface in connection with the time record or entry by automatic time-controlled means. The claims of the patent in suit in issue here must be limited by the prior art and also by their self-imposed limitations, and, so limited and construed, the defendant does not infringe.

The defendant's time-recorders, alleged to infringe, are fully operative and perform every function of the recorder, even to imprinting on the record sheet or recording surface the extra mark which distinguishes irregular time from regular time, when the ordinary single-colored ribbon only is used. As this extra symbol makes its impression by the side of the time record only, and at the same instant of time, if we substitute a two-colored ribbon, having a narrow margin of red, for the single-colored ribbon, and so insert it that the red margin comes opposite this extra symbol only and the other part of the ribbon comes opposite the type wheel, when the workman operates the handle or lever of the recorder to record his time, the time type will strike the one color and record the time in that color, and the extra symbol will strike the red margin of the ribbon and make its impression in red. It follows, on complainant's contention, that time-recorders which concededly do not infringe the claims in suit when used with a one-colored ribbon do infringe when used with a two-colored ribbon. Thus under complainant's contention, a noninfringing time-recorder, is converted into an infringing machine by putting into it and using with it a fugitive element, one which is frequently wearing out and being changed, if such element be a two-colored ribbon. It seems to me that this is, in substance, a contention that complainant's invention resides in putting a two-colored ribbon into a time-recorder and so modifying the mechanism that irregular time shall be printed with the red portion and regular time with the other portion. If this be so, defendant does not infringe. Defendant does not record time in red, and has not so modified or changed the mechanism of its recorder. Can it be possible that complainant, by the claims in issue, in view of the prior art, has obtained such a monopoly

that he can enjoin the world from using a two-colored ribbon, old in the time-recorder art, in a time-recorder which does not infringe unless it be when this old element is substituted for the single-colored ribbon? Can this be true in a case like this, when the claims alleged to be infringed demand that the record of the time itself be printed or impressed in such different colors as to cause the records of different classes of time to appear in different colors, and where the defendant's machines with the two-colored ribbon do not do that, but only do what they did before, indicate one class by a symbol, adding color to the impression made by the extra symbol used to designate a class of records, thereby making the designation the more plain and emphatic? It seems to me that this would be granting a monopoly of the use of a color in the time-recorder art; that it would be an unwarranted extension of the claims and monopoly granted thereby. It is evident that the conception was to introduce a two-colored ribbon into a time-recorder; actually print or record irregular time in one color and regular time in another color so as readily to distinguish the one class from the other class; to have this done by the workman himself as he presses the handle or lever to record his time; and in providing means so to do. But as all this contemplated the necessity of making a change in mechanism and providing additional mechanism, and the complainant's patent proceeds along the lines of providing means to shift the ribbon laterally so as to bring first the one-colored portion before the printing type and then the other, so as to have all the record of time itself printed from the same type but in different colors, means, including a controller positioned by clockwork mechanism, a lever moved by the controller and by the hand lever, and means for locking the controller and releasing the same at the proper moment, all of which are present in complainant's machine, but absent in defendant's, who has no equivalent, as he has no use for them, I cannot find infringement. And I repeat it is not infringement to accomplish the same general ultimate result by substantially different means operating in a substantially different way.

There will be a decree dismissing the bill with costs.

MOYER v. METAL STAMPING CO.

(Circuit Court, S. D. New York. March 20, 1909. On Rehearing, April 5, 1909.)

PATENTS (§ 328*)—ANTICIPATION—THILL COUPLING.

The Moyer patent, No. 591,561, for a thill coupling, *held* void for anticipation on satisfactory evidence that a device admitted to have all the essential features of that of the patent was made by another, and was in public use prior to the application for the patent.

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

In Equity. On final hearing.

Howard P. Denison, for complainant.

William A. Megrath (Samuel G. Metcalf, of counsel), for defendant.

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

HAZEL, District Judge. This action in equity arises out of the alleged infringement of letters patent No. 591,561, issued October 12, 1897, to the assignors of complainant for thill coupling. According to the specification, the thill coupling has a fixed jaw or shackle eye section, to which is attached a spring connected to a movable jaw or eye section put together in such a way as to securely hold between them a coupling pin or bolt, and to release or disengage such pin or bolt by reversing the spring or turning it downward. Claim 1 in controversy clearly sets forth the elemental character of the device. To join a fixed and movable jaw so as to confine between them a coupling pin or bolt was old, and the employment of a spring attached to one of the jaws or blocks to open and close the coupling portions was also a familiar contrivance at the date of the patent in suit. Such a coupling device is shown in the patent to Pardee, No. 382,828, dated May 15, 1888. In the Moyer patent in suit the spring, which is the new element of the combination, is curved, the ends pointing in the same direction. One end is pivotally connected to the coupling part or jaw, while the spring at the other end extends forward further than the other to enable it to lock while the jaw is in a closed position. When the spring is turned or moved backward, the jaw is opened, and the shaft or bolt of the vehicle may be readily released. The spring is pivotally connected at one end to the fixed jaw and at the other to a link or bar which is preferably connected to the movable jaw. Such arrangement of the parts, as shown in figures 1 and 2 of the drawings, will automatically open and close the jaws from a middle position by the action of the spring. In figures 6 and 7 is shown a modification of the coupling which consists of connecting a link on the free end of the spring and extending across the upper part of the movable jaw. In the Pardee patent is shown a loose spring secured at one end to a clamp block which fits into a hook shaped jaw, and which operates to hold the clamp block in its position against the coupling pin. When the block is released, it flies upward with the spring. The spring in the patent in suit is thought essentially different, in that it produces a different result. It noticeably facilitates and makes easier the opening and closing of the pivoted jaw, and therefore the Pardee patent is not anticipatory. The Worrest thill coupling manufactured and sold by the defendant is structurally slightly different from that of complainant, but it is operated in substantially the same way, and certainly produces a like result. It has a curved spring connected at one end to a movable jaw, while the other end is pivoted to a bar in such a way as to enable opening and closing the jaws by a forward and backward movement of the spring. I think infringement would not be avoided if it were not that the defense of prior use is thought fairly established.

The latter defense arises from the claim that the coupling device or its substantial equivalent has been in public use for more than two years before the application for the patent in suit was filed with the Commissioner of Patents. It was admitted by the complainant that the Winans device claimed by the defendant to have been manufactured and in public use since 1894 has all the elements of the claim in controversy, and, if prior public use has been proven, anticipates the

patent in controversy. The defendant gave evidence to show that in 1894 one Winans made two pair of thill couplings, one pair being continuously used by him on his carriage for about four years, and the other sold by him to the witness McCormick, to whom he also transferred an interest in his unpatented invention for the sum of $100. The receipt and transfer, dated September 20, 1894, are exhibits in the case. The witness McCormick testified to the identity of the prior coupling in evidence, and corroborates the witness Winans as to the time in 1894 when the coupling was sold and delivered to him, and when he purchased an interest in the invention. It is shown that the coupling thills were made in the presence of one Hurley, a disinterested witness, who identified them, and testified positively that they were made by Winans in 1894. He fixes the date by the fact that in 1893 and 1894 and the early part of 1895 he was in the employ of the New York Roofing Company, and that it was during this time that he came in contact with Winans, and saw the couplings. His certitude is based upon seeing the coupling before he left the employ of the New York Roofing Company, which was in March, 1895. Winans also exhibited the coupling to the witnesses Bauer, Tyler, Galvin, and one McIlhargy in the year 1894, and again in 1895 to the witness Galvin, president of the defendant, with a view of interesting him in its manufacture. Subsequently in 1905, he delivered the coupling to the defendant. The pair of couplings sold to the witness McCormick for $10 are shown to have been in continuous use from the time of the sale until the month of August or September, 1905, when they were delivered to the defendant. Witness Dawson testified that he saw the couplings on McCormick's wagon at different times during the years 1894 to 1899. Witness Quinn testified that in the latter part of August, 1895, he saw a pair of thill couplings resembling those in evidence on a wagon of the New York Contracting Company. Other testimony and circumstantial details corroboratory of the asserted prior use is found in the record. The said witnesses were fully cross-examined, and their testimony was not discredited in any material particular. As most of the testimony was given by disinterested witnesses, the court does not feel disposed to declare that such testimony is mistaken or not of a convincing character. The complainant gave testimony in opposition.

The witness Bowers testified that the Winans coupling was not made in 1894, but that, in fact, it was made in the month of May, 1905, in the shop of the defendant under his direction, and at the request of the president of the defendant. To carry out the instructions given him, he designed the Winans exhibit from the specification in suit on a block of steel, and he testifies that a fellow employé, named Shannon, at his request made the exhibit coupling from his sketch. He further testified that the spring made by Shannon was brittle, and that he then requested another fellow employé named Droz to harden it, and that a bolt in the thill eye was removed by another employé named Messenger. When the coupling was finished, he delivered it to Mr. Galvin, who on the next day suggested certain alterations appearing on a sheet of paper, and remarked that his pat-

ent solicitor indicated the desired changes, but that he did not wish to be quoted as having done so. The witness Shannon testified that the Winans exhibit coupling was made by him in 1905, at the request of Bowers, and he assigned reason for his positive identification. The witness Droz testified that in May or June, 1905, at the request of Bowers, he hardened the spring and worked on the thill eye part of the coupling. Other witnesses were sworn to corroborate Bowers, among them John Keenan, who was in the employ of the defendant at the time Bowers swore the coupling was made. He says that Bowers gave the Winans coupling to Shannon, with instructions to take it apart, and, after putting the parts together, to place the coupling on his desk. He also stated that Shannon conferred with him regarding the manner of putting the parts together, and he is positive that the coupling was not made by Shannon. Such testimony is clearly contradictory of the testimony of Bowers and Shannon in its most important features, and is corroborative of the witness Galvin, who testified that Bowers in the summer of 1905 asked permission to take the Winans coupling, and that he subsequently noticed that the device had been taken apart. The defendant contends that the testimony of Bowers was false and that from motives of ill will he procured other testimony to corroborate him. The court does not deem it necessary to allude to the many details claimed to be contradictory or an impeachment of the witness Bowers. The witnesses Shannon, Ogrera, Droz, and Chamberlain were formerly in the employ of the defendant, and Shannon and Ogrera were in the employ of Bowers at the time they testified. They probably have not willfully misstated the facts, but evidently confused the Winans device with another, or Shannon in taking such device apart and putting the same together, as testified by Keenan, sought the assistance of other workmen, who therefore are under the mistaken impression that the exhibit was produced or originated by him. As to Bowers, it is satisfactorily shown that he was not an impartial or unbiased witness. He had been discharged from the employment of the defendant and his rectitude challenged by its president. Moreover, there was litigation pending between him and the defendant arising from debt and from the asserted use by him of the defendant's trade-name. Either from rivalry in trade, his discharge from the defendant's employ, or reflections on his honesty the hostility of Bowers can scarcely be doubted upon close scrutiny of his testimony and the surrounding circumstances. His deep interest and feeling in the pending litigation is evidenced by his unsolicited interview with Mr. Bradley, who is interested on the side of complainant, and his subsequent search for witnesses to corroborate his testimony. In view of his interest in the present litigation, his relations with the defendant are unquestionably competent to affect his credibility and indicate a motive for false swearing. His arrest and indictment at the instigation of the defendant after he gave his testimony does not impair his credibility, and I have not so considered it; but his voluntary admissions as testified to by Galvin after the arrest that, if released and the proceeding dropped, he would correct his testimony upon the subject of prior use,

implying that he would testify to a different state of facts, ought not to be overlooked.

To determine the question of prior use under the facts and circumstances of this case is extremely difficult, and I have not concluded to reject the testimony of the complainant on this point without adequate deliberation. Ordinarily, where the evidence relative to prior use is contradictory or has been impeached or the circumstances are such as to discredit it, the court will not consider such defense as satisfactorily proven. But in the present case the witnesses were acquainted with devices of the description in suit. National Casket Co. v. Stolts, 157 Fed. 392, 85 C. C. A. 300. They were interested in wagon thills and wagon paraphernalia owing to their occupations, and I think the disinterestedness of some of those who gave important testimony will not fairly admit of the court holding that complainant's testimony is entitled to probative force, or that it is of sufficient weight to generate a reasonable doubt as to the asserted prior public use of the Winans coupling.

Because I entertain no such doubt as to the Winans thill coupling, the bill must be dismissed, with costs.

On Rehearing.

I have considered the application of complainant for rehearing, and have examined the reference in the petition to the testimony of Hurley, Otto Bauer, and Keenan. I have also considered the point that the exhibit Winans coupling shows no fraying or wear. According to the proofs, the pair of couplings retained by Winans was used much less than the pair with which he parted, which probably would account for any absence of fraying of the edges. Winans testified that the witness Hurley saw the coupling made, and Hurley says that he was present in 1894 when the coupling was in separate parts in Winan's shop, and that later he saw it in its completed form. Such testimony would seem to support the statement of the court in the opinion that Hurley was present when the coupling was made. Otto Bauer testified that the coupling which he saw in 1905 was new, and painted black. The coupling in evidence was in the fire in defendant's factory and later was found in the débris, and it has the appearance of having been painted black. It is claimed that the testimony of Bauer corroborates the claim of complainant that the coupling was actually made in 1905, as testified to by Bowers, and as evidenced by its new appearance and absence of fraying of the edges, but, giving consideration to the evidence of prior use in its entirety, such an inference is unwarranted.

The petition for rehearing is denied.

CRANE v. BARTELSTONE et al.

(Circuit Court, S. D. New York. March 10, 1909.)

PATENTS (§ 328*) — VALIDITY AND INFRINGEMENT — ANGLE CLAMPS FOR GLASS PLATES.

The Crane patent, No. 624,460, for an angle clamp for fastening glass plates together, discloses novelty and invention; also *held* infringed.

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

In Equity. On final hearing.

Thomas W. Bakewell and Albert E. Lynch, for complainant.
Duell, Warfield & Duell, for defendants.

MARTIN, District Judge. This complaint is brought for an infringement of a patent owned by the plaintiff, No. 624,460. The patent is a very simple one, and consists of a series of clamps applied at the meeting angles of glass plates; each clamp being composed of four pieces of metal—two angle pieces, one fitting on the outside and the other on the inside of a window at the angle where the glass plates meet, a shank or screw, which projects inwardly from the outside piece and through the hole in the inside piece, and a nut, which is screw-threaded upon the shank and presses upon the inner angle piece. This shank projects through notches filed in the edges of the adjoining glass plates, and when the nut is tightened it holds the glass plates together strongly and substantially by frictional contact of the angle clamps upon the surface of the glass. No hole is required to be drilled through the glass. The shank or bolt to which the nut is attached is held firmly in the outer clamp, but does not extend through it.

The defendant's device is substantially the same thing, except the shank or bolt extends through the outer clamp and is held in place at that end by a head on the outer end of the shank or bolt. If the complainant's patent is a novelty, and the former art is such that he is entitled to all he claims for it, the defendants have infringed. From an examination of the record I am of the opinion that the complainant's patent was a useful invention, and not so far restricted by the prior state of the art but that it is broad enough to cover the device used by the defendant.

Let decree be entered for an injunction and accounting, as prayed for in the bill.

G. & J. TIRE CO. v. UNITED STATES AGENCY, MICHELIN TIRE CO., et al.

(Circuit Court, S. D. New York. March 10, 1909.)

PATENTS (§ 328*)—INFRINGEMENT—PNEUMATIC TIRES.

The Jeffery patents, Nos. 454,115 and 558,956, for pneumatic wheel tires, *held* not infringed.

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

In Equity. On final hearing.

Ernest Hopkinson, for complainant.
Simpson, Thacher & Bartlett, for defendants.

MARTIN, District Judge. This is a bill in equity, alleging that the complainant is the sole owner of letters patent No. 454,115, issued to Thomas B. Jeffery, dated June 16, 1891, and also of letters patent No. 558,956, issued to the same Thomas B. Jeffery under date of April 28, 1896. The complainant claims that the clincher pneumatic tires for automobiles embody the invention of the two patents above named, and that the defendants have infringed those patents, and prays that said defendants be enjoined and restrained from further infringement of said letters patent, and for an accounting. The defendants contend that, if either of the said patents can be held to be valid, it must be upon details which the defendants have not used.

Upon an examination of the record it plainly enough appears that all the mooted questions here, involving these patents and alleged infringements, were before United States Circuit Judge Buffington in the case of Gormley & Jeffery Tire Co. v. Pennsylvania Rubber Co. (C. C.) 155 Fed. 982, and that judge, in a carefully prepared opinion, fully discussed these questions. His conclusion was that the bill should be dismissed. The case went to the Circuit Court of Appeals for the Third Circuit and was affirmed. Later on there was a motion for rehearing, which was denied. I concur in the decision of that court.

There should be a decree for the defendants.

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

ELECTRIC GOODS MFG. CO. v. BENJAMIN ELECTRIC MFG. CO.

(Circuit Court, S. D. New York. March 23, 1909.)

PATENTS (§ 310*)—SUITS FOR INFRINGEMENT—PLEADING—MULTIFARIOUSNESS OF BILL.

A bill for infringement of two different patents, which, while alleging that the inventions covered thereby are capable of being conjointly used in one apparatus, fails to allege that they are so used by defendant, or to allege that they were not patented in a foreign country more than seven months before applications for patents were filed in the United States, is insufficient, and subject to demurrer.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 507, 518; Dec. Dig. § 310.*]

In Equity. On general and special demurrer to bill.

Edwards, Sager & Wooster, for complainant.
Wylie C. Margeson, for defendant.

MARTIN, District Judge. This action is brought for alleged infringement of two patents which the complainant claims to own. The complainant alleges in his bill that each of said patents is susceptible of conjoint use in one apparatus, yet there is no allegation that they were so conjointly used by the defendant. There is no allegation that the inventions alleged to have been infringed were not first patented or caused to be patented in a foreign country on an application filed more than 7 months prior to the filing of the application in the United States. The allegation is 12 months, when it should read 7, as these patents antedate the act of 1903 (Act March 3, 1903, c. 1019, 32 Stat. 1225 [U. S. Comp. St. Supp. 1907, p. 1003]). The complaint is deficient in its allegations as to the execution of the complainant's patents. The defendant's special demurrer reaches each of these defects, and as to each of these defects the demurrer must be sustained, with costs to the defendant. All other grounds set up in the demurrer are overruled.

The complainant may have 20 days from the filing of this opinion in which to pay costs and amend, and the defendant 20 days in which to plead to the complainant's amended complaint.

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

WEST PUBLISHING CO. v. EDWARD THOMPSON CO.

(Circuit Court, E. D. New York. June 1, 1909.)

1. COPYRIGHTS (§ 86*)—INFRINGEMENT—INJUNCTION.
An unfair saving of labor and expense by the appropriation of the copyrighted work of another, animo furandi, is ground for injunction against the infringing publication, if the unfair use permeates the work to any material extent.
[Ed. Note.—For other cases, see Copyrights, Dec. Dig. § 86.*]

2. COPYRIGHTS (§ 73*)—INFRINGEMENT—REMEDIES—INJUNCTION—DAMAGES.
Where the damage by the infringement of an alleged copyright embraced only the expense of additional copying, or if the sale of the work in itself caused no unfair competition and no appropriation of literary work, then complainant would not be entitled to an injunction, but would be limited to a recovery of damages for the material appropriated or for the unjust enrichment at the expense of the copyrighted work.
[Ed Note.—For other cases, see Copyrights, Dec. Dig. § 73.*]

3. COPYRIGHTS (§ 73*)—INFRINGEMENT—INJUNCTION.
Injunction may be an appropriate remedy for copyright infringement, even after the copyright has expired, if the unfair taking occurred while the copyright was in force and no adequate legal remedy can be applied.
[Ed Note.—For other cases, see Copyrights, Dec. Dig. § 73.*]

4. COPYRIGHTS (§ 33*)—RENEWAL—NAME IN WHICH MADE—STATUTES.
Under the copyright statute, a valid renewal of copyright can be made only in the name of the author, "or his widow or children if he be dead," and not in the name of the assignee of the person or persons entitled to such renewal.
[Ed. Note.—For other cases, see Copyrights, Dec. Dig. § 33.*]

5. COPYRIGHTS (§ 47*)—ABANDONMENT—COPYRIGHT NOTICE—ASSIGNEES.
The rights of an assignee of a copyright are limited to the rights originally obtained by the filing of the copyright, the assignee being bound as the original author in so far as the abandonment of the copyright or the loss of rights to the material copyrighted is concerned, by failure to follow the statutory requirements, or through a publication of such a portion of the work as may require a repetition of the statutory notice if the material is not to be released.
[Ed. Note.—For other cases, see Copyrights, Dec. Dig. § 47.*]

6. COPYRIGHTS (§ 39*)—MATTER SUBJECT TO COPYRIGHT—LAW REPORTING—WORK OF REPORTER.
A law reporter's copyright is limited to the matter which is the result of his own intellectual labor, and, so far as the official reports are concerned, comprises only the syllabus and the statement by the reporter if not filed as a part of the decision; the opinion, the statement of facts if filed as part of the opinion, the arrangement of cases when printed in chronological order in an official publication, and the list of titles or index being public property, and not subject to copyright.
[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 39; Dec. Dig. § 39.*]

7. COPYRIGHTS (§§ 69, 73*)—MULTIPLICATION OF COPIES—INFRINGEMENT—REMEDIES.
An author's right to multiply copies and to prevent the appropriation of copyrighted material by others, granted by Rev. St. § 4952 (U. S. Comp. St. 1901, p. 3406), includes the right to recover damages where damages can be proven, and to an injunction if an appropriate or necessary remedy, as provided by sections 4967, 4970 (U. S. Comp. St. 1901, p. 3416).
[Ed. Note.—For other cases, see Copyrights, Dec. Dig. §§ 69, 73.*]

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

8. COPYRIGHTS (§§ 53, 83*)—INFRINGEMENT—PARAPHRASING.

Actionable infringement of copyright may consist of mere paraphrasing or avoidance of the appearance of copying while still appropriating the subject-matter, and may be proved either by internal evidence, depending on the sequence of ideas and language in such numbers as inevitably compels the conclusion that the copyrighted work was the source of the infringing publication, or by direct testimony as to the manner in which the work has been done.

[Ed. Note.—For other cases, see Copyrights. Cent. Dig. § 51; Dec. Dig. §§ 53, 83.*]

9. COPYRIGHTS (§ 51*)—UNFAIR COMPETITION—INFRINGEMENT OF COPYRIGHT DISTINGUISHED FROM UNFAIR COMPETITION.

While a similarity may be traced in the principles on which actions for infringement of copyright and for unfair competition are founded, copyright is based on statute, while unfair competition, except as affected by legislative enactment in connection with patents, trade-marks, etc., is dependent on abstract principles of law. Copyright relates to the printed material of a publication, while unfair competition may be concerned with any article of trade, whether having words or letters in its composition and appearance or not.

[Ed. Note.—For other cases, see Copyrights, Dec. Dig. § 51.*]

10. COPYRIGHTS (§ 12*) — ARRANGEMENT OF OLD MATERIALS — COMBINATION IN NEW FORM.

An author is entitled to copyright where he has taken existing materials from sources open to all writers and arranged and combined them in a new form, if he has exercised skill and discretion in making the selections, arrangement, and combination, and has presented something new and useful; the author under such circumstances being entitled to the protection of his plan of arrangement, though his copyright cannot prevent others from using the old material under the rule that a new and different use of old material is not an infringement.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 15; Dec. Dig. § 12.*]

11. COPYRIGHTS (§ 57*)—INFRINGEMENT—EXTENT.

To constitute an invasion of a copyright it is not necessary that the whole work should be copied, nor even a large portion thereof, in form or substance, it being sufficient that so much is taken that the value of the original is sensibly diminished, or the labors of the original author are substantially and to an injurious extent appropriated by another.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 53; Dec. Dig. § 57.*]

12. COPYRIGHTS (§ 56*)—INFRINGEMENT—USE OF COPYRIGHTED MATERIAL.

A subsequent writer may be guided by earlier copyrighted work, may consult the original authorities, and may use those which he considers applicable in support of his own original text, without being guilty of infringement.

[Ed. Note.—For other cases, see Copyrights, Dec. Dig. § 56.*]

13. COPYRIGHTS (§ 83*) — INFRINGEMENT—EVIDENCE—EXHIBITS—CONCLUSIONS OF EXPERTS.

In a suit for infringement of copyright, complainant inserted in parallel column exhibits certain comments, calling attention to the points of similarity and in most instances setting forth conclusions with respect thereto. Defendant also introduced answering exhibits, in series, to substantially each particular paragraph, inserting similar comments or conclusions. *Held*, that though such conclusions and arguments could not be taken as testimony, the examination of the publication by an expert could properly be accepted if the facts found were the subject-matter of the testimony and the findings could be fairly tested, so that the addition of such conclusions and arguments was not ground for the exclusion of

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

the exhibits, but would be considered in reading the record like statements in the briefs.

[Ed. Note.—For other cases, see Copyrights, Dec. Dig. § 83.*]

14. COPYRIGHTS (§ 57*)—INFRINGEMENT—"COPYING."
The term "copying," when used with reference to infringement of copyrighted legal publications, includes not only paraphrasing, but also the appropriation of the literary work, labor, and ideas of another, which includes arrangement and selection as well as mere language.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 53; Dec. Dig. § 57.*]

15. COPYRIGHTS (§ 56*)—INFRINGEMENT—LEGAL PUBLICATIONS—UNFAIR USE.
Where defendant, in the preparation of the Am. & Eng. Enc. Law (2d Ed.) and the Enc. Pl. & Pr., availed itself of the use of complainant's copyrighted syllabus and digest paragraphs without original digesting or renoting of citations, such use constituted an infringement, though the material and the several citations and paragraphs made use of could have been properly obtained by original work at the expense of greater effort.

[Ed. Note.—For other cases, see Copyrights, Dec. Dig. § 56.*]

16. COPYRIGHTS (§ 73*)—INFRINGEMENT—EQUITABLE RELIEF.
Where an infringing publication had become no longer a salable book, being entirely superseded by later works at the time suit for infringement was instituted, complainant was not entitled to an injunction nor to an accounting of damages as an incident to equitable relief, complainant's remedy at law being full and adequate.

[Ed. Note.—For other cases, see Copyrights, Dec. Dig. § 73.*]

17. COPYRIGHTS (§ 73*)—INFRINGEMENT—INJUNCTION—ACTION FOR DAMAGES.
Where a subsequent writer takes an earlier copyrighted work merely as a convenient and cheap method of transcribing his original material, or uses printed lists of words or names to make clear and legible copy, and it is affirmatively shown that the entire subsequent work is original on the part of the subsequent writer, with the exception of the saving in handwriting or stenographic preparation of that material, the remedy of the original copyright owner, whose work is thus taken, is not by injunction; but he is entitled to damages for the mere mechanical saving, if such mechanical use or saving could be brought within the term "unfair use," although it would not amount to literary piracy.

[Ed. Note.—For other cases, see Copyrights, Dec. Dig. § 73.*]

18. COPYRIGHTS (§ 56*)—USE OF COPYRIGHTED MATERIAL—LEGAL DIGESTS.
Law writers may consult copyrighted digests to obtain clues to the contents or holdings of the various cases as a means of locating the cases relating to a particular subject and, subject to verification, to collect the cases cited, and to classify them under the same legal head, without being guilty of infringement, if the literary work or arrangement of the digests is not thereby appropriated.

[Ed. Note.—For other cases, see Copyrights, Dec. Dig. § 56.*]

19. COPYRIGHTS (§ 74*)—INFRINGEMENT—WHAT CONSTITUTES—EQUITABLE RELIEF.
The owner of a copyrighted legal digest is not entitled to equitable relief against another publication, solely because the writer of the latter saved stenographic or manual handwriting by cutting or copying the words of the citations from the digest, where no literary ability is appropriated in the arrangement or collection of the cases themselves.

[Ed. Note.—For other cases, see Copyrights, Dec. Dig. § 74.*]

20. COPYRIGHTS (§ 56*)—INFRINGEMENT—USE OF DIGESTS.
Where a legal writer has formulated a proposition of text, his direction to his stenographer to add the citations shown by all of the copy-

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

righted digests does not constitute infringement, if he has previously verified the digest citations and found them to be correct.

[Ed. Note.—For other cases, see Copyrights, Dec. Dig. § 56.*]

21. COPYRIGHTS (§ 56*) — LEGAL PUBLICATIONS — DIGEST PARAGRAPHS—HEADNOTES—INFRINGEMENT.

Use of copyrighted digest paragraphs and syllabus headnotes by a law writer, after he has verified them, in the official publications or in works as to which rights of copyright have been lost, is not an infringement.

[Ed. Note.—For other cases, see Copyrights, Dec. Dig. § 56.*]

22. COPYRIGHTS (§ 86*)—INFRINGEMENT—INJUNCTION—SCOPE.

Where some substantial use of copyrighted material is shown, an injunction against the entire publication will be granted, unless the defendant can affirmatively justify its work as to particular portions of the books complained of, and thus except from the decree such articles or volumes as are affirmatively freed from the accusation of infringement.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 79; Dec. Dig. § 86.*]

23. COPYRIGHTS (§ 83*)—INFRINGEMENT—LEGAL PUBLICATIONS—EVIDENCE.

Evidence *held* to justify a finding that the entire Am. & Eng. Enc. Law (1st Ed.) and certain of the articles in the Am. & Eng. Enc. Law (2d Ed.) and Enc. Pl. & Pr. infringed antecedent digest copyrights in so far as the use of the material was concerned.

[Ed. Note.—For other cases, see Copyrights, Dec. Dig. § 83.*]

24. COPYRIGHTS (§ 52*)—INFRINGEMENT—INTENT OR PURPOSE.

While defendant corporation, in a suit for infringement of copyright, is responsible for the results published, and cannot avoid such responsibility by a claim that it did not intend to do wrong, the efforts which it made to avoid infringement may be considered in determining whether equitable relief should be granted because of the unwitting profit and use which was gained from the insertion of material which violated the rights of others, in spite of defendant's efforts to prevent such result.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 50; Dec. Dig. § 52.*]

25. COPYRIGHTS (§ 83*)—INFRINGEMENT—SCOPE—EVIDENCE.

Where, in a suit for copyright infringement, the identity of a few errors, which would certainly have been detected if original work had been done, appeared, and there was evidence showing a similar method of editorial work for the entire infringing publication, the court, in the absence of evidence to the contrary, should find that the entire practice and method of writing was improper, and enjoin the sale of the entire publication.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 76; Dec. Dig. § 83.*]

26. COPYRIGHTS (§ 15*) — LEGAL PUBLICATION — PARAPHRASED STATEMENT OF OPINION.

Digest and syllabus paragraphs, stated in language substantially to be found in an official opinion of the court, are only subject to copyright so far as they vary from the statement of the point as contained in the original source.

[Ed. Note.—For other cases, see Copyrights, Dec. Dig. § 15.*]

27. COPYRIGHTS (§ 56*)—LITERARY WORKS—"UNFAIR USE."

Since any person may obtain from a copyrighted legal digest, text-book, or other publication, a list of cases with the appropriate clues to what those cases held, the classification of a series of citations and notes which, when completed, resembled the arrangement in the copyrighted digests

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

and in the making of which some assistance had been obtained from the use of such digests, did not constitute an unfair use.

[Ed. Note.—For other cases, see Copyrights, Dec. Dig. § 56.*]

28. EQUITY (§ 330*)—BILL—WAIVER OF OBJECTIONS—MULTIFARIOUSNESS.
Where proper equitable jurisdiction on various grounds had been shown, and the defenses alleged were applicable to the allegations as pleaded, and the entire issue was tried, argued, and submitted for decision on the merits without the defense of multifariousness being raised by demurrer, as it could have been, the defense was waived in a case where infringement of several thousand copyrights was alleged in one bill.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 663; Dec. Dig. § 330.*]

29. COPYRIGHTS (§ 83*)—STEPS TO OBTAIN—EVIDENCE—CUSTOM.
Evidence *held* to show a custom and course of business by a publisher, from which it would be necessarily presumed that, except in occasional and unintentional instances, the requirements of the copyright statute were properly observed and the necessary acts performed to secure to the publisher the copyrights intended.

[Ed. Note.—For other cases, see Copyrights, Dec. Dig. § 83.*]

30. COPYRIGHTS (§ 40*)—ABANDONMENT.
A copyright is abandoned if the owner licenses the publication of the material by another under a new copyright.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 35; Dec. Dig. § 40.*]

31. COPYRIGHTS (§ 40*)—ACQUISITION—ABANDONMENT.
A copyright on the language of the headnotes, digest paragraphs, and the index blackletter lines of a legal publication, and the entire material of digest advance sheets put out by a law publisher, was abandoned by the publication of the copyrighted pamphlet numbers in advance of the completed volume where such volume did not carry the original copyright notices.

[Ed. Note.—For other cases, see Copyrights, Dec. Dig. § 40.*]

32. COPYRIGHTS (§ 29*)—MERGER OF COPYRIGHT MATERIAL—NOTICES.
Where copyrighted material originally published in pamphlets is thereafter combined in a bound volume, such volume, in order to protect the copyright, should disclose the date of the copyright on each pamphlet to set in operation the period of exclusive enjoyment.

[Ed. Note.—For other cases, see Copyrights, Dec. Dig. § 29.*]

33. COPYRIGHTS (§ 29*)—ACQUISITION—"EDITION."
Where a legal publication consisting of digest paragraphs is copyrighted, an "edition" of the book should be held to consist of any divisible part of which the copyright could consistently be entered by itself, though, from the standpoint of an individual paragraph, a subsequent "edition" would consist of any such portion of the book as might be consistently held suitable for a copyright, if it included the paragraph in question; thus, while no one paragraph, when reprinted in a different volume, would in itself be considered a different "edition" of the entire original volume, nor would an entire subsequent volume be considered an "edition" of some one paragraph in an earlier copyrighted publication, yet, if any appreciable portion is republished indicating the use of the material of the earlier publication in a later work, the later work must carry a notice of the earlier copyright.

[Ed. Note.—For other cases, see Copyrights, Dec. Dig § 29.*]

34. LITERARY PROPERTY (§ 1*)—OWNERSHIP.
The common-law right of property in literary material is superseded by the right of copyright conferred by Rev. St. § 4956 (U. S. Comp. St. 1901,

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

p. 3407), providing that no person shall be entitled to a copyright unless he shall deliver or deposit a printed title and two copies of such copyrighted book, etc.

[Ed. Note.—For other cases, see Literary Property, Dec. Dig. § 1.*]

35. COPYRIGHTS (§ 36*)—EXTENT OF RIGHT.

The extent of the right of copyright is that defined by Rev. St. § 4952 (U. S. Comp. St. 1901, p. 3406), namely: "The sole liberty of printing, * * * publishing, * * * copying, * * * or of vending the same," or of "multiplying copies."

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 37; Dec. Dig. § 36.*]

36. COPYRIGHTS (§ 40*)—LICENSE TO PUBLISH—ABANDONMENT.

The giving of license rights to publish copyrighted material is in the nature of a sale of the labor represented thereby, and constitutes an abandonment of the exclusive right of publication, unless the terms are such as to insure an insertion of the appropriate copyright notices whenever the use by the licensee approaches the extent of what would be considered an "edition."

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 35; Dec. Dig. § 40.*]

37. COPYRIGHTS (§ 75*)—INFRINGEMENT—DEFENSES.

In an action against a corporation for infringement of copyright, it was no defense that defendant instructed his editors to avoid generally the use of copyrighted material if, in spite of such instructions, a greater or less use was made thereof.

[Ed. Note.—For other cases, see Copyrights, Dec. Dig. § 75.*]

38. COPYRIGHTS (§ 83*)—INFRINGEMENT—GOOD FAITH—UNFAIR USE—EVIDENCE.

Where defendant, in preparing its legal publication, used complainant's digest paragraphs, the fact that defendant's editors and revisers struck out all citations and references to complainant's publication wherever the citation from the official reports could be substituted, and the material thus attributed to another source, in the form in which it was used was exclusively complainant's property, such evasion was sufficient to raise an inference against defendant's good faith, and that its use of the material was unfair unless complainant's rights had been lost or abandoned.

[Ed. Note.—For other cases, see Copyrights, Dec. Dig. § 83.*]

39. EQUITY (§ 67*)—ESTOPPEL (§ 90*)—DEFENSES—LACHES—ACQUIESCENCE.

The defense of laches involves a negative course of action while the defense of acquiescence is affirmative.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 192; Dec Dig. § 67;* Estoppel, Cent. Dig. § 242; Dec. Dig. § 90.*]

40. COPYRIGHTS (§ 80*)—INFRINGEMENT—DEFENSES—LACHES—ACQUIESCENCE.

In 1893 there was some discussion between complainant's directors over a suspicion that defendant was using complainant's copyrighted material, but an examination did not then reveal sufficient misuse of the material to justify action. In 1900 complainant acquired information which led to a determination to make a further investigation, which, in 1902, resulted in the bringing of suit, following soon after a decision in similar litigation between certain other concerns in which defendant's infringement was disclosed. It also appeared that defendant's use consisted largely of paraphrasing or an adaptation by mental recollection of complainant's material without a clue as to the source of the material. *Held*, that complainant was not barred from obtaining relief either by laches or acquiescence alone.

[Ed. Note.—For other cases, see Copyrights, Dec. Dig. § 80.*]

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

41. COPYRIGHTS (§ 73*)—INFRINGEMENT—REMEDIES—INJUNCTION—ACCOUNTING—ACTION FOR DAMAGES.

Where, in an action for infringement of copyright, it appeared that complainant's copyright on a large part of the material used had been abandoned or lost, and that much of the material used could have been lawfully obtained from other sources without infringement, so that the amount of actionable infringement was small in comparison with the whole quantity of matter, and an adequate remedy at law existed for any damages which could be proved, an injunction and an accounting of profits should be denied.

[Ed. Note.—For other cases, see Copyrights, Dec. Dig. § 73.*]

In Equity. Bill by West Publishing Company against Edward Thompson Company to restrain defendant from infringement of complainant's copyrights and for accounting for profits. Bill dismissed, without costs.

See, also, 151 Fed. 138; 152 Fed. 1019.

William B. Hale (Edmund Wetmore, and Henry E. Randall, of counsel), for complainant.

Walter Large (Frank P. Prichard, John L. Hill, and William M. McKinney, of counsel), for defendant.

CHATFIELD, District Judge. The complainant is a corporation organized under the laws of the state of Minnesota, which conducts, at St. Paul, in that state, a business of large extent, embracing all steps in the preparation, editing, publishing, printing, and distributing of law publications, in the nature of reports, digests, text-books, and kindred works of that character. The present corporation was organized upon the 1st day of November, 1882, and succeeded to the rights of a partnership known as the West Publishing Company, which had been formed in 1879, to conduct the business of John B. West & Co., founded in 1874, in St. Paul, Minn.

The present officers have been in control of affairs for some years. One of them, Mr. Charles W. Ames, joined the company in 1883, became general manager in the year 1899, and vice president in 1903. His connection and duties with the complainant bear directly upon some of the questions in this action. The treasurer, Mr. H. P. Clark, has been with the company since 1892, and the editor in chief, Mr. Henry E. Randall, since 1887.

Not only the officers but the men in charge of the work at St. Paul have acquired large experience and gained great proficiency in carrying on the various branches of the work conducted by the corporation. The staff of editors or writers, all connected with the legal profession, are shown by the testimony in the case to have acquired, by practice and training, an experience and ability which is peculiarly useful in the work which they have to do. This, of course, inures to their advantage, by giving them proficiency in what is a limited and special field of legal work. But, further, the results of the labor of such a force, when employed by a company of such capacity and enterprise, have produced an invaluable list of publications, consistent-

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

ly comprehensive and complete in execution, as well as continuous and progressive in scope.

It will be necessary later to take up these various publications in detail, both as to subject-matter and chronology. But it may be said generally that the publications of the West Publishing Company, so far as an examination of them is necessary in this case, comprise the opinions of the courts of this country in litigated cases, with complete digests covering these reports. These reports and digests consist of whole editions and successive books, for the entire period up to the time of publication, with separate portions, issued monthly or yearly, as the case may be, bringing each of the branches of the field down to date, and containing the decisions from year to year throughout the courts of the entire country.

The defendant corporation was organized in 1887, by one Edward Thompson, who was its first president, and who continued controlling a large portion of its stock until, in the year 1897, Mr. James Cockcroft, Mr. William M. McKinney, Mr. David S. Garland, Mr. John W. Hiltman, and Mr. Charles W. Dumont acquired a large holding in the corporation, since which time Mr. Cockcroft has been president, and Mr. McKinney and Mr. Garland have held office and acted as editors with respect to different publications, Mr. Hiltman has been manager, and all four have been actively engaged at all times in the conduct of the business. Mr. Dumont's interest was purchased by the other four in the year 1900.

The Edward Thompson Company was organized to accomplish a peculiar purpose, and to produce a product which it was believed, and as events have proved, was rightfully calculated to have a wide sale, and be of great assistance to the legal profession and to the courts.

As is known to practically every one in the law, the digests contain, according to certain classifications, statements of the holdings of all cases decided within the period of the digests' résumé and within their scope. If a certain field is covered by an annual digest, the lawyer in his search for authorities must follow down and examine all of the kindred titles and subjects, in all of the digests, for every year, unless these annual digests have been combined in some form of general digest covering an entire period. But, even if that digest is at hand, in many instances search must be made for decisions of different jurisdictions, and from different courts, necessitating not only an examination of every digest in a certain class, but of every digest in the various different jurisdictions.

The plan of uniting as many annual and limited digests as possible under one comprehensive publication, or in a series of volumes under one alphabet, has been and has continued to be carried on by the complainant corporation, as a part of its particular work; but no digest can set forth deductions or conclusions from, nor draw comparisons between, the ideas suggested by the cases examined. Nor can any set of books made up of extracts, giving the substantial and important points of every case, be confined within the limits of a workable series of books, and be serviceable for the quick ascertainment of principles, and the peculiar advantage of the product of skilled thought, such as,

in any particular branch of the law, had previously been supplied by text-books and works of that character. But no series of text-books, on the contrary, had covered the entire field of law, as text-books rapidly pass out of date and other text-books take their place. Even as to particular subjects, and in recent works, a lawyer running down a point would not find in the text-book any satisfactory or complete list of all the cases in the particular jurisdiction under examination, nor of the variations and different holdings, from time to time, in that jurisdiction, unless they happened to be illustrative of general principles important enough to be included in the limited field of the text-book writer's statements and conclusions. The legal profession was therefore ready, and the immense increase in litigation, through the expansion of business, had created a demand, for a book giving to every one the complete field of the law upon all subjects in jurisprudence, together with the course of decision in each division of the field; and to have this comprehensive work presented in the form of citations or lists of all cases, as well as a statement of conclusions and comparative deductions, from which principles of law of a reliable and trustworthy character could be quickly referred to. This particular need was met, to a considerable extent, by what has come to be known as the "Encyclopedia," of which there are now several (not all completely comprehensive in scope), and the particular editions and names of which must be taken up further on in this opinion.

The testimony shows that the originator and first worker upon the form of book which will hereafter be called the "Encyclopedia" was Mr. James Cockcroft, who began the preparation of this series of books about the year 1886. He wrote or supervised the first volume of the series for the publication of which the Edward Thompson Company was organized. The ability to digest cases, and to state concisely the important holdings of these cases, must have added to it an ability to properly compare, contrast, and apply the results of such digesting, followed by the constructive, and more or less literary, task of weaving the result of these conclusions into an article, as short as possible, and as clear and exact as the statements of a text-book, upon the point under discussion. The preparation of the great number of articles in such a book required, and requires, the work of a large force, including the responsible writers, who actually perform the functions above recited.

The defendant corporation has maintained at Northport, Long Island, in this district, a plant and publication house, in which its books have been prepared and published, and in connection with which the greater part of the compilation of material, and the work of its editorial or writing force, has been done. Experience and ability, coupled with practice in such editorial work, not only produces better results from the standpoint of quality, but, of course, enables more rapid work, thus bringing the books more closely up to the time of publication, decreasing expense, and increasing the compensation of the experienced worker.

The Edward Thompson Company has employed many men who have gained their experience in its own service, and also many men

who have worked for the complainant. It is particularly to be noticed that many writers on the defendant's publications had at some time been employed by the complainant, while nearly every writer whose testimony is relied upon by the complainant, as well as witnesses now connected with other publishing concerns evincing interest in this litigation, and even some of the counsel in the case, had worked for the defendant company. In many instances feeling has been engendered, or the present activities and sympathies of the witnesses are enlisted on behalf of the complainant, or a corporation controlled by those who have taken some apparent interest in the complainant's side of the suit.

In view of this fact, most of the statements of these witnesses with relation to the work which they did for the defendant company have been brought out by the complainant in the form of testimony attacking the methods of that work, and the legal invulnerability of the product of their own services to the defendant, from the standpoint of the alleged violated rights of the complainant.

The testimony of such witnesses, even though produced under subpœna, must, if it bears any imprint of personal character at all, be in the nature of an admission, which, coupled with the implication of wrongdoing, is open to the suggestion of bias or animosity, or of more or less uncertainty and evasiveness by those who, under compulsion, are thus called upon to lay open their own work and methods to criticism and attack.

But, on the other hand, the defendant's witnesses have in some instances been actuated by a certain degree of feeling, and have been prone, because of the attack made upon their methods, to deny the complainant's charges, to an extent greater than they might do if they were entirely certain that an exact statement of the transactions would not result in an unconscious and undesigned trespass upon the complainant's property, as set forth in this action.

The testimony of several of the witnesses, showing the existence of working rules and carefulness to avoid anything which might appear like copying of the language from copyrighted publications, indicates a general appreciation of the necessities of strict avoidance of trespass; and the care with which proof was examined, articles read over, and extracts and citations compared, shows, on the part of the responsible agents of the defendant, a careful attempt to see that their instructions were carried out. But the testimony of many witnesses indicates that the position taken by the complainant, in asking for a decree in this action, was neither recognized nor apprehended to be the law by those responsible for the defendant's publications, nor by the men who were performing the work, and for whom the defendant must as well be held responsible.

It appears from the testimony that Mr. James Cockcroft, in writing the first volume of the Encyclopedia, made use of digest paragraphs, so-called, in writing his text, and making up the citations added thereto in the form of notes. It is apparent that many other writers used digest paragraphs, with care to avoid copying of language, but with the idea that conclusions reached by the aid of the digest paragraphs, when verified either as to language or thought, could be properly re-

tained, and could be employed in the construction of the Encyclopedia article, with as much freedom as would be used by a judge in writing an opinion, or by a lawyer in making up a brief. In fact, in the Encyclopedia published by the defendant, citations and quotations obtained from the digests, which likewise could be found in the official reports, appear to have been copied from the digest paragraphs, and, if verified, ascribed to the official reports, without the formality of an additional ascription to the digest or the complainant's reports, and without going to the point of disregarding the digest paragraphs or classification of the case until after the original case had been read and worked into the Encyclopedia article.

The complainant seeks to show a fundamental limitation in the use which can be made of the contents of a text-book or a digest by any writer constructing a book for commercial purposes, and draws a close analogy between the present case and those cases in which the copyright of a dictionary, directory, or map has been held infringed by the publication of another work of the same sort, which had been constructed by the verification and reformation of the prior work, instead of by compilation of original material. A number of these cases are cited, such as Kelly v. Morris, L. R. 1 Eq. 697; Spiers v. Brown, 6 W. R. 352; Cary v. Kearsley, 4 Esp. 168; Wilkens v. Aiken, 17 Ves. 424; Gray v. Russell, 1 Story, 11, Fed. Cas. No. 5,728; Trow Directory, etc., Co. v. U. S. Directory Co. (C. C.) 122 Fed. 191; Chicago Dollar Directory Co. v. Chicago Directory Co., 66 Fed. 977, 14 C. C. A. 213; List Pub. Co. v. Keller (C. C.) 30 Fed. 774; Hartford Printing Co. v. Hartford Directory & Pub. Co. (C. C.) 146 Fed. 332; Williams v. Smythe (C. C.) 110 Fed. 961. And the courts have held in each instance that an unfair saving of labor and expense, by appropriating the work of another, which appropriation is said in the opinions to be animo furandi, should be the basis of recovery, and that the publication of such an unfair work will be enjoined, if the unfair use permeates the work to any material extent.

It is apparent that a map or a directory, which is merely a new edition, or what would be equivalent to a new edition, if gotten out by the same parties, is merely an attempt, on the part of those responsible for the publication, to obtain the market, and take away the rights of the persons selling the older book. It is not competition, but is larceny of a certain sort, and the distinction between such use and fair use can be readily seen. But if the person preparing a new book or map should go out through the district and make original surveys, and jot down the result of those surveys, using the old map merely as a check or convenient tablet for memoranda, or if, in the case of a directory, the canvasser should go, street by street, to all of the addresses to be included, but should use the printed pages of the old directory as a pad or tablet, rather than to write out the names therein contained in longhand, no literary work would be saved, no literary property would be taken away, and no injury inflicted, except the monetary damage caused by the saving of a certain amount of copying in the preparation of the new work, thus making the new work that much cheaper, or that much easier of accomplishment.

If infringement and unfair use of such a directory or map be shown, an injunction would be the only appropriate remedy while demand for the work existed. But if the extent of the damage could be shown to have been merely the expense of additional copying, or if the sale of the work in itself caused no unfair competition, and no appropriation of literary property, then injunction would not lie, but damages for the material appropriated, or damages for the unjust enrichment at the expense of the copyrighted work, would be the more appropriate remedy, as the legal remedy would be sufficient.

Reference will be made again to this point in connection with the expiration of copyright, inasmuch as it would appear that injunction may be an appropriate remedy, even after the expiration of a copyright, if the unfair taking occurred while the copyright was in force, and if no adequate legal remedy could be applied.

The complainant has raised the question of unfair use; that is, of infringement with reference to the entire publication of the books in question, up to the time of suit, upon the charges (1) of copying, in certain instances; (2) of the use of copyrighted material in the formation of systems of arrangement and plans of treatment; and (3) in the mechanical or physical use of copyrighted material as the subject matter of dictation and compilation.

In other words, the complainant in general charges that its copyrighted works have been copied, in some instances verbatim, in other instances with some verbal changes, intended to deceive and cover up the copying; that the defendant has physically cut up and made use of, as notes or copy, its copyrighted paragraphs from digests and other publications; that it has assorted and arranged these printed paragraphs, after being cut out, in an analysis and arrangement, which of itself followed the alleged copyrighted analysis of the complainant; that it has made use of ideas and statements contained in these copyrighted paragraphs, in order to gain knowledge and to form conclusions as to the holdings of the cases from which the paragraphs were originally deduced; that it has used the knowledge so gained, and even used the printed paragraphs so cut out, in the writing, dictation, and even copying of text articles, where the writer's work, and that of his stenographers, was shortened, made easier, and less expensive, than by recourse to the original opinions; and that the extent of these various acts has so permeated all of the books published by the defendant prior to the beginning of the suit that they not only cannot be definitely located, and the amount of damage caused thereby ascertained, but, on the contrary, that their use has been so material as to vitiate and taint the whole publication, even including the work of those writers who are shown to be free from any ground of criticism whatsoever.

It is the complainant's contention that the defendant, upon the showing made by the complainant, must affirmatively relieve its works, or such parts of its works as can be separated, from the effect of the accusation, and that unless divisible portions, or particular volumes, which are free from criticism, have been shown by the testimony, the complainant should be granted injunctive relief against the entire work.

The defendant, on the other hand, has denied the bald copying of paragraphs, and has explained its methods, its instructions, and its care, in an attempt to negative this charge, unless it be as to immaterial portions. The defendant further asserts that such use as it did make of the complainant's books was legitimate, and cannot be made the basis of even claims for damage. These issues must be examined carefully.

But the defendant has gone further, and has charged that the use alleged by the complainant, in the methods of working from digest paragraphs cut out of the copyrighted books of the complainant, where recourse is had to the original authorities, to obtain verification and amplification of the point stated, even if the digest paragraph be thereafter kept as the memorandum and statement of the authorities thus examined, is not actionable, for reasons which will be referred to at greater length later on.

The defendant has, further, attacked the copyrights alleged by the complainant to be valid, pointing out in certain instances inaccuracies in the records, and mistakes or omissions in complying with the statute; in other instances, expiration of the copyright, and failure to procure copyright at the outset; in other instances it is charged that the copyright has been lost or forfeited by premature publication of parts of the whole, and by licensed publication of the same material, or of parts thereof, by third parties, without repetition of the copyright notices claimed to be required by statute; and in many instances loss of copyright protection through the use of the copyrighted material in various forms by the complainant itself, in publications which are alleged by the defendant to be later editions, and in which notices of the copyrights are claimed to be necessary.

The defendant has also attacked the interest and motives, not only of the several witnesses, but of the parties by whom these witnesses are employed, and by whom their testimony is apparently produced or made possible in the present action.

It is charged that the results of the sale of the Encyclopedia have caused the coalition of interests between the complainant's and another Cyclopedia or publication competing with that of the defendant, and that the present action is not purely one for damage, nor for the protection of the complainant's rights, but to indirectly remove the defendant from the field of competition with the rival publication, in which it is charged that the complainant is interested, and whose sale they are endeavoring to enhance through injury to the defendant, under the guise of protection of the complainant's copyrights and books.

The defendant has also alleged laches on the part of the complainant, and failure to begin an action within a reasonable time after the question of possible infringement had been raised, in such a manner as to bring it to the complainant's notice. The complainant is also charged with contributory, or what might be called acquiescing, infringement, in that it has sold advertised copies of the defendant's own publications, in its general sale of law books at various periods.

The issues also involve, especially in connection with the question of copyright, the joinder of an apparently large number of separate

causes of action, if these causes of action be valid, inasmuch as each book copyrighted or published by the defendant has by itself raised the issue above set forth, with respect to a great number of the copyrights claimed by the complainant. The distinction between damages at law, and rights to an injunction in equity, must be borne in mind; and this question of joinder of the rights existing from separate breaches or invasions of the complainant's copyrights must be determined in considering the possibility of equitable relief, if legal injuries at different times have been satisfactorily shown.

It will be necessary, having thus stated the issues to be determined, to consider the publications of the complainant, and the form in which copyrights have been taken out, then to notice the dates of the publication and the order of preparation of the defendant's works, to compare with these the publication of the same or similar material in allied or licensed books, and thus to determine the scope of the suit, before taking up a discussion of the merits of any particular question, or the cases applying thereto.

The various publications which have been copyrighted, and as to which the validity of the copyrights has been called in question by the answer, were issued, not only at different intervals during a number of years, but also in many different portions or numbers, and in some cases with the same subject-matter, included in different arrangements, in more than one of these publications. These various works comprise, as has been said, reports in volumes, pamphlets or advance sheets, collections of cases, and digests of different sorts, including annual and general digests, as well as those confined to a certain set of reports. The complainant has furnished as well various collections of selected material or paragraphs to other publishers, and to customers who have used this material in their own works under some form of license.

The defendant, since the first volume of the Encyclopedia was issued, has published and copyrighted, at various times, a complete set of the A. & E. Enc. Law (1st Ed.) and a complete edition of the Enc. Pl. & Pr., and up to the time of bringing the action at bar, the A. & E. Enc. Law (2d Ed.) down to and including volume 23.

It will be convenient to make a table of these different publications of one sort and another, both from the standpoint of the complainant and of the defendant, and to include in this table dates of beginning each publication, for the purpose of tabulating the material about which the issues must be considered, and at the same time making it possible to compare the dates thus determined, the expiration of the various copyrights, and the books in existence and available at the the time any particular volume in the suit was in course of preparation.

This table will also be of advantage in passing upon the questions raised as to the validity of the various copyrights, and of abandonment in some instances, as well as in considering the defense of laches, in so far as that defense is based upon the existence and availability of the volumes to which the defense is alleged to apply.

In speaking of the licenses granted for the use of material contained in, and already copyrighted in the books of the complainant, and in connection with the purchase by the complainant of some of the ear-

lier publications, it must be borne in mind that at all the times involved in this action the right to a further extension of the life of any particular copyright, through refiling or registering, has been confined to the author, "or his widow or children if he be dead," and the rights of an assignee are confined to the limits of the rights originally obtained by the filing of the copyright itself, and that assignee is bound in the same way in which the original author was bound, in so far as the abandonment of the copyright or the loss of rights to the material copyrighted may occur through a failure to follow the statutory requirements, or through a publication of such a portion of the work as has been or may be held to require a repetition of the statutory notice, if the material is not to be released to the use of any one coming thereafter.

The decisions of the courts in the form of opinions, preceded by statements of fact, and by a digest or syllabus of the important points of the decision, have long been published in authorized reports, or in volumes compiled from the decisions of the courts themselves. The general method of publication has not varied greatly in the United States since the establishment of courts in the various states, and is similar to the form of such reports in use in England for a long time prior to the formation of the United States government, and the adoption of the federal Constitution.

But in the United States no general system of reports existed, and no one publication, nor series of publications, attempted to cover more than the particular court whose opinions were compiled by the reporter editing the volumes in question. Some of these series, such as the reports of the Supreme Court of the United States, have been carried on unbrokenly, in an official publication, until the present time. In most of the states the decisions of the highest and many of the lower courts have been published officially by a reporter, under the authority of the state, and registered under the copyright statute of the United States, thus protecting the material included in the volumes, in so far as the same could be copyrighted, but leaving the benefit to the person obtaining the copyright, as a matter of adjustment and contract between him and the commonwealth authorizing his work.

No question has been raised that the opinion of the court and the official statement of facts, when made a part of the opinion as filed, are open to use by the public, and are in no sense the private property of any individual. In so far, also, as the arrangement of cases is concerned, when printed in chronological order in an official publication, the list of titles or index is also public property, and the only portion of the official reports which is subject to copyright in the name of an individual is the syllabus or statement by the reporter, whether that reporter be a judge or another person, and any statement of facts produced by original work, and not filed as a part of the decision by the court.

The opinions and decisions of inferior courts have, from time to time, been published in various forms, sometimes in a series authorized by the state, sometimes as a matter of private enterprise on the part of members of the bar, and sometimes in a semiofficial form, by some firm which has combined private enterprise with a recognized and

admittedly authentic and complete series of cases in the jurisdiction covered by the work.

Into this field of official and private or semiofficial reports, the complainant corporation entered, some years after its organization, with the publication of volume 1 of the Northwestern Reporter, on January 23, 1880, followed by the first volume of the Federal Reporter on the 2d day of August, 1880. These publications have continued in series until the present time—in the case of the Northwestern Reporter, comprising the decisions of the various courts of that portion of the United States in which St. Paul, the place of publication, was located; and in the case of the Federal Reporter, containing the decisions of the United States courts, below the Supreme Court of the United States, down to the present time. By degrees various series of reports have been added, until at the present time, and at the time of bringing the present action, the different reporters published by the complainant contained all of the decisions of the United States courts below the Supreme Court, the courts of last resort of the various states, and, in some states, other courts of record, which last class is illustrated by the New York Supplement, which began with volume 1 on the 12th of June, 1888.

In addition to these Reporter series, now covering the entire field, a set of 30 volumes was printed and registered, from the 16th day of February, 1894, to the 26th day of April, 1897, known as "Federal Cases," in which were collected the opinions, statements of fact, and syllabus paragraphs of all cases decided in the lower federal courts prior to those contained in the first volume of the Federal Reporter. In the Federal Cases, some of these digest or syllabus paragraphs were taken from previous publications, and others were prepared in connection with the editing of the work, and the entire volumes were entered for copyright by the complainant.

It will thus be seen that any decision made by any court of the United States, since the establishment of those courts, respectively, can be found, together with some statement of fact and some digest or syllabus paragraph by a judge or editor, in the official series of the United States Reports, the Federal Reporter, and Federal Cases of the complainant. All cases decided by the courts whose opinions are covered by any series in question can be found in the publications of the complainant, from the date at which the particular series was commenced. But in addition to the printing of these reports containing decisions in full, with statements of the principal points decided by the cases, there has long existed, and contemporaneously grown up with the reports, various digests or collections of short statements of law and fact, with a reference to the case from which the statement is taken which is relied upon for the authority of judicial decision.

It will be seen that the worth of such statements, and the weight of authority thereby furnished, depend upon the accuracy and ability with which the statement is extracted from the opinion, as well as the standing and jurisdiction of the court making the decision. The purpose of such a digest is different from that of the argumentative and sequential narrative of a text-book, and furnishes (to the lawyer or judge consulting it) a catalogue of cases, with a speedy and convenient

method of locating the decisions bearing upon a particular point and of discriminating between them, in order to locate the particular ones affecting the point in question, or the holding of these cases thereon.

The field of the digest was particularly advanced, and the use of digests generally assured, by the work of Mr. Benjamin V. Abbott, who not only instituted the well-known series of New York Digests, and Annual United States Digests prior to 1869, but superintended and published, as long ago as the year 1872, a comprehensive United States Digest, which he called the "United States Digest, First Series." The preparation of the first volume of this work occupied the period between 1870 and 1872. Mr. Abbott was assisted in his work by Mr. John A. Mallory, who later continued upon the other United States Digests, which will be referred to subsequently, and upon the American Digest, with the West Publishing Company. Mr. Mallory completed, in its substantially final form, the division of the substantive heads of law into a system generally used, since about the year 1897, in the publications of the complainant and those licensed by it.

It is testified by Mr. Mallory that the beginning of this digest analysis or arrangement of subjects was undertaken in connection with Mr. Abbott, in the work upon the United States Digest, in the early 70's, and was continued until in later years the desirability of having a complete and uniform system of digesting, so far as the classification of paragraphs was concerned, became apparent from the digest system published by the complainant, and was completed and perfected for their use, even to the extent of being recommended and adopted by the American Bar Association, in the year 1897, in order to secure uniformity of treatment, and to avoid confusion in the classification of cases. The evidence does not show that any specific authority has been given to the public to make use of this digest classification, except by urging the advantage of its use, and as licenses have been granted to other publications. The system has been employed in connection with the complainant's books, and the evidence shows that the general scope of the classification has been a development from time to time, growing out of the work of Mr. Abbott, so that a particular examination will be necessary, in order to determine whether any disputed arrangement of topics and subjects is an infringement of original matter copyrighted by the complainant, or is merely a reuse of the ideas and work of the time of Abbott, or of copyrights sufficiently old so that their material has become public property.

The work of Mr. Abbott, and his copyrights on the United States Digest, First Series, and on the first nine volumes of the United States Digest, New Series, were assigned to the complainant in January, 1889. Volume 15 of the United States Digest, First Series, and volumes 10 to 18 of the United States Digest, New Series, were published and copyrighted by Little, Brown & Co., who employed Mr. George Fred Williams and other individuals to work upon the digesting of the reports and the preparation of the paragraphs to be inserted in the publication. The property rights of Little, Brown & Co. in these digests were conveyed to the West Publishing Company, the complainant, in the year 1889. About the year 1888 the West Publishing Company, en-

larging the scope of the digest, began what is known as the "American Digest," which has since been continued. A condensed edition, embracing what had gone before, and carrying on the work under the name "American Digest, Century Edition," commonly called the "Century Digest," was published in 1896. In addition, the complainant company printed a digest of the decisions in the Federal Cases, and, at different periods, digests of the cases in the Federal Reporter, and also printed a digest of the decisions of the Circuit Court of Appeals, for a time; but this material has been carried into the American and Century Digests, and into the Federal Reporter Digests. The decisions of the United States Supreme Court, and of the highest courts of the various states, have always been included in the scope of the American Digests, which, at the time of suit, covered the entire work of the Reporters as then printed by the complainant company.

The testimony shows also a series of books published by the Lawyers' Co-operative Publishing Company, of Rochester, N. Y., known as the "Lawyers' Reports, Annotated," in which are printed certain of the opinions, statements, and digests, substantially as contained in the complainant's reporters, and also the General Digest, begun in the year 1892, which contained material substantially identical in language, but different in appearance and type, from the digest paragraphs in complainant's American Digest for the corresponding period. The publication referred to frequently through the testimony as the "Cyclopedia," printed by the American Law Book Company, was first registered for the purposes of copyright in the year 1901, with volume 1, and has continued, not only to the time of instituting this action, but, as is shown by the testimony, was not in complete form at the latest reference thereto.

The following table will show, according to the testimony, but without attempting thereby to adjudicate the contentions of invalidity and abandonment, the chronological order of the complainant's and defendant's publications, with the number of the volumes, the date of registering, and thus the beginning of the periods for which copyright is claimed, and such other matters as can be set forth in a table of that nature.

Complainant's Publications.

Name of Publication.	No. of Vols.	Period Covered.
Atlantic Reporter	53	Oct. 1885, to Feb. 1903
Northeastern "	65	July, 1885, " Feb. 1903
Southeastern "	43	May, 1887, " Feb. 1903
Southern "	33	May, 1887, " Feb. 1903
Southwestern "	71	July, 1886, " Feb. 1903
Pacific "	70	Feb. 1884, " Jan. 1903
Northwestern "	92	1879, " Jan. 1903
Supreme Court "	23	1882, " Dec. 1902
Federal "	118	1880, " Jan. 1903
New York Supplement	79	June, 1888, " Feb. 1903
Federal Cases	30	Feb. 1894, " Apr. 1897
Federal Cases Digest	1	
American Digest	20	1888, " 1902
Federal Reporter Digest	8	1885, " 1900
Century Digest	38	1897, " 1903
U. S. Digest (1st Ser.)	14	1874, " 1876
U. S. Digest (New Ser.)	18	1872, " 1888

Defendant's Publications.

Name of Publication.	No. of Vols.	Period Covered.
A. & E. Enc. Law (1st Ed.)	29	1887 to 1896
Enc. Pl. & Pr.	22	1895 " 1902
A. & E. Enc. Law (2d Ed.)	23	1896 " 1903

An examination of the above list shows that at the time when any particular volume of any of the Encyclopedias was published, or in the course of preparation, a large number of volumes of the various digests, especially the two series of United States Digests, and some of the American Digests, were in existence. The testimony shows a long list of American and English digests and reports contained in the defendant's library at Northport, and, with the exception of a few scattered volumes, this library was substantially comprehensive of all American reports existent at any particular time. Later reports were added as fast as they were placed upon sale, and some missing volumes were supplied.

The various editorial writers were not only given the opportunity, but were instructed, to avail themselves of all of the books, including digests, reports, and text-books, in which any case bearing upon the subject upon which they were writing was reported or referred to.

It is evident that a book written and published in a certain year could not infringe upon nor be prepared from the contents of any book not yet in existence, and the comparative table above set forth will indicate the volumes of the various publications which were in existence when any particular volume of the defendant's publications was completed. Thus, for instance, the volumes of the A. & E. Enc. Law (1st Ed.) could none of them contain any of the new material of the complainant's works subsequent to the year 1896, when the first edition of the Encyclopedia was completed; but much of this material might be republished, and was republished, in different editions of the combined digests, such as the Century Edition of the American Digest, and in that form of publication would then be available to the writers of the defendant, and be at the disposal, so far as the work in the defendant's library was concerned, of any one who consulted either the earlier digests, or these later editions. Thus, the volumes of the Enc. Pl. & Pr. and the A. & E. Enc. Law (2d Ed.) not only included matter which had been originally worked up and published in the first edition of the Encyclopedia, but also material which had not been in existence, in published form, when the volumes of the first edition were prepared. At the same time, new and additional articles were prepared, from cases digested in the earlier as well as the later publications of the complainant.

With respect, therefore, to the later volumes of the Enc. Pl. & Pr. and the A. & E. Enc. Law (2d Ed.), the issue of alleged unfair use includes the question of the use of the more recent editions or publications of the complainant, even if the material therein published be the same as that contained in earlier editions. The work of the defendant's publications was progressive and contemporaneous. The works

of the complainant were also progressive—that is, chronological—and, whenever brought into a combined or comprehensive form, were also complete up to the time of publication; and we find from this fact that no uniform use of the publications was made by any two writers of the defendant, or even by the same writer at different periods, so far as the scope of his examination of authorities was concerned. An examination of the testimony, therefore, requires a constant reference to the table of publications, in order to keep in mind the books, in the form of digests and reports, which the writer could examine, and also to consider the effect of the use of the compiled digests, rather than the annual digests, or of the later publications instead of the earlier.

The United States Digests from 1847 to 1869 have cases and paragraphs which are continually recurring throughout the entire series of the complainant's works, and which are set forth frequently, with more or less verbatim accuracy, in the notes to the defendant's works. Many of the instances of alleged copying are explained, and an attempt is made by the defendant to justify them, on the ground that they are free to the use of every one, inasmuch as they were originally published in these digests, upon which the copyright has long expired. But such questions as this must be considered later, and the purpose of referring to them at the present time is merely to bring the different questions into view with reference to the first issue; that is, the charge of unfair use in the writing of the Encyclopedias themselves.

It may be taken as a premise that the right given to an author to multiply copies, and to prevent the appropriation of the copyrighted material by other persons, which is granted by section 4952 of the Revised Statutes (U. S. Comp. St. 1901, p. 3406), includes the right to recover damages where the damages can be proven, and to injunction where an injunction is the appropriate or necessary remedy, and such remedies are provided for by the statutes themselves, in sections 4967 and 4970 (U. S. Comp. St. 1901, p. 3416).

The earliest copyright law in the United States was passed in 1790, and it is unnecessary to trace the variations in the language of the statute upon this point, for the statutes have uniformly provided for the propositions just stated. The principles of copyright, and the awarding of damages and of equitable remedies, need no citation of cases.

A direct inference from the right itself is the liability incurred where literal copying is avoided, and mere paraphrasing or avoidance of the appearance of copying is obtained, while an appropriation of the subject-matter is had. In the case of Lawrence v. Dana, 4 Cliff. 1, Fed. Cas. No. 8,136, such paraphrasing was held within the provisions of the statue, and actionable the same as copying. Such paraphrasing, or such taking of material, can be proven in two ways, either by internal evidence, depending upon the sequence of ideas and language in such numbers as inevitably compels the conclusion that the copyrighted work was the source of the infringing publication, or direct testimony as to the manner in which the work was done. In the present case, both lines of proof have been followed, and the issue of copying, in the form of paraphrasing as well as literal abstraction of

consecutive words, has comprised a large part of the record in the case.

Actual copying, or such paraphrasing as to be equivalent to copying, was at first considered to be the only form of infringing use of copyrighted material. But the great diversity of printed publications, and the many phases of literary activity, especially when applied to minor pursuits, ultimately forced the construction of the copyright statute, in which the basis of injury is found in the unfair use of the material of the work in making up a book of similar nature, as well as in a direct copying or paraphrasing of the words therein contained. This extension of the law of copyright brings the case closely into the realm of unfair competition. But, while a likeness may be traced in the principles upon which this class of actions is founded, yet in application and in scope a sharp line of distinction can be drawn. Copyright is based upon statute, while unfair competition (except as it may be affected by legislative enactment, in connection with patents, trademarks, etc.) is dependent upon abstract principles of law. Copyright relates to the printed material of a publication, while unfair competition may be concerned with any article of trade, whether having words or letters in its composition and appearance or not.

In this connection it is well to cite some of the cases relating to copyright which affect the class of publications here being considered, in order to trace the advance in this idea beyond the original thought of copying alone, as a basis for granting relief.

The directory, map, and dictionary cases have already been referred to, and have themselves brought about a considerable advance in this particular line of decision, inasmuch as it is apparent, without detailed explanation, that infringement of copyright, by the verification and reformation of a list of names or words, with such corrections and amendments as may have developed during the period since the publication of the earlier work, depends more upon the idea of unfair use, and the unlawful saving of labor, in order to avoid the necessary original research, than upon the appropriation of any literary ideas or arrangement, based upon literary ability and studied plan.

Legal publications themselves, in some cases those even of the complainant and of the defendant herein, have been the source of adjudicated cases, and in this circuit the principles by which this case must be judged, from the doctrine of unfair use, have been laid down by the Circuit Court of Appeals, and are controlling when applicable to the present issue.

One of the earliest cases, and one of the most comprehensive with respect to legal publications, is that of Lawrence v. Dana, Fed. Cas. No. 8,136, 4 Cliff. 1, in which piracy was alleged, both on evidence of the manner of use, and also upon internal indications such as typographical errors, peculiar arrangement, and sequence of citations and language; the book as to which infringement was alleged being Lawrence's Annotated Edition of Wheaton's Elements of International Law, and the infringing publication Dana's Edition of that work.

There the court held that copyright may be justly claimed, where the author of a book has taken existing materials, from sources com-

mon to all writers, and arranged and combined them in a new form, if he has exercised skill and discretion in making the selections, arrangement, and combination, and has presented something new and useful—citing Gray v. Russell, Fed. Cas. No. 5,728; Lewis v. Fullarton, 2 Beav. 6; Greene v. Bishop, Fed. Cas. No. 5,763; Emerson v. Davies, Fed. Cas. No. 4,436; Story v. Holcombe, Fed. Cas. No. 13,497.

The court then holds that the person who has obtained this copyright has a right to his plan of arrangement, but that he cannot prevent others from using the old material, and that, even in the same field of law, a new and different use of old material is not an infringement of the original copyright.

Further, following the same idea, it is held that an abridgment of a copyrighted edition of old material, if the material itself be open to use, is not an infringement, unless the arrangement is copied; that the doctrine is different from that of a patent, where the idea of the patent cannot be used, even if independently conceived—citing again Story v. Holcombe, supra.

The court ultimately determined that Dana's notes were not in the nature of an abridgment of Lawrence's Wheaton, but were new notes to the original text, and then went on to consider whether there had been unfair use of the original edition in making up the new notes.

The court there approves the rule of Judge Story, that to constitute an invasion of copyright it is not necessary that the whole of a work should be copied, nor even a large portion of it, in form or substance, but that if so much is taken that the value of the original is sensibly diminished, or the labors of the original author are substantially, to an injurious extent, appropriated by another, that is sufficient to constitute an infringement. The court later says:

"The privilege of fair use accorded to a subsequent writer must be such, and such only, as will not cause substantial injury to the proprietor of the first publication."

And the decision of the court was to the effect that many of the notes did infringe corresponding notes of the complainant's publication, that the respondent borrowed very largely the arrangement of the antecedent edition, and, without making a detailed specification of the instances of infringement, the question was referred to a master to report the extent of the infringement, and to classify the instances thereof.

The United States Supreme Court, in 1888, decided the case of Callaghan v. Myers, 128 U. S. 617, 9 Sup. Ct. 177, 32 L. Ed. 547, in which it was held that a law reporter was entitled to obtain a copyright for the matter which was the result of his own intellectual labor, including the title page table of cases, any headnotes or syllabi, the statement of facts, argument of counsel, and index. But the court also said, as had been held in Wheaton v. Peters, 33 U. S. 590, 8 L. Ed. 1055, and Banks v. Manchester, 128 U. S. 244, 9 Sup. Ct. 36, 32 L. Ed. 425, that the rights obtained by copyright did not cover the opinions of the courts, nor the official statements of fact, and syllabi, if prepared by the court itself.

A number of cases are cited in the case of Callaghan v. Myers, at page 650 of 128 U. S., and page 185 of 9 Sup. Ct. (32 L. Ed. 547), following these propositions, and in that suit damages were granted in the final decree for infringements of the copyright of such volumes as had been satisfactorily proven to be copyrighted, and to have been infringed. Those books as to which these conditions were not proven were excluded from the effect of the decree; but where an infringing volume also contained lawful matter, and it was impossible to separate the profits derived from either class of material, the profits on the sale of the entire volume were awarded to the complainant.

The subject-matter of that action was a certain number of volumes of the Illinois State Reports, and the court considered both the issue of copying and of unfair use, in the sense that the defendants were alleged to have copied the complainant's arrangement or division of matter and its original material in the Reports, and to have referred to them and consulted them in the preparation of the books complained of.

The defendant claimed that the opinions used had been compared with the originals, and corrections made; that the other matter in the volumes was obtained from the original records of the courts, and arranged, reported, compiled, and edited wholly by original labor; but the decision of the District Court (reported in 20 Fed. 441) was that in each of certain volumes the copyrighted work "had been used by the defendants in the headnotes, the statements of fact, and arguments of counsel."

In Simms v. Stanton (C. C.) 75 Fed. 6, the cases, including many of those already cited herein, and text-books upon the subject of copyright, are recited at length, and the language of Banks v. McDivitt, 13 Blatch. 163, Fed. Cas. No. 961, which is frequently referred to in the later cases upon the subject, is particularly referred to, and is there credited with having definitely limited the prohibition of unfair use, by saying that fair use prohibits "a use of any part of the previous book, animo furandi, 'with an intention to take for the purpose of saving himself labor.' "

Many different statements of this same idea are set forth in this case of Simms v. Stanton, and the question of recurrence to common sources for the material used is considered. Certain errors appearing in both works are found to be not important enough to establish the fact of copying or piracy; and the use which the defendant had made of the complainant's book, which was a text-book or scientific work on Physiognomy, was decided to be fair, when the purpose of the work was taken into account.

But some of the precise questions which must be considered in the present action, and which must be taken as the foundation from which different propositions must be considered, are to be found in the cases of West Pub. Co. v. Lawyers' Co-operative Pub. Co. (C. C.) 64 Fed. 360, 25 L. R. A. 441, reversed in 79 Fed. 756, 25 C. C. A. 648, 35 L. R. A. 400, and the case of Edward Thompson Co. v. American Law Book Co. (C. C.) 121 Fed. 907, reversed in 122 Fed. 922, 59 C. C. A. 148, 62 L. R. A. 607.

It may be observed that the judge who wrote the opinion in the Circuit Court of Appeals in the latter case was the same who, as District Judge, decided the case of West Pub. Co. v. Lawyers' Co-operative Pub. Co. in the lower court, and who was reversed above, in that he had limited the scope of his decision to certain paragraphs found by the master, and had not applied the conclusions reached by him to the issues raised with respect to the entire publications involved. But it will be noted that the statement of the principles of law by Judge Coxe in the earlier case are cited with approval by the Circuit Court of Appeals, and the same principles, with a considerable review of cases, are the basis of the last decision of the four where, upon the application for a preliminary injunction, the court, without passing upon the question of infringement, held that a subsequent writer might be guided by earlier work, might consult the original authorities, and might use those which he considered applicable, in support of his own original text.

The subject-matter of the case of West Pub. Co. v. Lawyers' Co-operative Pub. Co., supra, was the series of digests and reporters owned by the complainant in the present action, in so far as they had been published at the time of bringing that suit. The alleged infringing works were copies of the General Digest, which subsequent to a date which will be referred to later have been substantially identical in form with the digests of the complainant, and the material for which has been furnished by the complainant to the Lawyers' Co-operative Publishing Company under a license or contract arrangement.

It may be assumed, as is admitted in the testimony, that this contract was entered into as a part of the outcome of the case above referred to, and the effect of this upon the complainant's copyrights will be considered when the subject of abandonment of copyright is taken up.

The suit of Edward Thompson Co. v. American Law Book Co., supra, was over alleged infringements or infringing use of the publications of the defendant involved in the present suit, so far as they had been completed at the time of that action, and the Cyc. which is frequently mentioned in the testimony, and which was then published by the company whose stock was, to a considerable extent, at some time acquired by different individuals holding positions and interested in the West Publishing Company, the complainant herein. In fact, in the case of Edward Thompson Co. v. American Law Book Co., supra, decided upon the 10th day of February, 1903, the court says:

"If the owners do not object to such use of their digests, their acquiescence may be taken to import a license. As to the digests which belong to the defendant [the West Publishing Company?], it would seem that the contention now advanced might more properly be made in a direct proceeding against complainant's publications, where the issue would be squarely presented."

The court there referred to a contention that the books of the Edward Thompson Company were themselves copied from copyrighted works of the West Publishing Company. The present action was begun by the filing of a complaint verified upon the 6th day of April, 1903. The suggestion of Judge Lacombe, therefore, was either quickly acted upon, or had already been in process of preparation. But, how-

ever that may be, the doctrine of these two cases is substantially contained in the following paragraphs:

"The following excerpts succinctly state the law governing cases such as this:

"A reporter [of opinions of a court] may acquire a valid copyright for the headnotes, footnotes, tables of cases, indexes, statements of facts, and abstracts of the arguments of counsel, where these are prepared by him and are the result of his labor and research. So he may have a copyright for a digest or synopsis of judicial decisions, and the selection and arrangement of cases relating to a particular branch of the law. The copyright protects only the original work of the reporter. * * * [He] has no monopoly of the opinions, decisions, and syllabi prepared by the courts and judges. * * * These opinions, decisions, and syllabi are free alike to all digesters. But when notes suitable for use in a digest have been prepared from these common sources of information, and properly secured by copyrights, a subsequent compiler in the same field is not permitted to avail himself of this original work, and save time and labor for himself by copying from the property of others. * * * He may take original opinions, and prepare from them his own notes, 'but he cannot exclusively and evasively use those already collected and embodied by the skill and industry and expenditures of another.'" 79 Fed. 761, 25 C. C. A. 652, 35 L. R. A. 400.

"Briefly stated, then, the question is this: Is a copyrighted lawbook infringed by a subsequent work on the same subject, where the only accusation against the second author is that he collected all available citations, including those found in the copyrighted work, and, after examining them in text-books and reports, used those which he considered applicable to support his own original text? We are of the opinion that this question must be answered in the negative. The doctrine contended for by the complainant extends the law of copyright beyond its present bounds, and if pushed to its logical conclusion will inflict a far greater injury upon literature than it can ever expect to prevent. If it be held that an author cannot consult the authorities collected by his predecessors, the law of copyright, enacted to promote the progress of science and useful arts, will retard that progress. It will be found upon examining the reported cases that there has been a finding of noninfringement, unless it appears that the whole or a part of the copyrighted work has been copied, either in hæc verba or by colorable variation:" 122 Fed. 923, 59 C. C. A. 149, 62 L. R. A. 607.

This is the rule by which the testimony of the case must be considered and the issue on the subject of infringement determined.

The complainant has produced witnesses who have testified as to the methods employed by themselves while working for the defendant at Northport. It has obtained considerable testimony through the cross-examination of many writers who were called by the defendant to testify as to how they had prepared the portions of the books written by them. It has submitted exhibits containing parallel columns, showing text, notes, and lists of citations, where identity or similarity of language, sequence of ideas, and juxtaposition of words or citations are pointed out as tending to show copying or paraphrasing; that is, dictating from the material under observation in the copyrighted publications.

The complainant has inserted in these exhibits containing the parallel columns certain comments or footnotes calling attention to the points of similarity, and in most instances setting forth conclusions with respect thereto.

It may be said here that the defendant has introduced exhibits answering in series, and as to substantially each particular paragraph, these parallel column exhibits, and the defendant has inserted similar

comments or conclusions as a footnote to its own parallel columns or answering statements.

The introduction of these various series of exhibits was objected to by each party to the litigation at the appropriate time, and it seems that the objection should be disposed of in the same way as in the case of West Pub. Co. v. Lawyers' Co-operative Pub. Co., 79 Fed. 756, 25 C. C. A. 648, 35 L. R. A. 400. The conclusions and arguments cannot, of course, be taken as testimony; but the examination of a publication by an experienced person, where it is impossible to make the examination in court, can properly be accepted, if the facts found by the examination are the subject-matter of the testimony, and if the accuracy of those findings can be fairly tested by the proper opportunity for verification on the part of the other side. Conclusions and arguments in an equity record should be excluded as the court passes upon the testimony, and yet such conclusions in the reading of the record are substantially like statements in the briefs, and the entire exhibits can be properly used, and should not be uniformly and completely excluded.

The complainant has also introduced in evidence (and the defendant has supplemented that evidence by testimony of its own) certain digests or testimony as to digests in the library of the defendant, which have been cut to pieces, and the printed paragraphs therefrom pasted upon cards of uniform size, for the convenience of the editorial writers of the defendant. Many of these digests—in fact, substantially the entire series of digests alleged to be infringed in the complaint—have been used in this manner; and, where no copy of the digest was available for cutting and pasting such printed paragraphs, stenographers copied the various paragraphs from the annual digests, and the compiled volumes of digests, to take the place of the missing printed slips.

It has appeared affirmatively, and has not been contradicted, at least to any persuasive extent, that certain writers, such as Judge Peck, who wrote the articles "Contribution and Exoneration," "De Facto Corporations," and "Guardian and Ward," for the A. & E. Enc. Law (2d Ed.), never used printed or typewritten copies of digest paragraphs, but that he prepared cards of his own, containing the holdings of the cases, and the citations which he wished to use in writing his article, and, after making an arrangement of the material, dictated the article from these cards. And yet with reference to the articles written by him it is claimed that an unfair use of the paragraphs contained in the digests was the result of his work.

Other writers, like Mr. Charles C. Moore, appear from the testimony to have neither used digest paragraphs in the cut or copied form, nor to have used the digests at all in the writing of articles. But the complainant has produced many exhibits against articles written by Mr. Moore, to show that the language of his reading notes, and the list of citations, and even some paragraphs of text, bear the evidences of having been taken from the slips or headnotes of cases in the reporter system, and therefore unfair use is charged as to his work.

Some writers also testify that they made no use of digest paragraphs, and appear to have written their articles from an examination of the cases. But in their work, similarly, resemblances are pointed out,

from which it is urged that they have saved themselves labor, have made use of the syllabus paragraphs, or have unconsciously appropriated the case digester's deductions, from the fact that the syllabus was read in connection with the opinion in the case.

Other writers testify that they collected all of the paragraphs, citations, and material which was available, either in the publications of the complainant or in other works, including text-books, reports, and digests in the defendant's library; that these paragraphs were assorted, in some instances by a reference to the black-letter line or headnote suggestion of the digest, in some instances by the general natural classification of the subject, and in some instances by a previous partial analysis of the article by the writer, and that under each head was grouped the material from these various books, as well as from the various annual volumes of the same publication; that then the cases were looked up and the original reports consulted. In practically every instance the writer used the syllabus in the sense of examining it, and having it in mind in reading the report of the case. In many instances the syllabus was consulted, and sometimes followed, either exactly or in a paraphrased form, in dictating paragraphs which were later, and after further classification, used for the writing of the text.

Still other writers testified that they used the digest paragraphs and syllabus notes for reference; but, having looked up the case and found that no language was to be taken therefrom, the words of the paragraphs or of the printed slip were stricken out, and the bare citation or title copied from the slip, in connection with others of like character, in the order in which the slips might be arranged by the writer.

It should be borne in mind throughout this entire discussion that the text of the defendant's books is much shorter; that is, contains many less words (although printed in larger type, and so placed upon the page as to be easily followed) than the footnotes or lists of cases which are appended to its text, and which cover the field from which the text is derived. One proposition in the large type of the text may have a quantity of footnotes, in the form of statements of varying applications of text propositions, throughout the federal and state courts, as well as those of England and Canada, and in such connection one statement of text will carry the citation of many cases which are merely cumulative or illustrative of the authority for the text. In such an instance, a stenographer could add citations after the cases had been examined by the writer, by a mere reference to the cards, whether printed, typewritten, or filled in by hand, and the order of the citations would be the arrangement by the writer, unless the particular printed or typewritten paragraph contained a number of citations upon the one sheet, in which case the order of the citations would be copied, as well as the material of the citations themselves.

The complainant has also brought in the testimony of certain witnesses, who testified that in case of haste, or where they became satisfied that the digest paragraphs were correct, through the reference in some opinion, or because the proposition was so well known that it did not need investigation, they actually copied or cited the digest material to a greater or less extent.

And, finally, in rebuttal, the complainant introduced certain evidence, which was received under objection, and which consisted, not only of testimony, but of the slips used by Messrs. William A. Martin and W. R. Hale in writing two large articles in the A. & E. Enc. Law (2d Ed.); the article prepared by Mr. Martin being that of "Intoxicating Liquors," and the article by Mr. Hale being that of "Patents." Mr. Martin produced certain slips, for which the testimony shows he was to be paid $400 if they were introduced in evidence, which slips, comprising some 12 or 13 boxes of bundles, were identified by him as the identical slips from which he wrote the article "Intoxicating Liquors," without consultation, to any appreciable extent, of the cases cited upon the slips, and in the writing of which article he used both the digest and syllabus paragraphs to such an extent as he deemed them applicable.

In the case of the article on "Patents," Mr. Hale has testified that under instructions from the editor in chief he wrote hurriedly from certain slips furnished by one Mr. Perry; that Mr. Perry had begun the article, but that Mr. Hale found it impossible to use his material, and rewrote and eventually furnished the greater part of the article as printed, some of the latest chapters having been prepared by others, in order to complete the work by the time it was needed.

Mr. Hale has testified that he used the cut and pasted digest slips, which are represented by the exhibits called the "Perry Patent Slips," both to the extent of following the analysis of the digest system, and in the use of pasted cards in arranging his material according to that analysis, and in dictating the article after the reliability or accuracy of the slips, and the statements therein contained, had been verified by him through a consultation of text-books and cases.

To a certain extent Mr. Hale, also, for the sake of haste, relied upon a portion of these digest paragraphs without verification, and in general Mr. Hale testifies that, not only did he make use of material derived from the complainant's digests and reporters, in the article on "Patents," but that he had, to a certain extent, but with more complete verification from original sources of the citations and statements, used such a method of writing during his entire service at the defendant's editorial rooms, covering a period of some seven years, in which time he wrote some 2,100 pages, or nearly one-eighth, of the Enc. Pl. & Pr., and some 849 pages of the A. & E. Enc. Law (2d Ed.).

The defendant has questioned the accuracy of Mr. Hale's testimony, from the standpoint of his bias, in that he became the solicitor for the complainant after severing his relations with the defendant, and at the close of the complainant's direct testimony.

The record would indicate that the defendant considered Mr. Hale to have been in consultation with it. It appears that he made an affidavit for the defendant with relation to his own work, in answer to the application for a preliminary injunction in this case, and that upon that occasion he prepared the affidavit himself, and denied inferentially any unfair use by him of the complainant's publications. Mr. Hale frankly, if somewhat to his own embarrassment, testified that his ideas upon the subject of unfair use of copyrighted material had

been changed, and that he had prepared his articles with the aid, to a greater or less extent, of the digest paragraphs, and of the headnotes or syllabi of cases. It appeared from his cross-examination that the result of his training when previously working for the complainant, and when writing for the defendant's Encyclopedias, has resulted in his following a method of work, which at the time he considered legitimate, but which, when viewed from the standards and legal propositions now contended for by him as counsel for complainant, would lead to the conclusion that the results of that work would be infringement of the complainant's copyrights, if the title to the copyrights themselves should be successfully maintained.

The testimony developed the fact that Mr. Hale, while engaged as a law writer for the defendant, and while discussing the issues of the present action, at about the time of the application for an injunction pendente lite, advised the defendant's solicitors to interpose a plea, rather than an answer, and this suggestion was based upon so-called "Syllogisms," which were reduced to writing, and which appear in the record. These syllogisms are as follows:

What Constitutes Infringement of Copyright.

1. Infringement consists of the violation of the exclusive right conferred by the statute.

2. The exclusive right conferred by the statute is "the sole liberty of printing, reprinting, publishing * * * and vending" the copyrighted matter; i. e., the exclusive right of multiplying copies.

3. Hence, there can be no infringement of copyright unless there has been copying, either in whole or in part of the copyrighted work.

1. Copying consists in the exact or substantial reproduction of an original, using such original as a model, as distinguished from an independent production of the same thing.

2. Two copies of a common original are not copies of each other, though identical.

3. Hence, a book written from the original sources—i. e., cases—is not a copy of another book written from the same sources, even though such book is used to point the way to such original sources, such use being the only use made of such other book.

Common Use.

1. The public are entitled to make any use of a copyrighted book which does not amount to a violation of the exclusive right given by the statute.

2. Anything less than a substantial copy of the whole or a material part of the book does not violate the exclusive right given by statute (99 U. S. 675), (and first syllogism supra).

3. Hence, any one may copy less than a material part of a copyrighted book; i. e., he may make a fair use of it.

Conclusions.

The law upon the subject of infringement of copyright is as follows:

1. There must be some copying in order to constitute infringement. If there is no copying there is no infringement, and the question of fair or unfair use does not arise.

2. Even where there is some copying, that fact is not conclusive of infringement. Some copying is permitted. In addition to copying, it must be shown that this has been done to an unfair extent. It is only after copying has been shown that the question of fair or unfair use arises, and then it is controlling. Several classes of cases of copying have been held to be fair and hence not an infringement, such as "fair quotation," "extracts for comment and criticism," "bona fide abridgments," etc. Perhaps others will be recog-

nized when they arise. Each case depends upon its particular circumstances.

3. The use of a copyrighted book merely as a means of reference to the original cases does not constitute copying, and hence is not an infringement, and hence does not present any question of fair or unfair use. All uses of a book are dedicated to the public by publication, except such as are reserved by the statutes.

4. Of course, a copy of an original is none the less a copy because its references have been verified by subsequent resort to the original sources. But the use of the original as a means of reference to the original sources, from which the book is subsequently written, is more than mere verification, and is not copying.

5. So there may be copying without any verbal identity. This would occur if a proposition were reproduced from a copyrighted book without independently producing it from the original source.

April 30, 1903. W. B. Hale.

Paraphrasing is Copying.

Infringement of Copyright in Legal Works.

1. If I reproduce the propositions of law from a previous work, using the same or different language, without independently producing the proposition, I have copied it, and therefore have infringed.

2. If I append to the propositions of law so copied the lists of cases cited in the original work in support of said propositions, without examining the cases in the reports, I have copied them and have infringed.

3. If I reproduce the propositions and cases as above, but also examine the cases in the reports, I have made a verified copy; but it is still a copy, and hence an infringement.

4. If I publish a list of cases cited in the previous work, but without reproducing the propositions to which they are cited, I have not infringed, although I have copied every case cited in the book, because there can be no copyright in the mere names of cases apart from the propositions of law which the cases support. It is not a "copy" because it does not convey the same information.

5. If I take a list of cases from a previous work, then examine the original reports, and deduce for myself from the reports the propositions which the cases support, and cite the cases in support of such propositions, I have copied nothing and have not infringed. The information conveyed is not derived from the previous work, but from the reports. The correlation of the cases with the propositions is not taken from the original work, but is independently produced. As the names of cases appear in the subsequent work, they are not copied from the original work, but are copied from the reports, which are the common and original source.

6. In all cases of compilation, a distinction must be drawn between verifying a copy and making an original compilation. The first constitutes an infringement; the latter does not, though the resulting product is exactly the same. The fact that it requires as much labor and expense to make a verified copy as to make an original compilation is wholly immaterial.

It may be observed that substantially each of the propositions set forth by Mr. Hale in this document is a correct deduction of the law, but that the application of the propositions is open to argument; and the determination of the questions of fact raised by the propositions, in most instances, will substantially determine the questions at issue in this portion of the case. For instance, Mr. Hale states that there can be no infringement of copyright, unless there has been copying. The question to be determined is: What will be held to be "copying," rather than any dispute as to the effect of such copying, if the question has been answered and copying has been found?

The discussion of the cases which has previously been made in this opinion shows that with respect to the use of copyrighted legal pub-

lications the courts have included, within the term "copying," not only paraphrasing, but also the appropriation of the literary work, labor, and ideas of another, and that this includes arrangement and selection, as well as mere language.

Mr. Hale's proposition that two copies of a common original are not copies of each other, although identical, must be tested as applied to the issue of fact, as to whether the identical use of the original material was made from a recourse to the original document, or whether it was by means of an unfair appropriation of the copyrighted paragraph, after verification of its genuineness, and in order to save the additional labor of making up a new original.

The parallel column exhibits show hundreds of digest paragraphs and headnotes, which were apparently taken from the cut and pasted cards, or from the headnotes of the Reporter System, after verification of the identity and accuracy of language in these paragraphs with language of the official opinions, or of the official headnotes in the reports not published by the complainant.

The complainant has introduced exhibits comprising the greater part of the books published by the defendant, in each of which certain articles, sometimes examined completely, and sometimes at stated intervals, have been marked to show language bearing such close resemblance to language found in the publications of the complainant as to indicate the use of the complainant's books, unless these words can be traced to a different source, or unless it is affirmatively shown that the writer derived them from the official publications or digests of which no copyright belongs to the complainant.

In a similar way, the defendant has introduced a series of the same books, marked with a cross-reference of the complainant's underscored exhibits, to the old digests upon which the copyright has expired, to the official reports, and the headnotes of these reports, and to different publications put upon the market by licensees and by the complainant, by reason of which use the defendant contends that the copyright has been abandoned.

An examination of the parallel column exhibits, of the underscored book exhibits of the complainant, of the answering parallel column exhibits of the defendant, and of underscored book exhibits of the defendant, leads the court to the conclusion that the defendant's writers, to a considerable extent, throughout the various volumes of the A. & E. Enc. Law (2d Ed.) and the Enc. Pl. & Pr., availed themselves of the cut and pasted paragraphs of the digest statements, and that the headnotes of the Reporter System, in so far as these sources were referred to by the writers, were under the observation and comparison of the writers when dictating propositions of text, and in many instances were used as notes or statements of legal conclusions, attributed to their proper citation, without any intentional copying or appropriation of the material of the complainant's books so far as the writer was aware at the time his article was prepared.

The court is satisfied that the defendant's writers, having established and formulated a text proposition, frequently arranged, as a footnote to that text, the paragraphs whose accuracy had been verified, or

whose conclusions had been substantiated by a consultation of textbooks and reports, and appended the cases contained in the digests, after a similar verification, making use of the assortment of digest and syllabus citations without rewriting or recopying the same.

It is considered by the court that in so far as the use of such material, without original digesting or renotation of citations, was equivalent to a saving of labor and of expense of copying, and to the gaining of time, the defendant's writers brought themselves within the doctrine of what has been held by the cases to be unfair use, even though such material, and the several citations and paragraphs made use of, could have been properly and without criticism obtained by entirely original work, at the expense of the greater amount of effort.

As to the A. & E. Enc. Law (1st Ed.) a somewhat different situation exists. The instances of copying, or of mere paraphrasing, and the use of material claimed by the complainant, were much more extensive in that work. The question of determining whether or not unfair use was made by the writers of the first edition would be much easier than with respect to the Enc. Pl. & Pr., and the A. & E. Enc. Law (2d Ed.). But the A. & E. Enc. Law (1st Ed.) is shown by the testimony to have substantially been withdrawn from sale before the present action was started. At this date, the A. & E. Enc. Law (1st Ed.) is not a salable book, having been entirely superseded by the later works. In so far as the A. & E. Enc. Law (1st Ed.) might be held to have infringed, without considering the affirmative defenses or the explanation of the material in that work, which is claimed to be available to any one because of its publication in uncopyrighted works, or in those on which copyright has expired, it seems to the court that in the present action no equitable relief can be granted, for no injunction would be of any avail. Nor could any accounting for damages be had as incident to equitable relief, for the reason that at the time of the bringing of this action complainant had a full and adequate remedy at law with respect to any injury which it might have successfully claimed because of the manner in which the work was conducted. But, in addition, the A. & E. Enc. Law (1st Ed.), in so far as its writers made use of the publications then available, is largely justified, and the amount of the apparent infringing work reduced to a small quantity, from the fact that it was completed early in the year 1895, before the publication of the Century Edition of the complainant's digest, and that the greater part of the material in the A. & E. Enc. Law (1st Ed.) was then open to the world, the copyrights having expired, or was made up of material contained in official publications substantially similar to the complainant's paragraphs and statements of law.

The defenses relating to the abandonment of copyright, laches, and acquiescence will be considered in their proper turn, bearing in mind the date of the publication of the A. & E. Enc. Law (1st Ed.) with respect to all the publications; but they add to and strengthen the determination of the court so far as this earliest publication is concerned.

The testimony shows that the Enc. Pl. & Pr. and the A. & E. Enc. Law (2d Ed.) were not, in a proper sense of the term, revisions or

later editions of the A. & E. Enc. Law (1st Ed.). For commercial purposes these works were held out to the public as being newer and more complete forms of the earlier publication. But an examination of the books, as well as a consideration of the testimony, leads to the conclusion that even the material in the first edition was not relied upon nor used by the subsequent writers to such an extent that any unfair use of the complainant's publications could be predicated upon the fact that the A. & E. Enc. Law (1st Ed.) was studied and consulted by these later writers in preparing the ground for their own work. In almost every instance the subject was entirely rewritten, and, if either the Enc. Pl. & Pr. or the A. & E. Enc. Law (2d Ed.) are to be held infringing, it must be upon the work actually done by the writers of these articles, and not because of the assistance obtained from the earlier work.

This discussion brings up a point with relation to the question of unfair use which is applicable to all three of the defendant's publications, and which can be most conveniently considered in this connection.

The dictionary, directory, and map cases, so called, which have been heretofore cited, suggest that if the subsequent writer has used the original publication, in the sense of material which he appropriates after verification and correction, the new book would be but a later edition of the old, and its publication could be enjoined. But if the subsequent writer had taken the earlier work merely as a convenient and cheap method of transcribing his original material, or had used the printed lists of words or names to make clear and legible copy, and it could be affirmatively shown that the entire work had been original on the part of the subsequent writer, with the exception of the saving in handwriting or stenographic preparation of that material, it is considered that the remedy would not be by way of injunction, but that the person owning the copyright might be entitled to damages for the mere mechanical saving, if it could be brought within the term "unfair use," but that it would not be literary piracy. Such damages would be further mitigated by the rights of ownership which are granted by the sale of the physical object represented by a printed book; and it is considered that it would be extremely difficult, if not impossible, to separate the title which the purchaser has in the printed book from the right which the owner of the copyright has reserved under the statute, to the extent of reserving to himself remedies for wrongful appropriation of his published copyrighted material, if that appropriation did not at the same time carry with it a use of his literary ideas and literary material. In the same way the Encyclopedia writers, as has been held in the various cases, have the right to consult the digests, and to obtain therefrom clues to the contents or the holdings of the various cases, as a means of locating the cases relating to any particular subject. They have the right, subject to verification, to collect the cases cited by the digests, and to classify them under the same head, if the literary work or arrangement is not thereby appropriated.

It does not seem to the court that the owner of a copyright is en-

titled to equitable relief against another publication solely because the writer of that other publication may have saved a certain amount of stenographic labor, or of manual handwriting, by cutting or copying the words of the citations from the digests, where no literary ability is appropriated in the arrangement or collection of the cases themselves. So an Encyclopedia writer, who has formulated a proposition of text and directs his stenographer to add to that text the citations shown by all of the digests, would not be guilty of infringement, and would not thereby make himself liable to a decree in equity, if, after proper research and verification, he merely for convenience used the printed words in making up the article, instead of having the stenographer rewrite the same at his dictation, with the original books in his hands when dictating, instead of having been examined and laid aside when the citation was found to be correct.

An extension of the same idea applies to the dictation or quotation of digest paragraphs and syllabus headnotes, after an examination of the original cases, and verification of these paragraphs or headnotes in the official publications, or in works as to which rights of copyright may have been lost.

The necessary advance in any science, and the very purpose for which text-books and legal publications are prepared, contemplates, to a certain extent, the dissemination of knowledge and improvement in the literature of the science, which is open to a subsequent writer as much as to a lawyer or judge, who is earning his living partly by the use of the copyrighted books. The words "unfair use," while having a broader meaning with respect to the appropriation of earlier writings by a work covering substantially the same ground, and supplanting the earlier book, than they have in the acquirement of knowledge upon the part of a student of the field treated by the publication, cannot, nevertheless, be arbitrarily made to be equivalent to no use at all, outside of consultation, in verifying the ground covered and the subjects or cases comprised in the earlier work. Such construction would mean that a later work would be no advance upon the earlier work, unless the writer had superior training or greater ability in doing the same thing which the earlier writer had attempted, and the improvement and advancement in the science itself would thus be sacrificed, and the writers of books would be deprived of the proper growth in knowledge, and from taking advantage of the position to which the earlier writers had carried the science under consideration.

But, applying the doctrine of the Circuit Court of Appeals set forth in the case of West Pub. Co. v. Lawyers' Co-operative Pub. Co., supra, which held that, if some substantial use of the copyrighted material was shown, injunction against the entire publication would be proper, unless the defendant could affirmatively justify its work, as to particular portions of the books complained against, and thus excepting from the decree only such articles or volumes as were affirmatively cleared of the accusation of infringement, it must be held, in the consideration of this portion of the case, that such articles as "Patents," "Intoxicating Liquors," and others of like composition and construction in the Enc. Pl. & Pr. and the A. & E. Enc. Law (2d Ed.), were prepared in such a way that unfair use would seem to be shown if they are not

justified, or if the affirmative defenses do not relieve them from the effect of this determination. It must also be held that the entire A. & E. Enc. Law (1st Ed.) has been shown to infringe, unless in the same way the affirmative defenses, or the explanation of the source of the material therein, be sufficient to indicate that merely an immaterial portion of the work was derived from sources free to the public in earlier publications, or released by the abandonment of copyright, or affected by the pleas of laches and acquiescence.

The testimony of Mr. William Lawrence Clark and of Mr. Charles Porterfield, and the conclusions as to the manner of their preparation of the articles written by them, are typical of nearly all the writers whose testimony has been introduced in evidence, with the exception of Mr. Hale and Mr. Martin.

It is apparent that Mr. Clark saved himself labor, and saved the defendant expense, by the use of printed slips, after a more or less careful verification of the accuracy of the slips so used. The testimony of Mr. Porterfield shows that he appended lists of cases to his statements of text, after a similar verification and comparison, and that he saved physical work and stenographic or manual labor to the defendant by the use of citations from the complainant's publications. But it is considered that the work of such writers, as exemplified by the two mentioned, did not cause in the Enc. Pl. & Pr. and the A. & E. Enc. Law (2d Ed.) any such substantial or material appropriation of the literary work of the complainant as would justify the granting of an injunction against the work, but, as has been said before, might have been ground for a claim of legal damages, if the other explanations and defenses be held insufficient.

The defendant furnished to its writers, almost uniformly, a series of instructions, by which the writers were warned against any appropriation of the literary labors of those who had protected their works by copyright, and the editors of the defendant's works, in their instructions to the writers orally, as well as by these rules, drew the attention of the writers to the necessity of original work, and definitely warned them against unfair use. Further, the defendant had the prepared articles examined to such extent as was deemed necessary, depending upon the experience of the writer and the circumstances of his employment, with a view to avoiding copying and the appropriation of copyrighted work.

The defendant was responsible for the results as published, and it cannot avoid that responsibility by a claim that it did not intend to do wrong. But the efforts which it made in avoiding any such wrong are to be considered in determining whether equitable relief should be granted because of the unwitting profit and use which was gained from the insertion of material which violated the rights of others, in spite of the efforts to prevent such a result.

The complainant has shown that wherever work was credited by the defendant's writers to the digests of the complainant and the reports of the complainant's Reporter System, such references were stricken out by the editors and revisers, and citations to the official series of reports inserted, and the defendant has thus undoubtedly laid itself

open to the charge of using many quotations and citations which, if accredited to the complainant's works, might have been free from criticism. The defendant explains this, and attempts to justify its action, by stating that it thus attempted to avoid the actual use of copyrighted material. Such methods have resulted in laying the paragraphs open to criticism, and in compelling explanations as to the right to use the paragraphs thus questioned, and has increased, to a very appreciable extent, the proportion of its various publications which are thus brought within the rule that the defendant must justify its use, rather than that the complainant must affirmatively show that the defendant did not have the right to so use the matter referred to.

Such articles as those of Mr. Porterfield and Mr. Clark show in isolated paragraphs, and in sequence of words and cases, that they were written with some aid from the digests and reporters, and that a saving of labor and time resulted. The same conclusion as to use (but of various degrees and in varying proportion) must also be reached with respect to some work of a majority of the writers, and, indeed, a majority of the articles in the Encyclopedias, of the defendant.

The entire first edition and volume 1 of the second edition are permeated with paragraphs which indicate some use of language of complainant's digests and reporter syllabi, and such use compels us to examine further, in order to see if the gain in labor and time was by means of the appropriation of literary or copyrightable labor or property. We must in so doing consider the excuses or justification presented as to each paragraph and as to the general results, and must also consider the affirmative defenses. The question of remedy in this action being comprehensive rather than specific, and the determination as to unfair use depending upon the amount of benefit and saving which was obtained by paraphrasing or adapting material original and copyrightable in the book from which the material was used, this court is compelled to make general findings from the testimony shown, rather than to go through the evidence like a special master and merely catalogue the paragraphs coming within the rules laid down by the cases cited.

The charge of copying has, in some cases, been based upon the identity of a few errors, which would certainly have been detected if original work had been done; and in the absence of evidence to the contrary, and with testimony from which a similar course of writing could be presumed for an entire book, the court has found that the entire practice and method of writing was improper, and the entire book, therefore, liable to an injunction. Trow Directory, etc., v. U. S. Directory, supra. In somewhat the same way, after an examination of the testimony as to the entire work, two volumes of the General Digest, with the exception of articles by two authors, were held to have infringed, and an injunction was granted in the case of West Pub. Co. v. Lawyers' Co-operative Pub. Co., 79 Fed. 756, 25 C. C. A. 648, 35 L. R. A. 400. But the issue in the present case is much different, while involving the same questions as a part of the complainant's case. As

has been said, if no question was being considered other than whether the defendant's writers had made use of the complainant's works, to such an extent as to have appropriated some of the language and ideas, and thus to have saved original labor on their own part, the case would be exactly similar to the one involving the General Digest above mentioned. But in the present suit a much more detailed analysis has been made of the paragraphs, from which the court is asked to decide the issue of copying. Much of the material contained in the paragraphs under examination is shown to be material, available to the defendant's writers, and even in paraphrased paragraphs the language so used is substantially that of the official opinion, or of other publications. This takes away from the complainant's paragraphs the greater portion of the copyrighted statements, and leaves the scope of the complainant's copyright limited to the arrangement of a few words, and to slight modifications of the points as expressed in the original source. The very necessity of following the direction of the Circuit Court of Appeals, in the General Digest Case, supra, and applying to the entire works the conclusions of the paragraphs shown in the testimony, in deciding whether unfair use has been had, and whether injunction will lie, brings us to the conclusion that the extent of the use, in so far as it took advantage of the material in the complainant's paragraphs, of which they are the owners by reason of the copyright, is comparatively small, and that most of the individual paragraphs examined, and inferentially, therefore, the most of the paragraphs in the entire Encyclopedia which were written after any use of the complainant's books had been made, have been shown to be statements of ideas and propositions which the defendant could fairly use, and as to which, even if some advantage was gained by the methods employed in connection with the complainant's works, nevertheless that advantage was not such as would justify this court in granting an injunction against the entire series of publications.

One class of material in the complainant's publications, as to which the question of unfair use must also be treated from a general standpoint, relates to the analyses of the various subjects according to which the substantive propositions of law can be divided, and the various titles of articles classified.

The complainant's digests and the Reporter System, both in the monthly pamphlets and the annual volumes, make use of what is commonly known as headlines or black letter catchlines, and any particular branch of law is treated, not only according to a certain index, made up of these headlines, but each subdivision is further classified by more detailed headlines, and particular paragraphs have what is known as a catchline to furnish a key to the main proposition for which the case is cited.

The testimony shows that as far back as 1871 Mr. Benj. V. Abbott began to put into effect the experience gained by him in digest work, and his analyses, as has been previously stated, were followed out through the different years, and a complete and substantially satisfactory system of classification for digest purposes was perfected and recommended to the use of reporters, text-book writers, and all per-

sons who might have need to employ anything in the nature of an analysis of legal subjects. There seems to have been no attempt to copyright this by itself, although, in so far as it was used in the complainant's publications, it was covered by the copyright of each volume; and assuming, in any volume copyrighted by the complainant, some portion of the digest analyses, titles, and headlines has been copyrighted, including the classification or arrangement of cases under these analyses and headlines, the question of unfair use arises with respect to the defendant's publications, wherever such analysis or arrangement was made use of by the defendant's writers.

Many of the writers have testified that they made up a tentative or experimental analysis or division of their subjects before commencing to read, and that they arranged or shuffled their digest paragraphs, with such notes as they might have prepared at the time of arrangement, according to this tentative classification. In many instances such classification was substantially that of the digest analysis, and was in general much like any new or original arrangement of the same subject. But each writer, from his reading of text-books, of the digests, or of the earlier edition of the Encyclopedia, and of the publications relating to his subject, must have followed, consciously or unconsciously, an arrangement which, if protected by copyright, and entirely the property of the complainant, even if the writer consciously avoided appropriation and endeavored to prepare out of his own mind, would nevertheless result in his benefiting by the aid of the complainant's publications and their uniform classification of the propositions for which the cases were cited in their volumes.

The questions of validity of copyright upon such a system of analyses, and upon a series of catchlines, and whether such a copyright would be limited to the particular arrangement in any one work, or would cover the entire general scheme, will be considered separately. But while on this subject of unfair use, it must be held that the defendant's writers have been shown by the testimony to have used, and in some cases to have followed, to a considerable extent, the analyses and headlines of the complainant's works, and to have made up the index of the various chapters of the Encyclopedias, either through the aid of, or by a mere ratification of, large portions of the subdivisions themselves. But can it be said that such use is an unfair use, or that, in a subject like the law, the division of titles into subheads, and what may be called "index classifications," can be made the subject of copyright, so that no subsequent writer can treat any particular subject, unless he entirely avoids making any analysis, or makes one entirely different from what has been recognized to cover the scope of the subject in the treatment of previous writers. The catchlines or mere large-type phrases, used to attract attention to particular cases, might of themselves contain literary material which should not be copied and used by another, and the assortment and division of cases, in preparing and inserting such headlines, in so far as it constitutes an arrangement, might be properly something as to which a man could object to its appropriation by another. But assuming, as has always been considered, that any person has the right to obtain from a digest,

or text-book, or other publication, a list of cases, with the appropriate clues to what those cases held, it would seem to be impossible to find unfair use, in making up by actual arrangement and classification a series of citations and notes which, when completed, resembled the arrangement in the complainant's digests, and in the making of which some assistance had been obtained from the fact that those digests had been used.

The testimony does not show a single instance, even in the index to the article "Patents," which Mr. Hale testifies he copied from the digest arrangement, of mere appropriation of material belonging to another person. But, on the contrary, the writers, having made a legitimate use of the help funished by the digests in every instance, formulated an index, and whatever unconscious or intentional copying or adaptation occurred, so far as these indices and analyses are concerned, was, in the opinion of this court, within the limits of a fair use of the digest material. The question varies from the proposition considered in the case of Edward Thompson Co. v. American Law Book Co., supra, where one Encyclopedia was found in the lower court to have taken the analyses and articles of the other Encyclopedia as equivalent to instructions and guides to its own writers as to what work they should do. Such acts would be akin to the dictionary and directory cases which have been so often referred to, and differ entirely from the case at bar.

The next question which must be considered is the affirmative defense of invalidity and abandonment of copyright, and in connection therewith must be considered, not only the method by which the complainant attempted to obtain the 9,000 copyrights which it is alleged in the complaint have been infringed, but as well the effect, upon such of the copyrights as were properly perfected and obtained, of the methods of publication, not only in the books of the complainant itself, but of various parties who have used greater or lesser portions of the copyrighted material under license.

The first and broadest question is that of title to the copyrights filed by the complainant itself. The complainant has charged the defendant with infringement, not of any one particular copyright, nor of any number of copyrights, by any specific designation or allegation relating to that copyright alone. This suit has not been based upon any one book or article as to which copyright was claimed, and even with respect to the entire 9,000 copyrights the allegations of infringement do not charge that any particular portion of the defendant's works infringed any particular portion of the copyrighted articles, but assert that the defendant has infringed, in printing, publishing, and selling the 74 volumes of the defendant's publications, against the rights of the complainant, through its ownership of the copyrights which it has filed, and which it has acquired by purchase. Such a general charge, rather than collection of specific and individual charges, necessarily has some effect upon the scope of the issues of the case, and also upon the questions of relevancy, materiality, and competency of proof.

The defendant has alleged multifariousness in the complaint; but proper equitable jurisdiction on various grounds having been shown,

and the defenses being applicable to the allegations as set forth, the extent to which the entire issue has been tried, argued, and presented to the court makes it impossible to give any weight to this technical defense, which could have been raised by demurrer. The condition of the record has compelled a determination upon the merits. In the same way, the many phases of each particular question, and the general charges which must be weighed in comparison with answers equally general in form, and the general deductions from the complainant's proofs which must be considered, in connection with similarly general conclusions from particular statements in the defendant's proofs, all go to show that no portion of the case can be decided upon any particular copyright, nor upon single instances of inaccuracy or carelessness in the methods of taking out copyrights at the time of publication.

An entire book of hundreds of pages may have been registered under one copyright title. The defendant may have used certain material from that particular book in each one of its 74 volumes, and yet this case cannot turn upon the single issue as to whether that particular copyright was valid or invalid.

The complainant has shown a reasonable degree of care in its efforts to comply with the copyright law, and in filing its two volumes of each publication, with the title pages of volumes which it was on the point of issuing, throughout the entire period as to which this case is concerned, with the exception of some volumes soon after the change of statute in 1891, by which the book had to be filed "not later" than publication, rather than within 10 days after publication as had been required by Act July 8, 1870, c. 230, § 90, 16 Stat. 213. Some books were thus not properly copyrighted, some few books were never copyrighted by any one, and a few scattered publications were improperly registered, for various reasons which will be specifically named later.

The testimony of the officers and clerks of the complainant, and the exhibits in the form of receipts and memoranda, with reference to the mailing of two copies of the publication to the Librarian of Congress at Washington, D. C., were put in under objection. It does not seem necessary to consider each specific objection separately, for the reason that the testimony as a whole, and in so far as it was competent, plainly showed a custom and course of business from which the presumption necessarily arose that, except in occasional and unintentional instances, the requirements of the statute were properly observed, and the necessary acts performed by the complainant to secure the copyrights intended. In the same way, testimony from the office of the Librarian of Congress, and the record of deposits of title, make satisfactory proof that the complainant's books were, on the whole, properly entered for copyright, and the statutory requirements observed, except in the instances hereinbefore referred to, and in the particular cases which can be included in a list of the copyright titles successfully attacked by affirmative evidence on the part of the defendant.

But a general conclusion as to the validity of the copyrights, and a general consideration of the use of those copyrights throughout the

entire series of the complainant's publications, lead just as certainly to the necessity of forming general conclusions with respect to the amount of material in the defendant's publications which can be traced to sources that were open to use by the defendant's writers, in comparison with the material from books in which the complainant still has an unimpaired ownership of the literary property. In other words, the determination of the issue of abandonment of copyright does not depend, in many of the phases of the question, upon the history of any particular copyright, nor its subsequent use; but all copyrighted material of a certain class which has been subjected to a similar use, or all copyrighted material which has been substantially found in unprotected works, must be considered as a whole, conclusions drawn as to its proportion to the work in the defendant's publications that must be held to have been taken from the complainant's books, and then the issue determined as to whether the amount of work so improperly taken constitutes a substantial and material portion of the entire volumes, and as well an indivisible portion of each volume. The question must then be determined whether, even if such portion be substantial, it be not controlled by the conclusions as to unfair use, in which it has been held that for some injuries to the complainant, and some benefits to the defendant, the remedy cannot be injunction, and as to those uses equitable relief will not lie in the present suit.

Various volumes and portions of the complainant's publications appear not to have been copyrighted, or some defect has been shown to exist in the method of recording the copyright, so that they can be dismissed from any question of unfair use, in that the complainant's rights thereto have been abandoned by publication, without proper precautions and compliance with the statute in so doing. The American Digest from 1900 to 1903 was freed to the world by the licensed publication under copyright of the General Digest for the same period. The Circuit Court of Appeals Reports and Digests, the Reporter Digests, and some digests of state reports were not copyrighted, and contain no copyright notice.

The entire series of Annual Digests prior to the year 1871 contained material as to which the copyrights have long since expired, and as to which such expiration had occurred at the time when the Enc. Pl. & Pr. and A. & E. Enc. Law (2d Ed.) were begun. The material from these old digests, comprising 31 volumes, with a number of old reports not digested in the previous volumes, was used by Mr. Abbott and his associates in making up the United States Digest, First Series, published in 14 volumes, from 1874 to 1876, at irregular intervals, and a separate volume containing a table of the cases in the previous 14. The classification of the matter, as has been said, was worked out by Mr. Abbott and his associates, and, beginning with the year 1872, a new series of Annual Digests, the first of which should have been published in the year 1871, commenced by Mr. Abbott, under the title of the "United States Digest, New Series." This work was published annually in one volume, under the direction of Mr. Abbott; and subsequently Little, Brown & Co., of Boston, Mass., commencing with volume 10, in the year 1880, began the publication of the work under

their own name and under their own registration of copyright. The United States Digest, New Series, was continued annually down to and including the volume for the year 1887, which was published as volume 18, and registered by Little, Brown & Co., in the year 1888.

At about that time the West Publishing Company, in connection with its reporter system, which had then been developed to a considerable extent, purchased from Little, Brown & Co. its title to the copyrights of the United States Digests, and the system was changed to a new series, starting with volume 1 of the American Digest, which also covered the decisions of the United States Supreme Court, the United States Circuit and District Courts, and the courts of last resort of all the states and territories, for the year 1887, and annually thereafter up to the date of the beginning of the present action. In order to perfect the title of the West Publishing Company to all of the rights of Mr. Abbott which had not been acquired from Little, Brown & Co., additional assignments were obtained from the children of Mr. Abbott, and thus the complainant became possessed of all property rights in the copyrights heretofore mentioned, which were transferable by assignment.

The American Digest was issued monthly in the form of advance sheets, called the "American Monthly Digest," following substantially the form of the advance sheets of the American Reporter System, then well under way. Each of these monthly digests was registered by title at Washington, and each number contained a statement of the copyright, substantially in the following form:

"The American Digest, United States Digest, Third Series. (Monthly Advance Sheets.) Copyright 18— by West Publishing Company."

The annual volume contained a similar notice, but with the date of the copyright that of the year in which the annual volume was issued, rather than of the year previous, during which the monthly digests had been registered and issued. The annual volumes were made up of the compiled or consolidated paragraphs of the monthly numbers, under the same classifications, headlines, and cross-references as had been used in the monthly pamphlets, and various paragraphs were substantially the same as the headnotes and syllabus paragraphs of the cases contained in the various volumes of the National Reporter System for the preceding year, with such revision and amendments as were necessary for the purposes of the digest.

In the year 1897 a new series was begun by the West Publishing Company, called the "American Digest, Century Edition," which was completed, registered for copyright, and put on the market at irregular intervals, until at the time of the beginning of this action 38 volumes had been completed; the thirty-eighth volume being registered in the year 1903. These 38 volumes purported to contain all decisions of American cases from the year 1658 to the year 1896, and the prospectus in the first volume stated that the digest would be completed in from 50 to 55 volumes, bringing the reports of cases down to a point connecting with the American Annual Digest for 1897, and substantially terminating with September 1, 1896.

When the first volume of the Century Digest was issued, the A. & E. Enc. Law (1st Ed.) had been completed, the Enc. Pl. & Pr. had advanced to publication of the ninth volume, and the A. & E. Enc. Law (2d Ed.) had been begun, and had advanced to the fourth or fifth volume. The Century Digest contained the material of the digests controlled by the complainant up to the year 1896, and the headnotes and syllabi of the National Reporter System to the same time. Each volume of the Century Digest was registered for copyright, and the volumes filed under a new copyright notice printed in each volume.

The testimony further shows that another publication was prepared and issued by the West Publishing Company, called "Federal Cases," which comprised 30 volumes, issued between February, 1894, and April, 1897, and contained all cases decided in the United States courts, other than the Supreme Court, prior to the beginning of the Federal Reporter, in the year 1880. A digest of these publications, called the "Federal Cases Digest," was issued in one volume, under a separate notice of copyright, in the year 1897. In 1900 a digest of the Federal Reporters was made and published, covering the reporters up to that time, comprising 8 volumes, each registered and filed for copyright, and containing a separate notice of copyright for each volume.

An entirely different set of publications, called the General Digest, was begun by the Lawyers' Co-operative Publishing Company, of Rochester, N. Y., a corporation not connected with the West Publishing Company. In the year 1900, and after the termination of the litigation between the West Publishing Company and the Lawyers' Co-operative Publishing Company (in the suit reported in 79 Fed. 756, 25 C. C. A. 648, 35 L. R. A. 400), a license was granted to the Lawyers' Co-operative Publishing Company to use the material of the West Publishing Company, both from the Reporter System and from the American Digest, and since that time the preparation of this digest material for the General Digest has been made by the West Publishing Company, and in most instances what are known as digest paragraphs were embodied in the General Digest and copyrighted, volume by volume, in the name of the Lawyers' Co-operative Publishing Company, in substantially the same form in which those paragraphs appear in the digests of the American Series, and in the headnotes of the reporter system.

In addition, the West Publishing Company have granted licenses to various text-book writers, and to certain publications such as the Central Law Journal, a periodical printed at St. Louis, Mo., and copyrighted by the Central Law Journal, number by number. Under this license current decisions and digest paragraphs had been printed in the Central Law Journal, in substantially the language and form of complainant's reporter system and the American Digest, and this use continued until after the beginning of the present action. A further license was given to Kinney's Illinois Digest and the Albany Law Journal, by which a similar use of the complainant's copyrighted material was made, and copyrights, from time to time, were taken out by the

publishers of these works upon their books as published, down to the date of the present action.

After the organization of the American Law Book Company, in the year 1900, and about the time of the litigation between that company and the Edward Thompson Company, considerable negotiations were had with the West Publishing Company, as a result of which the American Law Book Company was given the right to use the material of the West Publishing Company, in so far and in whatever way might be necessary, in the preparation and publication of the Cyclopedia of Law and Procedure, and that this publication has been copyrighted by the American Law Book Company, in its own name, volume by volume. A similar license has been granted to the Michie Co., of Charlottesville, Va.

It would be possible, therefore, to locate certain so-called digest paragraphs in the old United States Annual Digest, the United States Digest, First Series, and United States Digest, New Series, the American Digest, the Century Digest and the licensed publications of one sort and another. Some of the syllabus paragraphs of the Reporter System and of the corresponding digest paragraphs of the complainant's Monthly Digests could be traced and substantially located in the American Digest Annual, Century Digest, General Digest, Central Law Journal, the Cyclopedia of Law and Procedure, and some of the other licensed publications above referred to in each place being a part of a volume copyrighted under a separate title, and without reference to any preceding copyright. In addition, the syllabus paragraphs and index paragraphs of the weekly Reporters anticipate the volume Reports and Digests, and even the Monthly or Biweekly Digests, and in fact the first copyright of any particular paragraph will usually be found in a weekly number of some Reporter. Since the year 1883, practically all pamphlet numbers of the Reporter System and of the digests have been registered and filed separately as published, and the annual compiled volume has later been registered and filed in Washington, at the time of its completion and publication as a separate book.

It should be stated that the Reporter System has always been carried on in the form of advance sheets containing the decisions and headnotes in substantially the form of digest paragraphs, and with a partial index and collection of digest notes. The advance sheets of the first 14 volumes of the Federal Reporter were never filed by themselves for copyright, and some other early numbers of the Reporter pamphlets, such as the Northwestern Reporter before 1887, and volume 1 of the Pacific Reporter, were not filed until the volume was completed and filed by itself. The broad claim is made by the defendant that such use of copyrighted material has constituted an abandonment of the copyright upon every paragraph printed in more than one publication, and thus separately copyrighted, inasmuch as in no instance has one of the later volumes carried the notice of original copyright.

The New York Reports (official), which are printed in the form of advance sheets, separately copyrighted as published, and later included in a bound volume at the end of each year, also separately copyrighted, but containing in the annual volumes references to the sepa-

rate copyrights of the pamphlets, have been introduced in evidence as an instance of an attempt to prevent the loss of earlier copyrights by a republication of the various paragraphs in another copyrighted work; and while the court is not called upon to pass upon the sufficiency of this method, in order to determine whether the attempt at the preservation of copyright rights thus made is successful, the method used emphasizes and points the argument of the defendant in this regard.

It will be necessary to consider in this connection some decisions bearing upon the provisions of the copyright statute, as contained in section 4962, Rev. St. (U. S. Comp. St. 1901, p. 3411), which is as follows:

"No person shall maintain an action for the infringement of his copyright unless he shall give notice thereof by inserting in the several copies of every edition published, on the title-page or the page immediately following, if it be a book, * * * the following words, 'Entered according to act of Congress, in the year ———, by A. B., in the office of the Librarian of Congress at Washington,' or 'Copyright 18— by A. B.'"

And it will be necessary to determine with respect to such portions of the work as have been generally called digest and syllabus paragraphs in this suit, what constitutes a later edition, and whether or no the protection of the copyright notice, and the title of the author or person entitled to the copyright, is lost when such paragraphs are embodied in a subsequent work, with no reference made to the original copyright; that is, where no copyright notice of the original work is printed in connection with the later use of the article.

The case of Lawrence v. Dana, supra, decided in 1869, discussed the language, "No person shall maintain an action for the infringement of his copyright unless he shall give notice thereof by inserting in the several copies of every edition published" the date and name of the owner of the copyright. The Supreme Court held that a new edition, which was in effect a revision with original work, was not an edition of the old book, and did not need to contain a republication of the original notice of copyright. But the court was there passing upon the scope of the copyright of the new work, rather than whether the old material was released by an unauthorized or infringing publication, in which new material could be copyrighted by itself. In Mifflin v. R. H. White Company, 190 U. S. 260, 23 Sup. Ct. 769, 47 L. Ed. 1040, and Mifflin v. Dutton, 190 U. S. 265, 23 Sup. Ct. 771, 47 L. Ed. 1043, as well as in Holmes v. Hurst, 174 U. S. 82, 19 Sup. Ct. 606, 43 L. Ed. 904, the development of this idea further established the meaning of the statute. In Holmes v. Hurst, Dr. Holmes endeavored to prosecute the publication of his book "The Autocrat of the Breakfast Table," and the defense was interposed that the copyright had been lost, in that the entire book had been published in serial form in numbers of the Atlantic Monthly, without notice of copyright of the novel, and that the later book, in one volume, had been published and copyrighted by Dr. Holmes with the statutory record and printing of the notice. The Supreme Court there says that it had then become the settled law, in this country and in England, that the right of an author to a mo-

nopoly of his publications is measured and determined by the copyright act; in other words, that, while a remedy did exist at common law, it has been superseded by statute. Following the case of Wheaton v. Peters, supra, the court decided that Dr. Holmes had lost his copyright through the failure to comply strictly with the statutory requirements.

In Mifflin v. R. H. White Company, supra, "The Autocrat of the Breakfast Table" was again the work under consideration. It appears by this decision that ten of the monthly parts had been published in the Atlantic Monthly without any notice of copyright. The last two parts were printed in numbers of the magazine which carried a notice of a copyright of the magazine by its publishers, and the court there based the decision that the copyright had been lost, upon the theory that the object of the copyright notice was to warn the public against making use of the works of an author, and, the remedy being statutory, the public had the right to demand that the requirements be strictly complied with, for which reason the court held that the entry of a book under one title, by the publishers, could not be called to the aid of an entry of a different book, with a different title by another person, even when portions of each book were alike.

In the case of Mifflin v. Dutton, supra, the "Minister's Wooing," by Mrs. Harriet Beecher Stowe, was the subject of the case. It appeared that, of the 42 chapters, 29 had been published in the Atlantic Monthly, without notice of copyright. The last 13 had been included in the numbers of the magazine, each copyrighted by the publishers of that magazine. But the book as a whole was published between the appearance of the first 29 chapters and the appearance of the last 13. The court held that the copyright attempted to be taken out by Mrs. Stowe for the entire book was invalidated as to the first 29 chapters, in that these chapters had been previously printed in the Atlantic Monthly without copyright notice, and her rights to the remaining portion of the book—that is, the last 13 chapters—were lost by her acquiescence in and permission to the magazine to publish that part of her work, without repeating the notice of her copyright, under the provisions of section 5 of the statute then in effect (Act Feb. 3, 1831, 4 Stat. 436, c. 16), requiring an insertion in the several copies of each and every edition published during the term secured of information by the appropriate notice of the copyright.

Applying these principles to the present case, we find that the effect is extensive in several respects. As has already been indicated, the copyright upon a number of individual volumes was never perfected, for reasons heretofore pointed out; but as to a much greater number of volumes the copyright upon the language of the headnotes, the digest paragraphs in the index, the black-letter headlines, and, in the case of the digest advance sheets, the entire material of those pamphlets, was lost by the publication of the pamphlet numbers in advance of the completed volume, unless such result was obviated by the deposit of the various titles in the name of the same owner of the copyright. It is evident that the public would not be misled as to the name of the author, nor as to the identity of the person who

claimed the copyright, because of two notices, one indicating a pamphlet portion, and the other the completed volume, but both belonging to the same corporation. Nor would the public be wronged by the claim of that corporation that it had recorded the proper title each time that it had published a book or an edition of a previous book. But the public, and any person interested in the right to use the copyrighted material, would certainly be wronged, even to a slight extent, by a notice that, for instance, "in the year 1886, volume 1 of the Atlantic Reporter was entered for copyright," while twelve-fourteenths of that book, or the first 12 of the 14 pamphlets of which it was made up, had been entered for copyright and filed at different periods during the year 1885.

This brings the case within the doctrine of Baker v. Taylor, 2 Blatchf. 82, Fed. Cas. No. 782, where printing the date 1847 in mistake for 1846 caused loss of the copyright, rather than the doctrine of Callaghan v. Myers, supra, where the mistake in printing of a slightly earlier date was held to estop the publisher, but to be immaterial as to the validity of the copyright.

Surely the printing of a bound volume containing the entire contents of a copyrighted pamphlet is the printing of a later edition of that pamphlet, and this proposition runs through the entire series of the Reporter System and series of American Digests. As to some of them the question is simplified by the fact that the date of the copyright of the entire work is later than that of the copyright of its parts, and a search in the office of the Librarian of Congress at Washington, or in any other place, for the recorded title of the complete work, would mislead as to the date upon which copyright of the various portions would expire.

But in some instances such as the later numbers of the Federal Reporter, and certain of the other reporters, the copyright notice of the volume has been entered at Washington in the same year as that of the pamphlet numbers, or the greater portion of the pamphlet numbers, contained in that volume, and the notice, therefore, of the title, in so far as the portion of the title-page is material, and the printed notice carried in each subsequent copy of the book, would be the same for the whole or the greater part of the book.

It does not need much argument to support the conclusion that even in such a case the printed notice must comply with the statute; but it is with much greater difficulty that any reason can be found for holding that a title-page, say, of the "Federal Reporter, Vol. 150, No. 2, Copyright 1907, by West Publishing Company," with other particulars, and with the usual contents, would not be described as well as the other numbers, from 1 to 5 or 6, printed in that volume, in the notice of copyright printed in the completed volume, under the words "Copyright 1907, by West Publishing Company."

We therefore find that in some instances the complainant seems to have, almost by chance, published its books in such a way that the recorded titles complied with the statute in some instances, but in more instances that they did not. And it follows as a corollary that, if the West Publishing Company intended to copyright all of the original material contained in its pamphlets, it should have taken pains to see

that any book containing those pamphlets as a whole contained also an indication of when the copyright upon each pamphlet was obtained, and the period of exclusive enjoyment set in operation.

But, the question does not stop here. In the United States Digest, First Series, most of the material, as has been said, was taken from the earlier digests and from official reports. The paragraphs were republished from either old or copyrighted publications. The United States Digest, New Series, was, to a large extent, made up from syllabi and headnotes, either official or as to which permission for the use of which had been granted. Yet each volume of these digests was registered and filed for copyright, with a notice of copyright applying to the whole volume. The American Digest, the Federal Cases Digest, and the Century Digest contain, not only many paragraphs and syllabi which are in substance official or copied from the opinions, but have collected under the various headings the total paragraphs, as printed under those same heads in the Reporters and the advance sheets of the digests themselves.

It is contended by the complainant that no one paragraph can be called a subsequent edition of an entire book or pamphlet number of an annual digest, and that the doctrine of Mifflin v. Dutton, supra, in which the 13 final chapters, when printed in serial form, were held to have invalidated that portion of the complete book, is controlling. On the other hand, the defendant contends, not that each paragraph is necessarily a new edition, but that if the complainant made use of all the paragraphs—that is, substantially all of the contents of a copyrighted book—in the course of making up a new book, which is likewise to be copyrighted, and as to which only the original literary material is entitled to copyright, it must in some way indicate its indebtedness to the original copyrighted work, or must inform the public that that copyright is not abandoned; for otherwise, if the subsequent publication be authorized, the public would certainly seem to be entitled to assume that the material not original with the later publications had been released.

It is impossible to draw a hard and fast line between the use of one paragraph, which could hardly be called by itself an "edition," and the use of a portion of a book containing paragraphs enough so that it would constitute an edition. The true test would seem to be that, from the standpoint of the entire book, an edition could be any divisible part of which the copyright could consistently be entered by itself; while, from the standpoint of an individual paragraph in a copyrighted book, a subsequent edition would seem to be any such portion of the book as might be consistently held suitable for copyright, if this included the paragraph in question.

From this it will be seen that no one paragraph, when reprinted in a different volume, should of itself be considered an edition of the entire original volume, nor should an entire subsequent volume be considered merely an edition of some one paragraph in an earlier copyrighted publication. But if any appreciable portion—that is, such portion as would indicate a use of the material of the earlier publication—is included in the later work, it seems necessary to hold that

the later work should carry a notice of the earlier copyright, with a sufficiently definite clue to inform the reader of all copyrights whose existence was not intended to be destroyed or circumscribed by the publication of the later work.

Suppose a person should copyright a cook book, with a great number of recipes collected from various sources, and it should be assumed that in most instances the recipes had been rewritten and formulated in such manner as to entitle them to copyright, and then suppose that permission were given to various social organizations, newspapers, and advertising media to print from one to a large number of the recipes previously copyrighted; would a new copyright upon the newspaper or advertising publication, even if original work had been bestowed thereon, afford any protection to the recipes which might be so reprinted? And would a person then assuming the right to embody the same recipes in other books, or in a later cook book, be liable to infringement of the original copyright, when he could have no warning or notice of its existence? Would the plea that he should have known that any one recipe was not sufficiently an edition to require notice of copyright put him upon guard and compel him to search all the copyrighted cook books to protect himself against a suit for infringement? And especially if he knew that the recipes were not the original work of the person holding the later copyright?

The copyright law provides that "no person shall be entitled to a copyright unless he shall * * * deliver * * * or deposit a printed title * * * and two copies of such copyright book," etc. Section 4956, Rev. St. (U. S. Comp. St. 1901, p. 3407). As has been said, since the existence of this statute, rights may be acquired thereunder, and the common-law right of property in literary material is superseded by the right acquired through compliance with the statute. This statutory right is defined by section 4952, Rev. St. (U. S. Comp. St. 1901, p. 3406), to be "the sole liberty of printing, * * * publishing, * * * copying, * * * and vending the same," or, as it has been called, "of multiplying copies."

A property right to the material is thus assured, and apparently as an outgrowth of the necessities of the case, and in some manner from the doctrine of "unfair competition," the words of section 4967 (U. S. Comp. St. 1901, p. 3416), to wit, "Every person who shall print or publish any manuscript whatever," have been applied in the case of copyrighted works to the use of any material part. The words "animo furandi" have been treated as meaning "with intent to make use," rather than "with intent to unlawfully appropriate," and the decisions have not regarded a mistaken idea of right as a legal defense. But when the courts have taken up the consideration of section 4962, requiring a notice of copyright in every copy of every edition, they have apparently decided that a book containing new material with the old was not a new edition, unless it was merely a reprint of the original book. Banks v. McDivitt, supra; Lawrence v. Dana, supra. The complainant argues that the cases of Mifflin v. R. H. White Co., supra, Mifflin v. Dutton, supra, and Holmes v. Hurst, supra, are not cases of abandonment of copyright, but are illustrations of how a copyright may

never be secured through failure to comply with the statutes. This is true; but the failure to obtain a copyright was because the author abandoned the right to copyrightable matter, either before attempting to take out copyright or after so doing, by allowing a publication which prevented any action for infringement. So in this case the printing of an entire copyrighted pamphlet in an annual publication, which was merely a compilation of the various numbers, would seem to be an act which would require a strict compliance with the statute, and hence require a notice of the copyright which should be relied on for the protection of such material as was not open to a new and different copyright in the later work. If the last chapters of Mrs. Stowe's work had been recopyrighted by herself in a different year, would she have been better off than when they were copyrighted by some one to whom she had given the right to take such action?

If the material in the annual publications of the complainant was released, in that the old copyrights were not mentioned, what benefit can be claimed because those old copyrights were the property of the complainant itself? What hardship would be involved in printing after the title-page of the annual or compiled volume a statement of the copyrights which were included as new editions in the united volume? Suppose a monthly magazine should be issued in bound form at the end of the year, and that each department, such as "Fiction," "Editor's Table," etc., should be put together, and the various numbers thus interleaved or interlaid; would that free the publishers from repeating the copyright notice of each "monthly"?

But the questions arising from the use, under a license, of copyrighted material, assuming that the copyrights have been consistently preserved, presents even clearer illustrations, but depending upon essentially the same propositions. Such a use of an entire year's copyrighted material, as is made by the publishers of the General Digest of the paragraphs contained in the pamphlets of the American Digest for the preceding year, and of substantially the copyrightable material in an entire year's issue of the Federal Reporter, when transferred into the form of digest paragraphs, can be justified only upon the theory that the license used is equivalent to the use of the proprietor of the copyrights themselves. But from the standpoint of the public, or of any one endeavoring to observe the proprieties of legitimate use, the licensed publication would certainly give no information by which that person could be apprised of the original copyrights, and such use would seem to constitute a liberation of the original material. If the strict rights of protection against infringement are provided for, by the payment of royalties and the obtaining of a license, surely the public is entitled to know what rights must be respected, and what property can be indiscriminately used. So the giving of license rights to authors and publishers of text-books (while perhaps it should not cause termination of copyright, if the use be so limited as to indicate quotation, rather than republication), to publications like the Central Law Journal and Kinney's Illinois Digest, would seem to be in the light of a sale of the labor represented by the copyrighted material, and to be an abandonment of the exclusive right of publication, unless

the terms are such as to insure an insertion of the appropriate copyright notices, whenever the use approaches the extent of what could be considered an edition. Within the rule which has been adopted herein, the Central Law Journal, Illinois Law Notes, and the text-book collections of citations and authorities, would seem to be sufficiently editions of copyrightable and copyrighted material as to throw upon the complainant the burden of insisting that its copyrights be recited, when a substantially verbatim use of that copyrighted material was embodied in printed form and transmitted to the publisher.

The ordinary text-book and the Cyclopedia of Law & Procedure stand in a somewhat different position, and to a great extent the latter work can hardly be called an edition of the copyrighted material of the complainant's publications, except in so far as its footnotes may follow the digest paragraphs and syllabus headnotes of the complainant's books. But the fact that licenses have been granted to these publications, and that they have been allowed to make public, under their own copyright, such portions of the complainant's copyrighted books as the authors of these other publications may find necessary, without any attempt on the part of the complainant to compel insertion of notice of copyright, would indicate that no attempt was made by the complainant to prevent the destruction of its copyrights, if the use which might be made of the material should be extensive enough and in such form as to invalidate the copyrights affected, and form an additional argument why the defendant should not be enjoined in equity in the present action, because of the use of such materials as may have been released from the original copyrights, in the methods which have been indicated.

It can make no difference whether the defendant instructed its writers to avoid generally the use of the copyrighted material of the complainant, or of any other person, and in spite of such instructions a greater or less use was made by the various writers, provided this use ultimately proves to have been with relation to matter as to which the copyrights have been lost or invalidated. Such a result may not have been intended; but the defendant would be in the same position as if it had been able to investigate beforehand each paragraph so used, and to determine for itself that it was entitled to use it. It may be said that its escape from liability was unintentional, but the act must be judged by the facts, rather than whether such use was inadvertent or deliberate and premeditated; and equitable relief as to such matters would be no broader than legal damages, for both must depend upon the violation of legal rights, and such violation does not seem to have existed to any appreciable extent.

The complainant has made considerable point throughout the case of the fact that the defendant's editors and revisers struck out all citations and references in the complainant's Reporter System, wherever the citation from the official reports could be substituted. If the material thus attributed to another source had been found to be exclusively the property of the complainant, in the form in which it was used, and if the complainant's rights thereto had not been lost or appreciably affected, such evasion of attributing the paragraphs to the

sources from which they were obtained would be a strong argument against the defendant's good faith, and also against the defendant's claim that its use was not unfair. But if the defendant is fortunate enough to escape the effects of what might thus be considered unfair use, in that it has been able to show that it would have been entitled to do what it did do with impunity, it is not to be punished by injunction, when it could not be so punished if it had been in the possession of knowledge of all the facts, and had deliberately reached the same conclusion.

An examination of the many parallel column exhibits and marked exhibits introduced by the complainant, and comparison of these exhibits with the parallel column and marked exhibits introduced by the defendant, show that the number of instances where the paragraph or list of citations in the defendant's publications, by similarity of language or conjunction of words, or even literal copying of mistakes, cannot be explained and justified by the presence of the same paragraphs and language in other publications, either official or licensed, or republished with an accompanying abandonment of copyright, is comparatively insignificant and immaterial. The number of instances, as well, in which copying or paraphrasing for similar reasons must be presumed, and in which such use would necessarily be held unfair, in that the literary labor of the complainant, or its assignors, must be held to have been taken advantage of, and as to which a similar explanation or justification is not shown in the parallel column exhibits of the defendant, is also insignificant and immaterial in comparison with the total number of exhibits involved. Even in such articles as the subjects of "Patents" and "Intoxicating Liquors," the number of paragraphs upon which the complainant can claim relief, within the limits of this decision, is small and of insufficient amount, in comparison with the entire articles, to justify injunctive relief, and these conclusions are practically controlling upon the entire questions involved in the present action.

The defendant has raised the question of laches on the part of the complainant in bringing the present action. This particular defense raises the same question which has previously been considered, in that the action involved 74 separate printed volumes of the defendant's company. These were issued, as has been shown, through an interval of some 15 or 16 years, and each volume, or even the separate articles, subject by subject, in these volumes, might have been made the basis of a suit at any time after its issuance. Any such separate action would have disposed of the greater part of the questions involved in the present action, and would have presented a simple issue in comparison with the one at bar. The A. & E. Enc. Law (1st Ed.) presented a much plainer field for the investigation of alleged infringements and allegations of unfair use than did the later publications. The first volume of the A. & E. Enc. Law (2d Ed.) contains much more material which calls for explanation by the defendant than any of the subsequent volumes taken as a whole, and this book was published in the year 1896.

The testimony shows that as early as 1893 some discussion was had between the directors of the complainant, over a suspicion, as it is termed, that the Edward Thompson Company was making use of copy-

righted material belonging to the complainant. But an examination at that time did not reveal anything from which the complainant was led to institute an action, but, on the contrary, its conclusion was that litigation was not justified upon the information which it had. The suit between the Edward Thompson Company and the American Law Book Company (without considering its effect from the standpoint of motive) seems to have incited an investigation in the year 1902 leading to the bringing of the present action; while a visit made by Mr. Ames, vice president of the complainant, in 1900, to the defendant's plant, seems to have put him in possession of information from which he derived impressions which at least contributed to the later determination to bring suit. The details of this interview are variously stated. The defendant's witnesses relate the incidents of the conversations with Mr. Ames in such form as to indicate that Mr. Ames either found nothing of which he openly disapproved, or that he concealed his impressions over his discoveries, from any of the persons who were called as witnesses by the defendant.

Be that as it may, the present suit was instituted soon after the decision of the litigation referred to; and it also appears that at some time substantial, if not majority, interests in the American Law Book Company have been acquired by officers and stockholders of the West Publishing Company. Even without imputing any improper motive, it is plain that the interests of the complainant were involved in a substantially different way, when the field of sale was being covered by the A. & E. Enc. of Law and the Cyc. as competing publications. For this reason there is more force to the defense of laches with respect to the books printed prior to the year 1902 than might be found in a similar defense if it had been raised in any action instituted before that time. The lapse of time since the witnesses wrote, the loss of their manuscript in most cases, and the scattering or change of employment of the writers themselves, all adds to the force of the argument based on the proposition of laches in the sense of delay in bringing action.

The complainant is shown to have exchanged various publications for the defendant's Encyclopedias, and to have resold its Encyclopedias. For a number of years the advertising matter of the complainant and of the defendant indicated a rivalry and conflict between the digests, particularly the Century Edition and the defendant's Encyclopedias. But by degrees it became apparent that the digest was of value to a certain class of customers from one standpoint, while the Encyclopedias were of value to customers who desired books from a somewhat different standpoint. It would be hard to determine whether the Encyclopedia interfered more with the sale of the digests, or of the reports themselves, inasmuch as the Encyclopedia purported to cover the entire field up to the time of its issue. If the Encyclopedias had contained citations to the complainant's reports, it would have an effect which cannot now be estimated upon the question of "fair quotation," and of acquiescence on the part of the complainant in the defendant's acts.

But the use which was made by the defendant of the material in the complainant's works, nominally covered by its copyrights, was in the

form of paraphrasing, or of adaptation by mental recollection; and the lack of citation to the complainant's works, which would be equivalent to "quotation," as a clue to the source of the material, renders the defense of acquiescence of so slight importance as to leave it nothing more than an argument in connection with the defense of laches. The advertising matter of the complainant, and its entire course of action, is consistent with the idea that it did not arrive at the determination to bring an action until the time at which the present action was brought. But none of these acts are equivalent by themselves, or even taken collectively, to admissions which would estop the complainant, or would be equivalent to substantial approval of the matters now complained of in this action.

The defense of laches, involving loss of testimony, witnesses, and definite recollection of events, implies a negative course of action; that is, a failure on the part of the complainant to do what it was called upon to do, if its property rights had been injuriously invaded in a way of which it should have had knowledge at a time so long previous to the present action that it must be declared not entitled to equitable relief because of that negligence. But the defense of acquiescence is affirmative, and in so far as it means deliberate or conscious approval, even with some mistaken idea of the law, it does not, as has been said, rise in the present instance to the level of doing more than to throw some light upon the question of the other defenses.

The complainant asserts that the defense of laches is not applicable to rights accruing through infringement of patents, trade-marks, and copyrights, where further continuance of a wrong could be prevented by an injunction—citing McLean v. Fleming, 96 U. S. 245, 24 L. Ed. 828; Menendez v. Holt, 128 U. S. 514, 9 Sup. Ct. 143, 32 L. Ed. 526; Saxlehner v. Eisner & M. Co., 179 U. S. 19, 21 Sup. Ct. 7, 45 L. Ed. 60, and other cases. It urges the distinction based upon "executory," in opposition to "executed, interests," as defined by Clark v. Hart, 6 H. L. Cases, 633, and in Galway v. Metropolitan El. R. Co., 128 N. Y. 132, 28 N. E. 479, 13 L. R. A. 788, and Richardson v. Green, 61 Fed. 423, 9 C. C. A. 565, and contends that, as in Hutter v. Koscherak (C. C.) 137 Fed. 92, the defenses of laches and estoppel are the same, as far as they are applicable to the present action. It is unnecessary to seek any line of distinction, for the court agrees with the complainant's propositions in this regard, and it does not appear, as has been said, that these affirmative defenses, arising out of delay alone, could, independently of the other questions, determine this action.

These propositions have been referred to, not that any one of them is controlling, nor that this present action can be decided, or should be decided, solely upon any of these issues of laches or lack of equity in the complainant's own position; but, when considering the extended period which the scope of the action covers, and the impossibility of applying the more definite issues of infringement and the validity of copyright to any accurate portion of the alleged infringement, and bearing in mind the decision in the Circuit Court of Appeals in the case of West Publishing Co. v. Lawyers' Co-operative Co., supra, by which the burden is thrown upon the defendent of particularizing and prov-

ing affirmatively the title to every part of the books involved in the suit, as to which an injunction may not run, these defenses are cumulative and persuasive to the court in reaching the conclusion that equity does not demand an injunction against any part of the defendant's publications.

An adequate remedy at law existed for any damages which could have been proved, and an accounting for profits cannot be ordered herein.

Bill dismissed, but without costs.

CAFASSO v. PHILADELPHIA & R. RY. CO.

(Circuit Court, S. D. New York. February 27, 1909.)

RAILROADS (§ 33*)—FOREIGN COMPANIES—PROCESS—SERVICE—"DOING BUSINESS."

Where a railroad operates its tugs, boats, and barges in the waters of New York, and delivers coal to piers in that state, it is "doing business" therein, and subject to the service of process there, though its railroad is not within the state.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 71; Dec. Dig. § 33.*

For other definitions, see Words and Phrases, vol. 3, pp. 2155–2160; vol. 8, pp. 7640–7641.]

On Motion to Set Aside Service.

Thos. J. O'Neill, for plaintiff.

Armstrong, Brown & Boland, for defendant.

NOYES, Circuit Judge. In my opinion a railroad company, whose railroad is not within the state of New York, but which operates its tugs, boats, and barges in the waters of said state, and delivers coal to piers within said state, is "doing business" therein, and subject therein to the service of process.

The motion to set aside the service of the summons and complaint, and to dismiss the action for want of jurisdiction, is denied.

COLGATE v. JAMES T. WHITE & CO.

(Circuit Court, S. D. New York. February 27, 1909.)

INJUNCTION (§ 136*)—PRELIMINARY INJUNCTION—GROUNDS.

Where, in a suit to restrain defendant from publishing plaintiff's portrait, or his biography so far as based on information obtained from him, and from enforcing a subscription contract, it appeared that, if an injunction was not issued, complainant might suffer the very injury of which he complained before the cause could be heard, and defendant would suffer no especial harm, an injunction pendente lite would be granted on the execution of a proper bond.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 305, 306; Dec. Dig. § 136.*]

In Equity. On application for preliminary injunction.

Hawkins & Delafield, for complainant.

Philip J. McCook, for defendants.

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

NOYES, Circuit Judge. While there is much doubt about the questions discussed in the briefs, I am inclined to the opinion that the complainant presents a case calling for the preservation, so far as practicable, of the status quo of the parties pending the litigation. If an injunction is not issued, the complainant may suffer the very injury of which he complains before the cause can be heard. If it is issued, the defendant will suffer no especial harm, and for any possible injury should be protected by a bond.

Upon filing a proper and sufficient bond, therefore, an injunction may be issued restraining the defendants pendente lite from publishing the complainant's portrait, or his biography so far as the same may be based upon information obtained from him, and from enforcing the subscription contract. If the parties cannot agree as to the amount, form, and sufficiency of the bond, the matter may be presented to the court upon affidavit.

FERGUSON v. CONSOLIDATED RUBBER TIRE CO.

(Circuit Court, S. D. New York. February 2, 1909.)

COURTS (§ 272*)—FEDERAL COURTS—PROPER TRIAL DISTRICT.

Where plaintiff's assignor was an alien, and defendant a citizen, so that the Circuit Court of the United States had jurisdiction of the controversy, and the suit might have been brought in the Southern district of New York if no assignment had been made, had defendant waived its right to object because it was an inhabitant of New Jersey, the controversy, after assignment to a citizen of New York, became one between citizens of different states, and the action was properly brought in the district where the assignee resided.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 811; Dec. Dig. § 272.*

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

On Motion to Set Aside Summons and Complaint.

Chas. Stewart Davison, for plaintiff.
Chas. W. Stapleton, for defendant.

NOYES, Circuit Judge. The plaintiff's assignor is an alien. The defendant is a citizen. The Circuit Court of the United States had jurisdiction of a controversy between them. The venue of the action would have been primarily the district of which the defendant was an inhabitant, the district of New Jersey; but, the jurisdiction existing in the Circuit Court, the venue provision might have been waived if the defendant had been sued by the alien here. Consequently I think it may be said that the suit might have been prosecuted in this court if no assignment had been made. Therefore, while the question is doubtful, I shall rule that the provision regarding taking cognizance of suits by assignees is inapplicable, and that the controversy after the assignment became one between citizens of different states, and that the action was properly brought in the district where the assignee resides. See Whitman v. Taubel, 168 Fed. 1023, and Vaile

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

v. Moffat, 168 Fed. 1023 (decided by this court January 27, 1909); also, Stimson v. U. S. Wrapping Company (C. C.) 156 Fed. 298; Bolles v. Lehigh Valley R. (C. C.) 127 Fed. 884.

The motion is denied.

BERNIER v. GRISCOM-SPENCER CO.

(Circuit Court, S. D. New York. February 2, 1909.)

SPECIFIC PERFORMANCE (§ 70*)—CONTRACT TO DELIVER CORPORATE STOCK—ADEQUATE REMEDY AT LAW.

Equity, upon a breach shown, will not decree the specific performance of a contract to convey shares of stock in a corporation, unless the facts shown present an unusual and exceptional situation in which the damages recoverable at law would be clearly incomplete and inadequate.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 203; Dec. Dig. § 70.*]

In Equity. On demurrer to amended bill.

Hugh Gordon Miller, for complainant.

Robinson, Biddle & Benedict (Norman B. Beecher, of counsel), for defendant.

PLATT, District Judge. The original bill in this action was attacked by demurrer. The situation is thoroughly set forth in an exhaustive opinion giving reasons for sustaining the demurrer, to be found in 161 Fed. 438.

After reading that opinion, the complainant amended the bill so as to avoid the weaknesses which he thought were pointed out therein. The main differences between the original bill and the present one are these: It is now directed solely to a demand for a transfer of the "$9,000 worth of stock," and alleges that the defendant holds sufficient excess stock to respond to the demand, and that defendant has no stock in the market, and that it cannot be obtained and purchased by the plaintiff in the market or elsewhere. It is further alleged directly, in paragraph 6, that the stock which the plaintiff wishes transferred to him is of the value of $9,000, and that its intrinsic value is at least par at the present time, and that he cannot obtain it from any source except from the defendant.

The law is so plain that citations are unnecessary to establish the proposition that equity, upon a breach shown, will not decree the specific performance of a contract to convey shares of stock in a corporation, unless the facts set forth present an unusual and exceptional situation in which the damages at law would be clearly incomplete and inadequate. The former opinion ought to have made this obvious to the complainant, but it seems that it did not. The amended bill leaves the complainant in worse plight than he was at the outset. He has added the fact that he cannot buy the stock in the market, but he has also added the fact that its intrinsic value is $9,000. He has given no reason why that particular stock is of any especial importance to him. It is proper to infer that his connection with the defendant ceas-

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

ed on or about June 15, 1907, and his departure must have eliminated the only reason why he should care for the ownership of a few shares of stock in the defendant company, rather than their money value which he himself has fixed in his complaint. On the facts shown the remedy at law is full, adequate, and complete. It will be a sorry day when equity begins to assume unnecessary burdens and to interfere with simple problems which can be much more easily solved by law.

Let the demurrer to the amended bill be sustained, with costs.

UNITED STATES v. CAPELLA.

(District Court, N. D. California. March 27, 1909.)

No. 4,645.

CRIMINAL LAW (§ 108*)—VIOLATION OF IMMIGRATION LAWS—VENUE.

The offense of bringing into and landing in the United States an alien not lawfully entitled to admission, made a misdemeanor by Act Feb. 20, 1907, c. 1134, § 8, 34 Stat. 900 (U. S. Comp. St. Supp. 1907, p. 394), can be prosecuted only in the district where such alien is landed, and the fact that a person who unlawfully brought in a child under 16 years of age, unaccompanied by one or both of her parents, afterward took such child into another district, does not confer jurisdiction on the court in such district.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 108.*]

On Demurrer to Indictment.

Robt. T. Devlin, for the United States.
McGowan & Norley, for defendant.

De HAVEN, District Judge. Section 2 of the act to regulate the immigration of aliens into the United States, approved February 20, 1907 (34 Stat. 898, c. 1134 [U. S. Comp. St. Supp. 1907, p. 391]), provides for the exclusion from admission into the United States of—

"all children under 16 years of age, unaccompanied by one or both of their parents, at the discretion of the Secretary of Commerce and Labor, or under such regulations as he may from time to time prescribe."

Section 8 of the same act provides:

"That any person who shall attempt, by himself or through another, to bring into or land in the United States by vessel or otherwise, any alien not duly admitted by an immigration inspector or not lawfully entitled to enter the United States shall be deemed guilty of a misdemeanor."

The indictment, in this case, charges that the defendant—

"on or about the 8th day of December, 1908, at the port of New York, did unlawfully bring into and land in the United States from the Republic of Switzerland, an alien child, to wit, Pasqualina Ranzoni, of the age of eleven years, then and there pretending and representing to the immigration inspectors at the port of New York that the said Pasqualina Ranzoni was his daughter, while in truth and in fact the said Pasqualina Ranzoni was not his daughter, and was not accompanied by both or either of her parents, and was not then and there entitled to enter the United States; and thereafter, in pursuance of such illegal importation and bringing into the United States, he brought and caused to be brought the said alien child, Pasqualina Ranzoni, into the state

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

and Northern district of California, and within the jurisdiction of this honorable court."

The defendant has demurred to this indictment upon the general ground that it does not state facts sufficient to constitute a public offense, and upon the further ground that:

"The grand jury by which said indictment was found had no legal authority to inquire into the offense charged, by reason of the fact that, if the said offense sought to be charged was committed, it shows upon the face of the indictment that it was committed without the jurisdiction of this court."

The sixth amendment to the Constitution of the United States provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed."

The demurrer to the indictment, upon the ground of want of jurisdiction in the court to try the defendant, must be sustained, unless the case is brought within section 731 of the Revised Statutes (U. S. Comp. St. 1901, p. 585), which declares:

"When any offense against the United States is begun in one judicial district and completed in another, it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined and punished in either district, in the same manner as if it had been actually and wholly committed therein."

The offense charged in the indictment was not one begun at the port of New York, and completed in this district, but it was entirely committed at the port of New York. It was there that the minor child, Pasqualina Ranzoni, was landed in the United States, in violation of the act of February 20, 1907, and the subsequent act of the defendant in bringing the said minor within the jurisdiction of this court is no part of the offense of illegally bringing her into or landing her in the United States.

The demurrer to the indictment is sustained, upon the ground that the court has no jurisdiction of the offense charged.

UNDER-FEED STOKER CO. OF AMERICA v. AMERICAN STOKER CO.

(Circuit Court, S. D. New York. April 12, 1909.)

EQUITY (§ 198*)—PLEADING—CROSS-BILL—DEFENSE OF LACHES.

The defense of laches in bringing a suit or in prosecuting it after it is brought may be considered on final hearing although not pleaded, and a defendant will not be granted leave to file a cross-bill raising such issue to be disposed before the hearing on the original bill, especially where under the rules he might have expedited the hearing, but made no effort to do so.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 198.*]

In Equity.

Wetmore & Jenner, for complainant.

Richard N. Dyer and Hugh C. Lord, for defendant.

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

WARD, Circuit Judge. The defendant moves for an order limiting the recovery of profits and damages in this case to a period beginning October 28, 1908, on the ground that the complainant was guilty of laches in bringing the suit and has been guilty of laches in prosecuting it down to that date. It also moves for leave to file a cross-bill, alleging the complainant's laches, and the damage caused it thereby, the original bill to be stayed until the cross-bill is disposed of.

A cross-bill is filed with the answer to enable the defendant to obtain affirmative relief arising out of the subject-matters of the original bill, is heard with it, and must be for causes of action which would sustain an original bill. This is the general rule. Cases arise where a cross-bill may be allowed to be filed after answer and to be disposed of before the original bill because of facts arising after the filing of the answer which entitle the defendant to a defense. Scott v. Grant, 10 Paige (N. Y.) 485; Banque Franco-Egyptienne v. Brown (C. C.) 24 Fed. 106; Randolph's Bill, 66 Pa. 178. The defendant seeks to set up laches in filing the original bill and in prosecuting the suit. The effect of laches may be considered at final hearing, although not pleaded. McLaughlin v. Railway Co. (C. C.) 21 Fed. 574; Woodmanse v. Williams, 68 Fed. 489, 15 C. C. A. 520; Keyes v. Eureka Mining Co., 158 U. S. 150, 153, 15 Sup. Ct. 772, 39 L. Ed. 929. Therefore a cross-bill is not necessary. The laches considered in these cases was in filing the bill, but I see no reason why laches in prosecuting the suit, being a part of the case itself and entirely within the knowledge of the court, should not be treated in the same way. It would no doubt save the defendant trouble and expense to dispose of this question in the first instance provided it prevailed, but it may not prevail. Another consideration is that it could have speeded the prosecution by motion after the cause was at issue. Equity rule 69 fixes the time for taking proofs. If none are taken, either party may set the case down for hearing upon the pleadings under equity rule 109 of this court. If the complainant does not complete his proofs within the time fixed, the defendant may apply to the court to fix a time within which the proofs must be taken, or may move to dismiss for lack of prosecution. The usual course of procedure should not be departed from, especially as to matters resting in the discretion of the court, which, with the question of costs, can be more intelligently disposed of at final hearing.

The motions are denied.

THE GRACIE KENT.

(District Court, E. D. Louisiana. March 25, 1909.)

No. 14,070.

MARITIME LIENS (§ 28*)—SUPPLIES—AGREEMENT OF OWNER TO LIEN.

Where the owner of a disabled tug bought supplies and directed that they be charged to her, and afterwards approved such charge and obtained an extension of time for payment, he is estopped to deny the seller's right to a lien, although he may in fact have used the supplies on another vessel.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 46; Dec. Dig. § 28.*]

In Admiralty. Suit in rem to enforce lien.

Henry Chicapella, for libelant.
L. R. Hoover, for claimant.

FOSTER, District Judge. The steamboat Gracie Kent became disabled, while on a voyage from Lockport to New Orleans, La., with two barges of freight in tow. Her owner purchased certain supplies from libelant and instructed that they be charged to the Gracie Kent, and they were presumably delivered to her. It appears from the record, however, that the supplies were actually used on another boat belonging to the same owner, which boat completed the voyage to New Orleans with the said two barges of freight, though libelant interposed timely objection to proof of that fact. Thereafter, the bill not being paid, proctor for libelant called upon the owner of the Gracie Kent for a settlement, and the latter at the time acknowledged the bill in writing in the following words and figures:

"March 7, 1908.

"This bill is correct, and I ask a week's extension.

"Edw. Murphy, for Str. Gracie Kent."

It is urged by the claimant that, the supplies not having been actually used on the Gracie Kent, no admiralty lien was created as against her. The case is entirely between the libelant and the owner of the vessel, and no other creditors are concerned. Without going into the question as to whether or not a lien actually exists on the said vessel, it seems to me, as the owner ordered the supplies to be charged to the Gracie Kent, and subsequently did not object to, but approved, the bill as presented, and obtained further time for payment when a suit was imminent, he is now estopped to deny an admiralty lien on the vessel. See The George P. Kemp, 2 Low. 477, Fed. Cas. No. 5,341.

There will be judgment for libelant as prayed for.

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

DELAWARE, L. & W. R. CO. v. INTERSTATE COMMERCE COMMISSION.

(Circuit Court, S. D. New York. February 18, 1909.)

COMMERCE (§ 93*)—INTERSTATE COMMERCE COMMISSION—SUITS AGAINST—PARTIES.

In a suit by a railroad company against the Interstate Commerce Commission to enjoin or annul an order or requirement of the commission, third parties interested in such order are not entitled to intervene as of right, but may be permitted to do so at the request of the commission, on condition that the hearing shall not thereby be delayed.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 144; Dec. Dig. § 93.*]

On Petition for Leave to Intervene as Parties Defendant.

See, also, 166 Fed. 498, 499.

Wm. S. Jenney and Douglas Swift, for complainant.

Henry L. Stimson and P. J. Farrell, for defendant.

Masten & Nichols, for petitioners.

Before LACOMBE, WARD, and MARTIN, Circuit Judges.

PER CURIAM. In granting this application of the American Forwarding Company, Trans-Continental Freight Company, and Rockford Manufacturers' & Shippers' Association, this court is not to be understood as sanctioning a practice which would allow every interested person to intervene in proceedings of this nature. The application is granted in this case, because it appears that the three interveners above named were the persons who actually tried and argued the case before the Interstate Commerce Commission, and because the commission itself asks that the application be granted. Such intervention, however, shall not be allowed to delay the progress of the cause, and the interveners shall accept all action and unite in all stipulations had or made by the defendant the Interstate Commerce Commission.

VICTOR TALKING MACH. CO. v. HOSCHKE.

(Circuit Court, S. D. New York. February 9, 1909.)

EQUITY (§ 229*)—PLEADING—DEMURRER.

A defendant will not be permitted to delay the trial of a cause by filing a second demurrer on grounds which should have been set up and disposed of in the first, but may be allowed to plead such matter in the answer.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 505; Dec. Dig. § 229.*]

Horace Pettit, for complainant.

Waldo G. Morse, for defendant.

LACOMBE, Circuit Judge. No good reason is shown why the grounds of demurrer now sought to be interposed could not have been set up in the first demurrer. A second demurrer will unneces-

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

sarily delay the trial. Defendant will be allowed to set up the objections now presented in the answer, and the decree pro confesso will be vacated, so as to allow him to serve such answer within 20 days.

Orders proper to effect this disposition of the cross-motions may be submitted on notice.

CHARLES BARNES CO. v. ONE DREDGE BOAT et al.

(District Court, E. D. Kentucky. April 5, 1909.)

No. 28.

1. ADMIRALTY (§ 6*)—SUBJECTS OF JURISDICTION—"VESSEL."

A pumpboat, which consists of a floating structure equipped with engine, boiler, pumps, pipes, and capstans, used for pumping out coal barges, and which can be moved on the water by means of poles or ropes attached to its capstans or towed, is a navigable structure intended for the transportation of a permanent cargo, to wit, its engine, boiler, pumps, and capstans from place to place where required to do its work, and therefore is a "vessel" and subject to the admiralty jurisdiction.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 88–98; Dec. Dig. § 6.*

For other definitions, see Words and Phrases, vol. 8, pp. 7297–7301.]

2. COURTS (§ 502*)—CONFLICTING JURISDICTION—FEDERAL AND STATE COURTS—PROCEEDINGS IN REM IN ADMIRALTY.

Libelant filed a libel in rem in admiralty to enforce a maritime lien for supplies furnished to a pumpboat, but by mistake the libel described a different vessel. This was subsequently corrected by an amended libel, and an attachment was issued and levied on the pumpboat. In the meantime, however, the owner had made a general assignment, and the assignee had taken possession of the boat and brought a suit in a state court for a settlement of the assigned estate. *Held*, that the amended libel related back to the date of filing of the original libel, from which time the suit was one dealing potentially, if not actually, with the pumpboat, and gave the admiralty court jurisdiction over it to the exclusion of the state court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1392; Dec. Dig. § 502.*

Conflict of jurisdiction with state courts, see note to Louisville Trust Co. v. City of Cincinnati, 22 C. C. A. 356.]

In Admiralty. On motion for order of sale.

L. J. Crawford, for plaintiff.

B. F. Graziani, for One Dredge Boat.

COCHRAN, District Judge. This is a libel for supplies or material to the amount of $344.38 furnished to a pumpboat, the property at the time of the Independent Coal Company. The supplies or material furnished were used in equipping it.

This cause is before me on a motion for an order of sale under rules 10 and 11 of the general admiralty rules. This is objected to by defendant on the ground that this court is without jurisdiction of the cause. It is not contended that otherwise it is not proper to sustain the motion and make the order of sale. It is claimed that this court is without jurisdiction on two grounds. One of them is that the pump-

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

boat sued is not a vessel, and hence not within the jurisdiction of admiralty. I will consider and dispose of this ground before taking up the other. Is, then, the pumpboat a vessel? What is a vessel?

In the case of Cope v. Vallette Dry Dock Company, 119 U. S. 625, 7 Sup. Ct. 336, 30 L. Ed. 501, Mr. Justice Bradley said that the terms "ships and vessels" are used in "a very broad sense" and include "all navigable structures intended for transportation." In section 3, c. 1, tit. 1, Rev. St. (U. S. Comp. St. 1901, p. 4), a vessel is said to include "every description of water craft or other artificial contrivance used or capable of being used as a means of transportation on water." That statutory definition is somewhat broader than Mr. Justice Bradley's, in that it takes in a navigable structure capable of being used for transportation; whereas, his definition is limited to one intended for transportation. And I do not see why the statutory definition should not govern. If it does, then a "vessel" may be defined to be a navigable structure capable of being used for transportation whether intended to be or actually used for that purpose. Of course, if in addition to being capable of being so used any given navigable structure is intended to be so used or is actually so used, so much the greater reason for holding that it is a vessel. So far, however, as the necessities of this case are concerned, it is not required that we should go beyond Mr. Justice Bradley's definition, and a vessel will be treated as a navigable structure intended for transportation.

Such being the case, of course, in order to a navigable structure being a vessel, it is not essential that it have on board means by which it may be propelled upon the water. The earliest kind of vessel, to wit, the sailing vessel, did not have such means, as it was propelled by the wind, which was outside of it. It simply had means by which the force of the wind could be applied to the vessel. So frequently navigable structures intended for transportation have been held to be vessels, though without means of propulsion aboard and yet not propelled by the wind. A scow was held to be a vessel in the following cases, to wit: The General Cass, Fed. Cas. No. 5,307; Endner v. Greco (D. C.) 3 Fed. 411. A barge was so held to be in the following cases, to wit: The Dick Keys, Fed. Cas. No. 3,898; Disbrow v. Walsh Bros. (D. C.) 36 Fed. 608; The Wilmington (D. C.) 48 Fed. 567; Ex parte Easton, 95 U. S. 68, 24 L. Ed. 373. In the Dry Dock Case, supra, Mr. Justice Bradley, after referring to an English case in which was involved a "hopper barge" used in carrying "men and mud," said:

"Perhaps this case goes as far as any case has gone in extending the meaning of the terms 'ship' or 'vessel.'"

In the case of Wood v. Two Barges (C. C.) 46 Fed. 204, certain coal barges were held not to be vessels within admiralty rule No. 2. A floating circus was held to be a vessel in the case of the W. F. Brown (D. C.) 46 Fed. 290. A canal boat was so held to be in the case of The Kate Tremaine, Fed. Cas. No. 7,622. A raft was so held to be in the case of Seabrook v. Raft R. R. Cross-Ties (D. C.) 40 Fed. 596. A dismantled steamboat was so held to be in these cases, to wit: The Old Natchez (D. C.) 9 Fed. 476; The City of Pittsburg (D. C.) 45 Fed. 699. In the first case the structure in question was intended to be used

as a wharfboat. In the other it was intended to be used as a pleasure barge for transportation of excursion parties. From these two cases must be distinguished the case of The Hendrick Hudson, Fed. Cas. No. 6,355, where a dismantled steamboat was held not to be a vessel. It was in use as a hotel or saloon.

In each of these cases where the navigable structure in question was held to be a vessel, it was intended to be, if not actually, used for transportation. The thing transported, however, was aboard of the structure temporarily. It came and departed. Must, then, the transportation which the navigable structure is intended to effect be of something that is temporarily aboard in order that the structure may be held to be a vessel? Or is a navigable structure that is intended to be used in transporting something that is permanently aboard of it a vessel? I see no reason in principle why the length of time the thing is to be aboard the structure and transported by it should have any bearing on the question whether it is or not a vessel. It has therefore been held in a number of cases that a steam dredge is a vessel. Such structure transports, and is intended to transport permanently, the shovel and the steam outfit with which it does its work. It is true that it transports temporarily the crew that operates it and the coal from which the steam is generated; but the ground upon which it has been held to be a vessel is not because of such temporary transportation. It has been so held in the following cases, to wit: The Alabama (D. C.) 19 Fed 544; The Alabama (C. C.) 22 Fed. 449; The Pioneer (D. C.) 30 Fed. 206; Aitcheson v. Endless Chain Dredge (D. C.) 40 Fed. 253; The Atlantic (D. C.) 53 Fed. 609; The Starbuck (D. C.) 61 Fed. 502; Saylor v. Taylor, 77 Fed. 476, 23 C. C. A. 343; The International (D. C.) 83 Fed. 840; McRae v. Bowers Dredging Co. (C. C.) 86 Fed. 344; Bowers Hydraulic Dredging Co. v. Federal Contracting Co. (D. C.) 148 Fed. 290.

The cases of The Alabama (D. C.) 19 Fed. 544, and The Alabama (C. C.) 22 Fed. 449, present the same case; one being the decision in the court of original jurisdiction, and the other the decision in the appellate court. In that case and the case of The Starbuck (D. C.) 61 Fed. 502, there was involved not simply the dredge, but the dredge and its scows. In both cases they were treated as a unit, and the scows were regarded as affecting somewhat the character of the dredge. In The Alabama Case on appeal Judge Pardee said:

"The parties to this case have treated the dredge and scows as one thing, one plant, built and operated as one, as one complete whole carrying on one business, and having but one purpose. If the parties are right, in thus treating the dredgeboat and scows as one craft or thing, then it seems clear that the purpose and business of that craft is largely navigation and water transportation."

And again he said:

"The dredgeboat by itself might not be up to the test."

In The Starbuck Case Judge Butler said:

"That a dredge and her scows are to be treated as one concern and are subject to the admiralty jurisdiction has been several times decided, and I think rightly."

In the case of In re Hydraulic Steam Dredge No. 1, 80 Fed. 545, 25 C. C. A. 628, Judge Jenkins seems to think that such is the only basis on which a steam dredge can be held to be a vessel. He there said:

"The decisions holding that a steam dredge is within the admiralty jurisdiction may perhaps be rested upon the ground that a dredge is not only a floating structure upon the waters, but, as stated by Judge Pardee in The Alabama (C. C.) 22 Fed. 449, is accompanied by a scow, and that the scow and the barge are to be deemed one movable thing upon the waters, engaged in a common enterprise, and carrying the excavated earth by water transportation, and so engaged in navigation and related to commerce. Judge Pardee observes, however, that 'the dredgeboat by itself might not be up to the test.'"

But a consideration of the other dredgeboat cases cited will show that it by itself is regarded as being up to the test, and no good reason can be urged why it should not be so regarded.

In the case of Pile Driver E. O. A. (D. C.) 69 Fed. 1005, Judge Swan, in referring to The Pioneer Case, which was the next dredgeboat case to arise after The Alabama Case, which seems to have been the first, said:

"The case of The Pioneer (D. C.) 30 Fed. 206, which sustains a lien upon a dredge because it was capable of use in navigation without its machinery, although its use was to transport the shovel and machinery with which it was equipped, is irreconcilable with the cases of The Hendrick Hudson, 3 Ben. 419, Fed. Cas. No. 6,355; The Pulaski (D. C.) 33 Fed. 383; Ruddiman v. A Scow Platform (D. C.) 38 Fed. 158; The Big Jim (D. C.) 61 Fed. 503."

The cases referred to are really not irreconcilable with the Pioneer Case. I will not, however, take the time to show this, as the cases are so numerous which hold that a dredgeboat apart from its scow is a vessel that it must be accepted now that it is. The only discordant notes are those of Judges Pardee, Swan, and Jenkins; Judges Pardee and Jenkins simply questioning whether a dredge in such condition is a vessel.

Within the principle of these dredgeboat cases are the cases of The Hezekiah Baldwin, Fed. Cas. No. 6,449, and The Public Bath No. 13 (D. C.) 61 Fed. 692. In The Baldwin Case a canal boat upon which had been built an elevating apparatus for hoisting grain, without motive power of its own or capacity for cargo except the permanent cargo of its elevator, was held to be a vessel; in The Public Bath Case, a bathhouse built on boats. The boats were designed to float, to uphold, and to transport the bathhouse wherever and whenever desired. It was held to be a vessel. Judge Brown said:

"The bathhouse was in effect the permanent cargo of the boats."

The conclusion to be drawn from these dredgeboat, floating elevator, and bathhouse cases therefore is that a navigable structure which transports or is intended to transport a permanent cargo, and nothing else, is a vessel. In the dredgeboat case the thing transported was to facilitate navigation, and in the elevator case to facilitate transportation. In the bathhouse case it was not to facilitate either.

Before proceeding to a consideration of the particular structure here involved, notice should be taken of certain decisions that may be

thought to affect the conclusion thus reached. Of these are the dry dock cases. They are Cope v. Vallette Dry Dock (D. C.) 10 Fed. 142; Snyder v. A Floating Dry Dock, etc. (D. C.) 22 Fed. 685; Cope v. Vallette Dry Dock, 119 U. S. 625, 7 Sup. Ct. 336, 30 L. Ed. 501. The dry dock is a floating structure. It is possible that it is navigable, though as to this I have not taken the pains to ascertain from the facts presented in those cases. It is sufficient to say that it is not intended for transportation of anything.

In the case of Woodruff v. One Covered Scow (D. C.) 30 Fed. 269, the structure involved is described as a scow or float with a house on it nearly the size of the plant. It was used to store oars and sails of small boats landing at it and as a means of egress therefrom to the adjoining wharf and thence to the shore. It was held not to be a vessel. Judge Benedict said:

"But this structure, being stationary and never employed in the transportation of freight or passengers from place to place upon the water, cannot be held to be a ship or vessel."

In a line with this we have the case of Ruddiman v. A Scow Platform (D. C.) 38 Fed. 158, where it was held that a floating structure designed to be moored alongside a wharf so that carts containing refuse to be dumped into boats can be driven over it from the wharf was not a vessel. Judge Brown, distinguishing the case from the floating elevator case, supra, said:

"But in that case not only was the structure designed for the uses of commerce, but it was her constant business to move from place to place, as a vessel, in her peculiar work; in both respects differing from the present case. This structure though, as I have said, capable of being moved, was designed to be comparatively permanent. By its nature, build, design, and use, it belongs, I think, to that considerable class of cases, such as dry docks, floating saloons, bathhouses, floating hotels, floating boathouses, and floating bridges, all of which have been held not to be vessels within the maritime law."

This brings us to two cases cited on behalf of defendant which come closer to the dredgeboat, floating elevator, and bathhouse cases than any yet considered. They are the cases of The Big Jim (D. C.) 61 Fed. 503, and Pile Driver E. O. A. (D. C.) 69 Fed. 1005. The structure involved in The Big Jim Case is called a marine pump. When at work it rested on piles driven in the ground under the water, and its work was to suck mud from the bottom of the water or from scows alongside and force it on the adjacent land. It was capable of being towed from place to place where its services were needed and has been so towed. It was held not to be a vessel. As to this case it is to be noted that it was decided by Judge Butler, who held in The Starbuck Case that a dredge was a vessel, and seems to have been influenced in so holding by the fact that it was accompanied by a scow, and the dredge and scow were one thing. The structure involved in the Pile Driver E. O. A. Case was a floating platform which carried a derrick engine and pile-driving apparatus and was furnished with a wheel by which to propel itself about the bay or harbor. It was held not to be a vessel. It seems to me that this decision is unsound. It is in direct conflict as to principle involved with the dredgeboat

cases. Judge Swan recognized this in distinguishing The Alabama Cases, supra, because the dredge was accompanied by scows, and in holding that The Pioneer Case, where the dredge was not so accompanied, was incorrectly decided.

In conflict with this decision is the case of Lawrence v. Flatboat (D. C.) 84 Fed. 200, affirmed on appeal by the Circuit Court of Appeals of the Fifth Circuit in the case of Southern Log & Cart Supply Co. v. Lawrence, 86 Fed. 908, 30 C. C. A. 480, where it was held that a flatboat with a pile driver and its engine erected thereon, mainly used in constructing bulkheads for the erection of channel lights, which also transported material used in the work and was towed by a tug, was a vessel.

I therefore conclude that a navigable structure intended for the transportation of a permanent cargo that has to be towed in order to navigate is a "vessel," and that admiralty has jurisdiction of claims against and liens upon such a structure.

This brings us to the question as to the character of the structure involved here. I would note first the name by which it goes. It is called a "pumpboat." It is so called in the deed of assignment under which B. F. Graziani claims it as assignee of the Independent Coal Company. This indicates that to some extent it has been regarded by those who have had to do with it as a boat. A small vessel is one of the definitions of the word "boat." Again, I notice that in the deed of assignment referred to it is treated as having not only "machinery and tackle," but "sails, furniture, and apparel." It states that amongst other things thereby assigned are a "pumpboat, its machinery, sails, furniture, and apparel." In the affidavits filed bearing on the nature of the structure there is no reference made to the sails, furniture, and apparel of the pumpboat, except the affidavit filed on behalf of defendant, which states that it has no sails.

The plaintiff has filed three affidavits; the affidavits of its president and two boat builders, one of whom inspected the boat in question with a view of purchasing it at sale hereunder. The defendant has filed eight affidavits; the affidavits of the present claimant, Mr. Graziani, the assignee of the Independent Coal Company, former owner of it, of the president of said company, and six other men, all of whom have had such connection with the structure in question as to fit them to describe it correctly. In some particulars there is a sharp conflict between the two sets of affidavits hard to account for. According to plaintiff's affiants, the structure has a scow bow, scow stern, a deck fore, and a deck aft, and a cock pit in the center covered by cargo box. According to defendant's affiants, not one of these things is true of the structure. The boat is square in front and rear and has no decks or cock pit. A photograph was promised me so that I might determine myself, but it has not been forthcoming. The conflict, however, is not material. It is agreed that it is equipped with a double engine, a boiler, pumps and pipes connecting the boiler and pumps, and two capstans, a steam one in front and hand one in rear. It is used for the purpose of pumping water from coal barges and is navigable, i. e., it can be shoved with poles or drawn by ropes or towed. According to plaintiff's affiants, the sole object of the steam engines and capstans

is to propel the structure to such places as it may be desired to move it. This is done by means of an anchor or other thing to tie to. It is conceded by defendant's affiants that it can be propelled in this way, but it is denied that this is what the engines and capstans are for. It is claimed that their purpose is, by connecting with barges desired to be pumped by means of ropes, they can be drawn to it, and that this is the sole use that has been made of them. At first the hand capstan was made use of, and, this not working satisfactorily, the steam engines and capstans were added. It would seem that, if this apparatus can be made use of to draw barges to the pumpboat, it can also be made use of in drawing the pumpboat to the barges.

The pumpboat was constructed by said coal company and has never been used by any one but it, and it has used it in its coal harbor in the Ohio river at Ludlow, Ky., in pumping out its coal barges. In doing this work it has been either at one end of the fleet or the other and has been moved from one end to the other with poles or by drawing it with ropes. It is capable of being towed to any place on the Ohio river where its services might be needed.

The conclusion I draw from all this is that the pumpboat in question is a navigable structure intended for transportation of a permanent cargo, to wit, its engines, boiler, capstans, pumps, and pipes, in order to do the work of pumping where needed, and that therefore it is a "vessel" and subject to admiralty jurisdiction.

The other ground upon which it is claimed that this court is without jurisdiction of this cause is that the Kenton circuit court first acquired jurisdiction of the subject-matter of the controversy here, to wit, the pumpboat. The assignment was made on the 2d day of November, 1908, and upon its being made the assignee took possession of the boat along with the rest of the property assigned. On the same day he brought suit in the Kenton circuit court for the settlement of the estate in his hands for administration.

This libel was brought prior to the assignment and the bringing of said suit, but the attachment under which the boat was taken was not sued out and levied until November 12, 1908, after the assignment and bringing of the suit in the state court. This circumstance, however, is not sufficient to give the state court prior jurisdiction.

In the recent case of Westfeldt v. North Carolina Mining Co. (C. C. A.) 166 Fed. 706, Mr. Chief Justice Fuller, in referring to the rule that in matters of concurrent jurisdiction the court to which the jurisdiction first attaches holds the case to the exclusion of the other until the final determination of the matters in dispute, said:

"That rule is not limited in its application to cases where property has actually been seized under judicial process before the institution of a second suit, but is applicable to actions dealing actually or potentially with specific property, and it does not rest simply on comity but on necessity."

This, however, does not dispose entirely of the question we have here. The libel as originally brought was not against the pumpboat, but against a coal elevator float, and it was not until after the bringing of the suit in the state court that it was made a suit against the pumpboat, which was done by an amended libel filed on November 12, 1908; but it was by mistake that the suit was brought originally against the

coal elevator float and not against the pumpboat. It was to the latter, and not to the former, that the supplies and material forming the basis of the claim were furnished. This mistake is made to appear fully in the amended libel.

The amended libel related back to the original libel, and the libel, by reason of the amendment, must be treated as originally against the pumpboat. There was therefore pending in this court prior to the institution of the suit in the state court a libel dealing potentially, if not actually, with the pumpboat, and by reason of this priority this court, and not the state court, has jurisdiction thereof. See the case of Hernan v. American Bridge Co. (recently decided by Circuit Court of Appeals, Sixth Circuit) 167 Fed. 930.

The motion for an order of sale is sustained.

THE FREDERICK E. IVES.

(District Court, S. D. New York. April 20, 1909.)

TOWAGE (§ 11*)—LOSS OF TOW—LIABILITY.

A tug, losing her tow while seeking an entrance in a fog to New Haven harbor through a sudden change of wind, *held* not liable for the losses, but the petition to limit granted.

[Ed. Note.—For other cases, see Towage, Cent. Dig. §§ 11–23; Dec. Dig. § 11.*]

(Syllabus by the Judge.)

Robinson, Biddle & Benedict, for petitioner.
Wilcox & Green, for various claimants.
Carpenter, Park & Symmers, for Western Assurance Company.
James J. Macklin, for owners of two barges.

ADAMS, District Judge. The owner of the tug Frederick E. Ives seeks herein to limit and contest its liability for the loss of six coal laden barges, bound from points near New York for New Haven and New London, Connecticut, in a hawser tow. The barges were the Fannie Preston and the T. M. Righter in the hawser tier, the Edward F. Cullen and the H. W. Somers in the second tier and the Joseph W. Drayton and the Helen R. Cullen in the last tier. The Righter, the Somers and the Helen R. Cullen were the starboard boats. The tiers were about 15 feet apart. The hawser and bridle were about 100 fathoms long. The tow started from New York on the 12th day of February, 1908, reached the vicinity of Bridgeport the 14th, and anchored. The fog during the time the tow was near Bridgeport was dense and it remained so until after the loss. The master of the tug, having favorable indications of better weather from his barometer while near Bridgeport, however, concluded to go on and left there at high water, about 9:30 p. m., and started for New Haven. Reaching a point where, according to his soundings, he judged was in the vicinity of Sperry Light, on the easterly end of the West Breakwater off New Haven, he anchored, hauling the tow close up under the tug's stern.

There are three breakwaters at the entrance to the New Haven har-

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

bor; the West Breakwater, the Ludington Rock Breakwater and the East Breakwater. The space for entrance between the first two is somewhat less than three-eighths of a mile, while the space between the last two is nearly half a mile and is the one generally used. The first is very seldom used by tows. There is a siren connected with the Sperry lighthouse, but at the time in question it was so arranged that its sound was emitted from near the base of the house and instead of the horn being turned outward it was turned downward. Concededly, it was of little or no benefit at the time (though it has since been improved), and while it worked automatically, it was heard by no one on the tow until too late, and was practically useless.

The petition alleges that on the arrival of the tow in the vicinity of New Haven about 2:30 a. m., no attempt was made to go into New Haven harbor on account of the fog, but the tow anchored in 5½ fathoms in a safe anchorage to the westward of the West Breakwater.

Criticism is made by the claimants upon this method of navigating, inasmuch as if instead of attempting to go thence to the southward and subsequently endeavoring to find an entrance through the opening between the Ludington Breakwater and the West Breakwater, the tow had been taken to the northward from the anchorage, it would have been safe and in a good position to proceed further into the harbor when the fog lifted. Doubtless, as it turned out, this would have been a proper course to pursue but it would have been unusual for a tug in a fog to attempt such a method of entering, especially as she could not be certain of her position. In the existing condition of affairs, it was apparently better to wait for the lifting of the fog, which from appearances when off Bridgeport the master was reasonably entitled to expect, and in the meantime, to anchor. The fog did not lighten, however, and while waiting, the wind increased with some suddenness. Those on the tug say that the wind came out strong from the southward, even stated the velocity to have been as high as forty miles an hour. That was undoubtedly an overestimate. The New Haven weather records show there was little movement of the wind from 12 to 3 a. m.; that it increased to a velocity of ten miles an hour between 3 and 4 o'clock and to 18 miles between 4 and 5 o'clock. This does not corroborate the tug as to the strength but it does as to direction, south and southwest, and as to a sudden increase. Doubtless such a wind in the open water of the sound was enough to excite apprehension and the master properly determined it was time for some action on his part. He evidently could not remain at anchor, while a sea was being created, he therefore properly determined to seek protection. While he could not depend upon obtaining assistance from the foghorn at the east end of the breakwater, there was a possibility of hearing it in time. In the emergency, it would seem proper to seek that entrance to the harbor, as the most available one. He accordingly pulled a little distance to the southward and then shaped his course E. N. E., to clear the lighthouse and reach the entrance to the eastward of the light. The horn was not heard, however, until the tug was found to be almost on the breakwater, when the helm was put hard a port and the tug succeeded in escaping, but the wind and sea carried the boats of the tow quickly on the breakwater, where they filled and sank.

There are two principal disputes in the testimony: (1) Whether the tug did anchor, and (2) What the state of the weather was just before the tow struck.

(1) I think there can be no reasonable doubt that the tug anchored. All of her four witnesses have testified to it, the master, the mate, the deckhand and the engineer, and there was nothing in their appearance to indicate that they were testifying falsely. There was no substantial testimony in opposition. The one witness produced by the claimants to the contrary was the master of the Righter, and even he does not say positively that she did not anchor but merely: "I didn't see no anchor." Little credence can be given to what he said in view of the fact that in a protest sworn to at New Haven on the day of the accident no mention is made of the anchoring. This protest, in a general way, supports the claim of the tug with respect to the facts of the case. In it, this witness said:

"At 2:30 A. M of the 15th inst. we arrived off Sperry Light, New Haven. At that time there was a thick fog, dead calm. At 4:30 A. M. the wind breezed up south, southwest, with heavy sea, and it was made necessary for us to endeavor to get inside of the harbor. While trying to do so, we struck the Breakwater, designated as the West Breakwater. We heard no fog signal until after the barges had struck when they soon sank. Then we were up against the lighthouse where the barges are lying at the present time. I lost everything but what I had on."

It does not seem that the effect of this protest and the fact that that witness was the only one produced from the barges can be explained away by the statement that they (the barge masters) were "rounded up" by the petitioner in New Haven, immediately after the accident, and induced to make false statements under oath.

(2) The strength of the wind has been mentioned above. The tug's vindication depends upon the statements of those on the tug and the weather records. It is contradicted only by the master of the Righter and the lightkeeper and his wife. The two latter said, in substance, that there was no wind until about 7 or 8 o'clock, several hours after the disaster. It was conclusively shown to be otherwise and the credit to be given to these witnesses is affected by their erroneous statements in this and some other particulars.

The pleadings confirm, in some respects, the claim of the petitioner with regard to the weather. The answer of the Columbia Mining Company, the claimant of several of the boats and cargoes, states:

"Between 4 and 5 o'clock in the morning of February 15, a strong breeze from the southwest started up, and the wind and tide carried the tow on the breakwater."

It was argued for the claimants that the answers were prepared from the false protests but the one in evidence does not correspond with the statement quoted above.

It seems clear that it was necessary for the tug to get under way and endeavor to get into a harbor in order to protect her tow and she failed in the attempt for the reasons already stated.

It has been suggested that the tug should have sent a boat out to investigate. The master, however, did not know that he would be forced

to attempt an entrance at such short notice, and, in any event, the prudence of such a step is doubtful.

An argument has been made that the tug should not have ventured within the seven fathom line. What the master was properly trying to do, in the first instance, was to get in the vicinity of the entrance so that he could anchor and get inside as soon as possible. If the argument has reference to a duty on the part of the master to keep going to the southward until he reached that depth, it means that he would have been obliged to go a considerable distance further than he did, in a heavy southwest wind and sea, without achieving anything, because then he would have been no better off than when he did make the attempt.

It seems that the whole loss was attributable to the sudden increase of the wind, the necessity for a prudent navigator to seek harbor and the absence of any proper signal on the Sperry Light to aid the tug in her navigation. There may have been mistakes in judgment upon the part of the navigator but such mistakes do not create liability on the tug's part.

There is no question here about the right of the tug to limit her liability, and the petition is granted. As it has not been shown that there was any negligence on her part, the claims are dismissed.

UNIQUE SHIPPING CO. v. J. M. GUFFEY PETROLEUM CO.

(District Court, S. D. New York. May 7, 1909.)

SHIPPING (§§ 141, 153, 179*)—DELAY—LIABILITY—ACTS OF GOD.

The conclusion that such speed as was due from the respondent's steamer Ligonier was not attained on a voyage, which was a subject of dispute because of the use of one tug instead of two, sustained. The conclusion that the respondent was not entitled to recover for the detention of the steamer near Port Arthur because she did not go to the Sea Buoy to proceed with the towing, there having been a storm which constituted a vis major, sustained. Also *held* that in view of a general provision in the contract, viz., the acts of God, etc., special words of exemption from liability for the effects of a storm were not needed.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. §§ 141, 153, 179.*]

(Syllabus by the Judge.)

Wheeler, Cortis & Haight, for libellant.
Wing, Putnam & Burlingham, for respondent.

ADAMS, District Judge. This action was brought by the Unique Shipping Company, the chartered owner of the schooner W. L. Douglas, to recover the balance of certain freight on an oil cargo in bulk carried by the schooner on two voyages in October and November, 1906, from Port Arthur, Texas, to New York and Philadelphia. On the first, it was claimed that $2,051.04 remained due and on the second, $2,864.56. A further claim was made because the respondent's steamer Ligonier refused to tow the schooner to the mouth

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

of the Schuylkill River in conformity with a contract and dropped her near the Delaware Breakwater, from which point she was towed by tugs of less power than the Ligonier whereby the schooner was delayed 33 hours for which the libellant became entitled to compensation at the rate of $12.50 per hour, amounting to $412.50. A further claim was made for the loss of a steel hawser belonging to the schooner amounting to $500. The total claims made in the libel amounted to $5,828.10.

The answer, after some admissions and denials, alleged as follows:

"Eighth. Further answering, this respondent avers that * * * on said voyage No. 4 and in the beginning of voyage No. 5 the steamer of the respondent was delayed and detained in all for 120 hours by fault of libellant, for which, under the towing agreement (Schedule B of the libel) the Unique Shipping Company became liable to pay at the rate of twenty dollars per hour.

The items that thus became payable to the respondent, with the credit of the libellant, are set forth in detail in Exhibit 1, hereto annexed, which is made a part hereof. By reason of these items, and respondent's payment of $6,000 on account, as set forth in said statement, there became due respondent from libellant on account of said fourth voyage a balance of $1,156.80 which remained due at the commencement of the fifth voyage and for which no payment has been made or credit given by libellant.

Ninth. Further answering, this respondent alleges that pursuant to the terms of the shipping contract and the towing agreement, Schedules A and B of the libel respectively, certain items became due from libellant for shortages, demurrage and lighterage under and pursuant to the terms of said contract and agreement. These items are set forth in detail in Exhibit 2, hereto annexed, which is made a part hereof. By reason of these items, including the balance of $1,156.80 due as above alleged in article eighth thereof, there remained due and owing to libellant at the end of said fifth voyage the sum of $5,160.54 which was paid by respondent to libellant, December 5th, 1906, and on March 27th, 1907, as set forth in said Exhibit 2, and upon said payments no sum whatever remained due and owing from respondent to libellant."

Annexed to the answer were the following statements of account, alluded to therein:

"Exhibit 1.

J. M. Guffey Petroleum Company, in account with Unique Shipping Company.

Schr. 'Wm. L. Douglas,' Voyage No. 4.

Freight on 39,091.38 bbls. at 35¢		$13,681.98	
½ bill of Meyer & Co. for inspection		22.50	
			$13,704.48
Towing		5,000.00	
Shortage	873.03 bbls.		
Less 5% of 39,964.41 bbls. Gross Intake	199.82 "		
	673.21 " at $1.20	807.84	
Demurrage, [1] 120 hrs. at $20.00		2,400.00	
Lighterage 13,053.72 bbls. at 5%		652.69	
Cartage paid Sept. 22, 1906, per bill rendered		.75	
			8,861.28
			4,843.20
Paid on account			6,000.00
Balance due J. M. G. P. Co.			$ 1,156.80

[1] 49 hrs. of the 120 hrs. Demurrage were at the beginning of Voyage No. 5.

Exhibit 2.

J. M. Guffey Petroleum Company, in account with Unique Shipping Company.

Schooner 'Wm. L. Douglas,' Voyage No. 5.

Dr.		
Freight on 39,344.30 bbls. oil at 35¢	$13,770.50	
½ bill of Meyer & Co. for inspection	22.50	
		$13,793.00
Credits.		
Towing	$ 5,000.00	
Shortage .....204.21 bbls.		
Less 5% of gross intake (39,546.51 bbls.) .....197.74 "		
6.47 " at $1.20	7.76	
Demurrage .....109 hours		
Less free time..... 24 "		
85 " at $20.00.....	1,700.00	
Lighterage 13,828 bbls. at 5¢	691.40	
Amount paid Red Star Tugs for towage of Schooner from Anchorage to Gibson's Point, per their bill Dec. 5th	60.00	
Bills rendered by Gulf Refining Co.:		
1 Telephone call Bayonne to Philadelphia	.75	
Oil furnished at Port Arthur	15.75	
Balance due J. M. Guffey Petroleum Co. on a/c Voyage No. 4, per statement dated 3/27/07	1,156.80	
Amount paid on account Dec. 6th	5,000.00	
" " " " Mar. 27th	160.54	
	$13,793.00	$13,793.00"

By consent of the parties, the matter was referred to a commissioner, who subsequently reported, in part, as follows:

"On the first claim of the libellant, viz.: freight for the voyage of the Schooner 'W. L. Douglas,' October 12–November 1, 1906, less shortage, there is due to libellant	$1,243.20
With interest from November 1, 1906, to January 16, 1909	156.98
On the second claim of the libellant, viz.: freight on voyage of the Schooner 'W. L. Douglas,' November 13–December 4, 1906, there is due to libellant	2,856.80
With interest from December 4 (?), 1906, to January 16, 1909	362.75
On the third and fourth claims of the libellant, viz.: 14¾ hours detention on voyage 4. 18¼ " " " " 5. of the schooner 'W. L. Douglas,' there is due to libellant	56.25
With interest from December 2, 1906, to January 16, 1909	7.14
On the fourth claim of the libellant, viz.: loss of hawser, there is due to libellant, nothing.	
	$4,683.12
On the first set-off of the respondent, viz.: detention of the S. S. 'Ligonier' at Sabine Pass, October 13–16, 1906, 71 hours, there is due the respondent nothing.	
On the second set-off of the respondent, viz.: detention of the S. S. 'Ligonier' at Philadelphia, October 30–November 1, 1906, 49 hours, there is due to respondent nothing.	
On the third set-off of the respondent, viz.: detention of the S. S. 'Ligonier' at Sabine Pass, November 16–21, 1906, 109 hours, there is due to respondent nothing.	
There is therefore, due the libellant the sum of	$4,683.12"

The respondent filed numerous exceptions to the report, which it summarizes as follows:

"1st. The finding and allowance of $56.25 for undue delay in towing the Douglas on December 1st and 2d, 1906.

2d. The ruling that the towing steamers' demurrage under this contract would not begin until the Ligonier actually came out to the sea-buoy, some four miles of the entrance to Port Arthur.

3d. The ruling that the term 'fault' in the contract provision for detaining the steamship required actual evidence of wrong and neglect instead of interpreting same according to the received principles in demurrage contracts."

These exceptions will now be considered.

1. The commissioner disallowed a claim made for tardy towing where two tugs were employed instead of the Ligonier, but held where only one was doing the towing as follows: He said:

"Fourth.

On the next voyage only one tug, instead of two, was substituted for the Ligonier. She dropped the Douglas at 10 A. M. on December 1, and she reached League Island at 5:35 P. M. on the same day. The Douglas did not reach League Island till 3:15 P. M. on December 2 (Minford, p. 190–1), twenty-one hours and forty minutes after.

If the Ligonier had towed the Douglas up at 7 knots an hour, she could not have reached the Quarantine Station at Marcus Hook (70 miles from the Breakwater till 8:00 P. M., and as the hours of the health officer are from sunrise to sunset (Hanna, p. 207), she would have had to lie at anchor till after sunrise on December 2, and could not have reached League Island before 9:00 A. M. on December 2, and as it was, the Douglas reached League Island about 3:15 P. M., or six and a half hours later.

The two tugs took the Douglas in tow at 9 P. M. on October 26th, and arrived at the Schuylkill at noon on the 27th, taking fifteen hours in towing 84 miles, which is almost six miles an hour.

On the next voyage the Smith started with the Douglas at 9:45 or 10:00 A. M. December 1, and arrived at the Schuylkill at 3:15 P. M. on the 2d (Minford, 190–1), about thirty hours later, but she lay at anchor ten hours. Eighty-four miles in 20 hours towing is four miles an hour.

If the Douglas had been towed at six miles an hour from 10:00 A. M. till sunset at 4:36 (6½ hours), she would have made thirty-nine miles only, and she would not have reached Quarantine till 9:00 P. M., and would have had to lie there for the night. Starting at 8:00 A. M., with 66 miles to go, she would have got to League Island at 10:45. She got there at 3:15 P. M., four and one-half hours later, assisted part of the time by the tug John E. Mehrer. This delay of four and one-half hours was due to the slower speed of the Smith and the Mehrer, while towing her, than the speed made by the two tugs on the previous voyage. There is no reason why two tugs of power equal to the power of the two tugs used on the former voyage should not have been employed on this voyage also. And this delay of the Douglas for four and one-half hours must be held to have been undue delay, giving to the libellant a right to recover damages at the demurrage rate of $12.50 an hour stated in the charter, which is $56.25."

It will be seen that what the commissioner held was that if one or two tugs were used instead of the Ligonier, it, or they, should be of sufficient power to give a speed equal to that attained with tugs on the previous voyage furnished by the respondent. Such speed was not attained on this occasion and there was in that respect undue delay. The allowance seems to be very conservative especially in view of the fact that the terms of the contract that the Ligonier should tow the schooner were violated.

It does not appear that the commissioner has made any error in this respect and the exception is overruled.

2. The next question under the exceptions is whether the commissioner was wrong in disallowing the respondent's claim of $1,420, for 71 hours' detention of the Ligonier at or near Port Arthur, Texas, October 13–16, 1906.

The towing contract provides:

"If at the beginning of any single trip the Douglas is delayed in port through any fault of the Unique Shipping Company, so as not to be ready for sea within twenty-four hours of the readiness of the steamer to tow her, the Unique Shipping Company shall pay demurrage after the said twenty-four hours at the rate of twenty dollars per hour, but the Guffey Company is not required to wait more than forty-eight hours in all, and the Unique Shipping Company may within twenty-four hours after the steamer's readiness give notice that it will not require the barge towed on that trip, in which event it will not be required to pay for that trip if not made."

The commissioner states in this connection:

"Sixth.

Coming now to the consideration of the claim of $1,420 for seventy-one hours' demurrage of the Ligonier at Port Arthur on the October voyage, it is to be noted that there are two contracts.

In the first the voyage is described as 'from Sabine Pass, or Port Arthur, Texas, at shipper's option, to alongside docks at oil stations of Gulf Refining Co. at Bayonne, N. J., or Gibson's Point, Philadelphia.'

In the second the voyage is described as 'from a safe anchorage in New York Harbor to a safe anchorage at Sabine, Texas, and back again.'

The towage service of the Ligonier under the second contract was not to end at any dock or begin at any dock. It was to end at a safe anchorage and begin at a safe anchorage.

The rest of the voyage of the Douglas from that safe anchorage at Sabine Pass through the canal to a dock at Port Arthur was not included in the towage of the Douglas by the Ligonier at all.

Now, the towage agreement, Schedule B, requires the libellant to pay demurrage, if 'at the beginning of any single trip the Douglas is delayed in port through any fault of the Unique Shipping Company so as not to be ready for sea within twenty-four hours of the readiness of the steamer to tow her.' It does not say 'readiness of the steamer to go to sea,' but, 'readiness of the steamer to tow her' (the Douglas).

What is meant by 'the readiness of the steamer to tow her'?

The contract provided that the steamer was to tow the barge 'from a safe anchorage in New York Harbor to a safe anchorage at Sabine, Texas, and back again.'

On the previous voyage the towing back had begun at the Sea Buoy. The Douglas could not complete her loading except at the Sea Buoy, and there, of course, she had been taken in tow on the previous voyage. This action of the parties on the pervious voyage determines the rightful construction of the agreement in dealing with this voyage.

The contract, therefore, required the Ligonier on the fourth and fifth voyages to take the Douglas in tow at the Sea Buoy, and tow her from the Sea Buoy. And she could not be considered to be 'in readiness to tow' the Douglas until she was herself at the place where she was to take the Douglas in tow.

On the fourth voyage the Ligonier anchored off the Sea Buoy on October 15th at noon (Forsbad, Dep. p. 5). Her right to demurrage, then, did not begin until October 16th at noon (twenty-four hours later). The Douglas was ready on October 16th at 1:30, and the Ligonier sailed with the Douglas in tow on October 16th, at 2 P. M. (Jenkins, p. 6). The Ligonier would be entitled, then, to demurrage for one and a half hours, if the delay of the Douglas to be ready for sea until 1:30 P. M. was 'through fault of the Unique Shipping Company.'

The evidence shows that on the 15th a lighter was alongside of the Douglas, from which oil was being pumped into the Douglas; that at 3:40 P. M. that pumping was stopped, 'owing to heavy swell' (log), which made it unsafe for the lighter to lie alongside; that the pumping was begun again at 8 A. M. on the 16th, and the loading was completed at 11:30 A. M.—i. e., in three hours and a half of pumping. She would therefore have been 'ready for sea' at 7:10 P. M. on the 15th, if the pumping had not been stopped by the heavy swell.

That heavy swell was not the fault of the Unique Shipping Company.

Therefore the owners of the Ligonier have no claim for demurrage for the fourth voyage under the agreement.

It is not necessary to consider the happenings before the Ligonier arrived at the Sea Buoy at noon on October 15th. Of all those the Ligonier took the risk. If she had intended to claim demurrage before noon of October 16th, she should have got to the Sea Buoy before October 15th at noon.

It is to be noticed, as bearing upon the question as to when and where the right to claim damages for detention began, that the same condition of things existed at Port Arthur and at Philadelphia. At Philadelphia that right is claimed by the respondent to have begun not twenty-four hours after the Ligonier left the dock at Gibson's Point, but twenty-fours after her arrival at League Island, where the towing was to begin (respondent's brief, p. 32.)"

The question is a narrow one, i. e., whether the Ligonier could require the payment of demurrage without going to the Sea Buoy. The gist of the respondent's argument is contained in the following statement in its brief, viz.:

"When the Ligonier had loaded and come down the channel ready for sea she was 'ready to tow' and it seems a refinement inapplicable to the admiralty to say that she must steam out seawards four miles to prove her 'readiness to tow' when there was no tow there ready to be taken in tow!"

This is based upon a claim that the Douglas preceded the Ligonier in the canal leading from the place of loading at the Guffey wharf at Port Arthur and stopped near the entrance; that she remained within the canal all night thus blocking the exit for the Ligonier, which also remained there all night. The Douglas had already taken aboard as much cargo as she could within the canal and her loading was to be finished outside by a lighter, known as Clarke's Lighter No. 3. The pilot of the Douglas, who had gone home, returned in the morning and took her down to Sabine Pass, about 3 miles, where she anchored at about 10 or 11 o'clock. Meanwhile, as soon as the canal was clear the Ligonier resumed her voyage and came out of the canal about 11 A. M. and also came to anchor at Sabine Pass, about 2 miles below the mouth of the canal.

The facts seem to be that a grounding of the Douglas while going through the canal delayed her only about 15 minutes. She spent the night in the canal owing to darkness which made it unsafe for her to proceed. The loading of the Douglas began at the dock at Port Arthur on October 11th at 10 P. M., and was completed, as far as it could be there, the 12th at 3:45 P. M., when she proceeded down the canal on her way to sea, expecting to finish her loading outside as was usual and necessary. She reached the southern end of the canal about 7:30 p. m. During the night a storm was prevailing and the next morning the Douglas anchored to await the subsiding of the storm so that she would be able to take further cargo from a lighter alongside. The Ligonier on the 13th came out of the canal, assisted

by a tug, and also proceeded to Newton, two miles below the canal, and anchored there on account of the weather, the master said: "I would hardly have gone to sea; we expected a hurricane, according to indications." In the meantime the respondent had loaded the lighter to complete the cargo of the Douglas. The loading on the lighter was begun October 12th about 9 P. M. and completed the 13th at 3:40 A. M. In the usual course of events, the Douglas and the lighter would have crossed the bar the 13th and completed the former's loading on that day and the vessels have gone to sea without delay. This was prevented, however, by the prevalence of the storm, which made it impossible to complete the loading of the Douglas from the lighter outside the bar. The next morning, the 16th, however, the weather was better, and the loading was resumed and finished by 1:30 P. M.

The original contract provided:

"12. The acts of God, fire, all dangers and accidents of the seas and navigations, and any act or neglect of pilot, master or crew during the term of this contract are always mutually excepted."

The succeeding contract provided:

"There is nothing herein contained that abrogates in any way the provisions of the contract of May 16, 1906, between the same parties. * * *"

The respondent also seeks to obtain the benefit of an alleged detention of the Ligonier on the Douglas's voyage No. 5, contained in the respondent's statement of account in connection with that voyage, viz.:

Demurrage 109 hours
Less free
time..... 24 " 85 hours at $20.....$1,700

The commissioner said in this connection:

"On the November voyage the Ligonier anchored at the Sea Buoy on November 17th at 10:15 A. M. Her right to demurrage, therefore, would not begin till the 18th at 10:15.

The lighter reached the Douglas at the Sea Buoy and began pumping at 9:00 P. M. on November 16th (McLean, p. 49), and pumped for three hours, till 12 midnight, when the pipe line was broken by the sea. On the 17th it was not safe to pump on account of the sea, and at 3:30 P. M. the lighter left and went in to Sabine Pass. On the 18th and 19th the weather was so bad that no pumping could be done. The lighter was brought out to the Douglas at 9:00 A. M. on the 18th, but was taken back again on the 19th at 7:00 A. M., and again came to the Douglas at 1:45 P. M. on the 20th. But the sea was so heavy on the 18th and 19th that no pumping could be done.

On the 20th the weather and the sea had moderated, and at 2:30 the pumping was begun and finished at 6:30; Frostadt says 6:45 (p. 9).

At midnight, between the 16th and 17th, then, there were needed but four hours more of pumping to complete the pumping, so that, but for the sea which broke the pipes and prevented the pumping, the Douglas would have been loaded at 4:00 A. M. on the 17th, while the Ligonier did not arrive at the Sea Buoy till 10:00 A. M., of the 17th.

It follows that on this voyage, also, it was the heavy sea, which broke the pipes and prevented the pumping, which delayed the Douglas from being ready within twenty-four hours of the readiness of the Ligonier to tow, which readiness was at 12:15 on the 17th, and that heavy sea was not the fault of the Unique Shipping Company.

It follows that the claim of the respondent for demurrage of the Ligonier at Sabine on the fifth voyage cannot be sustained."

It does not seem necessary to add to what the commissioner has said.

In both instances of the detention of the Ligonier, the testimony indicates clear cases of vis major—Crossman v. Burrill, 179 U. S. 100, 113, 21 Sup. Ct. 38, 45 L. Ed. 106—and within the spirit of the provisions of the contract.

The exception is also overruled.

3. The respondent's brief contains the following:

"The commissioner's interpretation of the word 'fault' in the contract. This raises an important question of interpretation of what had previously been considered as abundantly settled. Did the weather that rendered oil pumping outside the bar difficult excuse the libellant from paying the stipulated $20.00 per hour?"

The argument in support of the claim of the respondent on this question is, briefly, that to obtain the advantage of such delays as were caused by the inability of the Douglas to take the cargo aboard from the lighter, some special words should have been inserted in the contract, like "Weather permitting" or "Unique Company not to be liable for detention due to heavy weather preventing operation of the lighters beyond the bar" or some similar qualification.

It does not seem, however, that any special words were needed in view of the general provision quoted above. The extraordinary weather which prevailed seems quite sufficient to excuse the libellant from having performed the provisions of the contract, otherwise incumbent upon it. It was not necessary for the libellant to continue loading when the vessels or their pipe connections were subject to peril from the weather conditions.

The commissioner finally reports:

"The result of the whole matter is that the libellant is entitled to recover $1,243.20, with interest from November 1, 1906; also $2,856.80, with interest from December 4, 1906, and $56.25, with interest from December 2, 1906."

No error appears in the report and it is confirmed.

THE HURSTDALE.

(District Court, S. D. New York. April 26, 1909.)

SHIPPING (§ 51*)—CHARTER—DEFICIENCY IN SPEED—LIABILITIES OF OWNER.

The owner stated in the contract that the vessel would steam 8½ knots per hour on about 17 tons of best Welsh coal per 24 hours, but that the particulars "are not guaranteed." The quality of coal mentioned was not furnished by the charterers. *Held* that the owner was bound by its agents' representations but that in order to entitle the libellants to recover it was incumbent upon them to show that the owner's representations were designedly false and that the libellants relied thereon. Also *held* that the owner had some justification for believing that the statement with reference to speed was true and that the clause containing the words quoted was at least a notice to the libellants not to rely upon it.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 51.*]

(Syllabus by the Judge.)

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

In Admiralty.

Henry W. Rudd and Harrington W. Putnam, for libellants.

Convers & Kirlin, John M. Woolsey, and Charles T. Cowenhoven, Jr., for claimant and respondent.

ADAMS, District Judge. This action was brought by Wessell, Duval & Company against the steamship Hurstdale, and her owner, to recover damages, alleged to amount to $6,000, suffered by reason of the steamer being deficient in speed. She was chartered at a monthly hire by the libellants from the owner by contract dated April 30, 1906, for a round voyage from the United States to ports on the West Coast of South America and return. The contract contained the clause:

"Owners represent that the steamer under ordinary conditions, and laden, will steam on an average about 8½ knots per hour on about 17 tons of best Welsh coal per 24 hours and that her deadweight capacity for cargo and bunkers is about 5,200 to 5,250 tons. These particulars are not guaranteed."

The libel alleged:

"Third: Prior to the execution of said charter-party and also in and by the said charter-party and as an inducement to the libellants to execute said charter-party, the owners of said steamship represented and stated to the libellants that the Hurstdale was a vessel that, under ordinary conditions and when laden, would steam on an average about 8½ knots per hour on about 17 tons of best Welsh coal per 24 hours.

The said representation was a material representation and was made for the purpose of inducing the libellants to execute said charter-party; the libellants had no knowledge of the speed of said vessel except as contained in the said representation in said charter-party and in cable messages from the owners of said vessel to the aforesaid agents, which cable messages were exhibited to the libellants prior to the execution by them of said charter-party, and in reliance upon said representation, the libellants duly executed said charter-party.

The aforesaid representation so made by the owners of the said steamship Hurstdale, was false and untrue and was known by the said owners to be false and untrue when so made. Said steamship Hurstdale was not then a vessel. that, under ordinary conditions and when laden, would steam on an average about 8½ knots per hour on about 17 tons of best Welsh coal per 24 hours.

Fourth: In reliance upon the aforesaid representation, however, the libellants executed the aforesaid charter-party as aforesaid, and on or about the 20th day of May, 1906, said steamship entered upon such charter-party and proceeded on her voyage to the West Coast of South America and return.

Fifth: Said steamer arrived at the Port of Baltimore, U. S. A., on or about the 22d day of December, 1906, on her return from her voyage to the West Coast of South America under said charter-party and the libellants then learned for the first time of the misrepresentation aforesaid.

Sixth: On said round voyage, under the aforesaid charter-party, to the West Coast of South America and return, the Hurstdale steamed on an average only 6½ knots per hour for the entire voyage and, in consequence thereof, was greatly delayed both on her outward and homeward voyage to the libellants' great loss and damage."

The claimant and respondent answered with some admissions and denials and as follows:

"Ninth: Further answering and by way of defence, they allege that the steamship Hurstdale was supplied by the libellants with the coal that was used while the vessel was engaged under the charter above referred to. This coal was of an inferior quality and was not best Welsh coal. Owing to the nature of the business on which the vessel was engaged, on the libellants' behalf under the above mentioned charter and to the manner in which the busi-

ness arrangements of the libellants required that it should be carried on, the vessel's bottom became foul and she did not encounter the ordinary conditions referred to in the charter in connection with which her speed might be ascertained. The owners and officers of the vessel did all that was reasonable and possible to have the voyage of the vessel prosecuted with the utmost despatch and they have duly performed all the obligations resting on them under the above mentioned charter party."

It appears that the steamer was duly delivered to the charterers on the 19th day of May at 7:30 a. m. and was employed under the contract for over 7 months. The question to be determined is whether the libellants are entitled to recover damages for delay in completing the round trip.

The respondent contends that there were no representations made by the owner to the charterers with respect to speed but what was said by the agents of the owner were merely expressions of opinion between them as agents and do not form any basis for the action. The contract was signed "By cable authority from J. Kilgour & Co., Barber & Co., Inc., F. B. Mackay, Agents for Owners." The libellants went into the possession of the vessel under this contract, which was the result of cables between the parties. These cables were shown by Barber & Co. to the libellants before the charter party was entered into and the authority of Kilgour & Co. to negotiate and close the contract has never been questioned. The owner had regularly received and retained the monthly hire. I think therefore that any question of authority on the part of the agents to make the representations may be disregarded and the consideration of the dispute turn upon other matters.

The contract as executed was prepared on one of the regular printed forms used by the libellants in their business of dealing on the West Coast. The form contained the printed clause quoted above excepting the concluding sentence, "These particulars are not guaranteed," which was typewritten.

The steamer's average speed was about 7 knots. The libellants claim that her actual steaming time was 123 days 3 hours, while if she had averaged 8½ knots it would have been only 93 days 4½ hours, therefore it must be concluded that she was in a similar condition when delivered. The libellants were injured by a deficiency in the expected speed of the vessel and the question to be determined is whether the representations of the owner were designedly false and the libellants thereby induced to make a contract which damaged them in such a manner that they were entitled to seek legal redress.

The owner claims that there were in fact no false representations and the steamer in all respects complied with the warranties in the contract. There can be no doubt that the steamer was seaworthy and fulfilled the warranties, unless there was what was equivalent to one in the statement that she would make a speed of 8½ knots. It was not in fact a warranty in view of the wording that the particulars given in the part of the charter covering the speed of the vessel were not guaranteed. It is well understood that in the absence of fraud a statement as to the speed of a vessel, as well as with respect to the quality of an article sold, must be deemed a mere expression of opinion and not a contract of warranty.

The libellants contend that notwithstanding the express disclaimer of any speed guaranty, nevertheless there were false representations made by the respondent. The latter contends that even if the statement, quoted above, and similar ones in the cables preceding the charter, can be considered as representations, the libellants have failed to show by a preponderance of the evidence that they were in fact false. It urges that the apparent loss of speed can be accounted for in several ways:

(a) By an increase in the draft of the vessel, owing to an increased immersion through a new freeboard being granted by Lloyds and permission to load the vessel 6 inches deeper.

It appears that negotiations for the charter took place in the latter part of April, while the new freeboard was granted and permission for deeper loading obtained about May 20th. Therefore the original representations were made before permission was obtained for the deeper loading.

It is true that the figures given show a contemplation that there would be a change in the load line, that is a statement that the dead weight for cargo and bunker was about 5,250 tons, but the owner apparently refused to guarantee this capacity doubtless on account of the uncertainty of the increase. It said in cable of April 25th: "She will carry about 5,200–5,250 but owners will not guarantee capacity." No one knew until after the draft was changed how the vessel would be affected by it. As it resulted, the speed was changed considerably by reason of the change, said to be a knot and a half to two knots an hour, and head seas were encountered continually on the outward voyage, which affected the speed of a blunt vessel.

When the charterers were negotiating for the vessel, they knew of the proposed change and subsequently, in loading, took advantage of it. The master testified that one of the charterer's agents told him before the marks were changed they would not have paid so much for the vessel but upon the understanding that she was to carry more cargo, "have 180 tons more of boat."

(b) The failure of the charterers to supply the steamer with Welsh coal affected her speed.

The cables preceding the contract do not specify the kind of coal but they refer to a consumption of "about 17 tons per 24 hours" which must have meant the "best Welsh coal" contained in the libellants' form of charter.

The first coal supplied by the charterers was received in New York. It was an American—Eureka—coal.

The next was Pocahontas coal received at Norfolk.

In using Pocahontas coal, the best American coal, it is necessary to clean fires twice during a watch, while with Welsh coal one cleaning during that period is sufficient.

When fires are cleaned they are out of commission during the period and after cleaning it takes a certain amount of time to bring them up again to their full capacity. It results in the loss of steam pressure and speed.

Seventeen tons of the best Welsh coal are considered the equivalent of 19 tons of Eureka coal and of 18 tons of Pocahontas coal.

The next coal furnished to the steamer was Coronel, a native Chilian coal. It is very quick burning and requires considerable work with the boilers. It was said that 20 tons of Welsh coal are equivalent to 26 of this, in using which it was necessary to clean the fires 3 times a watch. Its use involved more labor, as larger quantities are required and it leaves more clinkers than the Welsh. This coal was taken on again later and the same trouble encountered with it.

It is not possible to get as good results with inferior coal. It is very exhausting to the firemen in hot climates and difficult for them to do the necessary amount of work to obtain good speed.

(c) The fouling of the bottom of the steamer in the South America trade affected her speed.

She was dry docked and cleaned and painted just before she entered upon this charter. When she returned from the voyage her bottom was very foul, coated with small shell, mussel and marine growths. They were unusual in size, the mussel averaging from 2¾ to 5½ inches in length and grass from ½ to 4 inches in length. It was estimated that these growths caused delay from 1 to 2 knots an hour. There was ample opportunity for the growths to accumulate as the vessel was delayed 14 days at Valparaiso and at Autofogasto nearly a month on account of the congestion of shipping there.

(d) The speed was somewhat affected by weather conditions.

The steamer encountered head seas constantly on the voyage out and while she had good weather on the return voyage, still there was delay on account of the weather. On the 29th of June off the river Plate she was hove to under slow speed for 22 hours. Excepting this instance the weather was good. The master said, however, that he met with "high head seas."

There is no question that the steamer so far as hull and machinery were concerned was in an efficient condition and on this voyage at times she made the stipulated speed. For example, on June 1st, under favorable conditions, she made the rate of 9 knots for 10 consecutive hours and on June 2nd, under the same conditions, she made an average of 8½ knots. And on August 25th and 26th, a speed of from 8¾ to 9 knots an hour was maintained. These records were made with coal inferior to Welsh and with the increased draft due to her marks having been changed.

On other occasions the steamer had made such speed as would, to some extent, justify the owner in believing that she could, under ordinary conditions, maintain an average speed of 8½ knots an hour. Prior to this charter on a voyage from Cardiff to Rio Janeiro, using 17 tons of the best Welsh coal for 24 hours, she ran about 200 miles per day, an average of 8.44 knots per hour. On another occasion, using North Country, or Newcastle, coal, on a voyage from Leith to Rio Janeiro, she averaged 8.7 knots. On a voyage from Calcutta to Colombo, with Welsh coal chiefly, she made a speed of between 200 and 210 knots per day. These voyages were made in 1904 and 1905. These instances were doubtless in favoring weather without any conditions adverse to speed, and probably were the only times she reached the speed mentioned in the contract but still they afforded the own-

er ground for a reasonable belief that she might fulfill such requirement during this contract. In any event, such past performances being known, it can scarcely be said that there was any such wilful misrepresentation of the steamer's speed capacity as would constitute fraud, or give a right to recover damages for fraudulent representations.

When the contract was executed it contained the clause that the particulars mentioned therein were not guaranteed. I think this may fairly be regarded as a notice to the libellants that they should not rely upon the speed mentioned but must look to other sources for exact information, if they required it.

The libel is dismissed.

KORZIB v. NETHERLANDS-AMERICAN STEAM NAVIGATION CO.

(District Court, S. D. New York. May 8, 1909.)

SHIPPING (§ 166*)—INJURY TO PASSENGER.

The libellant, a female passenger about 16 years of age, went to the ship's pantry to obtain some hot water and in delivering a teapot to a stewardess it was so handled by the latter that the spout of the pot struck and destroyed the girl's eye. *Held* that the accident was caused by the stewardess carelessly or willfully striking the pot and the respondent was liable.

(Ed. Note.—For other cases, see Shipping, Dec. Dig. § 166.*]

(Syllabus by the Judge.)

A. Leonard Brougham, for libellant.

Wing, Putnam & Burlingham, for respondent.

ADAMS, District Judge. This action was brought by Eufrazia Korzib, an infant, by her guardian ad litem, to recover damages, alleged to amount to $30,000, for the loss of her right eye and becoming permanently blind and disfigured through the spout of a teapot striking it when she went to a room on the respondent's steamship Nieuw Amsterdam on or about the 20th day of June, 1907. The injured infant was a Polish girl about 16 years of age, and proceeding from Rotterdam to New York. The claim is more fully set forth in the libel, as follows:

"Third. That on or about the 15th day of June, 1907, the libellant was accepted by the said Company as a passenger for hire on board of its said steamship 'Nieuw Amsterdam' for passage from Rotterdam, Holland, to the Port of New York.

Fourth. That said Company thereby undertook and agreed to carry the libellant safely and without injury from said Rotterdam to the Port of New York on its said steamship, and undertook and agreed with the libellant, who was then an infant of the age of sixteen years, that its agents, servants and employees upon the said steamship would treat her with kindness and consideration and would not do violence to her person or cause her to sustain personal injury or come to harm through their careless, negligent or improper conduct while she was in their charge as a passenger upon said steamship.

Fifth. That on or about the 20th day of June, 1907, while said steamship was upon the high seas on about the sixth day of its trip from said Rotterdam

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

to the Port of New York, the libellant proceeded to a place on said steamship where said Company had provided and equipped a room or compartment for the purpose of furnishing hot water to passengers on said ship, upon their application therefor, for their use in making tea and for other purposes connected with their welfare and comfort, which room or compartment was then and there in charge of one of the female employees of said Company on said ship, who, at the time libellant arrived there, was drawing hot water for one of the other passengers upon said ship; that immediately after said employee had given the receptacle containing the hot water to this other passenger, the libellant presented herself at the window-like opening to said room or compartment and tendered a teapot to said employee to be likewise filled with hot water, extending the same in her right hand across the counter at said window and into the said room where said employee was; and that thereupon, and without any warning being given to the libellant, the said employee suddenly struck said teapot violently upon the bottom thereof and knocked it upward and back toward the libellant in such fashion that the metal spout thereof was caused to strike and become imbedded in the libellant's right eye-ball.

Sixth. That by reason of said wrongful and improper act of said Company's employee, and without any negligence on the part of the libellant contributing thereto, the libellant was caused to lose the sight of her right eye and to become permanently blind therein, her face was permanently disfigured and rendered hideous, her optic nerves and parts of her brain having to do with sight were so injured and deranged that the sight in her left eye was impaired and affected to such an extent that she may become blind in her left eye also, she was caused excruciating pain and suffering in her eyes and head, her nervous system was shocked and deranged, her chances of matrimony were destroyed and her future chances of earning her own living were and are seriously impaired by her disfigurement and blindness occasioned as aforesaid."

The answer of the respondent, after admitting the libellant's allegations that it was a foreign corporation, engaged in business as a common carrier of passengers, owning the said steamer at the time, and the allegations of the third paragraph of the libel, quoted above, proceeds as follows:

"Second: For answer to the fourth article of said libel, the respondent begs leave to refer to the passenger ticket or contract of carriage issued by the respondent for the passage of the libellant from Rotterdam to New York.

Third: The respondent admits that on or about June 20th, 1907, the libellant sustained certain injuries while on board the S. S. Nieuw Amsterdam. Further answering, it denies the correctness, accuracy or truth of each and every other allegation of the fifth article of said libel, and alleges that the truth as to said accident is as follows:

The Nieuw Amsterdam is a steel steamship of the finest modern type, of 17,250 tons net register, built in Belfast, Ireland, in 1906, and was at the time of the accident in all respects seaworthy and well fitted, equipped and supplied. For the convenience of the women and children passengers in the after compartments of the steerage between decks, the pantry in steerage compartment No. 7 was fitted with apparatus for furnishing hot water and milk, and a steerage stewardess was stationed in said pantry, whose duty it was to furnish milk and hot water to such passengers on request. No. 7 pantry is a room about 7 feet long athwartships by about 6 feet wide with a rectangular window opening into the steerage about 3 feet above the floor and about 4½ feet long by about 4 feet high. Inside this window there is a shelf of the same length as the window. In the steerage itself there were a table and two benches running athwartships and the space between the pantry window and the nearest bench was about 3½ feet.

On the afternoon of June 20th, 1908, a large number of passengers, including the libellant, were pressing towards the window and handing their jugs, kettles and other receptacles through the window to the stewardess to be filled with hot water. As the respondent is informed, the libellant stood

upon the nearest bench with a kettle in her hands and attempted to reach and lean over and past the other passengers in front of her, so that she might be served more promptly, and while she was thus trying to get ahead of the others, and negligently exposing herself to injury, the spout of her kettle was caused to come in contact with her eye, either through the jostling of the passengers or the act of some one or more persons among them or the motion of the ship or the libellant's losing her balance, or from all such causes.

Fourth: The respondent denies each and every allegation of the sixth and seventh articles of said libel.

Fifth: The respondent denies any knowledge or information sufficient to form a belief as to the allegations of article eighth of said libel.

* * * * * * * * * * * * *

Seventh: The accident was not caused or contributed to by any negligence on the part of the respondent or its agents or servants. The Nieuw Amsterdam was in all respects well found, equipped and manned. The method of serving hot water to the passengers above described was the usual and customary method and was entirely safe and proper.

The injuries sustained by the libellant were due to the negligence of the libellant herself in standing up on a bench and attempting to reach and lean over past the other crowding and jostling passengers ahead of her while the ship was in motion, and were due also to the jostling of the passengers past whom she was trying to reach or the intentional act of some one or more persons amongst them, or to the motion of the sea and the libellant losing her balance, or were the result of a pure accident which could not have been foreseen or guarded against by human prudence.

As soon as the accident occurred, the ship's surgeon attended to the libellant and did everything that could be done in the treatment of the wound and the relieving the libellant's sufferings, and during the remainder of the voyage the libellant received every attention and consideration that could be given her."

It has been stipulated as follows:

"It is agreed between counsel that the pantry on the ship is seven feet long running athwartships, by about six feet deep, with a rectangular window opening into the steerage compartment which is about three feet above the floor and is about four and one-half feet long by about four feet high. That inside this window there is a shelf the same length as the window, about ten inches wide. That in the steerage compartment itself there was a table with a bench on either side of it running athwartships and that the space between the pantry window and the nearest bench was about four feet."

A statement of the ship's physician, on the part of the respondent, was, by consent, received in evidence, as follows:

"Surgeon of S. S. Rotterdam. Graduate of New York University Medical School 1892. Hospital Service in New York Lying-in Hospital, Gouverneur Hospital and Infant Asylum.

In service Holland-America Line ten years. Joined S. S. Rotterdam May 19th, 1907. Mrs. Van Rhyn, steerage stewardess, brought the girl Eufrasia Korbiz to my office in the evening and said her eye had been injured by the spout of a tea kettle. The wound was one running in and up over a quarter of an inch. I gave it an antiseptic boric dressing. There was nothing else to do. Instead of being convex the eye was then concave and in my opinion the only thing to do with it was to take it out thus preventing the danger of a sympathetic inflammation in the other eye. The girl was Polish and did not speak English. She was about five feet high.

Mrs. Van Rhyn did not bring her to me on any other occasion. She was brought by another stewardess."

The libellant testified, through an interpreter, that she was 16½ years old; that in June, 1907, she boarded the steamship at Rotterdam on the day of sailing, which was Friday; that on the follow-

ing Thursday in the evening, after supper, she met with the accident; that she had been sitting on her bed and her friend, Mary Przytula, came and sat with her, then took a teapot, which she borrowed from one of the other passengers, and left her and came back shortly without any hot water; that after a few minutes she went again, and again returned without any hot water; that then, after a few minutes, both went for hot water to the place, described above, where hot water was given out; that she found a woman there, the stewardess, and handed the kettle into the window, extending her arm its full length; that the woman hit the teapot and the spout flew into the libellant's eye; that at the time Mary was at her side but there were no other people there; that the stewardess did not give her any water; that as soon as the teapot struck her she yelled out and said to the stewardess: "You are the one that hit me in the eye and put my eye out;" that the stewardess then took her aside and wiped her eye, cleaned it with cold water; that the stewardess then took the libellant to the room of the stewardess and left her locked up, for about a half an hour, when she came and took her to the doctor, who examined and bandaged her eye and the stewardess then took her to her berth in the steerage; that the stewardess then came back in a few minutes with an older man who asked her "whether she put my eye out, whether the stewardess put my eye out," and "I answered that she" (the stewardess) "put my eye out"; that the next day she went to the ship's hospital and remained there during the rest of the voyage; that when she reached this country, she went to a hospital and stayed there six weeks. On the cross, she said she was alone on the voyage, excepting for Mary, but came to an aunt in this country; that she had never been for hot water before; that the stewardess hit the teapot on the bottom "and it came over and hit my eye that way"; that she did not know whether the stewardess did it intentionally or not; that it "hurt me very much. * * * It ran right away; it bled." On the re-direct, she said that her eyelid was not cut.

Mary Przytula testified that she was between 18 and 19 years of age, nearly 19; that she came to this country on the same ship as the libellant; that on Thursday the libellant had her eye hurt, about half an hour after supper; that the two were sitting on the bed and the witness went for hot water; that the window was locked the first and second time and then both went together, finding the window open; that the libellant had the teapot and put her hand in the window; that there was nobody there but a woman in the room behind the window whom the witness had seen giving out water before; that the libellant put the teapot in the window and the witness looked around saying, "It is all over with my eye;" that the witness was then standing "about six steps away," about 3 feet; that when the libellant said it was all over with her eye, "the blood was going down"; that the stewardess then took the libellant to the latter's room to clean her eye; that the libellant stood on the floor at the window when she had the teapot in her hand; that the libellant was led from the pantry and the witness was not permitted to go with her, although she wanted to; that she next saw the libellant when she was brought back to her bed in the evening, with one eye bandaged; that that evening the

stewardess came to the bed with an elderly man, who asked the libellant "if this waitress put her eye out and Eufrazia said that she did, that this waitress put out my eye." On the cross, she said that there were not a lot of people in the compartment, drinking beer and standing around; that the spout of the teapot was higher than its top; that she stood three feet from Eufrazia while she was handing in the teapot through the window, in doing which, she stretched out her arm as far as it would go; that Eufrazia said to the stewardess in Polish: "You did that, your hurt my eye;" that neither she nor the libellant had had any trouble with the stewardess.

The respondent offered in evidence the statement of the ship's physician, quoted above, and the deposition of the stewardess.

The latter deposed that she had been with the respondent line for twelve years and on this steamer from April, 1906; that her position required her to look after the women and children, giving them hot water and milk; that the pantry was on the middle deck, amidships; that boiler was in the left hand forward corner of the pantry; that the accident to the libellant happened about seven o'clock in the evening; that she was injured when she came for her water, which she did morning and evening, when she was given as much as she wanted; that she was coming for water all the time; that thirty or forty people came, and she saw the libellant standing on the top of the bench which is fast to the table; that the witness said to her, "Get down there or you will get an accident;" that the libellant pushed the kettle toward the witness three or four times and there were a great many people there who seemed to be annoyed at her reaching over their heads, she was reaching her arm over the heads of others, of some 30 or 40 people standing there calling for hot water; that the witness said, "Little girl get down, if you don't you will get no hot water;" that she came back and the witness said the same thing three or four times; that "she was laying with her hands on the top of their heads to get the water; she wanted to be first to push the kettle towards me; she wanted to push the kettle like that (indicating) and some one came and lifted her arm and pushed the kettle up, one of the passengers that came for hot water, and I saw her go away." She was then asked: "Did you know her eye had been injured then?" to which she replied:

"A. I heard some noise outside, and I opened the door and I said, 'What is the matter?' They said, 'You done that.' I said, 'I, are you crazy; how do you get that?' I said, 'I couldn't reach you, how could I have done it?' and I took her arm and bring her to the doctor because it is not my custom to quarrel with young people. Q. What was the matter with her eye? A. I saw blood. Q. Which eye was it? A. I think it was the left eye. Q. Did you see the spout of the kettle driven into her eye? A. I didn't see it."

The witness then said she took the girl into the pantry, shutting "the door because a lot of people were coming," and took her to the doctor, the same moment; being asked if it was true when the girl was injured there was nobody at the window except one man and one other young girl she said:

"A. It was full of people, and therefore she laid her hands on the heads of others; she was in the rear of the other people."

She further said:

"Q. Is it true that the girl Eufrazia Korzib, reached in her kettle, that you sruck it up, and drove the spout into her eye? A. No; I only said 'go away.' Q. Did you touch her kettle? A. I did not have the kettle. Q. While it was in her hands, in the girl's hands, did you ever touch it? A. She had it all the time in her own hands; she couldn't reach me. Q. Did you strike the teapot violently on the bottom and knock it up towards the girl in such a way that the metal spout struck her eye? A. I did not touch the kettle; that was the time when the other passengers hit her arm. Q. Did you ever tell anybody that you hurt the girl's eye? A. I couldn't tell that; I didn't do it."

The testimony of the stewardess was not satisfactory or persuasive of the truth of her account of the matter and I think that given by the girls should prevail.

Whether this accident was caused by some careless act on the part of the stewardess or through some exhibition of temper is not shown but enough appears to be convincing that the vessel's agents did not perform their full duty to this passenger.

There will be a decree for the libellant, with an order of reference.

FRANK v. LEOPOLD & FERON CO. et al.

(Circuit Court, N. D. California. March 29, 1909.)

No. 14,850.

1. REMOVAL OF CAUSES (§ 19*)—INJUNCTION AGAINST UNITED STATES MARSHAL—GROUNDS—"CASE ARISING UNDER LAWS OF UNITED STATES."

Where the United States marshal in his official capacity levied on real estate under an execution issued out of the federal court, an injunction issued by a state court restraining the marshal from proceeding further under the writ was removable to the United States Circuit Court as a "case arising under the laws of the United States," though the marshal was joined as a defendant with one over whom jurisdiction was dependent on other considerations, it being immaterial that there was no diversity of citizenship.

[Ed. Note.—For other cases, see Removal of Causes, Dec. Dig. § 19.*]

2. COURTS (§ 497*)—FEDERAL COURTS—JURISDICTION—SEIZURE OF PROPERTY—INTERFERENCE BY STATE COURT.

Property seized by a United States marshal in satisfaction of a writ issued by the federal court was in custodia legis and within the exclusive jurisdiction of such court, without reference to the rights of the contending parties to the property seized, and hence a state court had no jurisdiction thereafter to restrain the marshal from proceeding further under the writ.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1396–1398; Dec. Dig. § 497.*

Jurisdiction as affected by possession of the subject-matter, see note to Adams v. Mercantile Trust Co., 15 C. C. A. 6.]

3. INJUNCTION (§ 169*)—MOTION TO DISSOLVE—TIME—OBJECTION.

An objection that a motion to dissolve an injunction was prematurely made because presented before the first day of the next ensuing term after filing the record in the federal Circuit Court on removal from the state court became unsustainable after the first day of the term had passed, as the motion could be then treated as having been made at the current term.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 169.*]

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

In Equity.

The defendant Leopold & Feron Company obtained a judgment in this court against George Frank, the husband of this plaintiff, and thereafter the defendant Elliott, acting in his official capacity as United States marshal for this district, under and by virtue of a writ of execution duly issued out of this court, levied upon certain real estate situate in the county of Santa Clara as the property of said George Frank, and advertised the same for sale in satisfaction of such judgment. Thereupon the plaintiff herein, Margaret Frank, commenced this action in the superior court of Santa Clara county, alleging the real estate in question to be her separate property and that a sale thereof under the execution would cast a cloud upon her title, and procured an injunction to be therein issued by the state court restraining the marshal from proceeding further under the writ. In due time after the service of the injunction upon him the defendant Elliott procured the cause to be removed to this court, and upon the filing of the record here moved for an order dissolving the injunction as one not competently within the power of the state court to grant. This motion was antagonized by a counter motion on behalf of the plaintiff to remand the cause to the state court on the ground that this court has no jurisdiction for lack of diversity of citizenship of the parties or the existence of any federal question. These motions have been argued and submitted together, and may be so considered.

Mastick & Partridge, for plaintiff.

Robert T. Devlin, U. S. Atty., and Campbell, Metson, Drew, Oatman & McKenzie, for defendants.

VAN FLEET, District Judge (after stating the facts as above). 1. The motion to remand must be denied. The jurisdiction of this court under the facts disclosed by the record does not depend upon diversity of citizenship. It appears affirmatively both from the complaint and the petition for removal that the action of the defendant Elliott sought to be enjoined was taken by him in his official capacity as the marshal of this district and in obedience to the mandate of a writ regularly issued out of this court commanding him to proceed and satisfy its judgment. The marshal was therefore proceeding in the discharge of a duty imposed upon him by the laws of the United States, and the case made is one arising under the laws of the United States and as such removable from the state court. Bock v. Perkins, 139 U. S. 628, 11 Sup. Ct. 677, 35 L. Ed. 314.

In that case it is said that a case "depending upon the inquiry whether a marshal or his deputy has rightfully executed a lawful precept directed to the former from a court of the United States is one arising under the laws of the United States; for, as this court has said, 'Cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege, or claim or protection, or defense of the party, in whole or in part, by whom they are asserted.' Tennessee v. Davis, 100 U. S. 257, 264, 25 L. Ed. 648; Railroad Co. v. Mississippi, 102 U. S. 135, 141, 26 L. Ed. 96."

Nor does it affect the right of removal in such a case that the marshal is joined as defendant with one over whom jurisdiction is dependent upon other considerations. "Had the action been brought against the marshal alone, there can be no doubt that the Circuit Court would have had jurisdiction of the case as one arising under the Constitution and laws of the United States. Feibelmann v. Packard, 109 U.

S. 241, 3 Sup. Ct. 289, 27 L. Ed. 984; Bachrack v. Norton, 132 U. S. 337, 10 Sup. Ct. 106, 33 L. Ed. 377. It is true that in these cases the action was against the marshal and the sureties upon his bond; but there is no difference in principle. The right of action in both cases is given by the laws of the United States, which make the marshal responsible for trespasses committed by him in his official character. Bock v. Perkins, 139 U. S. 628, 11 Sup. Ct. 677, 35 L. Ed. 314; Buck v. Colbath, 3 Wall. 334, 18 L. Ed. 257; Texas & Pacific Railway v. Cox, 145 U. S. 593, 12 Sup. Ct. 905, 36 L. Ed. 829. If suits against a bank or railways chartered by Congress are suits arising under the laws of the United States, as we held in Osborn v. U. S. Bank, 9 Wheat. 738, 6 L. Ed. 204, and in Pacific Railway Removal Cases, 115 U. S. 1, 5 Sup. Ct. 1113, 27 L. Ed. 319, with even greater reason must it be considered that a suit against a marshal of the United States for acts done in his official capacity falls within the same category." Sonnentheil v. Moerlein Brewing Co., 172 U. S. 401, 19 Sup. Ct. 233, 43 L. Ed. 492.

2. As to the motion to dissolve the injunction, it is, I think, disposed of by the principles announced by the Supreme Court in Freeman v. Howe, 24 How. 451, 16 L. Ed. 749; and that, applying those principles to the facts of this case, it must be held that the state court was without competent authority to interfere by its injunction with the execution of the process of this court. The doctrine of that case is that where property is first seized into the control of a federal court through its proper officers in obedience to the requirements of its process, mesne, or final, that court is clothed with full, plenary, and exclusive jurisdiction to determine every question arising out of the circumstances as to the propriety of such seizure, and the liability of the property to the claim made against it; that the property is in custodia legis, and that any attempt by a state court to interfere with such property while it so remains in the custody and control of the federal tribunal is an unauthorized interference with the jurisdiction of the latter and without right; that this exclusive jurisdiction in the federal court does not depend at all upon the rights of the contending parties to the property seized, but solely upon the question which jurisdiction has first attached by a seizure and custody of the property under its process; and that any controversy over the ownership of the property growing out of a claim, as here, that it does not belong to the party for whose obligation it is sought to be taken, is a question for the court which has first taken it into its control; and the method for presenting that question to the court for determination is clearly pointed out. In an exhaustive discussion of this question of conflicting jurisdiction between federal and state courts arising out of circumstances which make a case not distinguishable in principle from that presented here, Mr. Justice Nelson, speaking for the court, says:

"Another and main ground relied on by the defendants in error is that the process in the present instance was directed against the property of the railroad company, and conferred no authority upon the marshal to take the property of the plaintiffs in the replevin suit. But this involves a question of right and title to the property under the federal process, and which it belongs to the federal, not the state, courts to determine. This is now admitted; for, though a point is made in the brief by the counsel for the defendant in error

that this court had no jurisdiction of the case, it was given up on the argument. And in the condition of the present case more than this is involved; for the property having been seized under the process of attachment, and in the custody of the marshal, and the right to hold it being a question belonging to the federal court, under whose process it was seized, to determine, there was no authority, as we have seen, under the process of the state court, to interfere with it. We agree with Mr. Justice Grier, in Peck et al. v. Jenness et al., 7 How. 624, 625, 12 L. Ed. 841: 'It is a doctrine of law too long established to require citations of authorities, that where a court has jurisdiction it has a right to decide every question which occurs in the cause; and, whether its decision be correct or otherwise, its judgment till reversed is regarded as binding in every court; and that where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court.' 'Neither can one take the property from the custody of the other by replevin, or any other process; for this would produce a conflict extremely embarrassing to the administration of justice.' "

These principles have been repeatedly reaffirmed, and in no respect modified. In Covell v. Heyman, 111 U. S. 176, 4 Sup. Ct. 355, 28 L. Ed. 390, Freeman v. Howe is extensively reviewed, and the effect of that case thus stated:

"The point of the decision in Freeman v. Howe, supra, is that when property is taken and held under process, mesne or final, of a court of the United States, it is in the custody of the law, and within the exclusive jurisdiction of the court from which the process has issued, for the purposes of the writ; that the possession of the officer cannot be disturbed by process from any state court, because to disturb that possession would be to invade the jurisdiction of the court by whose command it is held, and to violate the law which that jurisdiction is appointed to administer; that any person, not a party to the suit or judgment, whose property has been wrongfully, but under color of process, taken and withheld, may prosecute, by ancillary proceedings, in the court whence the process issued, his remedy for restitution of the property or its proceeds, while remaining in the control of that court; but that all other remedies to which he may be entitled, against officers or parties, not involving the withdrawal of the property or its proceeds, from the custody of the officer and the jurisdiction of the court, he may pursue in any tribunal, state or federal, having jurisdiction over the parties and the subject-matter. And, vice versa, the same principle protects the possession of property while thus held, by process issuing from state courts, against any disturbance under process of the courts of the United States; excepting, of course, those cases wherein the latter exercise jurisdiction for the purpose of enforcing the supremacy of the Constitution and laws of the United States."

See, also, Krippendorf v. Hyde, 110 U. S. 276, 4 Sup. Ct. 27, 28 L. Ed. 145.

The case of Buck v. Colbath, 3 Wall. 334, 18 L. Ed. 257, does not modify the rule of Freeman v. Howe, but further defines and distinguishes it, and, as stated in Covell v. Heyman, "checked and corrected an attempted misapplication of its principle, which, if permitted, would cover actions against the officer for trespasses, not involving any interference with the property itself while in his possession." In Buck v. Colbath the marshal had taken goods under an attachment which were not the property of the defendants in the attachment, and the rightful owner, ignoring his right to a return of the goods, sued the marshal in trespass for damages. The marshal merely pleaded in defense the taking of the property in his official capacity, but did not aver that they were the goods of the defendants. It was held that the case did not fall within the doctrine of Freeman v. Howe,

since it did not seek to disturb the possession or control of the property in the hands of the federal court; and that, as the goods were seized under a writ which did not require the marshal to take that specific property, he took them at his peril, and was liable for his trespass in any court of competent jurisdiction.

The objection that the motion to dissolve the injunction was prematurely made as having been presented before the first day of the next ensuing term after the filing of the record here cannot be sustained. If the objection ever possessed any merit, it has faded out since the first day of the term has passed, and the motion may be treated as having been made at the present term.

It follows from these considerations that the motion to remand the cause must, as above indicated, be denied and that the motion to dissolve the injunction must be granted. It is so ordered.

UNION SWITCH & SIGNAL CO. v. SPERRY.

(Circuit Court, S. D. New York. March 12, 1909.)

MASTER AND SERVANT (§ 60*)—WRONGFUL ACTS OF SERVANT—CARRYING AWAY CONFIDENTIAL DOCUMENTS OF MASTER.

An employé, on the termination of his employment, has no right to carry away records or documents containing trade secrets or other confidential matters relating to the master's business; and if he does so a court of equity will grant relief by requiring him to return the same and enjoining him from using or communicating their contents to others.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 60.*]

In Equity.

Thos. W. Bakewell, for complainant.
Solomon Hanford, for defendant.

MARTIN, District Judge. The defendant was in the complainant's employ from January 1, 1900, to February 14, 1905, with a salary ranging from $3,300 to $4,200 per year. He was in general charge of the New York office of the complainant, and his duties required him to attend to the supervision and construction work of what is here termed the "Eastern District," being that portion of the United States east of Pittsburg. His position was somewhat of a confidential character. The New York office was under his charge, and he had access to the records, confidential and otherwise. Of the work performed by the complainant company during the services of the defendant was the installation of an automatic block signaling system on the Boston Elevated Railroad lines and the Interborough Rapid Transit Company, the New York subway. Copies of reports, letters, diagrams, blue prints, and photographs relating to the complainant's business the defendant kept in a so-called personal file. The defendant voluntarily closed his services for the plaintiff and took away with him said file, containing the documents aforesaid, without the knowledge or consent of the complainant, and subsequently made

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

use of them in aid of the complainant's competitors and parties who were in litigation with the complainant. This bill was brought to compel the defendant to deliver to the complainant the letters, records, and reports, and copies thereof, belonging to the complainant, that were so taken from the complainant by the defendant, and praying for a writ of injunction restraining the defendant, his clerks, etc., from any further use of said documents, and from disclosing the same to others in violation of the orator's rights, and that there may be an accounting to assess damages suffered by the complainant.

Some of the articles involved in this proceeding were photographs and blue prints made public by the complainant, and upon hearing were not urged to be included in the decree. Aside from those articles, I am satisfied, from an examination of the exhibits and the evidence, that they are the property of the complainant, and that the defendant's possession thereof is unjust and unlawful. It is unnecessary in this case to discuss the distinction between carrying away and making use of mental information and carrying away and making use of documents. The facts in this case only apply to the latter, which is a plain violation of the complainant's rights. In Keene v. Wheatley et al., 14 Fed. Cas. 181 (Case No. 7,644), Judge Cadawalader uses this language:

"In the administration of equitable jurisprudence, improper disclosures of the knowledge of primary results of mental development, whether the contents of literary compositions, or oral disclosures, or secrets of inventions, or improper disclosures of knowledge acquired in professional relations, or in those of service or agency, are prevented and redressed on principles of general applicability."

I regard this as sound law, and it well applies to the facts in the case at bar. The complainant may have decree that the defendant deliver to the complainant such of the exhibits, including originals and copies, as were not of a public nature, and that the defendant and his clerks, attorneys, servants, agents, and workmen, be restrained from further use, in any manner, of said exhibits, with costs.

The complainant's prayer for an accounting for damages is not insisted upon, and therefore not to be included in the decree.

In re LEWKOWICZ.

(District Court, S. D. New York. April 28, 1909.)

ALIENS (§ 68*)—NATURALIZATION—DECLARATION OF INTENTION—AMENDMENT.

A declaration of intention to become a citizen, and to renounce allegiance, erroneously alleging that the alien was a native of France, when, in fact, he was a subject of the czar or emperor of Russia, could not be amended nunc pro tunc, either by the court in which the declaration was filed or by the petitioner so as to show the true fact.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 139; Dec. Dig. § 68.*]

On Final Hearing of Petition.

Hugh Govern, Asst. U. S. Atty.

HOUGH, District Judge. Lewkowicz executed a declaration of intent to become a citizen of the United States in April, 1905, in the

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

circuit court of St. Louis, Mo. According to the records of that court, he then deposed that he was a native of France, and it was his intention to renounce allegiance, etc., to the republic of France. The applicant, having removed to New York, prepared to execute his petition for final papers in this court, and then discovered that his declaration of intent was erroneous, in that he is not a native of France, but of Russia. Thereupon he employed an attorney, who procured from the circuit court aforesaid an order amending the declaration of intent by changing its entire substance so that as amended it reads that the declarant was a native of Russia, and that it was his intention to renounce all allegiance, etc., to the "empire of Russia." The applicant explains this occurrence by stating that he was born in Russian Poland, that before he was four years old he was taken to France, and with the exception of a few months spent in England he lived in that country until he came to the United States; that in 1905 he did not understand English at all well, and in making his declaration of intent he used an interpreter who asked him, not where he was born, but where he "came from." To this he replied "France," and the declaration was prepared for his signature and verification without further examination.

Under some of the decisions (Ex parte Smith, 8 Blackf. [Ind.] 395) even the amended declaration is insufficient, in that it declares Lewkowicz to be a subject of the Russian empire, and not of the czar or emperor of Russia. But I am further of the opinion that the so-called amendment was beyond the power of any court to grant. The declaration as drawn was a complete and intelligible document. It may not have been true—I do not think it was true—but such as it was it contained no clerical error, and it is going much too far to ask any court to correct the error of the applicant or his interpreter, and thus to manufacture an entirely new paper.

The statute, in substance, requires that a true declaration of intent must be executed and filed the requisite length of time before petition made. That was not done in this case, and the circuit court of St. Louis, Mo., cannot do it nunc pro tunc any more than can the petitioner himself.

Lewkowicz's application must be denied, without prejudice to renewal.

WALTER A. WOOD CO. v. EUBANKS.

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

No. 820.

1. BANKRUPTCY (§ 151*)—RIGHTS OF TRUSTEE.
A bankrupt's trustee occupies the same relation to the creditor that the bankrupt sustained prior to the date of the adjudication.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 193; Dec. Dig. § 151.*]

2. BANKRUPTCY (§ 140*)—TITLE AND RIGHTS OF TRUSTEE—CONTRACT—CONSTRUCTION.
A contract by which petitioner furnished certain implements to the bankrupt provided that all goods on hand and the proceeds of the sales of all goods received under the contract, whether consisting of notes, cash, or book accounts, the bankrupt agreed to hold as collateral security, in trust for the benefit of petitioner, until all obligations under the contract due petitioner from the bankrupt had been paid in cash. *Held*, that such agreement constituted an enforceable trust as between the bankrupt and his trustee, and not a conditional sale.
[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 140.*]

3. CHATTEL MORTGAGES (§ 84*)—VALID INTER PARTES—REGISTRATION.
Under the laws of North Carolina, a chattel mortgage is valid between the parties without registration.
[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 152; Dec. Dig. § 84.*]

4. SALES (§ 465*)—CONDITIONAL SALES—REGISTRATION.
Under the law of North Carolina, a conditional sale is valid between the parties without registration.
[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1353; Dec. Dig. § 465.*]

5. COURTS (§ 366*)—DECISIONS OF STATE COURTS—RULES OF DECISION.
The validity of an unregistered mortgage as between the parties is a question as to which the decisions of the highest courts of the states are controlling on the federal courts sitting therein.
[Ed. Note.—For other cases, see Courts, Dec. Dig. § 366.*
Conclusiveness of judgment between federal and state courts, see notes to Kansas City, Ft. S. & M. R. Co. v. Morgan, 21 C. C. A. 478; Union & Planters' Bank v. City of Memphis, 49 C. C. A. 468.]

On Petition to Superintend and Revise, in Matter of Law, Proceedings of the District Court of the United States for the Western District of North Carolina, at Statesville.

This is a petition to superintend and revise in a matter of law the proceedings of the court in bankruptcy for the Western district of North Carolina. On October 16, 1906, a contract was made between the Walter A. Wood Company and the Implement & Supply Company by which certain goods of the former were sold and delivered to the latter. As a part of said contract, the Implement & Supply Company made the following agreement:
"All goods on hand, and the proceeds of all sales of all goods received under this contract, whether such proceeds of sales consist of notes, cash or book accounts, the party of the second part agrees to hold as collateral security in trust and for the benefit of the party of the first part, until all obligations hereunder due party of the first part from party of the second part are paid in cash."

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

The Implement & Supply Company purchased goods from the Walter A. Wood Company, and sold the same to its customers on time, and took certain promissory notes and mortgages therefor aggregating $524.90, which identified as such are now in the possession of the trustee in bankruptcy. The said the Implement & Supply Company still owes the Walter A. Wood Company for the whole of the contract price of the goods sold and delivered to it under said contract.

Upon the foregoing facts, the Walter A. Wood Company moved before W. C. Erwin, Esq., referee in bankruptcy, for an order directing H. M. Eubanks, trustee in bankruptcy of said the Implement & Supply Company, to turn over said notes and mortgages, amounting to $524.90, under the provisions of the contract aforesaid. The referee declined to make such order, and the Walter A. Wood Company excepted and appealed to the District Judge, who, after hearing the same, overruled the objections and exceptions of the appellant, and made an order affirming the order and rulings of the said referee in bankruptcy.

Charles H. Armfield and Wilfred D. Turner, for petitioner.

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

PRITCHARD, Circuit Judge (after stating the facts as above). To properly determine the questions involved in the controversy now before us, it becomes necessary to ascertain the nature of the contract between the Walter A. Wood Company and the Implement & Supply Company. This contract being in writing, free from ambiguity and plain in its terms, it is purely a question of law as to its interpretation. Hence this case comes before us on a petition to superintend and revise in matters of law the proceedings of the District Court. The referee found the following facts and conclusions of law:

"(1) That the Walter A. Wood Company sold to the bankrupt, under contract dated 17th day of October, 1906, certain machinery and implements described therein; that the same was absolute, and not conditional or by way of consignment.

"(2) That said contract of sale was never registered.

"(3) That said contract, which was signed by the bankrupt corporation, contained the following clause: 'All goods on hand, and the proceeds of all sales of goods received under this contract, whether such proceeds of sales consist of notes, cash or book accounts, the party of the second part agrees to hold as collateral security in trust and for the benefit of the party of the first part, until all obligations hereunder due party of the first part from the party of the second part are paid in cash.'

"(4) That the total indebtedness of the Implement & Supply Company for said machinery is still due and unpaid.

"(5) That certain of said machines and implements were sold by the bankrupt in due course of trade for cash, and that the money arising from said sale was deposited by said company to its general credit in the First National Bank at Statesville, and said money was used by the bankrupt as other funds belonging to it; and that certain of said machines and implements were sold by the bankrupt on credit or partly on credit; and that part of the proceeds of sale was evidenced by notes taken by the bankrupt and payable to bankrupt's order, and by a book account against one Turner Jennings for thirty ($30) dollars; that said notes and book accounts have been fully identified; that the aggregate amount thereof is $524.90, and that a true list thereof appears in the accompanying petition of the said Walter A. Wood Company.

"(6) That said notes were in possession of the bankrupt at the time of the adjudication, were embraced in the schedule, and are now in the possession of the trustee in bankruptcy.

"Conclusions of Law.

"Upon the foregoing facts I conclude:

"(1) That the contract between the petitioning creditors and the bankrupt did not constitute a valid pledge of the choses in action, for that there was no delivery to the pledgee or to any third party for its use.

"(2) That the same did not constitute a valid mortgage as against the trustee, for that it was not registered.

"(3) That it did not constitute such an equitable lien as could be enforced against the trustee in bankruptcy."

That portion of the contract which is pertinent to the question presented here reads as follows:

"All goods on hand, and the proceeds of all sales of all goods received under this contract, whether such proceeds of sales consist of notes, cash, or book accounts, the party of the second part agrees to hold as collateral security in trust and for the benefit of the party of the first part until all obligations hereunder due party of the first part from the party of the second part are paid in cash."

Under the terms of this contract, the Implement & Supply Company purchased certain goods of the Walter A. Wood Company with the distinct agreement at the time of such purchase that the Implement & Supply Company would hold all goods on hand, the proceeds of sales consisting of notes, cash, or book accounts, as collateral security, in trust for the Walter A. Wood Company, until all the obligations under the contract should be paid in full in cash. It was clearly the intention of the parties that the goods sold and delivered to the Implement & Supply Company and the proceeds arising from the sale thereof should be held in trust for the exclusive use and benefit of the Walter A. Wood Company until the obligations incurred thereunder should be fully discharged by the payment of the same in cash. Pursuant to this agreement, the Implement & Supply Company, at the time it was adjudged a bankrupt, held certain notes taken in payment for goods sold to the bankrupt by the petitioner, and those notes went into the hands of the trustee, as shown by the referee's report.

It is well settled that the trustee of a bankrupt stands in the shoes of the bankrupt, and occupies the same relation to the creditor that the bankrupt sustained prior to the date on which he was adjudged a bankrupt. Therefore, in dealing with this question, we will consider the trustee as possessing all the rights of the bankrupt, and for the time being acting in his stead. "A trustee in bankruptcy gets no better title than that which the bankrupt had, and is not a subsequent purchaser in good faith within the meaning of section 112 of chapter 418, p. 540, of the Statutes of 1897 of New York, and, as a vendor's title under a conditional sale is good against the bankrupt, it is also good against the trustee." Hewit v. Berlin Machine Works, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986.

The Supreme Court of the United States, in the case of Thomas v. Taggart, 209 U. S. 389, 28 Sup. Ct. 520, 52 L. Ed. 845, speaking through Justice Day, says:

"The rule is generally recognized that if the title to property claimed is good as against the bankrupt and his creditors, at the time the trustee's title accrued, the title does not pass and the property should be restored to its true owner; or, if the property has been sold, the proceeds of the sale takes

the place of the property. Loveland on Bankruptcy (3d Ed.) § 152; Hewit v. Berlin Machine Works, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986; York Mfg. Co. v. Cassell, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782."

While the decisions of the District Courts, as well as those of the Circuit Courts of Appeals, are conflicting, yet there are many cases in which it is held that an unrecorded conditional sale, if not forbidden by the statute, is good between the vendor and the trustee of the bankrupt, upon the theory that the trustee, for the time being, is the representative of the bankrupt, and as such sustains the same relation to the vendor that the bankrupt sustained at the time the contract was executed.

Under the circumstances, the inquiry naturally arises as to whether the Walter A. Wood Company and the Implement & Supply Company had the right to enter into this contract at the time they did for the purposes for which it was intended, and as to the intent and meaning of the provisions contained therein. It is not seriously contended that the parties did not have the right to contract, which leaves only the question as to the scope and extent of such contract. The court below sustained the conclusions of the referee to the effect that the contract between the petitioning creditors and the bankrupt did not constitute a valid pledge of the choses in action, for that there was no delivery to the pledgee or to any third party for its use; that the same did not constitute a valid mortgage as against the trustee, for that it was not registered; that it did not constitute such an equitable lien as could be enforced against the trustee in bankruptcy.

We do not deem it necessary to pass upon the ruling of the court as respects the first conclusion of the referee, and will therefore confine ourselves to the second and third conclusions. The second conclusion, that the contract "did not constitute a valid mortgage as against the trustee, for that it was not registered," is, in our opinion, erroneous, in view of the facts and circumstances surrounding this transaction. While it is not necessary to a proper determination of this cause to pass upon the question as to whether this agreement constituted a valid mortgage under the laws of North Carolina, yet if it were a mortgage under the laws of that state, it would be valid inter partes without registration. Under the laws of that state, mortgages, deeds of trust, etc., are valid and enforceable between the original parties without registration. Wallace v. Cohen, 111 N. C. 106, 15 S. E. 892; Buffkin v. Eason, 110 N. C. 264, 14 S. E. 749; Todd v. Outlaw, 79 N. C. 235.

It has likewise been held by the courts of North Carolina that a conditional sale is good inter partes without registration. In the case of Williams v. Jones, 95 N. C. 506, the court said:

"There is no principle better settled than that, as between the parties, a mortgage is valid without registration (Leggett v. Bullock, 44 N. C. 283); and it is so laid down in Jones on Mortgages. 'Of course,' says that author, 'the recording of a mortgage is not necessary as against the mortgagor, and, even in those states where it is provided by statute that a mortgage shall be recorded within a specified time, it is still valid between the parties until registered.' Section 107. And it is maintained by the same author, in section 545, that a mortgage may be recorded after the death of the mortgagor, if he has in his lifetime made delivery of it.' His general creditors cannot, for

that reason, claim that the mortgage was inoperative as against them. Such a mortgage is good and binding upon the heir in like manner as upon the mortgagor, and the same principle applies to chattel mortgages. Neither the heir in the one case, nor the administrator in the other, is a third person, but represents the intestate, and has no better title than he had. Jones on Chattel Mortgages, § 239. The same principle applies to assignees in bankruptcy. Though they are held to be trustees for the creditors, yet they stand in the place of the bankrupt, and they can take in no better manner than he could. They take subject to whatever equity the bankrupt was entitled to."

This being a question to be determined by the laws of North Carolina, the decisions of the highest court of that state construing the same are controlling.

In the case of Thompson v. Fairbanks, 196 U. S. 522, 25 Sup. Ct. 308, 49 L. Ed. 577, the court said:

"Whether and to what extent a mortgage of this kind is legal is a legal question, and the decisions of the state court will be followed by this court in such cases." Dooley v. Pease, 180 U. S. 126, 21 Sup. Ct. 308, 45 L. Ed. 457.

Also in the case of Humphrey v. Tatman, 198 U. S. 92, 25 Sup. Ct. 567, 49 L. Ed. 956, the court, among other things, said:

"It may be assumed, in view of the recent decision in Thompson v. Fairbanks, 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577, that, if the taking of possession was good as against the trustee in bankruptcy so far as the Massachusetts law is concerned, * * * it is good here."

This contract is not a conditional sale, nor is it a mortgage. It went into effect and became binding upon the parties upon its execution and the delivery of the goods in accordance with its provisions. The laws of North Carolina did not require its registration.

In the case of Chemical Company v. Johnson, 98 N. C. 123, 3 S. E. 723, the Supreme Court of that state passed upon that question. There it was contended that a contract similar to the one in question was invalid because it had not been registered. Chief Justice Smith, who delivered the opinion of the court, said:

"The only question before us is as to the character and construction of the agreement, and whether it is an instrument required to be registered, and inoperative and void, unless and until so registered, against creditors and purchasers. Code, § 1254.

"We are unable to concur in the opinion of the court that the contract is within the purview of the enactment cited, or of the mischiefs which were remedied by it, and the amendatory act which extends it to conditional sales of personal property. Code, § 1275.

"In form it is largely executory in its provisions, requiring the vendor to take and hold all securities received upon sales of the guano for payment of the original purchase money. This trust, at least as between the parties, attaches to the substituted fund, and it can only be conveyed (except in certain cases) in the same plight to another. There are present none of the features and essential elements of 'deed of trust or mortgage,' as there were none before the new statute in conditional sales of personal property. The statute was intended to meet this latter class of cases, because they were in legal effect of the nature of mortgages, the legal title being retained to secure payment of the price for which the property was sold.

"Again, if it were otherwise, the want of registration (for the contract would be valid as between the parties without registration) would apply to the articles sold, and, as this has all been disposed of, would not reach the choses in action taken in exchange. Can it be supposed that as soon as a sale is made it must be put in writing, and so toties quoties, so that upon inspection of the registry the attaching trust to the fund substituted would

appear? In form and fact the property passes from the plaintiff to the defendant, Johnson, and if the expression, 'all of the above mentioned goods, as well as the proceeds therefrom, are to be held in trust by him for the payment of his notes to us,' creates a trust in the sense of the statute, it accompanies and attaches to the property conveyed, and hence the plaintiff would become mortgagor and Johnson mortgagee in their relations to each, and in such case the want of registration avoids the operation of the instrument 'as against creditors or purchasers for a valuable consideration from the donor, bargainor or mortgagor,' but from the registration, etc. (section 1254), but not creditors or purchasers of the mortgagee; in other words, for such creditors or purchases as the statute refers to. The title does not pass, but remains in the mortgagor as if no such conveyance had been made. The effect, then, would be to leave the property in the mortgagor for the benefit of his creditors or vendees for value, and none claiming under the chemical company are assailing the transfer as obstructing the enforcement of demands against it, and none others can for the alleged defect. As, then, the defendant, Johnson, transferred these claims clothed with the trust he had assumed, and which is valid and effectual as against him, they pass into the hands of the assignee in the same plight and condition, and must be accounted for in like manner by the latter.

"It is suggested that the contract may admit of a construction reversing the relations of the parties, and giving the character of mortgagor to Johnson, by virtue of his stipulations as to the holding and disposition to be made of the property. But in our opinion it will not bear this interpretation. There is but one transfer of property, and the trust declared and assumed is an incident to the conveyance. In most deeds of trust such is the case. The trust is declared by the bargainor, the estate accepted subordinate thereto, and the trusts are equally obligatory on the mortgagee, whether he in terms agrees to carry the trust into effect or not. His acceptance of the estate fixes upon him this duty. The stipulations, therefore, of Johnson, do not alter the nature of the transaction, but it remains a transfer with the restrictions imposed by the company that made it, and they are not removed by his general assignment for the benefit of his creditors."

We have carefully considered the facts in the case supra, and find that the contract in that instance is nearly identical with the contract relied upon in the case at bar.

In the case of Chemical Company v. McNair, 139 N. C. 335, 51 S. E. 952, the court said:

"It appears from an inspection of the contract made by Coble with Ober & Sons Company, bearing date January 17, 1898, that he was to sell the guano, and deliver to Ober & Sons Company notes of the planters to whom he sold, to be held by them as collateral security, and that all proceeds of guano sold were to be held in trust by Coble for the payment of his notes. As between Coble and Ober, there can be no question that the accounts were held as the property of the latter, and the money collected thereon was held in trust for them. Contracts containing the same language in respect to the terms upon which the guano was to be sold and the proceeds held were construed by this court in Chemical Co. v. Johnson, 98 N. C. 123, 3 S. E. 723, and Guano Company v. Bryan, 118 N. C. 576, 24 S. E. 364. In the last case, Mr. Justice Montgomery said: 'There can be no doubt that the contract makes the defendant a trustee for the plaintiff's benefit of the guano sold to him by the plaintiff, of the notes taken by the defendant from the purchasers of the guano, and of the cash money derived from the sales and of that collected on the notes.'"

There is an unbroken line of decisions of the Supreme Court of North Carolina construing contracts similar to the one relied upon by the petitioner in this instance in which it is held that such an instrument is neither a mortgage nor a conditional sale, but that it is a contract which creates a trust, and is therefore not required to be

registered. That under its provisions the vendee holds the property, or the proceeds resulting from the sale thereof, in trust for the vendor, and that the right to the possession of the said property, or the proceeds of the sale of the same, may be enforced against a creditor or the purchaser by the vendor at any and all times. Therefore we are of opinion that the Walter A. Wood Company is entitled to the relief sought to be obtained in this proceeding.

For the reasons stated, the judgment of the district court is reversed, and this cause is remanded to said court with instructions to proceed in accordance with the views herein expressed.

Reversed and remanded.

MORRIS, District Judge (concurring). I concur upon the ground that the agreement between the vendor and the vendee created a trust as to the proceeds of the goods, which, under the settled law of North Carolina, is valid as against the trustee in bankruptcy. And as the proceeds are represented by notes and an account which are identified in the hands of the trustees, the vendor is entitled to them. The North Carolina cases cited in the opinion appear to fully sustain this ruling.

CORBITT BUGGY CO. v. RICAUD.

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

No. 859.

1. BANKRUPTCY (§ 140*)—CONTRACT—CONSTRUCTION—DISTINGUISHED FROM CONDITIONAL SALE.

A contract by which vehicles were furnished by petitioner to the bankrupt provided that the title should remain in petitioner, his successors and assigns, until the purchase price had been paid, and that any note or notes executed to petitioner should not be considered payment unless fully paid, but that the title to the goods covered by the notes should remain in petitioner, and, in case of a sale of any or all of the goods, the proceeds arising therefrom should be held in trust for petitioner as the money arising from the sale of goods belonging to it. *Held*, that the contract was not a conditional sale, but created a trust in favor of petitioner, which was enforceable as against the bankrupt and his trustee without being recorded.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 140.*]

2. SALES (§ 465*)—CONDITIONAL SALES—REGISTRATION.

Under the laws of North Carolina, a conditional sale is good between the parties without registration.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1353; Dec. Dig. § 465.*]

Appeal from the District Court of the United States for the Eastern District of North Carolina, at Wilmington.

This is an appeal from a decision and judgment of the District Court in a proceeding in bankruptcy affirming the findings of fact and conclusions of law of George H. Howell, Esq., one of the referees in bankruptcy.

The controversy arises on a petition of the Corbitt Buggy Company against A. G. Ricaud, who had been duly appointed trustee of John L. James, bank-

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

rupt, seeking to recover from said trustee 22 buggies, or their proceeds, which had been delivered by the Corbitt Buggy Company to the bankrupt, John L. James, a few days prior to his making a voluntary assignment for the benefit of creditors, and under the contract hereinafter set out. The petition was referred to George H. Howell, Esq., who made the findings of fact set out in the record, and held as a conclusion of law that the petitioner was not entitled to recover the buggies, or their proceeds, from the trustee in bankruptcy, which decision was, as hereinbefore said, affirmed by the District Court upon exceptions filed by the petitioner to the decision of the referee and a petition to review the same. The controversy arises upon the proper construction of the contract between the Corbitt Buggy Company and the bankrupt, John L. James. The essential portions of that contract are as follows:

"It is expressly understood by and between the Corbitt Buggy Company and the undersigned that the title to the goods above described and ordered sent to the undersigned shall be and remain in the Corbitt Buggy Company, its successors and assigns, until purchase price has been fully paid. And any note or notes executed to the Corbitt Buggy Company shall not be considered as payment unless the same are fully paid; but the title to the goods covered by said notes shall remain in said company. In case of sale of any or all of said goods, the proceeds arising therefrom shall be considered and held in trust for said company as money arising from the sale of goods belonging to the company."

George Rountree (Herbert McClammy and Rountree & Carr, on the briefs), for appellant.

Thos. W. Davis, for appellee.

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

PRITCHARD, Circuit Judge (after stating the facts as above). In disposing of the case of the Walter A. Wood Company v. Eubanks, Trustee of Implement & Supply Company (decided at this term of the court) 169 Fed. 929, we considered and passed upon every material point involved in this controversy, and therefore do not deem it necessary to enter into a discussion of those matters which have already been determined.

The contract relied upon in this instance is not, in our opinion, a conditional sale, therefore it does not come within that class of instruments required by the North Carolina statute to be registered. It clearly creates a trust in favor of the grantor, and by its provisions the vendee holds the property, or the proceeds of the sale thereof, for the sole use and benefit of the vendor until his debt is paid. Even if this contract were a conditional sale, under the laws of North Carolina such sale would be good inter partes without registration. In this instance the trustee occupies the same relation to the vendor that the bankrupt sustained prior to his adjudication as a bankrupt.

We have carefully considered the contentions of the parties with respect to the matters in dispute in this proceeding, and are of opinion that the court below erred in its ruling affirming the report of the referee; therefore we are of opinion that the petitioner is entitled to the relief sought to be obtained in this proceeding.

For the reasons stated in the case of Walter A. Wood Company v. Implement & Supply Company, supra, and the cases cited in support thereof, and also the case of York Mfg. Co. v. Cassell, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782, the judgment of the District

Court is reversed, and this case is remanded to that court with instructions to proceed in accordance with the views herein expressed.

Reversed and remanded.

MORRIS, District Judge (concurring). I concur that the judgment appealed from should be reversed. The contract between the vendor (the Corbitt Buggy Company) and the vendee (John L. James, the bankrupt) was a contract by which the property was sold and delivered to the bankrupt, with the agreement that the title thereto should not pass to the bankrupt, but should remain in the vendor until the purchase price was fully paid. There was added to the contract a stipulation that, in case of sale by the vendee, the proceeds should be held in trust for the vendor; but this stipulation, as it appears to me, never became effective, for there were no sales, the specific property having remained undisposed of and having come into the possession of the trustee in bankruptcy.

A sale with the condition that the title to the goods shall not pass to the vendee until the goods are paid for is a valid condition, except as controlled by local statutes. York Mfg. Co. v. Cassell, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782; Harkness v. Russell, 118 U. S. 663, 7 Sup. Ct. 51, 30 L. Ed. 285; Dunlap v. Mercer, 156 Fed. 545–548, 86 C. C. A. 435. It was also held in the York Manufacturing Company Case that the adjudication in bankruptcy was not equivalent to a judgment, attachment, or other specific lien upon the property of the bankrupt, and that the trustee of the bankrupt was vested with no better right or title to the bankrupt's property than belonged to the bankrupt at the time when the trustee's title accrued, in cases unaffected with fraud.

Under the law of North Carolina, conditional sales are required to be reduced to writing and registered with the same legal effect as chattel mortgages. As to chattel mortgages, it is provided by the North Carolina statutes that, to pass any property as against creditors or purchasers for a valuable consideration, chattel mortgages should be registered. And it has likewise been held in North Carolina that a conditional sale is good inter partes without registration. In the case of Williams v. Jones, 95 N. C. 506, the court said, "There is no principle better settled than that, as between the parties, a mortgage is valid without registration." Leggett v. Bullock, 44 N. C. 283. And it is so laid down in Jones on Mortgages. "Of course," says that author, "the recording of a mortgage is not necessary as against the mortgagor, and, even in those states where it is provided by statute that a mortgage should be recorded within a specified time, it is still valid between the parties until registered." Section 107. And it is maintained by the same author, in section 545:

"That a mortgage may be recorded after the death of the mortgagor, if he has in his lifetime made a delivery of it. His general creditors cannot, for that reason, claim that the mortgage was inoperative as against them. Such a mortgage is good and binding upon the heir in like manner as upon the mortgagor, and the same principle applies to chattel mortgages. Neither the heir in one case, nor the administrator in the other, is a third person, but represents the intestate, and has no better title than he had."

Jones on Chattel Mortgages, § 239:

"The same principle applies to the assignees in bankruptcy. Though they are held to be trustees for the creditors, yet they stand in the place of the bankrupt, and they can take in no better manner than he could. They take subject to whatever equity the bankrupt was entitled to."

In Thomas v. Cooksey, 130 N. C. 148–151, 41 S. E. 2, 3, the court said:

"But we think it is a conditional sale under the doctrine of Wilcox v. Cherry, 123 N. C. 79, 31 S. E. 369, which in express terms overrules Foreman v. Drake, 98 N. C. 311, 3 S. E. 842. Being a conditional sale, the title never passed out of the plaintiff to the defendant. This has without exception been held to be the law in this state, at least since the case of Gaither v. Teague, 26 N. C. 65, including Brem v. Lockhard, 93 N. C. 191, and many other cases. The act of 1883 (sections 1274, 1275, of the Code) providing for the registration of conditional sales, did not change the law as between the original parties. This statute put them on the same footing as chattel mortgages, which only protects creditors and purchasers. Brem v. Lockhard, 93 N. C. 191."

We take it to be the settled law of North Carolina, with regard to conditional sales as with chattel mortgages, that although unrecorded they are good as between the parties and as against creditors who have no specific lien, and are therefore good as against the bankrupt's trustee.

This is in accordance with the general rule of construction, which is thus stated in Am. & Eng. Enc. Law, vol. 24. p. 125:

"By the express provisions of many of the recording acts, their protection is extended to creditors of the grantor, mortgagor, or other apparent owner. Usually such provisions, whether limited in their terms to lien creditors or simply specifying creditors generally, are held to apply to such creditors only as have effected a lien on the conveying debtor's property by attachment, judgment, or otherwise before the recordation of the prior conveyance."

Also, 5 Am. & Eng. Enc. Law, 1016. See, also, In re New York Economical Printing Co., 6 Am. Bankr. Rep. 615–618, 619, 110 Fed. 514.

It appears from the record that the 22 buggies in question were delivered to the bankrupt only a few days before he made a general assignment for the benefit of his creditors, so that it cannot be said that any creditor of the bankrupt trusted him upon the faith of his possession of the property in question. The general assignment for the benefit of creditors was avoided and set aside by the adjudication in bankruptcy, and therefore can have no effect upon the question in issue in this case.

YEANDLE et al. v. PENNSYLVANIA R. CO.

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

No. 6.

1. MASTER AND SERVANT (§ 231*)—DEATH OF SERVANT—RAILROADS—FOLLOWING TRAINS.

Where decedent was lawfully on the tracks over which defendant was operating trains, in the prosecution of his work of inspecting signals and signal lights by means of a gasoline motor car, decedent was entitled to

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

expect that those in control of following trains would use due caution, where there was a full opportunity for view, not to run him down, though such right would not excuse want of due care on his part.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 675–677; Dec. Dig. § 231.*]

2. MASTER AND SERVANT (§ 289*)—DEATH OF SERVANT—RAILROADS—CONTRIBUTORY NEGLIGENCE.

Whether decedent, a railroad employé lawfully operating a gasoline motor car at the rate of 25 miles an hour, was negligent in not looking back for a following extra train, of the existence of which he had no knowledge, for a minute and a half or two minutes occupied by the train in approaching him at a negligent and improper rate of 50 miles an hour, in violation of the rules of the railroad company, was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089–1132; Dec. Dig. § 289.*]

3. COURTS (§ 322*)—FEDERAL COURTS—DIVERSE CITIZENSHIP.

A declaration describing defendant as a corporation organized under and by virtue of the laws of Pennsylvania and plaintiff as being of the state of New Jersey did not sufficiently allege diverse citizenship to confer jurisdiction on a federal Circuit Court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 876, 877, 878; Dec. Dig. § 322.*

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

4. COURTS (§ 322*)—FEDERAL COURTS—DIVERSE CITIZENSHIP.

A declaration alleging that plaintiff was a corporation organized under the laws of Pennsylvania and that letters of administration had been taken out by plaintiff in New Jersey was insufficient to confer federal jurisdiction on the ground of diverse citizenship.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 876, 877, 878; Dec. Dig. § 322.*]

5. COURTS (§ 280*)—FEDERAL COURTS—JURISDICTION—PRESUMPTIONS.

United States courts being of limited jurisdiction, no presumption will be entertained as to the existence of jurisdictional facts, which must be both alleged and proved.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 817; Dec. Dig. § 280.*]

6. COURTS (§ 405*)—RECORD—JURISDICTIONAL QUESTIONS.

Where the record on a writ of error to the Circuit Court of Appeals does not show a case within the jurisdiction of the Circuit Court, the Circuit Court of Appeals will notice the fact, though no jurisdictional question is raised by the parties.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1103; Dec. Dig. § 405.*]

7. APPEAL AND ERROR (§ 653*)—RECORD—AMENDMENT.

The record on a writ of error to a federal court cannot be amended there so as to show federal jurisdiction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2816–2829; Dec. Dig. § 653.*]

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

Samuel Kadish, for plaintiffs in error.

Alan H. Strong, for defendant in error.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

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

GRAY, Circuit Judge. Suit was brought in the court below by the plaintiffs in error, as administrators of Ralph A. Dey, deceased, against the Pennsylvania Railroad Company, the defendant in error, to recover damages for the death of the decedent, which was alleged to have been caused by the negligence of the defendant. At the close of plaintiffs' testimony, there was a judgment of non suit, on motion of the defendant, to which this writ of error was sued out.

At the time of his death, the decedent was in the employ of the New York & Long Branch Railroad Company, as its master mechanic and inspector of its signals and signal lights, used in the operation of the railroad owned, managed and controlled by it. The Pennsylvania Railroad Company, by virtue of a contract with the said New York & Long Branch Railroad Company, ran its trains over the tracks of the latter road, pursuant to its rules and regulations. On the 31st day of July, 1907, the decedent, with one Whitworth as an assistant, was proceeding on a gasoline motor car, as had been his custom, along the tracks of the company by which he was employed, for the purpose of inspecting signals and signal lamps. Just before rounding a sharp curve on the road, they had a clear view, on looking back, for a long distance, and had seen no approaching train. After rounding the curve, they proceeded at a speed of 25 miles an hour, on a tangent to the curve, for something over a mile, when they were overtaken by a train running at high speed, which, colliding with their car, caused the death of the decedent. It was broad daylight at the time of the accident, and there was evidence tending to show that those on the engine, upon rounding the curve, had a clear and unobstructed view ahead for more than a mile; that this train, which was an extra train, and not a scheduled train, was running at a high rate of speed, as it must have been to overtake decedent's car, which was running at 25 or 30 miles an hour; that no whistle, or other signal, was given by the engine, except the short, sharp blasts a moment before the collision; and that a red flag was flying from the rear of the motor car. Decedent was lawfully upon the tracks, in the prosecution of his work, and had a right to expect that those in control of following trains would use due caution, where there was full opportunity of view, not to run him down, though, of course, this would not excuse any want of due care on his own part. There was also evidence that, after rounding the curve, neither of the men looked behind them. Assuming, however, that the locomotive engine was going at the rate of 50 miles an hour, and the motor car going at the rate of 25 miles an hour, as there was evidence tending to show, there was ground for the inference that, if they had looked around when half the distance from the curve to the point of the accident, they would not have seen the engine, by reason of the curve. The alleged negligence in not looking might be confined, therefore, to one-half the distance between the curve and the place where the car was struck. It would be a question for the jury, whether a man running such a car at 25 miles an hour, and on that account obliged to keep his eye ahead for obstructions, would be guilty of negligence in not looking back for the minute and a half or two minutes occupied in passing over the interval described.

There was also evidence tending to show that decedent and his assistant knew that they were not on the time of any of the regular trains, and that there was a rule of the company that no special train, if a special excursion train, could lawfully exceed 35 miles an hour, or if a locomotive engine with a car, 25 miles an hour.

It might be a question, under these circumstances, whether, if decedent had looked behind and, discovering the train, had attempted to slow down his own car, in order to alight and remove it from the track, he would not have been the sooner overtaken by the following engine running at the high speed at which it must have been running. It is also a question, whether, if he had looked around and seen the approaching train, he had not a right to anticipate that he would not be run down while in full view, and that it was a reasonable thing in him to proceed, at the rate at which he was going, to the next station, called Hazlet's, 2,000 feet beyond the place of the collision, at which he expected to stop, where he could have conveniently gotten out of the way of the following train. There was also evidence tending to show that the following train was being run in a reckless and negligent manner, which the motion for nonsuit, made at the conclusion of plaintiffs' testimony, must assume, and it was a fair question whether, under the circumstances, anything done or omitted by the decedent had any causal connection with the collision which resulted in his death. The learned judge of the court below granted the motion for a nonsuit, on the ground that, as a question of law, the decedent must be taken to have been guilty of contributory negligence. We think, however, that it was a case, under all the circumstances, for submission to the jury.

There is a question of jurisdiction, however, appearing on the record, the determination of which must control our disposition of the case. It was not brought to the attention of the court below, but has been called to our attention by the counsel for the defendant in error. The declaration of the plaintiff describes the defendant as "a corporation organized under and by virtue of the laws of the state of Pennsylvania," and the plaintiffs as being "of the state of New Jersey." There is no doubt that this is not a sufficient allegation of the diverse citizenship necessary to the jurisdiction of the Circuit Court. Nor is this defect cured by anything which elsewhere appears in the record. The allegation, that letters of administration were taken out by the plaintiffs in New Jersey, is plainly insufficient, and it is not denied that there was no proof of citizenship made during the trial. The United States Circuit Courts are courts of limited jurisdiction, and no presumption will be entertained as to the existence of the jurisdictional facts. These facts must be alleged, and if controverted must be proved. Where the record does not show a case within the jurisdiction of a Circuit Court, this court will take notice of that fact, although no question as to jurisdiction has been raised by the parties. Grace v. Am. Cent. Ins. Co., 109 U. S. 278, 283, 3 Sup. Ct. 207, 27 L. Ed. 932; M., C. & L. M. Ry. Co. v. Swan, 111 U. S. 379, 4 Sup. Ct. 510, 28 L. Ed. 462; Cont. Ins. Co. v. Rhoads, 119 U. S. 237, 240, 7 Sup. Ct. 193, 30 L. Ed. 380. Neel v. Pa. Co., 157 U. S. 153, 15 Sup. Ct. 589, 39 L. Ed. 654.

Though the record cannot be amended here, it is possible, in the disposition that we make of this case, that it may be amended in the court below, to which it will be remanded, and we therefore, following the course pursued by the Supreme Court of the United States in some of the cases already referred to, have attempted to indicate, for the benefit of the parties at a possible future trial, the conclusion reached by us on the merits of the motion for nonsuit.

The judgment of the court below is therefore reversed, and the case remanded, with directions to set aside the judgment, and for such further proceedings as may not be inconsistent with this opinion.

WATSON v. ST. LOUIS, I. M. & S. RY. CO.

(Circuit Court, E. D. Arkansas, E. D. June, 1909.)

No. 211.

1. COMMERCE (§ 5*)—POWERS OF CONGRESS UNDER COMMERCE CLAUSE.
Under the commerce clause of the Constitution, Congress has the power to regulate the relation of master and servants of carriers by rail engaged in interstate transportation, if limited to employés while engaged in interstate service.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 3–5; Dec. Dig. § 5.*]

2. COURTS (§ 92*)—"OBITER DICTA"—WHAT CONSTITUTES.
General expressions in an opinion which are not essential to a disposition of the cause, on points not presented nor argued to the court, are obiter, and are not permitted to control the judgment of the courts in subsequent cases; but when a question is directly involved in the issues raised, was determined by the trial court, is assigned as error in the assignment of errors on appeal, argued by counsel for all parties, and distinctly decided by the appellate court, a decision of such question is not obiter dictum, although the cause is disposed of on other grounds, and this applies specially when the question involves the power of Congress to enact the legislation.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 335; Dec. Dig. § 92.*

For other definitions, see Words and Phrases, vol. 3, pp. 2051, 2052; vol. 8, p. 7735.]

3. CONSTITUTIONAL LAW (§ 251*) — DUE PROCESS OF LAW — "PRIVILEGES AND IMMUNITIES."
The fifth amendment to the United States Constitution applies only to privileges and immunities which arise out of the natural and essential character of the national government, or are specifically granted or secured to all citizens or persons by the Constitution of the United States. Those fundamental rights which are inherent in and belong to all who live in a free government are privileges and immunities of state citizenship only, and not within the protection of the fifth amendment.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 726, 727; Dec. Dig. § 251.*

For other definitions, see Words and Phrases, vol. 6, pp. 5599–5606.]

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

4. CONSTITUTIONAL LAW (§ 278*)—DUE PROCESS OF LAW.

A statute, although it indirectly works harm and loss to individuals, is not a taking of property without due process of law within the meaning of that amendment.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 763; Dec. Dig. § 278.*]

5. CONSTITUTIONAL LAW (§ 245*)—EQUAL PROTECTION OF LAWS—PRIVILEGES AND IMMUNITIES—CLASSIFICATION OF CARRIERS.

A statute abolishing the fellow-servant rule, limiting its application to carriers by rail, is neither an arbitrary nor unreasonable classification.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 702; Dec. Dig. § 245.*]

6. COMMERCE (§ 58*)—EMPLOYER'S LIABILITY ACT OF 1908.

The employer's liability act of Congress (Act April 22, 1908, c. 149, 35 Stat. 65) is a valid exercise of the powers granted to Congress by the commerce clause of the Constitution, as it is confined to common carriers by rail engaged in interstate commerce and employés while thus actually engaged. The fact that the act is not limited to injuries caused by the negligence of a fellow servant who is at the time engaged in interstate employment does not make the act, or that part of it abolishing the fellow-servant rule, unconstitutional.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 77; Dec. Dig. § 58.*]

(Syllabus by the Court.)

On Demurrer to the Complaint.

The plaintiff, as administratrix of the estate of her deceased husband, seeks by this action to recover damages under the act of Congress approved April 22, 1908 (chapter 149, 35 Stat. 65) generally referred to as the "Employer's Liability Act." The material allegations of the complaint are: That the defendant is a railway corporation, a common carrier engaged in commerce between the states of Arkansas and Missouri; that on June 19, 1908, plaintiff's intestate was employed as fireman on one of defendant's locomotives then engaged in interstate commerce; and that the injuries causing the death of her intestate were caused by the negligent acts of defendant's agents and servants while he was so employed. The complaint then sets out very fully how the accident which caused the death of her intestate occurred, charging that it was caused by a collision with another train by reason of the negligence of the conductor and engineer of the train on which her intestate was employed as fireman in failing to meet the other train at a siding as directed by the train dispatcher. The jurisdiction of this court is invoked solely upon the ground that the action is one arising under the laws of the United States; there being no diversity of citizenship alleged. The defendant demurred to the complaint, setting up numerous grounds, but which may be summarized as follows: (1) That the complaint fails to state a cause of action. (2) That the act of Congress under which a recovery is sought is unconstitutional.

Johnson & Burr, for plaintiff.

J. W. Canada, E. B. Kinsworthy, Lewis Rhoton, and P. R. Andrews, for defendant.

The Attorney General of the United States, by leave of the court, filed a brief as amicus curiæ on the constitutionality of the act.

TRIEBER, District Judge (after stating the facts as above). Without setting out the complaint in full, it is sufficient to say that it states a good cause of action under the act of Congress. It alleges every fact necessary to show: That the death of plaintiff's intestate result-

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

ed from the negligence and wrongful acts of the conductor and engineer in charge of the train and locomotive on which her intestate was, at the time, employed and acting as a fireman; that at the time of the accident the train on which he was employed was engaged in transportation between the states of Arkansas and Missouri; that he left, him surviving, a widow and two children for whose benefit this action is brought by the plaintiff as administratrix of his estate, duly appointed by a court of competent jurisdiction. This leaves only one other question to be determined: Is the act of Congress constitutional?

The constitutionality is attacked upon many grounds, but some of them have been so many times determined by the Supreme Court of the United States that they can no longer be considered as open questions, and for this reason will not be discussed in this opinion. That Congress has the power under the commerce clause of the Constitution to regulate the relation of master and servant to the extent that such regulations are confined solely to interstate commerce, and employés while engaged in such traffic, was fully determined in Employer's Liability Cases, 207 U. S. 463, 494, 28 S. Ct. 141, 52 L. Ed. 297, which arose under Act June 11, 1906, c. 3073, 32 Stat. 232 (U. S. Comp. St. Supp. 1907, p. 891). That act was held to be unconstitutional, but upon grounds other than a want of power on the part of Congress to enact it. It is true that the court, had it seen proper, might have declined to pass upon that question; but for reasons fully stated in the opinion the majority of the court considered it its duty to determine that question, and it did so in a very carefully considered opinion, after a most exhaustive argument of eminent counsel. Six of the justices concurred in this part of the opinion. Mr. Justice Peckham, in his concurring opinion, did not dissent from that conclusion, merely stating that "he was not prepared to agree with all that is stated as to the power of Congress to legislate upon the subject of the relation between master and servant"; the Chief Justice and Mr. Justice Brewer agreeing with this view.

A carefully prepared opinion on an important question of law expressly decided by the trial court (see the opinions of the trial judges reported in 148 Fed. 986 [Brooks v. Southern Pac. Co.] and 997 [Howard v. Illinois Cent. R. Co.]), properly brought before the court by the assignment of errors and the pleadings in the case, and which was fully and ably argued by counsel for all the parties, cannot be considered as obiter even if the action could be, and in fact was, determined upon other issues. This is peculiarly applicable to cases in which grave constitutional questions only are involved. Congress having evidenced by the enactment of the statute that, in its opinion, legislation on that subject should be enacted, when the constitutionality of such an act is questioned upon a number of grounds, among which is one attacking the power of Congress to legislate upon that subject, courts, as a rule, decide that question, even if the act must be held to be unconstitutional upon other grounds. If the power exists, Congress had indicated its desire to exercise it. The Supreme Court evidently presumed that, if the act is invalid for some reason other than a want of power to enact it, it would be re-enacted, omitting or

changing those provisions which make it unconstitutional. That is what Congress did in this instance.

The act of 1906 was held to be unconstitutional by the Supreme Court in an opinion filed on January 6, 1908, 207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. 297. The President, on January 31, 1908, in a special message to Congress, called its attention to that decision and earnestly recommended the enactment of a statute to apply only to the class of cases upon which the court had decided it can constitutionally legislate, and, Congress being in session at that time, the present act was introduced, was carefully considered by the Judiciary Committee of the House, and thereafter enacted as a law at that session, and approved by the President on April 22, 1908, only a little more than three months after the Supreme Court had declared the former act unconstitutional. The same rule was followed in United States v. Delaware & Hudson Co. (decided May 3, 1909) 213 U. S. 366, 29 Sup. Ct. 527, 53 L. Ed. ——. In a later case, decided at the same term at which the Employer's Liability Case was determined, the decision of the court on that point was treated as a final determination that the power existed. Adair v. United States, 208 U. S. 161, 178, 28 Sup. Ct. 277, 282, 52 L. Ed. 436, where it was said:

"In that case (the Employer's Liability Cases) the court sustained the authority of Congress, under its power to regulate interstate commerce, to prescribe the rule of liability as between interstate carriers and its employés in such interstate commerce in cases of personal injuries while actually engaged in such commerce."

The rule as to what does not constitute a dictum is that a decision of a legal proposition within the issues of the case, presented and argued by counsel to the court, and by the court, with its reasons therefor, decided, is not obiter, although the court could have determined the case on other propositions, but elected to settle that proposition. Railroad Company v. Schutte, 103 U. S. 118, 143, 26 L. Ed. 327; Jones v. Habersham, 107 U. S. 174, 179, 2 Sup. Ct. 336, 27 L. Ed. 401; Union Pacific Ry. Co. v. Mason City & Ft. Dodge R. R. Co., 128 Fed. 230, 236, 64 C. C. A. 348, affirmed in 199 U. S. 160, 165, 26 Sup. Ct. 19, 50 L. Ed. 134.

In Michael v. Morey, 26 Md. 239, 261, 90 Am. Dec. 106, the court held:

"When the question was directly involved in the issues raised, and the mind of the court was directly drawn to and distinctly expressed upon the subject, the decision cannot be said to be obiter dictum."

No doubt the court anticipated the objection now made, and, in order to meet it, Mr. Justice White, who delivered the opinion of the court, said:

"While it may be, if we indulged, for the sake of argument, in the hypothesis of limited power upon which the second proposition rests, that it would result that a consideration of the first proposition would be unnecessary because the act would be found to be repugnant to the Constitution because embracing provisions beyond such assumed and restricted authority, we do not think we are at liberty to avoid deciding whether, in any possible aspect, the subject to which the act relates is within the power of Congress. We say this, for if it be that, from the nature of the subject, no power whatever over the same can, under any conceivable circumstances, be possessed by Congress, we

ought to so declare, and not, by an attempt to conceive the inconceivable, assume the existence of some authority, thus, it may be, misleading Congress and giving rise to future contention." 207 U. S. 494, 28 Sup. Ct. 143, 52 L. Ed. 297.

The official reporter of the court treated it as the decision of the court and included it in the headnotes.

It is next claimed that the decision in the Employer's Liability Cases is not conclusive of the act now before the court, because the act of 1906 applied to "every common carrier" engaged in interstate traffic, while the act now under consideration applies only to "common carriers by rail." This, it is claimed, "is an illogical and arbitrary basis of classification, in violation of the fifth amendment to the Constitution." The only cases relied upon to sustain this contention are those in which the constitutionality of state statutes was attacked as being within the prohibition of the equal protection clause of the fourteenth amendment. It might be sufficient to dispose of this contention to say that the fifth amendment, which is a limitation on the powers of Congress only, does not contain the equal protection clause found in the fourteenth amendment which applies solely to the powers of the states. United States v. New York, N. H. & H. R. R. Co. (C. C.) 165 Fed. 742, 745, decided by the full bench of Circuit Judges of the First Circuit.

A constitutional provision, prohibiting the states from doing certain acts, does not by implication apply to Congress. The prohibition against a state impairing the obligations of a contract, it has been repeatedly held, does not apply to Congress. Legal Tender Cases, 12 Wall. 457, 549, 20 L. Ed. 287; Sinking Fund Cases, 99 U. S. 700, 718, 25 L. Ed. 504; Mitchell v. Clark, 110 U. S. 633, 4 Sup. Ct. 170, 28 L. Ed. 279.

In United States ex rel. v. Delaware & Hudson Co. (decided May 3, 1909) 213 U. S. 366, 29 Sup. Ct. 527, 53 L. Ed. ——, it was claimed that the commodities clause of Act June 29, 1906, c. 3591, 34 Stat. 584 (U. S. Comp. St. Supp. 1907, p. 894), usually referred to as the "Hepburn act," was unconstitutional as violative of the due process clause of the fifth amendment because it excepted timber from the provisions of the act, and that it did not apply to all carriers, but the court overruled these contentions, saying:

"Deciding, as we do, that the clause, as construed, was a lawful exercise by Congress of the power to regulate commerce, we know of no constitutional limitation requiring that such a regulation when adopted should be applied to all commodities alike. It follows that even if we gave heed to the many reasons of experience which have been suggested in argument against the exception, and the injustice and favoritism which it is asserted will be operated thereby, that part can have no weight in passing upon the question of power. *And the same reasons also dispose of the contention that the clause is void as a discrimination between carriers.*"

See, also, Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136.

Besides, the due process clause of the fifth amendment only applies to the privileges and immunities "which arise out of the natural and essential character of the national government, or are specifically granted or secured to all citizens or persons by the Constitution of

the United States," and not those fundamental rights which are inherent in and belong to all who live under a free government. These latter privileges are "inherent in state citizenship, and are privileges or immunities of that citizenship only." This question has been very learnedly discussed in the late case of Twining v. New Jersey, 211 U. S. 78, 97, 29 Sup. Ct. 14, 53 L. Ed. 97, where Mr. Justice Moody analytically reviews the previous decisions of the Supreme Court on that subject.

But, assuming that the limitations are the same, that the "due process" clause of the fifth amendment is broad enough to include the "equal protection of the laws," and that for this reason the construction placed upon that provision of the fourteenth amendment should apply to causes involving the interpretation of the fifth amendment, still the contention on behalf of defendant could not be sustained. In every instance in which state statutes abolishing or modifying the fellow-servant rule, and limiting the act to railroads only as in the act now under consideration, have been attacked as being in violation of the "equal protection" clause of the fourteenth amendment, the Supreme Court of the United States has overruled the contention and sustained the validity of the acts, declaring that such classification by the legislative department is permissible, and not within the prohibition of that amendment. Missouri Pacific Ry. Co. v. Mackey, 127 U. S. 206, 8 Sup. Ct. 1161, 32 L. Ed. 107; Minneapolis, etc., R. R. Co. v. Herrick, 127 U. S. 210, 8 Sup. Ct. 1176, 32 L. Ed. 109; Chicago, etc., R. R. Co. v. Pontius, 157 U. S. 209, 15 Sup. Ct. 585, 39 L. Ed. 675; Tullis v. Lake Erie & Western R. R. Co., 175 U. S. 348, 351, 20 Sup. Ct. 136, 44 L. Ed. 192; St. Louis, etc., R. R. Co. v. Callahan, 194 U. S. 628, 24 Sup. Ct. 857, 48 L. Ed. 1157.

So well was the law deemed to be settled, when the last-cited case came before the Supreme Court on error to the Supreme Court of Missouri, that the affirmance was by a memorandum opinion.

In Minnesota Iron Co. v. Kline, 199 U. S. 593, 26 Sup. Ct. 159, 50 L. Ed. 322, the court even went a step further, and held that a state statute changing the fellow-servant rule as to employés of railroads, but which excepted uncompleted roads, is not violative of the "equal protection" clause of the fourteenth amendment, despite that exception. As stated in Bachtel v. Wilson, 204 U. S. 36, 27 Sup. Ct. 243, 51 L. Ed. 357:

"The selection, in order to become obnoxious to the fourteenth amendment, must be arbitrary and unreasonable, not merely possibly, but clearly and actually so."

The latest case on the subject of classification is Heath & Milligan Co. v. Worst, 207 U. S. 338, 354, 28 Sup. Ct. 114, 52 L. Ed. 236, where the court did not deem it necessary to cite authorities, saying:

"We have declared many times, and illustrated the declaration, that classification must have relation to the purpose of the Legislature; but logical appropriateness of the inclusion or exclusion of objects or persons is not required. A classification may not be only arbitrary, but necessarily there must be great freedom of discretion even though it result in ill-advised, unequal, and oppressive legislation."

It is also claimed that the act is in violation of the fifth amendment as imposing liabilities which, in effect, deprive the carriers by rail of property without due process of law. In the Legal Tender Cases, supra, the same proposition was advanced. It was earnestly insisted that the act was in violation of the spirit of the fifth amendment, which forbids taking private property for public use without just compensation or due process of law. The court, in overruling this contention, said:

"That provision has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon or to inhibit laws that indirectly work harm and loss to individuals. A new tariff, an embargo, a draft, or a war may inevitably bring upon individuals great loss; may, indeed, render valuable property valueless. They may destroy the worth of contracts. But whoever supposed that, because of this, a tariff could not be changed, or a nonintercourse act or an embargo be enacted, or a war be declared?" 12 Wall. 551, 20 L. Ed. 287.

Nor does the fact that the act changes an existing rule of law in permitting the recovery of damages for injuries for which there could be no recovery at common law or under pre-existing statutes make an act of Congress void under the fifth amendment, or a state statute under the fourteenth amendment. Wilmington Mining Co. v. Fulton, 205 U. S. 60, 74, 27 Sup. Ct. 412, 417, 51 L. Ed. 708, where the court said:

"And even although the liability imposed upon the mine owners to respond in damages for the willful failure of the mine manager and mine examiner to comply with the requirements of the statute was not in harmony with the principles of the common law applicable to the relation of master and servant, it being competent for the state to change and modify those principles in accord with its conceptions of public policy, we cannot infer that the selection of mine owners as a class upon which to impose the liability in question was purely arbitrary and without reason."

Other cases in which state statutes of this nature have been held valid are hereinbefore cited.

The next question to be considered is whether the fact that the act is not limited to injuries caused by the negligence of fellow servants who are, themselves, engaged at the time in interstate employment, but permits a recovery by the injured servant who at the time was engaged in interstate service, but was injured by the negligence of a fellow servant not so engaged, makes it invalid. In the Employer's Liability Cases, Mr. Justice White, in delivering the majority opinion of the court, used the following language, on which great stress is laid by learned counsel for the defendant:

"Thus, the liability of a common carrier is declared to be in favor of 'any of its employés.' As the word 'any' is unqualified, it follows that liability to the servant is coextensive with the business done by the employers whom the statute embraces; that is, it is in favor of any of the employés of all carriers who engaged in interstate commerce. *This also is the rule as to the one who otherwise would be a fellow servant, by whose negligence the injury or death may have been occasioned, since it is provided that the right to recover on the part of any servant will exist, although the injury for which the carrier is to be held resulted from 'negligence of any of its officers, agents or employés.'*" 207 U. S. 498, 28 Sup. Ct. 145, 52 L. Ed. 297.

The italicized portion (which does not so appear in the opinion) is claimed to be a determination by the court that unless Congress also limited the act to injuries caused by fellow servants who were at the time engaged in interstate commerce, the act, or at least that part of it relating to fellow servants, is void. Assuming that the language quoted might possibly justify such a construction, still, unless that particular question was presented and argued to the court and intended to be decided, it would be obiter. From the record of the case it appears beyond question that neither was done; nor was it necessary to a decision of the case. For these reasons it is reasonable to presume that it was merely an inadvertent expression used by the learned justice who delivered the opinion of the court, as a part of his reasoning. A careful perusal of the opinions filed by the trial judges in the two cases, as well as the original briefs filed by the counsel for both sides, fails to show that this question was raised or argued by any of the counsel or considered by any of them or the learned trial judges to be necessary for the determination of the issues involved. Therefore it must be considered as a mere dictum and not a part of the decision of the court.

General expressions in an opinion, which are not essential to dispose of the case, are not permitted to control the judgment of the court in subsequent suits. Cohen v. Virginia, 6 Wheat. 264, 399, 5 L. Ed. 257; United States ex rel. Johnson v. County Court, 96 U. S. 211, 24 L. Ed. 628; Cross v. Burke, 146 U. S. 82, 13 Sup. Ct. 22, 36 L. Ed. 896; McCormick Harvesting Co. v. Aultman Co., 169 U. S. 606, 18 Sup. Ct. 443, 42 L. Ed. 875; Bardes v. Bank, 178 U. S. 524, 20 Sup. Ct. 1000, 4 L. Ed. 1175; Harriman v. Northern Securities Co., 197 U. S. 244, 291, 25 Sup. Ct. 493, 49 L. Ed. 739.

The object of Congress in the enactment of the law was to protect the men employed in this hazardous occupation, in which thousands are annually killed or maimed without any fault of the master himself, but by the negligence of other employés, over whom the servant has no control, and in whose selection he had no voice. The legislation is neither new nor revolutionary. It had been recommended by President Roosevelt in his annual message in 1905, and again in a special message on January 31, 1908. A similar act was passed by the English Parliament as early as 1880, and among the states of the Union a large number have either abolished the fellow-servant rule entirely or modified it materially in respect to employés engaged in hazardous occupations; many of them limiting the change to railroads. Among these are Alabama, Arkansas, California, Connecticut, Colorado, Florida, Georgia, Indiana, Iowa, Kansas, Massachusetts, Minnesota, Missouri, Mississippi, Montana, Nebraska, Nevada, North Carolina, North Dakota, New York, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Texas, Wisconsin, Virginia, and Wyoming, all of which acted on that subject long before Congress. Similar statutes have also been for a long time in force in most of the continental states of Europe. This evidences that such legislation is in compliance with the demands of an enlightened public opinion. To effect this purpose it is wholly immaterial what the employment of the fellow servant is. Public opinion, as expressed

through the legislative departments of the nation, as well as many of the states, evidently considered it an injustice that persons injured, or in case of death, the surviving members of the family, should become burdens on the public and objects of charity, and therefore considered it better public policy that the employer should be required to make some provision for them, charging the moneys thus expended to expenses of management, or cost of production, and collect it indirectly from the public. The enactment of such a statute not only results in protecting the employés of carriers by rail, but at the same time guards the public welfare by securing the safety of travelers. The latter is one of the reasons mentioned by the court in Johnson v. Southern Pacific Ry. Co., 196 U. S. 1, 17, 25 Sup. Ct. 158, 49 L. Ed. 363, involving the safety appliance act. As stated by Mr. Justice Moody, in his dissenting opinion in the Employer's Liability Case:

"Any law which promotes the safety of either (meaning the employé or passengers) promotes the safety of both." 207 U. S. 533, 28 Sup. Ct. 159, 52 L. Ed. 297.

That provisions for the safety of the employés of a railway if not directly, at least indirectly, add to that of the passengers, cannot be doubted. The knowledge of the fact that, in case of an accident, some provision will be made for him in case of disability, or for the family dependent upon him if death results from the injury, relieves the employé's mind to that extent of the anxiety incidental to the fear entertained by every man, and especially if he has a family dependent upon his earnings, as to what would become of them if he became helpless or is killed. This anxiety, ever present to those engaged in such a hazardous occupation as that of railways propelled by the dangerous agency of steam, may materially affect the safety of the passengers intrusted to him in an emergency in which cool judgment is so essential. By making this provision for him, legislators might well have reasoned that the safety of the passengers is as much promoted as that of the employé. In fact, the elementary principles of law governing the fellow-servant rule and the reasons therefor, show that it is wholly immaterial what the employment of the fellow servant whose negligence caused the injury is. The liability of the master for injuries caused by the wrongs committed by his servants while acting about the business of the master and within the scope of his employment is based upon the maxim of respondeat superior; but, when the fellow-servant rule was first established, it was held that this maxim does not apply so as to make the master responsible for injuries inflicted upon his servants by the negligence of a fellow servant. The main reason assigned for this exception is that of assumption of risk. Priestley v. Fowler, 3 Mees. & W. 1, and Hutchinson v. York, N. C. & B. R. Co., 5 Exch. 343, 19 L. J. Exch. 296, the leading English cases; Murray v. South Carolina R. Co., 1 McMul. (S. C.) 385, 36 Am. Dec. 268, and Farwell v. Boston & Worcester R. Co., 4 Metc. (Mass.) 49, 38 Am. Dec. 339, the earliest American cases on that subject; Railroad Co. v. Fort, 17 Wall. 553, 557, 21 L. Ed. 739; Pollock's Essay on Jurisp. pp. 127–133.

If Congress has the power to abolish the rule so far as it applies

to master and servant when engaged in interstate commerce, then the employment of the servant whose wrong or negligence caused the injury is clearly immaterial, as the liability of the master by the repeal of that rule is imposed by the maxim of respondeat superior. Congress having by the enactment of this statute abolished the fellow-servant rule as to employés while engaged in interstate commerce, such servant, when so engaged to serve a master who is a carrier by rail engaged in interstate transportation, does not undertake, as between himself and his employer, to assume the risk of negligence upon the part of a fellow servant. And, in order to prevent the evasion of the provisions of this act, Congress, by section 5 (Act April 22, 1908, c. 149, 35 Stat. 66), declares:

"That any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall, to that extent, be void."

But, aside from that, courts have nothing to do with the wisdom of such legislation, as that has been wisely left by the Constitution to the lawmaking department. In St. Louis, Iron Mountain & S. Ry. Co. v. Taylor, 210 U. S. 281, 295, 28 Sup. Ct. 616, 621, 52 L. Ed. 106, the court, in reply to a similar contention, said:

"To this we reply: If it be the true construction, its harshness is no concern of the courts. They have no responsibility for the justice or wisdom of legislation, and no duty except to enforce the law, as it is written, unless it is clearly beyond the constitutional power of the lawmaking body."

As the powers of Congress are limited to those granted by the Constitution, and the only provision of that instrument authorizing such legislation is the commerce clause, and that is limited to "commerce with foreign nations and among the several states and Indian tribes," it can, of course, only legislate for the safety of those employed in those branches of commerce, and not in intrastate carriage. That is all the act under consideration attempts to do. It is limited to those who are in the employment of railroads engaged in commerce between the states and while they are actually engaged in such employment. What difference does it make what the employment of the fellow servant is—whether interstate or intrastate? The safety of the employés of an interstate train, as well as of the passengers intrusted to their care, can in no wise be affected by that. Congress having the exclusive power to regulate interstate commerce, that power necessarily includes the right to regulate the relation of the master and servant operating such trains and legislate for the safety of the employés. Johnson v. Southern Pacific Ry. Co., supra; Schlemmer v. Buffalo, etc., Ry. Co., 205 U. S. 1, 27 Sup. Ct. 407, 51 L. Ed. 681; Employer's Liability Cases, supra.

If the contention of defendant is sustained, the effect would be that although the employé of a carrier by rail engaged in interstate transportation is injured while engaged on an interstate train, if the cause of the injury was the negligence of a fellow servant not engaged at the time in interstate work, Congress is powerless to provide for a recovery of compensation for the injuries suffered. Therefore, if an engineer or fireman on an interstate train is injured by reason of the

negligence of a switchman or other employé of a train operated on a branch line, which is used exclusively for intrastate business, the failure of Congress to except such accidents from the provisions of the statute makes it unconstitutional as being in excess of its powers under the Constitution. The same result would follow if a telegraph operator on such a branch line fails to transmit or deliver a message from the train dispatcher directing the conductor of the interstate train to go on a siding for the purpose of letting an intrastate train pass on the main line, and by reason of such negligence there is a collision. In State v. Chicago, Milwaukee & St. Paul R. Co. (Wis.) 117 N. W. 686, the court, speaking of a similar question, said:

"The direction and dispatching of every train on an interstate railway necessarily involves knowledge in the train dispatcher of all other trains which are in the same vicinity at the same time, and also an ability to control such other trains. An interstate train from Milwaukee to Chicago cannot be safely forwarded if, under the direction of a separate employé, a local train may be moving between Milwaukee and Racine over the same track at the same time, or nearly so. The very switching at local stations must be within the knowledge and under the control of him who is to decide upon and direct the most important of interstate transportation. Obviously division of authority over these subjects would be fraught with great perils and delays to both kinds of transportation. Hardly any act of a train dispatcher on a busy railroad can be conceived which does not affect both interstate and domestic commerce. He cannot move or stop the most distinctively local train without affecting the interstate train, or vice versa. No extra or special can be put on the division without adjustment of other trains. Of course, also, every interstate train carries some purely intrastate freight or passengers. Many purely domestic trains carry some freight or passengers in transit to extrastate destination. It would seem that any severance of control over state from interstate trains involved so much of confusion and probability of danger, and its possibility even is so doubtful and experimental that no Legislature would absolutely precipitate it without careful consideration nor without providing in the act for the event of failure of such experiments."

There is nothing in the Employer's Liability Cases to warrant the construction claimed on behalf of defendant. What the court did decide in that case was that as the act under consideration included all employés of an interstate carrier, even if they (the employés) were engaged in an employment wholly disconnected from the interstate business, citing "employés of a purely local branch operated wholly within a state, employés in repair shops, construction work, accounting and clerical work, storage elevators and warehouses, not to suggest, besides, the possibility of it being engaged in other independent enterprises," and then held that:

"As the act thus includes many subjects wholly beyond the power to regulate commerce and depends for its sanction upon that authority, it results that the act is repugnant to the Constitution."

No doubt Congress, had it seen proper to do so, could have limited it to certain fellow servants, such as are employed only in interstate service or in the same or different departments of the common employment, as has been done by some of the states. See acts of Arkansas, Indiana, Massachusetts, Mississippi, Missouri, Montana, Ohio, Oregon, South Carolina, Texas, Utah, and Virginia. But the failure to do so cannot invalidate the act.

In Northern Securities Co. v. United States, 192 U. S. 197, 331, 24 Sup. Ct. 436, 48 L. Ed. 679, the contention was that the defendant was not a railroad company, that it was a corporation created by one of the states and its corporate powers limited to buying, selling, and holding stock, bonds, and other securities, and for that reason Congress had no power to regulate it; but the court held that, under the power to regulate commerce among the several states, Congress had the authority to enact the statute, and that it applied to the Securities Company. Another case in which one of the issues was very much like that now under consideration is Loewe v. Lawlor, 208 U. S. 274, 301, 28 Sup. Ct. 301, 52 L. Ed. 488. It was there claimed that the Sherman Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), was not applicable, or, if applicable, not within the power of Congress to enact it, because the defendants were not themselves engaged in interstate commerce; but the contention was by the court overruled. The same conclusion was reached in United States v. Debs (C. C.) 64 Fed. 724, 745, 755, affirmed in 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092.

Other statutes of similar nature have been repeatedly enacted by Congress, and, when questioned, sustained. Act July 3, 1866, c. 162, 14 Stat. 81, digested as sections 5353, 5354, 5355, Rev. St. (U. S. Comp. St. 1901, pp. 3637, 3638), makes it a criminal offense to transport or ship, by a carrier engaged in interstate transportation, dangerous explosives, regardless of the fact whether the shipment is interstate or intrastate, provided the carrier is at the time engaged in interstate transportation. The gravamen of the offense is to transport, or cause to be transported, any of the prohibited articles on any vessel or vehicle employed in interstate traffic. It was the passengers and employés on such vehicles or vessels whom Congress sought to protect, and under the commerce clause had the right to protect. The danger to them was as great if the explosion occurred from an intrastate shipment as an interstate. The constitutional limitation was fully met by confining the provisions of the act to vehicles employed at the time in interstate traffic. The constitutionality of this act seems never to have been questioned. In fact, the only reported case construing this act, which the court has been able to find, is United States v. Saul (D. C.) 58 Fed. 763.

In Act Cong. December 21, 1898, c. 28, 30 Stat. 755, 763 (U. S. Comp. St. 1901, p. 3081), "An act to amend the law relating to American seamen, for the protection of such seamen, and to promote commerce," the language used applied to all seamen, regardless of whether the vessel on which they were employed was engaged in interstate or intrastate commerce. In Patterson v. Bark Eudora, 190 U. S. 169, 179, 23 Sup. Ct. 821, 47 L. Ed. 1002, the constitutionality of this act was attacked upon the ground now raised and also that it applied to foreign vessels. While the court declined to determine what its decision might be in a case relating to contracts of sailors for services to be performed wholly within the state, as that question was not before it, it sustained the constitutionality of the act in an action in which the vessel was engaged in interstate commerce, and whether

the vessel is foreign or not. The argument of counsel for the government, cited with approval by the court, might well be applied here:

"Moreover, as 90 per cent. of all commerce in our ports is conducted in foreign vessels, it must be obvious that their exemption from these shipping laws will go far to embarrass domestic vessels in obtaining their quota of seaman. To the average sailor it is a consideration while in port to have his wages in part prepaid; and if, in a large port like New York, 90 per cent. of the vessels are permitted to prepay such seamen as ship upon them, and the other 10 per cent., being American vessels, cannot thus prepay, it will be exceedingly difficult for American vessels to obtain crews. This practical consideration, presumably, appealed to Congress and fully justified the provisions herein contained." 190 U. S. 179, 23 Sup. Ct. 824, 47 L. Ed. 1002.

It is well known that, while there may be some few railroads engaged wholly in intrastate traffic, there are practically none engaged in interstate transportation which is not also engaged in intrastate carriage of freight or passengers. To limit the liability of the railroad to its employés on a train employed in interstate traffic for injuries caused by fellow servants engaged in like employment would in many instances make the act valueless and of no benefit to the employé. In the language above quoted:

"This practical consideration, presumably, appealed to Congress and fully justified the provisions herein contained."

The safety appliance acts (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174], amended by Act April 1, 1896, c. 87, 29 Stat. 85 [U. S. Comp. St. 1901, p. 3174], amended by Act March 2, 1903, c. 976, 32 Stat. 943 [U. S. Comp. St. Supp. 1907, p. 885]) make it unlawful to haul any car in interstate transportation not equipped with certain appliances deemed necessary for the safety of employés. When these statutes first came before the courts for construction, it was contended that they could only apply to carriers whose lines traverse more than one state; otherwise they would be in excess of the powers possessed by Congress. Some of the trial courts sustained this contention, but upon appeal it has been practically uniformly held that they apply to all railroads, although operating entirely within a single state, independently of all other carriers, if any interstate freight is carried on any car of the train. The test of the application of the act is held to be the transportation of any articles of interstate commerce, and, as thus construed, the act has been enforced as a constitutional exercise of the powers vested in Congress. United States v. Colorado & N. W. R. Co., 157 Fed. 321, 85 C. C. A. 27, 15 L. R. A. (N. S.) 167; United States v. Colorado & N. W. R. Co., 157 Fed. 342, 85 C. C. A. 48; United States v. Atchison, etc., Ry. Co. (C. C. A.) 163 Fed. 517; Chicago, etc., Ry. Co. v. United States (C. C. A.) 165 Fed. 423; United States v. Southern Pacific Co. (C. C. A.) 169 Fed. 407; Union Stock Yards Co. v. United States (C. C. A.) 169 Fed. 404; Belt R. Co. of Chicago v. United States (C. C. A.) 168 Fed. 542; Wabash R. Co. v. United States (C. C. A.) 168 Fed. 1.

The constitutionality of the bankruptcy acts of Congress has at different times been questioned upon similar grounds, but they have been uniformly sustained. Sturges v. Crowninshield, 4 Wheat. 122,

4 L. Ed. 529; Nelson v. Carland, 1 How. 265, 11 L. Ed. 126; Hanover Nat. Bank v. Moyses, 186 U. S. 181, 22 Sup. Ct. 857, 46 L. Ed. 1113.

In The Daniel Ball, 10 Wall. 557, 566, 19 L. Ed. 999, it was claimed that the provisions of Act Cong. July 7, 1838, c. 191, 5 Stat. 304, amended by Act Aug. 30, 1852, c. 106, 9 Stat. 61, making it unlawful for any steam vessel to transport merchandise or passengers upon the navigable waters of the United States without a license, did not apply to a steamer engaged as a common carrier between places in the same state, although a portion of the merchandise transported by her is destined to places in other states; she not running in connection with or in continuation of any line of steamers or other vessels, or any railway line leading to or from another state. But the court overruled this contention and held that the act applied to such cases, and that it was not an infringement on the rights of the states. Mr. Justice Field, who delivered the opinion of the court, said on that subject:

"And we answer, further, that we are unable to draw any clear and distinct line between the authority of Congress to regulate an agency employed in commerce between the states, when that agency extends through two or more states, and when it is confined in its action entirely within the limits of a single state. If its authority does not extend to an agency in such commerce, when that agency is confined within the limits of a state, its entire authority over interstate commerce may be defeated."

While that case was one arising on the navigable waters of the United States, it is now well settled that the power of Congress under the commerce clause is as complete upon the land. In re Debs, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092; United States v. Colorado & N. W. R. Co., supra. It may be proper to state that this same objection was made by Messrs. Littlefield and Bannon, of the House Judiciary Committee, in their minority report on this bill, but failed to receive the approval of either House of Congress.

The only reported case involving this act, which the court has been able to find, is Fulgham v. Midland Valley R. Co. (C. C.) 167 Fed. 660, decided by Judge Rogers of the Western district of this state; but the constitutionality of the act, it seems was not questioned, and not determined by the learned judge.

In view of the conclusions reached, it is unnecessary to determine whether that question can be raised by defendant in this case, as the complaint shows on its face that the accident was caused by reason of the negligence of the conductor and locomotive engineer of the train on which plaintiff's intestate was the fireman, and which train, it is alleged, was at the time engaged in interstate transportation. Cases on that point which may be consulted are 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, supra; State of Missouri v. Dockery, 191 U. S. 170, 24 Sup. Ct. 53, 48 L. Ed. 133; Cooley on Const. Lim. (7th Ed.) p. 250.

In the opinion of the court the act in controversy is a valid exercise of the powers granted to Congress by the Constitution, and the demurrer must be overruled.

FISHER v. CLEVELAND, C., C. & ST. L. RY. CO. et al.

(Circuit Court, E. D. Kentucky. April 9, 1909.)

1. RAILROADS (§ 22*)—ACTION—VENUE—"DOING BUSINESS."

Where a part of defendant railway's line passed into K. county, Ky., the railroad did business in that state, so that some Kentucky court had jurisdiction of an action against it, and this, though none of them were within Civ. Code Prac. Ky. § 73, providing that an action against a carrier for injury to a person must be brought in the county in which the defendant or either of the several defendants resides, in which plaintiff is injured, or in which he resides, if he resides in a county into which the carrier passes.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 50; Dec. Dig. § 22.*

For other definitions, see Words and Phrases, vol. 3, pp. 2155–2160; vol. 8, pp. 7640, 7641.]

2. RAILROADS (§ 22*)—ACTIONS—VENUE.

Civ. Code Prac. Ky. § 73, provides that an action against a carrier for an injury to a person must be brought in the county in which the defendant or either of the several defendants resides, or in which the plaintiff is injured or in which he resides, if he resides in a county into which the carrier passes. *Held*, that an action for injuries could not be brought against a carrier in a county into which the carrier's line passed, but in which plaintiff did not reside, nor in a county in which the carrier had no agent on whom process could be served.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 50; Dec. Dig. § 22.*]

3. RAILROADS (§ 22*)—ACTIONS—VENUE.

Defendant carrier did not pass into K. county, Ky., prior to October 24, 1905, when it contracted with a bridge company for a division of work over the lines passing into K. county, that, in consideration of defendant assisting the bridge company in doing such work, it would render assistance to the railroad company of a similar amount, and that the railroad company should pay the bridge company 50 cents a car in so far as the bridge company's assistance exceeds that rendered by the railroad company. *Held*, that the railroad company's cars and servants while operating in K. county were the servants of the bridge company and under its control, and hence the railroad company was not liable to be sued in K. county for injuries to a person residing there under Civ. Code Prac. Ky. § 73, authorizing an action against a common carrier in a county in which the plaintiff resides, and into which the carrier passes.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 50; Dec. Dig. § 22.*]

Action by Richard Fisher against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company and another. On plea in abatement to jurisdiction after removal. Sustained.

Plaintiff Richard Fisher lived in Covington, Ky., and was employed by defendant railway company as night car cooper and sealer at its freight depot in Cincinnati, Ohio. Defendant Michael Igo was also employed by the railroad company in the same capacity and place in the daytime. The duty of both was to see that cars were properly sealed on departure, to examine and record the condition of seals on incoming cars, and to break the seals on cars to be unloaded. On the night of December 6, 1905, plaintiff was walking along a platform at the freight depot to examine the seals of certain cars on the track adjoining the platform, at the end of which were three or four steps leading therefrom to a lower level. When plaintiff reached the steps, he start-

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

ed to go down, but the steps having been broken down by some sectionmen during the day, while defendant Igo was on duty, of which Igo did not inform plaintiff, he fell to the ground, and received injuries for which he sued. The case having been removed to the federal court notwithstanding defendant Igo was also a resident of Kentucky, on a finding that no cause of action was stated against him, defendant railroad company filed a plea in abatement to the court's jurisdiction on the ground that under the Kentucky Code the Kentucky court from which the cause has been removed was without jurisdiction.

S. D. Rouse and R. C. Simmons, for plaintiff.
John Galvin and Maurice L. Galvin, for defendants.

COCHRAN, District Judge. The corporation defendant since the filing of the transcript herein and overruling of the motion to remand has questioned this court's jurisdiction of the cause on the ground that the state court from whence it was removed did not have jurisdiction thereof. Of course, if this is true, then this court does not have jurisdiction. Said defendant first raised the question by special demurrer, and then by plea in abatement. I have overruled both, holding that the state court had jurisdiction. After so holding, my attention has been called by the corporation defendant to the case of Byrne v. Kansas City, etc., R. Co., 61 Fed. 605, 9 C. C. A. 666, 24 L. R. A. 693, and in the course of my reading I have come across the case of Standard Oil Co. v. Anderson (decided by the Supreme Court of the United States February 1, 1909) 212 U. S. 215, 29 Sup. Ct. 252, 53 L. Ed. ——. Both of these cases have a bearing on the question whether the defendant corporation passes into Kenton county, Ky., in the circuit court whereof this action was originally brought. On my motion a reargument has been had on the question of jurisdiction, and at my instance the affidavits of E. P. Goodwin and J. S. Sweeney setting forth in detail the nature of the direction and control exercised by the bridge company over the engines and crews of the corporation defendant passing over the bridge and tracks of said company under the contract between the two have been filed. And, in order to set forth fully my reasons for the conclusion which I have reached in regard to the matter, I have prepared this written opinion.

Section 73 of the Civil Code of Practice of Kentucky provides that an action against a common carrier for an injury to a person must be brought in the county in which the defendant or either of the several defendants resides, or in which the plaintiff is injured, or in which he resides, if he resides in a county into which the carrier passes. Neither of the defendants resided in Kenton county when the suit was brought, and the plaintiff was not injured therein. He resided, however, in that county, so that if at the time the corporation defendant passed thereinto the Kenton circuit court had jurisdiction of the action. It does not necessarily follow that, if it did not pass thereinto, that court did not have jurisdiction of the action. It appears from the plea in abatement that said defendant passes into Jefferson county, Ky., and hence does business in the state. This being so, some court in Kentucky has jurisdiction of the cause of action, and this notwithstanding the fact that no court in Kentucky comes within the terms of section 73 of the Code. The circuit court of Jefferson county does not come within that sec-

tion; because, though said defendant passes into Jefferson county, plaintiff does not reside therein. This was so decided by the Kentucky Court of Appeals in the case of C. & O. Ry. Co. v. Cowherd, 96 Ky. 113, 27 S. W. 990, but the Kenton circuit court does not have jurisdiction of the cause under this view of the matter because said defendant had and has no agent in Kenton county upon whom process could or has been served. It was undertaken to be brought before that court by service of summons on said defendant's superintendent and designated agent for service of process who resides and was served in Jefferson county. It follows, therefore, that the jurisdiction of the Kenton circuit court depends on the question whether the defendant corporation at the time the action was brought within the meaning of said Code provision passes into Kenton county. If it did not, that court did not have jurisdiction. If it did, it had jurisdiction.

Now, it is certain that said defendant did not pass into Kenton county prior to October 24, 1905, when the contract between it and the bridge company went into effect; for prior to that time said defendant did nothing that could possibly be construed as a passing into Kenton county. If it passed into Kenton county at the time the action was brought, it was by virtue of what it has done since then under said contract. Nor can it be said that it passed into Kenton county from the mere fact that its engines and crews have since then passed into Kenton county. In the case of Byrne v. Kansas City R. Co., supra, it was held that the railroad company was not liable to a person injured by its engine in charge of its engineer and fireman whilst on the track of the bridge company, because the same were there under a contract of renting to that company by the railroad company. The former was paying the latter for the use thereof $10 a day and its expenses in the operation thereof. The basis of the holding was that, though the engine and trainmen were the property and servants of the railroad company, they were not at the time of the injury doing the work of the railroad company, but that of the bridge company, and the question as to whose work they were doing was considered to be determined by the fact as to whose control and direction they were then under. Judge Taft said:

"They were [referring to the trainmen] it is true general servants of the railway company, but at the time of the accident they were engaged in the work of the bridge company, were subject to the orders of the bridge company's officer, and in what they did or failed to do were acting for the bridge company. The result is determined by the answer to the further question, whose work was the servant doing? And under whose control was he doing it?"

And in the case of Standard Oil Co. v. Anderson Mr. Justice Moody said:

"It sometimes happens that one wishes a certain work to be done for his benefit, and neither has persons in his employ who can do it, nor is willing to take such persons into his general service. He may then enter into an agreement with another. If that other furnishes him with persons to do the work, and places them under his exclusive control in the performance of it, those men become pro hac vice the servants of him to whom they are furnished. But, on the other hand, one may prefer to enter into an agreement with another that that other for a consideration shall himself perform the work through servants of his own selection, retaining the direction and control of them for the period. In the first case, he to whom the workmen are furnish-

ed is responsible for their negligence in the conduct of the work, because the work is his work, and they are for the time his workmen. In the second case, he who agrees to furnish the completed work through servants over whom he retains control is responsible for their negligence in the conduct of it, because, though it is done for the ultimate benefit of the other, it is still in its doing his own work. To determine whether a given case falls within the one class or the other we must inquire whose is the work being performed—a question which is usually answered by ascertaining who has the power to control and direct the servants in the performance of their work. Here we must carefully distinguish between authoritative direction and control and mere suggestion as to detail or the necessary co-operation, where the work furnished is a part of a larger undertaking."

If, then, it is possible that the defendant corporation's engine and crew may pass into Kenton county and it not be responsible for the negligence of the crew in the operation of the engine and cars which it is drawing, it is possible that such may be the case, and said defendant be said not to pass into Kenton county within the meaning of the Code provision; for the same state of facts which would make it not liable for such negligence would prevent its being said that it so passed

What, then, is essential in addition to the passage of such engines and crews into Kenton county in order that said defendant may be liable for the negligence of the latter and that it may be said to so pass into said county? It is essential that when those engines and crews pass into Kenton county that they be doing its work, and not the work of the bridge company. If they are doing the work of that company, then it is not so liable, and it does not so pass. Whose work, then, do they do? It is certain that they are on the property of the bridge company when they so pass, and they are doing that which that company was organized to do and for which it exists. It is certain, also, that at the time they are so passing they are under its general supervision, direction, and control. That such is the case speaks out of the contract under which they pass. No doubt, it was in recognition thereof that it was provided in the contract that the bridge company, and not the defendant, should be liable for accidents happening while they are so passing. It is stated generally in the affidavit of Van Winkle that such is the case, and it is shown to be so more in detail by the affidavits of Goodwin and Sweeney. Nothing is shown to the contrary, and I do not understand that it is claimed that it is otherwise.

I gather from the decision of the Sixth Circuit Court of Appeals and the Supreme Court referred to, that the test as to whose work the engines and crews are doing in such circumstances is under whose general supervision, direction, and control they are doing the work. The consideration for the defendant corporation thus assisting the bridge company in doing its work is the rendition of a like amount of assistance by said bridge company to said defendant in the doing of its work and the payment to the bridge company 50 cents per car in so far as the assistance rendered by it exceeds that rendered by said defendant. It may, therefore, be said that the defendant corporation rents or lets its engines and crews to the bridge company in return for such assistance and payment, and thus that it comes directly within the Byrne Case. It does not come within the Anderson Case because there the winch and drum and winchman when the work of hoisting

was being done were on the dock of the defendant, and were under its general supervision, direction, and control. They never passed out from its general supervision, direction, and control into that of the stevedore. The work was done in conjunction with that of the stevedore, and in answer to signals from the stevedore. But by virtue thereof the winch and drum and winchman did not pass out from under the general supervision, direction, and control of the defendant.

Mr. Justice Moody said:

"Was the winchman at the time he negligently failed to observe the signals engaged in the work of the master's stevedore under his rightful control, or was he rather engaged in the work of the defendant under his rightful control? We think the latter was the true situation. The winchman was undoubtedly in the general employ of the defendant who selected him, paid his wages, and had the right to discharge him for incompetency, misconduct, or any other reason. In order to relieve defendant from the results of the legal relation of master and servant, it must appear that that relation for the time has been suspended, and a new like relation between the winchman and the stevedore had been created. The evidence in this case does not warrant the conclusion that this changed relation had come into existence. For reasons satisfactory to it the defendant preferred to do the work of hoisting itself, and received an agreed compensation for it. The power, the winch, the drum, and the winchman were its own. It did not furnish them, but furnished the work they did to the stevedore. The work was done by the defendant for a price as its own work, by and through its own instrumentalities and servants under its own control."

I therefore feel constrained to hold that this court is without jurisdiction of the cause herein, the order overruling the plea in abatement set aside, and the plea adjudged good.

In re BRASELTON.

(District Court, N. D. Georgia, E. D. May 11, 1909.)

1. SALES (§ 474*)—CONDITIONAL SALES—CREDITORS OF BUYER.

Civ. Code Ga. 1895, § 2776, declares that, if personal property is conditionally sold, the sale to be enforceable against third parties shall be executed in writing as chattel mortgages, and section 2777 provides that such sales must be recorded within 30 days from date, and in other respects shall be governed by the laws regulating chattel mortgage registration. *Held* that, where a written reservation of title is not properly executed and recorded, the reservation, while good between the parties and as against general creditors and creditors with liens antedating the sale, it is subject to liens obtained or debts arising from credit given in good faith by reason of the buyer's apparent ownership of the property.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1391–1402; Dec. Dig. § 474.*

What constitutes a contract of conditional sale, see note to Dunlop v. Mercer, 86 C. C. A. 448.]

2. BANKRUPTCY (§ 228*)—FINDINGS OF REFEREE—REVIEW.

Findings of fact by a referee in bankruptcy are not to be disturbed unless clearly erroneous.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 228.*]

3. BANKRUPTCY (§ 310*)—PREFERRED CLAIMS—LIENS—CONDITIONAL SALES.

Where a conditional sale of property to a bankrupt was not valid as against subsequent creditors whose claims were contracted on the faith

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

of the bankrupt's ownership of the property conditionally sold, because of the conditional vendor's failure to record the reservation of title as required by the state law, and the referee found as a fact that such omission operated to defraud such subsequent creditors, the vendor was not entitled to the allowance of his claim as a secured claim, but was required to share equally with general creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 501–507; Dec. Dig. § 310.*]

In Bankruptcy. Review of action of referee.

A. S. Richardson and W. L. Hodges, for D. C. Alford.
A. A. McCurry, for trustee.

NEWMAN, District Judge. This matter coming before the court on an application to review the action of the referee on the claim of D. C. Alford that he is entitled to a preference over general creditors of the bankrupt because of a reservation of title to a certain stock of goods sold by him to E. K. Braselton, the bankrupt. The case makes necessary the application of the statutes of Georgia with reference to conditional sales or sales with reservation of title by the seller, and as to its effect against third parties.

In the case In re Atlanta News Publishing Company (D. C.) 160 Fed. 519–522, this court had occasion to pass upon the proper construction of the sections of the Code of Georgia on this subject. Section 2776 of the Civil Code of Georgia is as follows:

"Whenever personal property is sold and delivered with the condition fixed 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."

Section 2777 of the Civil Code of Georgia is as follows:

"Conditional bills of sale must be recorded within thirty days from their date, and in other respects shall be governed by the laws relating to registration of mortgages."

In construing these sections in the case of the Atlanta News Publishing Company, this is said:

"The meaning of section 2776 as applicable to the facts in this case as construed by the Supreme Court of the state is this: (1) Where there is a mere oral reservation of title and no writing whatever on the subject, the title will be so fixed in the vendee that the rights of third parties obtaining judgments or liens antedating the sale may be enforced against the vendor's claim of title. (2) Where the contract reserving title in the vendor is in writing, although not properly executed and recorded as required by the statute, the reservation is good as between the parties, and as to general creditors, and also as to creditors with liens antedating the conditional sale; and is only subject to such liens as are obtained, or debts arising from credit given in good faith by reason of the property being in the possession of the vendee with apparent ownership and without notice of title elsewhere."

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

The referee's certificate of the proceeding before him states the case as follows:

"I, Frank L. Upson, one of the referees of said court in bankruptcy, do hereby certify that, in the course of the proceedings in said cause before me, the following questions arose pertinent to said proceedings:

"Question: Whether or not the claim of D. C. Alford should be allowed as a secured claim because of a written instrument entered into between him and the bankrupt, partaking of the nature both of a retention of title and a chattel mortgage, which had been withheld from record since its date, January 27, A. D. 1908, to August 1, A. D. 1908; the adjudication having been had on a petition filed August 21, A. D. 1908. Objections to the allowance of this claim as a secured claim being made by R. R. Webb, trustee.

"A hearing on this issue was had before me on the 9th day of February, A. D. 1909. At said hearing counsel for trustee introduced the record of the bankruptcy matter as of file, designating specially all of the proven claims which showed sales subsequent to the giving of the alleged security and also affidavits of a number of creditors who set forth that they had extended credit on the faith of the bankrupt's apparent ownership of the stock of goods; the affidavits being received as evidence by the consent of the counsel for D. C. Alford, the creditor. A list of the sales, as shown by these proven claims, is hereto attached, marked Exhibit F and embodied as a part of my findings, together with the affidavits. E. K. Braselton was sworn and examined, a summary of his evidence is hereto attached, having been agreed on by counsel.

"Findings of Fact.

"I find that this retention of title note and the chattel mortgage clause thereon was withheld from the record by D. C. Alford from the date it was given, to wit, 27th day of January A. D. 1908, until 1st day of August, A. D. 1908, and that D. C. Alford told the bankrupt, E. K. Braselton, that the notes would not be recorded, as they were just as good whether recorded or not. Amount of fund in controversy is some $378.25.

"I find that it has been proved that some $799.76 of goods were sold to said E. K. Braselton by creditors whose claims have been proved, and that these goods were sold, without knowledge of the lien claimed by D. C. Alford, and that by reason of the withholding of this instrument from the record that a commercial credit standing had gone out to the trade on which credit these goods were sold.

"I find as a matter of fact that this withholding of this instrument was with the intent not to impair E. K. Braselton's credit by putting same on record, and that a legal fraud was worked on those creditors who sold by reason of his commercial rating obtained by reason of the nonrecording of this instrument which will now estop the said D. C. Alford from setting up this claim as superior to their claim and that of their trustee.

"Findings of Law.

"As ruled by your honor in the recent case of the Atlanta News Publishing Co. (D. C.) 20 Am. Bankr. Rep. 193, 160 Fed. 519, this retention of title and chattel mortgage is good as between the parties, but is 'subject to debts arising from credit given in good faith by reason of the vendee's apparent ownership from his possession of the property' (second headnote).

"On the facts of this case there is a strong similarity with the recent case of In re Hickerson (D. C.) 20 Am. Bankr. Rep. 686, 162 Fed. 345, in which case the recent rulings of the Supreme Court (Thompson v. Fairbanks, 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577; York Mfg. Co. v. Cassell, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782; First Nat. Bank v. Staake, 202 U. S. 141, 26 Sup. Ct. 580, 50 L. Ed. 967) and the leading District and Circuit Court of Appeals decisions on the point are discussed and relied on to support the court's decision that the fact that the mortgage was withheld from the record, although both the bank and the mortgagee testified that it was in 'good faith,' that it was 'deliberate, and that it had the effect of getting extensions and additional credits for the bankrupt,' and by order the claim was disallowed as a secured claim, and only to be allowed as an unsecured claim.

"It is my conclusion of law that D. C. Alford cannot prove his claim as a secured claim over the claims of the creditors who sold subsequent to the date of the instrument, and that the trustee is subrogated to the rights of these creditors and can successfully maintain an objection in this court of bankruptcy to the allowance of this claim as a secured claim.

"An order was therefore made disallowing said claim as a secured claim, and allowing same claim only as an unsecured claim."

It is well understood that the findings of referees in bankruptcy upon questions of fact are not to be disturbed unless clearly erroneous. The evidence in the case is very brief. It shows that on January 27, 1908, D. C. Alford sold to E. K. Braselton, the bankrupt, a stock of goods described as "one American soda fount and fixtures, and also stock of drugs as per invoice." The invoice shows the items embraced in the sale amounting to $999.40. Braselton gave D. C. Alford four promissory notes, three for $250 each, and one for $249.40, payable at intervals. After reciting that they were given for the purchase money of the soda fount and fixtures and the stock of drugs, the notes contained this provision:

"Should we, or either of us, fail to pay this debt at maturity, the said D. C. Alford, or their assigns, may at their option take possession of said property without process of law and sell the same at public outcry at the courthouse door in Hartwell, Ga., after five days' notice published at said courthouse door, and apply the proceeds of said sale to this note after paying all costs. And in case of a deficit after said application is made, we, or either of us, are bound therefor. In case there is a surplus of the proceeds of said sale after said application is made, the same is to be paid to either of us. To better secure this debt, I hereby sell and convey to said D. C. Alford the following property, which is my own and unincumbered, to wit: Any goods I may have in my possession not on consignment that may accumulate from time to time in the run of my business."

This sale having been made and these papers executed on January 27, 1908, the notes containing this reservation in the seller were not recorded until August 1, 1908.

On August 21, 1908, an involuntary petition in bankruptcy was filed against E. K. Braselton, and he was adjudicated a bankrupt on the 1st day of September, 1908. Between the time of the sale by D. C. Alford to E. K. Braselton and the filing of the petition in bankruptcy, Braselton bought from different creditors, as will be seen in the finding of the referee, several hundred dollars worth of merchandise. The referee finds that:

"These goods were sold without knowledge of the lien claimed by D. C. Alford and that by reason of the withholding of this instrument from the record, a commercial credit standing had gone out to the trade on which credit these goods were sold."

The referee further finds that:

"As a matter of fact that this withholding of this instrument was with the intent not to impair E. K. Braselton's credit by putting same on record, and that a legal fraud was worked on those creditors who sold by reason of his commercial rating obtained by reason of the nonrecording of this instrument which will now estop the said D. C. Alford from setting up this claim as superior to their claim and that of their trustee."

The referee had the witnesses and parties before him and had a good opportunity for judging the bona fides of this failure of Alford

to record, and its effect upon the other creditors. I do not think the court would be justified in disturbing his finding to the effect that D. C. Alford should only be allowed to prove his claim as an unsecured claim and share equally with the general creditors.

The referee's finding is approved.

BRAWNER v. IRVIN.

(Circuit Court, N. D. Georgia, E. D. May 1, 1909.)

1. CIVIL RIGHTS (§ 13*)—STATUTORY PROVISIONS—ACTION FOR DAMAGES.
   Rev. St. § 5510 (U. S. Comp. St. 1901, p. 3713), declaring that every person who, under color of any law, statute, ordinance, regulation, or custom, subjects an inhabitant of any state or territory to the deprivation of any rights, privileges, or immunities, secured or protected by the Constitution and laws of the United States or to different punishments, pains, or penalties, on account of his being an alien, or by reason of his color or race, than that prescribed for the punishment of citizens, shall be punished, is a penal statute, the infringement of which will not give rise to a civil action for damages.
   [Ed. Note.—For other cases, see Civil Rights, Cent. Dig. § 11; Dec. Dig. § 13.*]

2. CIVIL RIGHTS (§ 13*)—STATUTES—CONSTRUCTION.
   Rev. St. § 1979 (U. S. Comp. St. 1901, p. 1262), declares that every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and the laws, shall be liable to the party injured in an action at law. *Held*, that the rights, privileges, and immunities referred to were those secured by the Constitution and the laws of the United States and did not include the right of an individual to life, liberty, or property, which were primary rights within the protection of the state of which the individual is an inhabitant.
   [Ed. Note.—For other cases, see Civil Rights, Dec. Dig. § 13.*]

3. COURTS (§ 282*) — FEDERAL COURTS — CONSTITUTIONAL QUESTIONS — FOURTEENTH AND FIFTEENTH AMENDMENTS.
   The fourteenth and fifteenth amendments of the federal Constitution are limitations on the states and did not confer primary rights enforceable by a person of color in the first instance in the federal courts.
   [Ed. Note.—For other cases, see Courts, Dec. Dig. § 282.*]

4. CIVIL RIGHTS (§ 1*)—STATUTES—CITIZENS—NEGROES.
   Persons of African descent have the same, but no greater, rights than other citizens in the state where they make their home; the rights and privileges protected from infringement by Rev. St. § 1979 (U. S. Comp. St. 1901, p. 1262), and the infringement of which creates a cause of action for damages, being common to all citizens.
   [Ed. Note.—For other cases, see Civil Rights, Dec. Dig. § 1.*]

5. COURTS (§ 282*)—FEDERAL COURTS—JURISDICTION.
   The federal courts have no jurisdiction of an action for damages by a citizen of African descent against an Anglo-Saxon citizen of the same state for an alleged unlawful assault committed under color of executive authority.
   [Ed. Note.—For other cases, see Courts, Dec. Dig. § 282.*]

E. C. Kinnebrew, for plaintiff.
Sam Olive, for defendant.

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

NEWMAN, District Judge. The declaration in this case is as follows:

"The petition of Lula Brawner shows that W. H. Irvin has injured and damaged her in the sum of $5,000 under the facts set forth in the following paragraphs:

"Second. Said W. H. Irvin is a resident of Elbert county, Ga.

"Third. For that heretofore, to wit, on the 20th day of June, 1908, your petitioner was living in the city of Elberton in Elbert county, Ga., with her husband, William Brawner, and her children in her own house, attending to her domestic duties, at peace with all the world and demeaning herself as an orderly and law-abiding woman.

"Fourth. Your petitioner further shows that while at her home at the time and place mentioned in paragraph 3 of this petition and living in the condition therein set forth, the defendant in this case, W. H. Irvin, the then chief of police of the said city of Elberton, called your petitioner from her house into her yard, arrested her, and then and there maliciously and cruelly assaulted and beat her with a whip, cutting her flesh in scars, causing her much pain and suffering, all without fault on her part, and without any just cause or provocation.

"Fifth. When the said W. H. Irvin arrested petitioner as stated in paragraph 4 of this petition, and before whipping her, he charged her with having struck a child of his relatives, which charge petitioner then and there denied, and which she now avers to be wholly and absolutely untrue.

"Sixth. The defendant, after whipping petitioner as charged in paragraph 4 of this petition, locked her up in the city prison, immediately, kept her there for two hours, after which he discharged her from custody without preferring any charge against her and without requiring her to give bond for her appearance before any court.

"Seventh. As chief of police of the city of Elberton, the defendant has the power under the laws, ordinances, and regulations of the city government to arrest offenders and under certain conditions to put them in custody, and in treating petitioner as set forth in the foregoing paragraphs he was acting under color of his official authority, and subjected her to a different punishment from that prescribed for citizens by reason of her color.

"Eighth. The whipping of petitioner by the defendant was in an open and public manner, in the daytime. The people on neighboring lots being spectators, it subjected petitioner to great mortification.

"Ninth. The state courts of Elbert county have declined to prosecute the defendant after being asked by petitioner so to do. The grand jury took no action on the matter. Petitioner asks for redress under the Constitution and laws of the United States.

"Tenth. By reason of the unprovoked and aggravated character of the assault, the contempt of public justice displayed by the defendant in his usurpation of power, and the pain and mortification caused to petitioner, she prays that the court may allow her exemplary and punitive damages in this case.

"Eleventh. All of the foregoing happened to the injury and damage of petitioner as set forth in paragraph 1 of this petition."

Then follows the prayer for process.

Defendant has filed a plea to jurisdiction and demurrer.

It is sought to support this suit by section 5510, Rev. St. (U. S. Comp. St. 1901, p. 3713), which reads as follows:

"Every person who, under color of any law, statute, ordinance, regulation, or custom, subjects, or causes to be subjected, any inhabitant of any state or territory to the deprivation of any rights, privileges, or immunities, secured or protected by the Constitution and laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color or race, than are prescribed for the punishment of citizens, shall be punished," etc.

This, as will be seen, is a penal statute, so it could hardly be sufficient to support a civil suit.

Counsel for plaintiff further invokes section 1979, Rev. St. (U. S. Comp. St. 1901, p. 1262), which reads as follows:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

It does not appear from the declaration in this case that the defendant has deprived the plaintiff of any rights, privileges, or immunities secured by the Constitution and laws of the United States. As is well understood, of course, the right of an individual to life, liberty, and property, and to be free from molestation, is primarily and originally the right of a citizen of the state of which the individual is an inhabitant. To bring a case within this section, it must appear that some right, privilege, or immunity secured by the Constitution and laws of the United States has been infringed. It is useless, of course, to attempt to support this proceeding under the fourteenth or fifteenth amendments to the Constitution of the United States. These are limitations upon the states. Nor is there any warrant for such procedure under the thirteenth amendment.

Without discussing all the cases since the Slaughterhouse Cases, 16 Wall. 36, 21 L. Ed. 394, I think the determination of this question is sufficiently found in Hodges v. United States, 203 U. S. 1, 27 Sup. Ct. 6, 51 L. Ed. 65. In that case the defendant was charged with conspiracy against certain persons named, "citizens of the United States of African descent, in the free exercise and enjoyment of rights and privileges secured to them and each of them by the Constitution and laws of the United States, and because of their having exercised the same." The facts charged were that the persons against whom the conspiracy was said to have been formed had made contracts to work for certain sawmill operators as laborers and workmen, and the conspirators threatened to injure them in their persons, and that the conspirators unlawfully marched and moved in a body, armed with deadly weapons, and threatened and intimidated the said workmen, for the purpose of compelling them to quit their employment and work at the sawmills; all this being done because they were colored men and citizens of African descent, contrary to the form of the statute, etc. There was a demurrer in the Circuit Court, which demurrer was overruled, and thereupon the case was taken directly to the Supreme Court of the United States on a writ of error. In the statement of the case preceding the opinion, the court refers, among other sections of the revised statutes, to two sections invoked, that is sections 1977 and 5508 (U. S. Comp. St. 1901, pp. 1259, 3712). In delivering the opinion of the court, Mr. Justice Brewer said:

"While the indictment was founded on sections 1977 and 5508, we have quoted other sections to show the scope of the legislation of Congress on the general question involved. That prior to the three post bellum amendments to the Constitution the national government had no jurisdiction over a wrong like

that charged in this indictment is conceded. That the fourteenth and fifteenth amendments do not justify the legislation is also beyond dispute, for they, as repeatedly held, are restrictions upon state action, and no action on the part of the state is complained of. Unless therefore the thirteenth amendment vests in the nation the jurisdiction claimed, the remedy must be sought through state action and in state tribunals subject to the supervision of this court by writ of error in proper cases."

The extract contained in the opinion in the Slaughterhouse Cases, 16 Wall. 36, 21 L. Ed. 394, from the opinion of Mr. Justice Washington in Corfield v. Coryell, 4 Wash. C. C. 371, 380, Fed. Cas. No. 3,230, is then quoted, as follows:

" 'The inquiry,' he says, 'is: What are the privileges and immunities of citizens of the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by citizens of the several states which compose this union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government, the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole.' "

Further quotation is then given from the Slaughterhouse Cases (page 77 of 16 Wall. [21 L. Ed. 394]) as follows:

" 'It would be the vainest show of learning to attempt to prove by citations of authority that up to the adoption of the recent amendments no claim or pretense was set up that those rights depended on the federal government for their existence or protection, beyond the very few express limitations which the federal Constitution imposed upon the states—such, for instance, as the prohibition against ex post facto laws, bills of attainder, and laws impairing the obligation of contracts. But with the exception of these and a few other restrictions, the entire domain of the privileges and immunities of citizens of the states, as above defined, lay within the constitutional and legislative power of the states, and without that of the federal government.' "

The opinion then proceeds:

"Notwithstanding the adoption of these three amendments, the national government still remains one of enumerated powers, and the tenth amendment, which reads, 'the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people,' is not shorn of its vitality. True, the thirteenth amendment grants certain specified and additional power to Congress, but any congressional legislation directed against individual action which was not warranted before the thirteenth amendment must find authority in it."

In further discussing the matter, and after some reference to the proper definition of "slavery" and "involuntary servitude," Mr. Justice Brewer continues:

"It is said, however, that one of the disabilities of slavery, one of the indicia of its existence, was a lack of power to make or perform contracts, and that when these defendants, by intimidation and force, compelled the colored men named in the indictment to desist from performing their contract, they to that extent reduced those parties to a condition of slavery, that is, of subjection to the will of defendants, and deprived them of a freeman's power to perform his contract. But every wrong done to an individual by another, acting singly or in concert with others, operates pro tanto to abridge some of the freedom

to which the individual is entitled. A freeman has a right to be protected in his person from an assault and battery. He is entitled to hold his property safe from trespass or appropriation, but no mere personal assault or trespass or appropriation operates to reduce the individual to a condition of slavery."

The opinion then concludes:

"At the close of the Civil War, when the problem of the emancipated slaves was before the nation, it might have left them in a condition of alienage, or established them as wards of the government like the Indian tribes, and thus retain for the nation jurisdiction over them, or it might, as it did, give them citizenship. It chose the latter. By the fourteenth amendment it made citizens of all born within the limits of the United States, and subject to its jurisdiction. By the fifteenth it prohibited any state from denying the right of suffrage on account of race, color, or previous condition of servitude, and by the thirteenth it forbade slavery or involuntary servitude anywhere within the limits of the land. Whether this was or was not the wiser way to deal with the great problem is not a matter for the courts to consider. It is for us to accept the decision, which declined to constitute them wards of the nation or leave them in a condition of alienage where they would be subject to the jurisdiction of Congress, but gave them citizenship, doubtless believing that thereby in the long run their best interests would be subserved; they taking their chances with other citizens in the states where they should make their homes."

The whole matter resolves itself therefore into this: A person of African descent has no more rights than a person of Anglo-Saxon descent. All are citizens, and persons of African descent, as is stated in the foregoing opinion, take their chances with other citizens in the states where they make their home, so that the rights, privileges, and immunities referred to in section 1979 are nothing peculiar to persons of African descent, but are common to all citizens.

Whatever wrong may have been inflicted upon the plaintiff in this case, and whatever rights she may have against the defendant in a court of competent jurisdiction, it is perfectly clear that this court has no jurisdiction in the case. The plaintiff and defendant are citizens and residents of this district, both, indeed, residing in the same town. Whatever rights the plaintiff has must be enforced therefore in the courts of the state. The declaration certainly makes no case in the courts of the United States.

The plea to the jurisdiction will be sustained.

PORTLAND CO. v. SEARLE

(Circuit Court, D. Maine. May 10, 1909.)

No. 41.

1. SALES (§ 52*)—BUYER—EVIDENCE.

Evidence *held* to warrant a finding that a contract of sale of certain railroad equipment, etc., was made with defendant's testator and on his credit, and not on the credit of certain railroad corporations in which testator was interested.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 138; Dec. Dig. § 52.*]

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

2. SALES (§ 370*)—EXECUTORY CONTRACT—REPUDIATION—ACTION FOR BREACH.
Where defendant, immediately after the death of his testator, who had contracted with plaintiff for certain railroad equipment, repudiated the contract before time for performance had arrived, the contract being executory, plaintiff was authorized to treat it as terminated and to sue at once for its breach.
[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1085; Dec. Dig. § 370.*]

3. SALES (§ 384*)—BREACH OF CONTRACT—DAMAGES—PROFITS.
In an action for breach of an executory contract for the construction and delivery of railroad equipment of a special character and gauge, prior to the time for delivery, the seller's measure of damages was his outlay and expenses, less the value of materials on hand and the profits which might have been realized by performing the contract.
[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1098; Dec. Dig. § 384.*]

At Law.

Benjamin Thompson and Frederic J. Laughlin, for plaintiff.
Arthur P. Hardy and William M. Bradley, for defendant.

HALE, District Judge. In this action at law plaintiff seeks to recover of the defendant the contract price for the building of 50 log bunks and 6 sets of snow-plow irons, and also to recover damages by reason of the failure of Calvin Putnam, the defendant's testator, to carry out the provisions of the contract alleged to have been made by him with the plaintiff for the building of 25 flat cars. The plaintiff corporation is engaged in the building of cars and locomotives. At the time of the making of the alleged contract, Calvin Putnam was the owner of Redington township in Franklin county, Me. The evidence shows that in November, 1902, Mr. Putnam, who was then 87 years old, had contracted with the Berlin Mills Company to sell them certain timber upon Redington township; to build a railroad into that township to a point designated to the Berlin Mills Company by Fletcher Pope, and shown on a preliminary survey; to finish the road by December, 1903; to furnish a sufficient number of cars for hauling, during the logging season, the logs that might be cut under the terms of the contract with the Berlin Mills Company; and to haul all the logs cut under contract with the Berlin Mills Company to the place designated by the company. The Berlin Mills Company agreed, among other things, to cut, in the fall of 1903, and annually thereafter, from five to ten million feet of timber until the same had been removed in accordance with the contract, and to pay Mr. Putnam at a certain agreed price per thousand for the lumber. The company further agreed to loan Mr. Putnam, from time to time, an amount in money not to exceed $100,000, at 5 per cent. interest; of which $25,000 was to be paid at the execution of the contract, and the balance as the building of the road progressed. For the purposes of this case it is not essential to enter into further details of this contract. Another contract was made in the same month by Mr. Putnam with one Fletcher Pope, which recited that the contract had been made with the Berlin Mills Company, and that Mr. Putnam had agreed to engage and em-

ploy Mr. Pope as his agent, general manager, and superintendent "in the execution of all things to be done, and work to be performed, by said Calvin Putnam in his said agreement with said Berlin Mills Company; and to represent him and act for him in dealing with said Berlin Mills Company, and in the superintendence and management of all things to be done and observed by said Berlin Mills Company under their agreement with said Calvin Putnam in said contract." That contract further provided that Mr. Pope was to act under the direction and control, and conform to the wishes, of Mr. Putnam, the latter having the power during his lifetime to terminate the contract with Mr. Pope by 30 days' written notice. The contract undertook further to provide that, at the death of said Calvin Putnam, or in the event of his incapacity, from any cause, to manage his business, Pope should be empowered to manage all the property described in the contract with the Berlin Mills Company, "and to carry out and perform all the duties and obligations entered into and assumed by him therein and thereunder until such contract should have been fully performed by the respective parties"; and "to do and perform in his name, or in the name of the estate, all things necessary to be done to carry out and perform so much of said contract as should remain unexecuted in the event of such incapacity or at his decease." The contract also authorized Pope to "provide any and all material that from time to time might be necessary to meet the requirements of said contract and carry out its provisions, and to do any and all things necessary to be done to carry out said contract as fully and effectually as said Putnam could or should do if living." In this contract, Fletcher Pope agreed to act as the agent and general manager of Calvin Putnam, and to assume and execute all powers given in the contract, and to perform all work and services necessary and proper for him to perform as such agent and manager. Within a year from making this contract, the railroad, known as the "Eustis Railroad," was built, under the superintendence of Mr. Pope, from a point on the line of the Phillips & Rangeley Railroad into Redington plantation; and on January 13, 1903, Mr. Pope contracted with the Portland Company for 25 flat cars at the contract price of $6,875. These cars were afterwards paid for by Mr. Pope's checks on a deposit of moneys received from Mr. Putnam in connection with the building of the road. The Berlin Mills Company, under its contract with Mr. Putnam, advanced for the building of the road more than $100,000, all of which was paid to Mr. Pope by Mr. Putnam's order. The money so received was deposited by Mr. Pope in his own name in certain banks. The indebtedness incurred for the construction of the road was paid, so far as payments were made, by the personal checks of Mr. Pope on these banks.

In August, 1903, Mr. Pope contracted with the Portland Company for 25 more flat cars and 50 log bunks; the latter being for the express purpose of hauling out the lumber cut by the Berlin Mills Company on the Redington plantation. The 50 log bunks were built by the Portland Company, and $2,500 has been paid to the plaintiff company on this account by checks of Mr. Pope.

On November 19, 1903, Mr. Pope wrote the Portland Company:

"On the last order for flats you were not to begin until the first of December. Now we have been called upon to build six more miles of railroad and it is going to take more money than we had planned for and we would like to hold up the order for the 25 cars you now have a little while. We shall want the cars all right, but must make arrangements for the money first. We have been forced by circumstances to make these other extensions much sooner than we expected and have put the money into them which we intended to put into flats."

Neither Mr. Pope, nor the defendant, ever subsequently called for the cars; they were never ready to carry out that part of the contract; while the plaintiff says that it was always ready to perform its part of the contract.

On January 15, 1904, Mr. Putnam had a fall, and later the same year died in consequence of it.

After the death of Mr. Putnam there is no suggestion that Mr. Searle, as the executor of Mr. Putnam's will, ever offered in any manner to carry out the contract with the Portland Company relating to the flat cars; but, on the contrary, he refused to even recognize that part of the contract which relates to the log bunks which had been delivered and used during Mr. Putnam's lifetime in hauling out the timber cut by the Berlin Mills Company under its contract with Mr. Putnam. The plaintiff company offers testimony that the material which it had acquired in order to carry out the contract for flat cars was of comparatively little value in its partially manufactured state, owing to the fact that such material was for narrow-gauge cars, and that the patterns were of a class used on only one of the other narrow-gauge roads in this state.

This action is brought to recover the balance due on the log bunks, the value of the snow-plow irons which were intended for and used by the railroad constructed by Mr. Pope, and also to recover the damages sustained by the Portland Company in consequence of Mr. Putnam's failure to carry out the contract for the construction of the flat cars intended for that road.

1. To whom was the credit given? The defendant urges that the credit was given by the plaintiff, not to Calvin Putnam, but to the Phillips & Rangeley Railroad or to the Eustis Railroad; that the plaintiff corporation made the charge upon its books to the Phillips & Rangeley Railroad for the work done upon this contract; that Fletcher Pope's correspondence with the plaintiff was on letter heads of the Phillips & Rangeley Railroad or of the Eustis road; that he attached his signature as vice president and general manager of the Phillips & Rangeley Railroad; and that the plaintiff in its letters addressed him in that capacity.

It is unnecessary to enter upon a discussion of all the testimony. The whole evidence induces me to believe that the Portland Company sold wholly upon the credit of Mr. Putnam. Neither the Eustis Railroad nor the Phillips & Rangeley Railroad had any credit, and, although the memorandum of charge was made to the Phillips & Rangeley Railroad, the testimony is overwhelming that the actual credit was given to Calvin Putnam. The defendant admits that it was the intention of all parties that the money to be used in equipping the road

was the $100,000 to be obtained by Calvin Putnam from the Berlin Mills Company. The learned counsel for the defendant urge that what the plaintiff was really interested in was this $100,000 coming from the Berlin Mills Company. But it must be remembered that this $100,000 was to be the property of Calvin Putnam. The whole testimony is convincing that Mr. Pope was acting as the agent of Calvin Putnam in the whole transaction, and that the intention of all parties was that Calvin Putnam should be personally liable for the indebtedness incurred in equipping a railroad built for the sole purpose of selling his lumber in Redington township.

2. The evidence clearly shows that there was a contract made by Fletcher Pope as the agent of Calvin Putnam with the plaintiff for 25 flat cars at $275 each, and for 50 log bunks at $85 each. So far as the testimony indicates, there has never been any question raised but that the log bunks were built and delivered according to contract. The plaintiff has received from the defendant, through Fletcher Pope, $2,500 on account of them. The value of 50 log bunks, at $85 each, is $4,250; deducting the payment of $2,500, leaves $1,750 remaining due upon this item. The testimony shows that there were six sets of center snow-plow irons sold and delivered by the plaintiff for use on the same road, and that they were of the value of $16.86.

With reference to the flat cars, the correspondence, taken in connection with the rest of the testimony, induces the belief that there was a legal contract with the defendant for 25 flat cars at the price of $275 each; that, after making the contract, Mr. Payson, the agent of the plaintiff, immediately proceeded on the work by ordering the material for constructing the cars; that this material consisted of lumber, car wheels, axles, refined iron, and all the other materials that the company itself makes. These materials were of a peculiar character, owing to the fact that the road was of a narrow gauge and differed from standard roads; for this reason there was no general sale for flat cars of such design; nor was there any sale for such materials, from the fact that they had been adapted to meet the requirements of patterns for the particular contract to which I have referred. Mr. Payson, the manager for the plaintiff company, says that the flat cars were got ready for final assembling when the correspondence, to which I have alluded, occurred. This correspondence, with the subsequent action upon the part of defendant's testator, is sufficient evidence of the breach of the contract. For there can be no doubt that where either party to an executory contract annuls it without cause, and before the time for performing it elapses, he authorizes the other party to treat it as terminated, without prejudice to a right of action for damages; and the party whose duty it was to deliver the goods under the contract may elect to treat the contract as terminated, and bring his action at once.

3. What, then, is the measure of damages for nonperformance of the contract? Such damages must be compensatory; they must represent the amount of the loss which the plaintiff has sustained. In United States v. Behan, 110 U. S. 338, 4 Sup. Ct. 81, 28 L. Ed. 168, the court held:

"When one party enters upon the performance of a contract, and incurs expense therein, and, being willing to perform, is, without fault of his own, prevented by the other party from performing, his loss will consist of two distinct items of damage: First, his outlay and expenses, less the value of materials on hand; second, the profits he might have realized by performance, which profits are related to the outlays and include them and something more. The first item he may recover in all cases, unless the other party can show the contrary; and the failure to prove profits will not prevent him from recovering it. The second he may recover when the profits are the direct fruit of the contract, and not too remote or speculative."

In speaking for the court, Mr. Justice Bradley said:

"The prima facie measure of damages for the breach of a contract is the amount of the loss which the injured party has sustained thereby. If the breach consists in preventing the performance of the contract, without the fault of the other party, who is willing to perform it, the loss of the latter will consist of two distinct items or grounds of damage, namely: First, what he has already expended towards performance (less the value of materials on hand); secondly, the profits that he would realize by performing the whole contract."

The Behan Case contains a clear statement by the Supreme Court of the rule of damages. The rule in that case is only one aspect of the general rule; it is the rule applicable to a particular class of executory contracts, where the plaintiff has been put to great expense in providing peculiar materials for fulfilling the contract, has expended labor thereon in adapting them to the contract, and, without his fault, has been prevented from carrying out and completing the contract. The following cases are also in point: United States v. Speed, 8 Wall. 77, 19 L. Ed. 449; Roehm v. Horst, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953, affirming 91 Fed. 345, 33 C. C. A. 550; Taylor Mfg. Co. v. Hatcher Mfg. Co. (C. C.) 39 Fed. 440, 3 L. R. A. 587; McElwee v. Bridgeport Land & Improvement Co., 54 Fed. 627, 4 C. C. A. 525; Anvil Mining Co. v. Humble, 153 U. S. 540, 552, 14 Sup. Ct. 876, 38 L. Ed. 814; Lovell v. Insurance Co., 111 U. S. 264, 274, 4 Sup. Ct. 390, 28 L. Ed. 423; In re Stern, 116 Fed. 604, 606, 54 C. C. A. 60; Michigan Yacht & Power Co. v. Busch, 143 Fed. 929, 934, 75 C. C. A. 109; Wells v. National Life Association of Hartford, 99 Fed. 222, 228, 39 C. C. A. 476, 53 L. R. A. 33; Hetzel v. Baltimore & Ohio R. R. Co., 169 U. S. 26, 18 Sup. Ct. 255, 42 L. Ed. 648.

In the case at bar, Mr. Payson, the manager of the plaintiff corporation, testifies as to the necessary expenditures for the performance of the contract. He makes a statement of the cost of the various articles of lumber, iron, and other materials which were indispensable in building the flat cars. He takes into account the labor expended upon these materials in order to adapt them to their use. He produces a tabulated statement of the cost of the materials and of their present value. By agreement of counsel, this schedule has been received in evidence as a statement of the loss sustained. Upon a careful examination of the whole testimony, it appears that the plaintiff's outlay and expenses, less the value of materials on hand, together with the profits which he would have realized by the performance of the contract, amount to a sum larger than the $3,500 claimed by the plaintiff as the damage occasioned by reason of failure to complete the flat-car contract. The tabulated statement, to which I have referred,

and the testimony of Mr. Payson, make a prima facie case of the amount of damage which his corporation has suffered by the defendant's failure to carry out the contract. The defendant has offered no evidence that the plaintiff has not been damaged to the extent to which its witnesses have testified, nor has he introduced testimony tending to show that the plaintiff incurred unnecessary expense for the purpose of carrying out the contract, nor has he sought to prove in any way that the plaintiff's evidence respecting profits is incorrect.

The plaintiff is entitled to recover the balance due on the 50 log bunks, namely, the contract price, $4,250, less the payment on account, $2,500, namely, $1,750. To this is added the six sets of snow-plow center irons, $16.86—$1,766.86. As I have already indicated, I allow also the loss occasioned by the reason of failure to carry out and complete the flat-car contract, $3,500. Total, $5,266.86. To this should be added interest from the breach of the contract, $1,685.39.

Judgment may therefore be entered for the plaintiff for the sum of $6,952.25.

WARBURTON v. TRUST CO. OF AMERICA.

(Circuit Court, E. D. Pennsylvania. May 5, 1909.)

No. 16.

1. PLEDGES (§ 30*)—COLLATERAL—CONSERVATION—DUTY OF PLEDGEE.

Where a trust company received certain corporate bonds as collateral security for complainant's liability on an underwriting agreement, and the corporation became a bankrupt, it was the trust company's duty to employ reasonable diligence to conserve the collateral and collect thereon all moneys which it was reasonably possible for it to secure through a prompt presentation of the bonds in the bankruptcy proceedings.

[Ed. Note.—For other cases, see Pledges, Dec. Dig. § 30.*]

2. PLEDGES (§ 1*)—CHOSES IN ACTION—TRANSFER AS COLLATERAL—RIGHTS OF PLEDGEE.

A bond, or any chose in action, which is transferred as collateral security, is not in the nature of or subject to the incidents of a pawn or pledge, but is under the dominion of the creditor, to make his claim out of it.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 1, 4, 5; Dec. Dig. § 1.*]

3. JUDGMENT (§ 735*)—RES JUDICATA—QUESTIONS DETERMINED.

Complainant subscribed to an underwriting agreement for the bonds of a corporation in the sum of $15,000. The bonds were delivered to defendant trust company, and, the corporation having become a bankrupt, the trust company surrendered the bonds and released the lien of the mortgage on receiving 8 per cent. of their face value. In an action by the trust company on the underwriting agreement, complainant denied liability thereon, and the case was tried on that theory, though it was also alleged that the bonds which the trust company had held as collateral to defendant's subscription had been converted, and the amount realized thereon stated. *Held*, that a judgment establishing complainant's liability on the agreement was not res judicata of the question whether the trust company had exercised reasonable diligence in conserving the collateral and collecting all that was possible therefrom.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 735.*]

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

4. JUDGMENT (§ 735*)—RES JUDICATA.

Where defendant trust company received the bonds of a corporation as collateral to an underwriting agreement, and later surrendered the bonds in bankruptcy proceedings against the corporation for 8 per cent. of their face value, complainant, in a suit to restrain the collection of a judgment recovered by the trust company against him on his underwriting subscription, was entitled to a determination of the question whether the trust company had used reasonable diligence in conserving and collecting the collateral.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 735.*]

In Equity.

Frank A. Harrigan, for complainant.
Duane, Morris & Heckscher, for respondent.

HOLLAND, District Judge. Complainant has filed this bill to restrain the Trust Company of America from proceeding to collect a judgment which the trust company secured against him in this court on November 12, 1906, for the sum of $17,783.94. It appears from the bill filed that the trust company brought suit against Mr. Warburton on what is described as an "underwriter's agreement," which is set forth in full in the bill. It further appears that the trust company, upon the solicitation of the board of directors of the Fournier-Searchmont Automobile Company, a corporation engaged in manufacturing automobiles in this state, agreed to loan the automobile company $350,000, for which sum the latter executed a mortgage on its real estate here. The complainant became an underwriter for $15,000 of the bonds secured by this mortgage, and signed the agreement, which contained the following provision:

"The underwriters will deposit, or cause to be deposited, with the trust company, as collateral security for the repayment of said loan, or advances, and such interest and commission, and for the reimbursement of the trust company for any and all expenses which said trust company may incur by reason of any breach of this agreement on the part of the underwriters, * * * the bonds and shares of the capital stock of the said Fournier-Searchmont Automobile Company in amount as follows."

As the entire bond issue of $350,000 was guaranteed by subscribers to these bonds in the underwriter's agreement, the entire issue of these bonds, with $350,000 of preferred and $350,000 of common stock, was delivered as collateral for the loan.

To the statement filed by the trust company in its suit at law against Mr. Warburton, charging him with the sum of $15,000, the amount of the bonds for which he subscribed, together with interest, the latter filed an affidavit of defense denying his liability, and upon the issue framed a verdict by a jury was rendered against him on November 12, 1906, for $17,783.94, and subsequently the Circuit Court of Appeals for this circuit, on the 6th day of February, 1908, affirmed the judgment entered upon that verdict, whereupon Mr. Warburton made a tender to the trust company of the sum of $19,309.06, being the amount of the judgment, with interest and costs to the date of the tender, and demanded of the trust company that it return to him the

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

collateral deposited by him under the contract. The trust company offered to return to Mr. Warburton the preferred and common stock of the automobile company which had been deposited with it as collateral security, but informed the complainant that it was unable to return the $15,000 of bonds placed with it as collateral, and further claimed that it was not required to do so, for the reasons set forth by the trust company in its answer to this bill, from which it appears that these bonds were taken as collateral security for the $15,000 subscription of Mr. Warburton, who had been notified on December 2, 1903, by the Trust Company, to take and pay for them in accordance with his agreement, and he had refused to do so. Subsequently the automobile company became insolvent, and was adjudged a bankrupt in the United States District Court for the Eastern District of Pennsylvania on December 29, 1903. The bankruptcy proceedings were continued before a referee. It is claimed that it was ascertained that the bonds of the automobile company were rapidly deteriorating in value, and the trust company surrendered them and released the lien of the mortgage upon receiving 8 per cent. of their face value. After deducting the costs of collection, the balance, amounting to $901.97, was credited to Mr. Warburton's account on the books of the trust company, and allowed him in the statement of claim filed in the suit at law upon which the judgment was obtained. The trust company, in its statement of claim filed in the suit at law, set forth the fact that these bonds had been surrendered and the sum of $901.97 collected for Mr. Warburton's account, and it was alleged in the statement that it was done with his assent. This, however, in his affidavit of defense, Mr. Warburton denied, and claimed that he was not liable on the contract, and that the trust company presented these bonds in the bankruptcy proceeding for their own protection. Mr. Warburton was present at some of the meetings of the creditors in the bankruptcy proceedings of the automobile company, and was aware of the action of the trust company in entering into the agreement to accept 8 per cent. on the bonds which it held as collateral security, and made no objection, but at that time he denied any liability on his part on the underwriter's agreement. His defense was a denial of liability and nothing more. At the trial of the cause he presented evidence only in support of his contention of no liability, and none as to the value of the bonds. The trust company, as it appears, is unable to deliver to Mr. Warburton these bonds, and the bill prays that it be perpetually enjoined from issuing execution upon this judgment against the complainant, or from otherwise attempting to collect the same; and the trust company insists that such an order should not be made against it, and that the bill should be dismissed, alleging that the complainant is estopped from setting up this claim, as Mr. Warburton knew of the surrender of the bonds in the bankruptcy proceeding and acquiesced in the credit allowed by the trust company in its suit at law in which the judgment was obtained against him.

The first question to be considered is the question of the rights and duties of a holder of collateral security. The verdict in the suit at law upon which the judgment was obtained establishes that the trust company was a creditor of Mr. Warburton in the sum of $15,000 on

the underwriter's contract, and that the latter had placed in its possession $15,000 of these bonds as collateral security for that amount. It became the duty of the trust company to employ reasonable diligence in preserving the collateral, and to collect upon it all moneys which, under the circumstances of the particular case, it was reasonably possible for it to secure. It was the duty of the trust company to promptly present these bonds in the bankruptcy proceedings and to use reasonable vigilance and care in securing a full share of the assets in that estate. Had it failed to do so when a distribution was being made in the bankruptcy proceedings of the automobile company, it undoubtedly would have been liable for any amount which could have subsequently been shown to have been collectible on these bonds. A bond, or any chose in action, which is transferred as collateral security, is put under the dominion of the creditor, to make his claim out of it. It is not in the nature of, or subject to the incidents of, a pawn or a pledge. Muirhead v. Kirkpatrick, 21 Pa. 241. The trust company was required to employ reasonable diligence in the collection of any moneys which could be made on these securities, and especially so when the securities were obligations against an insolvent corporation passing through bankruptcy. If the trust company had not presented these bonds in the bankruptcy estate to share in the distribution of the assets, it would have been liable for the loss. Lyon v. Huntingdon Bank, 12 Serg. & R. (Pa.) 61; Lishy v. O'Brien, 4 Watts (Pa.) 141; Beale v. Bank, 5 Watts (Pa.) 529; Mullen v. Morris, 2 Pa. 85; Chambersburg Insurance Company v. Smith, 11 Pa. 120; Muirhead v. Kirkpatrick, 21 Pa. 237; Sellers v. Nichols, 22 Pa. 423; Kemmerer v. Wilson, 31 Pa. 110; Girard Fire & Marine Insurance Company v. Marr, 46 Pa. 504; Hanna v. Holton, 78 Pa. 334, 21 Am. Rep. 20; Stuart v. Bigler, 98 Pa. 80; McQueen's Appeal, 104 Pa. 595, 49 Am. Rep. 592; Reynolds v. Cridge, 131 Pa. 189, 18 Atl. 1010; Easton v. German-American Bank (C. C.) 24 Fed. 523; Chemical National Bank v. Armstrong (C. C.) 50 Fed. 798; Northwestern National Bank v. Thompson Mfg. Co., 71 Fed. 113, 17 C. C. A. 638; Brown v. First National Bank, 132 Fed. 450, 66 C. C. A. 293.

From these authorities it will appear that it was the duty of the trust company to carefully conserve the collateral, and to avoid any depreciation or loss thereon so far as it was able to do so by presenting the same for collection. If the trust company was reasonably diligent, and collected as much as it was possible to do under the circumstances of the case, it is entitled to payment of its judgment; but, in every case where the holder of collateral has failed to realize the face value of the same, it is a question to be determined whether or not due diligence has been observed by the creditor in possession of the collateral in securing all moneys which, under the circumstances, could have been collected on it. It is contended that this question was adjudicated at the trial of the suit at law in this court, and that the complainant in the bill is now estopped from raising that question at this time. The pleadings in the suit at law show that the plaintiff in that case set forth the fact that the security had been converted, and stated the amount which had been realized on the $15,000 of bonds: but Mr. Warburton, prior to the institution of the suit at law, had

denied liability on the underwriter's agreement, which denial he asserted in the pleadings, and the case was tried upon that theory. The verdict established Mr. Warburton's liability on the contract, and he now sets up that the trust company destroyed the value of the collateral given to secure the payment of his obligation to it.

The question as to whether or not the trust company observed due diligence in conserving the value of the collateral and collecting upon it in payment of Mr. Warburton's indebtedness was not, in my judgment, adjudicated, and he is not estopped from inquiring into that question at this time. The inquiry can be had in this equitable proceeding. McQueen's Appeal, 104 Pa. 595, 49 Am. Rep. 592; Brown v. First National Bank, 132 Fed. 450, 66 C. C. A. 293.

It is ordered, therefore, that Frederick L. Clark, Esq., be and is hereby appointed a special master to report to this court on this question within 30 days from this date. In the meantime an injunction will issue restraining the trust company from issuing execution on the judgment.

HERVIEU v. J. S. OGILVIE PUB. CO.

(Circuit Court, S. D. New York. March 23, 1909.)

COPYRIGHTS (§ 28*) — PROCEEDINGS TO OBTAIN — DRAMATIC COMPOSITION — DEPOSIT OF COPIES—"BOOK."

Rev. St. § 4956, as amended in 1891 (U. S. Comp. St. 1901, p. 3407), after enumerating the things which may be copyrighted, provides that the person desiring a copyright shall deposit with the librarian of Congress "two copies of such copyright book, map, chart, dramatic or musical composition, engraving, chromo, cut, print or photograph, or in case of a painting, drawing, statue, statuary, model or design for a work of the fine arts, a photograph of same; provided that in the case of a book, photograph, chromo or lithograph, the two copies of the same required to be delivered or deposited as above shall be printed from type set within the limits of the United States or from plates made therefrom. * * *" *Held*, that dramatic compositions, being twice enumerated in the body of the section separately from books, and not being specified in the proviso, are not included therein, and that such a composition, although printed in book form, need not be printed from type set or plates made in the United States to be entitled to copyright.

[Ed. Note.—For other cases, see Copyrights, Dec. Dig. § 28.*

For other definitions, see Words and Phrases, vol. 1, pp. 836–838.]

In Equity. The basis of this suit is an alleged infringement of a copyright of a dramatic composition. Counsel in this case are to be commended for their industry and fairness in reducing the evidence taken to an agreed statement of facts, which is as follows:

Paul Hervieu, the complainant herein, a well-known dramatist and man of letters, was at the time of the commencement of this suit, and still is, an alien of the United States of America and a citizen and resident of the Republic of France, and at the time of the commencement of this suit the defendant was, and still is, a resident, inhabitant, and citizen of the state of New York, United States of America.

In 1903 the said complainant composed and created an original play or dramatic composition in five acts in the French language entitled "Le Dédale."

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

On December 24, 1903, Cornelius Van Cott, the then postmaster of New York City, made the following certificate: "Post Office, New York, N. Y., December 24th, 1903. Received from Paul Hervieu one package addressed to 'Librarian of Congress, Washington, D. C.,' containing copyright title in the following words, 'Le Dédale piece en cinq actes per Paul Hervieu;' and also one package addressed to 'Librarian of Congress, Washington, D. C.,' containing two complete printed copies of the dramatic composition bearing said title. C. Van Cott, Postmaster." The said title referred to in this letter was printed, and on the said 24th day of December, 1903, before publication of the said dramatic composition in this or any foreign country, was deposited in the mail at New York City, within the United States, addressed to the Librarian of Congress, at Washington, District of Columbia, and was received in due course of post at the office of the Register of Copyrights in the Library of Congress, Washington. The title of the said dramatic composition was in the following words, "Le Dédale, Piece en cinq actes. De Paul Hervieu," and was entered by the Register of Copyrights in Class D, XXC, No. 4,428, the rights in which title the said Hervieu claimed as author and proprietor in conformity with the laws of the United States respecting copyrights.

Two printed copies of the said dramatic composition in the French language, with the same title, were on the said 24th day of December, 1903, and before the publication of the said dramatic composition in this or any foreign country, deposited in the mail at New York City within the United States, addressed to the Librarian of Congress, Washington, District of Columbia, and were received in due course of post at the copyright office in the Library of Congress, Washington, and were credited on entry XXC, No. 4428 of Class D 1903, to complete copyright. The copies of "Le Dédale," so deposited, contain 74 numbered pages measuring about 4½ by 7¾ inches. The title pages in full read as follows: "Paul Hervieu Le Dédale Piece en cinq actes. The play Le Dedale is entered according to act of Congress, in the year 1903, by M. Paul Hervieu, in the office of the Librarian of Congress. All rights reserved." The copies were paper covered; the covers being yellow or tan in color and containing the same words as the title page. These copies were set up in type in the printing house of L'Illustration, a weekly publication, 13 Rue Saint Georges, Paris, France. L'Illustration appears on Saturday of each week. On Saturday, December 26, 1903, or two days after the title and two printed copies were deposited in the mail within the United States, properly addressed, as hereinbefore set forth. Le Dédale appeared in L'Illustration. This was the first publication of the play in this or any foreign country, and said L'Illustration containing said play Le Dédale was sold to the public in France and the United States.

The copies deposited in Washington were from the identical type used in printing the play in L'Illustration; the typographical arrangement being exactly the same. The pages in the copies deposited in Washington are the columns in L'Illustration. The advance printing in pamphlet form is consistently done by L'Illustration for the purpose of depositing in Washington, for copyright protection in advance, copies of the plays and dramatic compositions which are subsequently to be published in its columns. On the front cover of all copies of the issue of L'Illustration of December 26, 1903, in which the said dramatic composition appeared, and at the bottom of the first page and at the bottom of the back cover page, the following words appeared: "The play Le Dédale is entered according to act of Congress, in the year 1903, by M. Paul Hervieu, in the office of the Librarian of Congress. All rights reserved." On the cover and title page of every copy of the said play Le Dédale ever published there appears the notice of copyright in the United States as prescribed by section 4962 of the Revised Statutes (copyright law) of the United States.

On December 26, 1905, a book entitled "The Labyrinth, or a Case of Divorce, by George Morehead," was entered in the copyright office in the Library of Congress, Washington, in the name of the J. S. Ogilvie Company, Class A, XXC, 134,271. Two copies of the book were received at the copyright office on November 14, 1905. The book is paper covered and contains 181 numbered pages and 16 numbered chapters. The title page reads as follows: "The Labyrinth; or, A Case of Divorce. A Dramatic Story Based Upon Paul Her-

vieu's Famous Play of the Same Name. By George Morehead. Author of 'The Sorceress,' 'Francesca da Rimini,' 'Robert Emmet,' etc., etc. Copyright, 1905, By J. S. Ogilvie Publishing Company, New York. J. S. Ogilvie Publishing Company, 57 Rose Street."

The page numbered "5" in the said book, headed "Introductory," contains the following language: "Olga Nethersole, the distinguished English actress, whose impersonations of 'Sappho' and 'Carmen' are famous in the theatrical annals of England and America, has added another character to her series of stage portraits—that of Marianne in the play called 'The Labyrinth.' The drama is from the pen of Paul Hervieu, who stands at the side of Victorien Sardou as one of the greatest of French playwrights. 'The Labyrinth' is a powerful story of love, passion and revenge, woven with keen dramatic skill and artistic finish into a play of intense interest, which becomes almost tragic in its surging struggle of human passions. It illustrates the fact that divorce is only a human institution, and that while it may dissolve the contract of marriage, it cannot sever the intangible bond that unites two loving hearts. True love cannot be divorced. This story follows faithfully the action and language of the play, and forms an excellent example of the dramatic strength of one of the most powerful of modern dramatists." The story of the book, its characters, scenes, incidents, situations, etc., are based directly upon M. Hervieu's play as printed in book form as hereinafter stated. The defendant's book was published and sold generally to the public by the defendant from the date of the said publication up to the date of the injunction herein.

On or about the 11th day of February, 1907, this action was brought in equity in this court, by Paul Hervieu, the complainant, against J. S. Ogilvie Publishing Company, a corporation, defendant, by the service of the bill of complaint on the defendant. The bill of complaint, filed in this court, prays: (1) That the defendant be forever enjoined from publishing, selling, vending, or offering for sale, or otherwise dealing with the said book "The Labyrinth, or a Case of Divorce," or any publication, book, dramatization, etc., or any colorable imitation, simulation, etc., of "Le Dédale," and that complainant's damages be established by a jury on a feigned issue; (2) that the defendant be compelled to account for all profits derived from the sale of "The Labyrinth, or a Case of Divorce"; (3) that the defendant be compelled to pay such damages to the complainant; (4) that the defendant be decreed to pay the costs of this suit; (5) that the defendant, pursuant to section 4965 of the copyright laws of the United States, be directed to turn over to complainant, all plates and all printed sheets of the said book in defendant's possession and forfeit $1 for every sheet found in his possession, etc.

Motion papers for a temporary injunction were served on the defendant with the bill of complaint herein. The said motion for an injunction came on to be heard before Mr. Justice Hough on the 26th day of February, 1907, and at such time the defendant consented to the entry of an order that, until the entry of the final decree in the said suit, the defendant, its agents, etc., be restrained from publishing, selling, etc., "The Labyrinth, or A Case of Divorce," or any publication, dramatization, translation, etc., or any colorable imitation or simulation of "Le Dédale."

It is further agreed: (1) That the dramatic composition "Le Dédale" was printed in book form in the French language and offered for sale and sold to the public as a book both in France and the United States of America prior to the publication of defendant's book, which is the subject of this action. (2) That the said book was so printed and sold in both France and America by the authority and consent of the complainant, Hervieu. (3) That the said book was printed from plates made in France or from type set up in France, and not printed from plates made in the United States or from type set up in the United States. (4) Defendant's book, the subject of this action, was taken from said book made in France.

The above statement of facts is stipulated and agreed to by the attorneys for the respective parties.

Ernst, Lowenstein & Cane, for complainant.
Andrew W. Gleason, for defendant.

MARTIN, District Judge (after stating the facts as above). It is claimed by the defendant that the complainant's copyright is invalid in that the copies of his dramatic composition as delivered at the office of the Librarian of Congress, and, as brought before the public, were in book form, and therefore come within the proviso of section 3 of Act March 3, 1891, c. 565, 26 Stat. 1106 (U. S. Comp St. 1901, p. 3406), which is to the effect that copies of books, photographs, chromos, and lithographs filed with the Librarian of Congress shall be printed from type set within the United States, or from plates made therefrom, or from negatives or drawings on stone made within the United States, and that the complainant, in procuring his copyright, filed copies of his dramatic composition in books that were printed from type set without the limits of the United States.

The act of March 3, 1891, is an amendment to the then existing copyright law. It extended the privilege of copyright to foreigners under treaties of reciprocity. The complainant is a citizen of France, and, under the treaties with France, her citizens are entitled to the benefit of this statute. Section 1 of said act, so far as it relates to this question, reads thus:

"The author, inventor, designer or proprietor of any book, map, chart, dramatic or musical composition, engraving, cut print or photograph or negative thereof, or of a painting, drawing, chromo, statue, statuary—shall, upon complying with the provisions of this chapter, have the sole liberty of printing, reprinting, publishing," etc.

Section 3 recites the conditions which must be complied with, and says:

"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—a printed copy of the title of the book, map, chart, dramatic or musical composition, engraving, cut, print, photograph or chromo, or a description of the painting, drawing, statue, statuary—for which he desires a copyright, nor unless he shall also, not later than the day of the publication thereof in this or any foreign country, deliver at the office of the Librarian—two copies of such copyright book, map, chart, dramatic or musical composition, engraving, chromo, cut, print or photograph, or in case of a painting, drawing, statue, statuary, model or design for a work of fine arts, a photograph of the same; provided that in the case of a book, photograph, chromo or lithograph, the two copies of the same required to be delivered or deposited as above shall be printed from type set within the limits of the United States, or from plates made therefrom, or from negatives, or drawings on stone made within the limits of the United States, or made from transfers therefrom."

From the foregoing language, it is apparent to me that Congress did not intend to include "dramatic or musical compositions" as a "book." The proviso leaves out map, chart, dramatic, or musical compositions, engraving, cut, print, or photograph, painting, drawing, statue, statuary, or model design for a work of fine arts. All these seem to have been purposely omitted from the list of those articles for which the type must be set, or plates and drawings made, in the United States. The act provides for the printing of the whole list. It was self-evident to Congress, as it is to everybody, that dramatic compositions, if printed, must be upon sheets of paper known

by bookmakers as signatures, and these signatures must be folded, thus making what may be called a "book"; but Congress especially eliminated both musical and dramatic compositions from being classified as a book. Congress twice designated, in the same section, map, chart, dramatic or musical composition, engraving, cut, and print as independent of the word "book," as therein used. It has often been held that a specific designation of any article in the legislative enactment excludes it from general terms contained in the same act. Potter's Dwarris on Statutes, 198; Arthur v. Lahey, 96 U. S. 112, 24 L. Ed. 766; Arthur v. Stephani, 96 U. S. 125, 24 L. Ed. 771; Arthur v. Rheims, 96 U. S. 143, 24 L. Ed. 813; Reiche v. Smythe, 13 Wall. 162, 20 L. Ed. 566; Ferry v. Livingstone, 115 U. S. 549, 6 Sup. Ct. 175, 29 L. Ed. 489.

The question here presented is not whether a dramatic composition can ever be regarded as a book, but whether Congress intended, by the act above quoted, to include dramatic compositions within the terms of the proviso. Dictionary definitions of the word "book" are of no aid in settling this question. It stands squarely upon the meaning of the act.

It was said by Justice Swayne in Smythe v. Fiske, 23 Wall. 374, 380, 23 L. Ed. 47:

"A thing may be within the letter of a statute and not within its meaning, and within its meaning though not within its letter. The intention of the lawmaker is the law."

In Clayton v. Stone, 2 Paine, 382, Fed. Cas. No. 2,872, the court said:

"The literary property intended to be protected by the act is not to be determined by the size, form, or shape in which it makes its appearance, but by the subject-matter of the work."

There is another important thing to consider in construing this statute. The penalty for infringing a copyright of a musical or dramatic composition differs from that of infringing the copyright of books. Section 4964, Rev. St. (U. S. Comp. St. 1901, p. 3413), provides that any person who, without the consent of the proprietor, shall sell or expose for sale any book that is protected by copyright, shall forfeit every copy thereof to the proprietor and pay such damages as may be recovered in a civil action in a court of competent jurisdiction. Section 4966, Rev. St. (U. S. Comp. St. 1901, p. 3415), provides that any person who shall publicly perform or represent any dramatic composition for which a copyright has been obtained, without the consent of the proprietor thereof, shall be liable in damages therefor to be assessed, not less than $100 for the first, and $50 for every subsequent performance.

It will be observed, by analyzing these two sections of the statute, that Congress has intended all through its copyright enactments to distinguish between books and dramatic composition. How the damages are to be measured in the case at bar, it is unnecessary now to discuss.

The history of the bill which resulted in this copyright statute of March 3, 1891, and the contemporaneous construction given it by the

departments and the officers of the government, conform to the views above expressed; but, to my mind, the language of the statute is so clear that it is unnecessary to enter into a discussion of the history of this legislation or the construction given it by the Treasury Department.

The case of Littleton v. Oliver Ditson Co. (decided by Judge Colt of the First Circuit) 62 Fed. 597, and his decision affirmed by the Court of Appeals (67 Fed. 905, 15 C. C. A. 61), involves the very question presented here, except in that case it was a musical composition, while in this it is dramatic; but by the language of the statute dramatic and musical compositions are coupled together. Hence the holding of that court that a musical composition is not included in the proviso as a book applies with equal force to the question presented in the case at bar.

I hold that the complainant's copyright is valid, and that he is entitled to full copyright protection. The agreed statement of facts shows conclusively that the defendant has infringed the complainant's copyright.

Wherefore the complainant may have decree for the relief prayed for in his bill of complaint.

MANITOWOC MALTING CO. v. FUECHTWANGER et al.

(Circuit Court, E. D. Wisconsin. May 15, 1909.)

1. PLEADING (§ 236*)—AMENDMENT—STATE LAW.

Wis. St. 1898, § 2830, provides that the court may on the trial, or at any other stage of the action before or after judgment, in furtherance of justice, and on such terms as may be just, amend any process, pleading, or proceeding by inserting other allegations material to the case, or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved. *Held* that, under such section as construed by the highest state court, the only limitation of judicial power to allow an amendment to the complaint is that plaintiff's "claim" shall not be substantially changed and that sound discretion shall not be overstepped.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 601; Dec. Dig. § 236.*

Following state practice, see notes to O'Connell v. Reed, 5 C. C. A. 594; Nederland Life Ins. Co. v. Hall, 27 C. C. A. 392.]

2. COURTS (§ 347*)—FEDERAL COURTS—PLEADINGS—AMENDMENT.

Congress having itself legislated on the subject of amendments to pleadings by enacting Rev. St. § 954 (U. S. Comp. St. 1901, p. 696), regulating such subject, the federal courts are not bound to follow the state courts in their construction of local statutes regulating the amendment of pleadings in suits at law.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 921; Dec. Dig. § 347.*]

3. COURTS (§ 347*)—AMENDMENT—AMOUNT DEMANDED.

Rev. St. § 954 (U. S. Comp. St. 1901, p. 696), provides that no declaration in a civil cause shall be abated for any defect or want of form, but the court shall give judgment according to the right of the cause, and shall amend every defect and want of form other than those which a

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

party demurring so expresses, and may permit either of the parties to amend any defect on such conditions as it shall in its discretion and by its rules prescribe. *Held*, that a federal court under such section was authorized in the exercise of judicial discretion to permit an amendment, after trial, of the ad damnum clause of plaintiff's complaint, so as to raise the amount sued for to conform to the proof.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 921; Dec. Dig. § 347.*]

4. PLEADING (§ 245*)—AMENDMENT—DAMAGES DEMANDED—ESTOPPEL.

Plaintiff's failure to apply for the amendment of the ad damnum clause of its complaint, so as to raise the amount sued for to conform to the proof, when the court announced, while answering an interrogatory of a juror, after submission of the cause, that plaintiff would in the end be limited to the amount named in such clause, did not estop plaintiff from asking permission so to amend after verdict, defendants not having changed their position to their prejudice by plaintiff's conduct.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 667; Dec. Dig. § 245.*]

5. PLEADING (§ 245*)—AMENDMENT—DAMAGES.

Plaintiff sued for breach of a contract by which defendants agreed to furnish plaintiff 400,000 bushels of barley during the year 1907 and 1908, which plaintiff agreed to malt at 13½ cents a bushel. Defendants defaulted in shipments to the amount of 322,000 bushels, whereupon plaintiff sued for damages in the sum of $10,000. At the trial it was shown that the cost of malting to plaintiff was $.06784 per bushel, and that the damages actually sustained were $21,664.54, for which amount a verdict was returned. *Held*, that plaintiff was entitled to leave to amend the ad damnum clause of its complaint after verdict to conform to the proof, there being no showing that they had been injured or misled, or that they had any additional proofs which would lead to a different result on a second trial.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 667; Dec. Dig. § 245.*]

At Law.

This is a common-law action for damages predicated upon a written contract whereby the defendants agreed to furnish to the plaintiff corporation at its malthouse in Manitowoc 400,000 bushels of barley to be malted during the season of 1907–08. The plaintiff agreed to malt this barley at the stipulated price of 13½ cents per bushel. The contract provided for monthly deliveries of malt and monthly payments of the stipulated commission. The evidence showed beyond dispute that the defendants were in default in their shipments of barley, under the contract, to the amount of 322,000 bushels. The action was brought by the plaintiff for damages.

The court charged the jury that, in case the plaintiff was entitled to recover at all upon the first cause of action, its measure of damages would be the difference between the stipulated commission of 13½ cents per bushel and the actual cost that would have been incurred by the plaintiff in manufacturing the 322,000 bushels as to which the defendants were in default. We lay aside other issues raised by the defendants to the first cause of action.

The jury found, in answer to a special question propounded by the court, that the cost per bushel of manufacturing this barley into malt at the plaintiff's plant would have been $.06784 per bushel. This finding was clearly established by evidence that was admitted without objection. It is apparent that upon this basis the plaintiff would be entitled to recover $21,664.54. No motion was made to increase the ad damnum clause. The jury having returned for further instructions, the following dialogue took place between court and counsel:

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

Mr. Schwartz, a juror, inquired: "We would like to know the amount of damages in the first cause of action, claimed by the plaintiff. The Court: Well, I suppose that would be a limit on the plaintiff's recovery; would it not, gentlemen" (addressing the bar)? Mr. Nash (one of the attorneys for the plaintiff): Do I understand that the inquiry is what the pleadings show? The Court: The jury want to know what your demand is, which, of course, they would not have any business to know unless it imposes a limitation. The judgment could not exceed the demand. I don't know that it has any reference to the verdict. Mr. Nash: I do not remember whether I stated the amount in my opening statement. Counsel generally do, and if I had thought of it I should probably have stated it to the jury when I made my opening statement. But I cannot see that we have any objections to the court reading what the complaint demands in that respect. The Court: I would not do it without the consent of both counsel. I have no copy of the complaint here. If counsel on both sides have no objection, I will answer that question to the jury; otherwise, I will not. (Mr. Nash hands to the court a copy of the complaint). Mr. Eschweiler: I can see no objection to the jury being informed of the condition of the pleadings; they are matters of record. The Court: Still, of course, the jury ought to find their verdict from the evidence. But if the plaintiff has limited itself by its ad damnum clause, it would have to meet that limit when we reach the question of judgment. The Court (addressing the jury): By consent of counsel, gentlemen, I am permitted to instruct you that the ad damnum clause under the first cause of action is for $10,000."

The jury then retired, and after due deliberation returned a verdict for the plaintiff upon the first cause of action for $21,664.54.

After verdict the plaintiff comes and moves the court for leave to amend the ad damnum clause of the first cause of action by substituting $21,664.54 for and instead of $10,000. The sole question involved here is whether the court has power to allow the amendment at this time, and whether, conceding the existence of such power, it would amount to an abuse of discretion.

Nash & Nash and Spooner & Ellis, for plaintiff.
F. C. Eschweiler and W. H. Timlin, Jr., for defendants.

QUARLES, District Judge (after stating the facts as above). We are met at the outset with the contention that under section 914 of the Federal Statutes (U. S. Comp. St. 1901, p. 684), commonly known as the "Conformity Act," the federal court is bound to adopt the construction imposed by the Supreme Court of Wisconsin upon the Wisconsin statutes relating to variance and amendments of pleadings, and that therefore the case of Pierce v. Northey, 14 Wis. 9, 17, should be accepted as decisive of the present motion. In that case the Supreme Court held that the ad damnum clause ought not to be amended after verdict except upon condition of a new trial. It may be fair to say that the court gave slight consideration to the underlying principles, and made no reference to the Wisconsin statutes on the subject, and indulged in no discussion except to say: "This was the rule before the Code, and the reasons for it still exist." This case has never been formally overruled. Indeed, it has never been cited to this point, while the same court in numerous later decisions has construed the Wisconsin statutes in such manner as to practically ignore and discredit the doctrine of this early case.

The sections of the Wisconsin Statutes of 1898 that bear upon the pending proposition are sections 2669 and 2670, which do away with the old rule as to variance, and section 2830, which is the

general statute governing amendments. Section 2830 provides as follows:

"The court may upon the trial or at any other stage of the action, before or after judgment, in furtherance of justice and upon such terms as may be just, amend any process, pleading or proceeding * * * by inserting other allegations material to the case, or when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved."

Without referring to the many cases in Wisconsin where these statutes have been construed, it will be sufficient to cite Carmichael v. Argard, 52 Wis. 607, 9 N. W. 470, and the later case of Gates v. Paul, 117 Wis. 170, 182, 94 N. W. 55, where the court, after reviewing the authorities, distinctly hold that the only limitation of judicial power, under section 2830, as to allowing a complaint to be amended, is that the "claim" of the plaintiff shall not be substantially changed, and sound discretion in the matter shall not be overstepped, and that such amendment may be ordered either before the trial, at the trial, or after the trial.

It is apparent that the amendment here proposed does not substantially change the "claim" of the plaintiff within the meaning of this statute. So that, under the interpretation given to the Wisconsin statutes by the highest tribunal of the state, it seems clear that the state law presents no obstacle in the way of the amendment proposed. See, also, Hansen v. Allen, 117 Wis. 61, 93 N. W. 805.

Plaintiff's counsel cite the following cases where the court, under similar statutes, have permitted the ad damnum clause to be amended during the trial or after verdict, so as to allow the entry of a larger judgment than that demanded by the complaint. Cain v. Cody (Cal.) 29 Pac. 779; Billingsley v. Dean, 11 Ind. 331; McClannahan v. Smith, 76 Mo. 428; Davis v. Smith, 14 How. Prac. (N. Y.) 187; Knapp v. Roche, 62 N. Y. 614; Cargain v. Everett, 62 Hun, 620, 16 N. Y. Supp. 668; Arrigo v. Catalano, 7 Misc. Rep. 515, 27 N. Y. Supp. 995; Givens v. Porteous, 2 McCord (S. C.) 48. The state courts do not all subscribe to this doctrine, but as the several statutes vary, it would be unprofitable to consider them at length.

But we are not content with the proposition that the federal court is bound to follow the state courts in their construction of local statutes regarding the amendment of pleadings. Congress has itself legislated on this subject, and in 1789 incorporated into the original judiciary act a section which has ever since remained unchanged upon the statute book, and is now known as section 954, Rev. St. (U. S. Comp. St. 1901, p. 696). This section reads as follows:

"No summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect, or want of form, except those which, in cases of demurrer, the party demurring specifically sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall in its discretion and by its rules, prescribe."

This was a bold and radical departure from the common-law, which has been many times commended by the Supreme Court as a most wise and beneficient advance in the interest of justice.

In 1872 sections 914, 918, and 948, Rev. St. U. S. (U. S. Comp. St. 1901, pp. 684, 685, 695), bearing upon the same subject, were introduced in the Senate by Senator Carpenter, and the language of section 948, which empowers any Circuit or District Court, to allow in its discretion, and upon such terms as it may deem just, any amendment of any process, pleading, etc., where the defect has not prejudiced and the amendment will not injure the opposite party, indicates that the amendment was based upon the Wisconsin statute.

These several enactments of Congress constitute a federal system of amendment, and it has been held that these several congressional enactments must be construed together, because in pari materia.

In Van Doren v. Pennsylvania Railway Co., 93 Fed. 260, 35 C. C. A. 282, the Circuit Court of Appeals of the Third Circuit laid down this doctrine in a case where the amendment of the declaration was ordered after verdict, in a case arising in New Jersey, where the state statutes, as construed by the Supreme Court of New Jersey, did not tolerate such an amendment.

In O'Connell v. Reed, 56 Fed. 531, 5 C. C. A. 586, the Circuit Court of Appeals of the Eighth Circuit, in discussing this question, say:

"But, on the other hand, the courts of the United States are not subordinate to the courts of the states. They constitute an independent judiciary system, the judges of which do not derive their powers from the states, nor can the legislation of the states, or the decisions of their courts, determine the limits of those powers, or prescribe the duties their exercise imposes. * * * It was not the intention of Congress to require, by the passage of this act of conformity, the adoption by the Circuit Courts of any rule of pleading, practice, or procedure enacted by state statute, or announced by the decision of a state court, which would enlarge or restrict the jurisdiction of the federal courts, or prevent the wise administration of the law in the light of their own system of jurisprudence, as defined by their own Constitution, as tribunals, and the acts of Congress upon that subject. On the other hand, that act expressly reserves to the judges of those courts the right, and, we think, imposes upon them the duty, in the exercise of a wise judicial discretion, to reject any statute, practice, or decision that would have such an effect."

The Court of Appeals for the Eighth Circuit, in McDonald v. State, 101 Fed. 171, 177, 41 C. C. A. 278, 284, speaking of section 954, Rev. St., say:

"This act emancipated the judicial department of the government from the shackles of artificial and technical rules which had theretofore been interposed to obstruct the administration of justice, as completely as the Revolution had emancipated the political department of the government from foreign dominion. This was done by investing the federal courts with plenary power to remove by amendment all such impediments to the attainment of justice"—citing Mr. Justice Story's opinion in Matheson v. Grant, 2 How. 263, 11 L. Ed. 261.

See, also, Davis v. Railway (C. C.) 32 Fed. 863, where the ad damnum clause was amended to save the jurisdiction of the court.

Numerous decisions of the Supreme Court have settled the law that whenever Congress has legislated upon any matter of practice, and prescribed a definite rule for the government of its own courts, it is

to that extent independent of the legislation of the state upon the same subject-matter. S. Pac. Co. v. Denton, 146 U. S. 202, 209, 13 Sup. Ct. 44, 36 L. Ed. 942; Luxton v. N. River Bridge Co., 147 U. S. 337, 13 Sup. Ct. 356, 37 L. Ed. 194; Shepard v. Adams, 168 U. S. 618, 18 Sup. Ct. 214, 42 L. Ed. 602; St. Clair v. United States, 154 U. S. 134, 153, 14 Sup. Ct. 1002, 38 L. Ed. 936; Mexican Ry. Co. v. Duthie, 189 U. S. 76, 23 Sup. Ct. 610, 47 L. Ed. 715.

In a great variety of cases the Circuit Courts of the United States have furnished practical illustrations of this doctrine. In Norton v. Dover (C. C.) 14 Fed. 106, Judge Lowell holds that the practice in New Hampshire, while it might enlarge our powers of amendment, cannot diminish those that are conferred upon us by the acts of Congress. See, also, Erstein v. Rothschild (C. C.) 22 Fed. 61, 64. As an instance of the application of this principle, we may refer to: Railway Officials v. Wilson, 100 Fed. 370, 40 C. C. A. 411; Montana Mining Co. v. St. Louis Mining Co., 147 Fed. 897, 906, 78 C. C. A. 33; Maddox v. Thorn, 60 Fed. 217, 8 C. C. A. 574; De Valle v. S. Pac. Ry. (C. C.) 167 Fed. 654, 657.

Great stress was laid in the argument upon the early decision of Judge Blatchford in Elting v. Campbell, 5 Blatchf. 183, Fed. Cas. No. 4,422, which is similar in its facts to the instant case, where the old rule was adhered to as in the early Wisconsin Case above referred to. But the learned judge makes it known that his ruling was predicated upon the practice of the state of New York under the statute of 1821, and it is a significant fact that no reference is made in the opinion to any of the federal statutes of amendment whose function was to modify the old rule. For this reason, the case is not persuasive as an authority.

I feel, therefore, no hesitancy in holding that, whether the statutes of Wisconsin or the enactments of Congress be adopted as controlling, there is no impediment to bar the exercise of judicial discretion to which the pending motion appeals.

The remaining question, therefore, is whether the relief asked for can be granted without an abuse of judicial discretion. It will be noted that section 948 of the Revised Statutes of the United States and likewise sections 2669 and 2670 of the Wisconsin Statutes of 1898, provide in substance that this discretion shall be exercised only when the defect has not prejudiced, and the amendment will not injure, the opposite party; and the Wisconsin statute provides specifically that the party claiming surprise or prejudice must make the fact appear to the satisfaction of the court.

The only consideration urged by defendants' counsel bearing upon this matter of discretion is that the conduct of plaintiff's counsel, when the jury returned for further instruction, amounted to a waiver of the right to amend. The court having announced that the plaintiff would in the end be limited by the amount named in the ad damnum clause, but that the jury should proceed to a verdict on the evidence, it is contended that it was the duty of the plaintiff then and there to apply for an amendment, if desired at all; and that, having acquiesced in allowing the case to go to the jury while its claim was for $10,000, it has foreclosed itself from now asking to enlarge its

demand. There would be force in this suggestion if the defendants, relying on the conduct of the plaintiff, had changed their position to their prejudice. But the case was already in the hands of the jury, and nothing occurred which seems to lay the foundation for any claim of estoppel, and I cannot see that defendants got any vested right in the mistake of their opponent. No exception has been reserved to any suggestion made by the court in response to the request of the jury.

On the other hand, it is contended that the defendants by their silence practically waived the right to make the present objection. It is urged that they might have asked an instruction then and there that the jury could not return a verdict under the first cause of action for a larger sum than $10,000, and the court would have been obliged to so instruct. But no such instruction was asked. It is urged that the defendants thus practically acquiesced in the suggestion of the court that the jury should base their verdict on the evidence. It is clear that, if this instruction had been asked by the defendants, it would have driven the plaintiff to amend instanter, or to accept a verdict within the limit of its ad damnum clause. But as both parties remained silent, it may well be claimed that each was willing to take the chances of the situation, and that neither has any just cause of complaint. Defendants' counsel may have concluded that, inasmuch as the jury were informed that the plaintiff had limited its claim to $10,000 on the first cause of action, the chances were that the jury would accept the limitation, and that it was not wise to force an amendment which would result in giving the jury wider scope. Perhaps the course pursued by defendants' counsel would be indorsed by skillful trial lawyers as sagacious. Whatever may have been the motives that actuated either counsel, the basic fact remains that the motion is to make the complaint conform to the proofs. The verdict is fully justified by the evidence. There was really only one contested question on the first cause of action. It was conceded that defendants were in default under the contract to the extent of 322,000 bushels. The malting commission was fixed by the contract at 13½ cents. There was practically no dispute that the measure of damages was the difference between the contract price per bushel and the actual cost per bushel of manufacturing the barley into malt. The cost of manufacturing was therefore the only unknown quantity in the equation. The proof offered by the plaintiff on this subject was received without objection, but the case was thoroughly contested. The proofs of the plaintiff were elaborate and complete, tending to show that the cost of manufacture was $.06784 per bushel, and the jury adopted this proof as satisfactory. There was nothing different that the jury could do under the evidence, unless they arbitrarily adopted the amount named in the ad damnum clause. No showing has been made by defendants that they have any additional proofs which would lead to a different result upon a second trial, nor has it been made to appear that the defendants have been injured or misled to their prejudice. In other words, the defendants have not brought themselves within the only restriction imposed upon the discretion of the court by either state or federal enactment. On the record as it stands, on the

merits, the plaintiff is entitled to the verdict which the jury returned.

Under these circumstances, I cannot see my way clear to grant a new trial as a condition to allowing the amendment.

The motion must therefore be granted, and it is so ordered.

HOHL v. NORDDEUTSCHER LLOYD.

(District Court, S. D. New York. April 21, 1909.)

SHIPPING (§ 140*)—CARRIAGE OF GOODS—LOSS—LIMITING LIABILITY.

Provision in bill of lading that carrier shall not be liable for more than $100 unless a greater value is expressed. *Held*, that the case was not distinguishable from the U. S. Lace Curtain Mills v. Oceanic S. Nav. Co. (D. C.) 145 Fed. 701, and the libellant is entitled to recover the value of the lost case without regard to limitation of liability to $100, as provided by the bill of lading.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 495; Dec. Dig. § 140.*

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

(Syllabus by the Judge.)

Kneeland & Harison, for libellant.
Choate & Larocque, for respondent.

ADAMS, District Judge. This action was brought by Sebald M. Hohl to recover the value of a case of hosiery shipped at Bremen on the 15th of July, 1907, on the respondent's steamer Kaiser Wilhelm der Grosse, for delivery to Goldman, Sachs & Co. in New York. A bill of lading was duly issued by the respondent and assigned to the libellant. This bill of lading was for ten cases of hosiery and provided, among other things:

"Not accountable for any Sum exceeding $100, per package, for goods of whatever description, nor for any amount in respect of Gold, Silver, Bullion, Specie, Jewellery, precious Stones or Metals, Paintings, Statuary, or any other valuable Goods of whatever description, unless the value of such be herein expressed and freight as may be agreed paid thereon."

The steamer duly arrived and delivered nine cases of the ten. The alleged value of the missing case was $768.75, and it is to recover the difference between this sum and $100, which the respondent was willing to pay, that the action is pressed.

The question to be determined is purely one of law and the contentions of each side have been ably presented. The libellant urges that the determination of this court in United States Lace C. M. v. Oceanic Steam Navigation Co. (D. C.) 145 Fed. 701, is conclusive of this case, while the respondent argues that that case is not sound and, in any event, is distinguishable from the one now presented. It is to be regretted that the case has not been presented on appeal, as the question is an important one and should receive the consideration of the higher courts. In the absence, however, of a decision there on the question

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

involved, the case must stand as the law of this court, and it remains to be ascertained whether the one now presented can be distinguished from it.

It is urged by the respondent that the case is different from the one cited in several respects:

(1) In the cited case, the bill of lading was prepared by the carrier, while in the one at bar it was prepared by the libellant's agents, as appears from the fact that the name of "Louis Delius & Co. Forwarders and Bankers" is printed in large capital letters in the upper left hand margin and again the second line of the instrument, and the name of Goldman, Sachs & Co., who are bankers in this city, is printed in the body of the contract as the consignees, showing a well established and uniform course of business on the part of the libellant's shipping agents. It is said that this in itself would be sufficient to establish the fact that this was not an isolated shipment, where the shipper, unfamiliar with the usual course and practice, receives a bill of lading as a mere receipt, being entirely unfamiliar with the terms, but further than that the testimony shows that this was the libellant's own form of bill of lading and that in a business in which the libellant imported from five to twenty cases a week through Delius & Co. under this form.

This does not tend materially to support the respondent's contention. The fact that the libellant's agents printed their name upon the bill of lading does show that they were not imposed upon by a contract with which they were unfamiliar, but it does not change the features of the agreement so far as they apply here. It is not important that it should appear that the respondent dictated the language employed. It was adopted by both parties and expressed their agreement.

(2) It is also urged that in the cited case no evidence was introduced to show that any higher rate would have been charged had the actual value of the goods been disclosed, while here the freight for the transportation of ten cases of hosiery, the cases being all about the same size, was $27.33; that the amount of damages demanded for the loss of one case is $768.75, so that the value of the whole shipment was $7,687, and the freight for the lost case was only $2.73, an extremely low rate for the labor of transportation alone, exclusive of the risk of insurance; also it affirmatively appears that where a value is declared which is in excess of $100 it is the uniform custom of the respondent to charge additional freight for full insurance and this would have been done in this case had the true value been disclosed.

This is seemingly more of an argument on the merits of the cited case than an attempt to distinguish this case from it, except the latter part, and it has not been made at all clear by the testimony that there would have been any additional charge. The respondent's agent in New York, who was especially familiar with eastbound freights, said that cargo was placed in special places if the value was declared in the bill of lading, but the company does nothing to notify shippers to declare additional values.

(3) It is also urged that in the cited case it did not appear that any special care was taken by the carrier of the valuable packages, while in the case at bar the contrary is true.

The testimony with respect to care is too vague and uncertain to give much force to this argument.

It is said the libellant, by representing that the respondent would not be held accountable for more than $100 for the loss of a package, misled the respondent into the belief that the package was of small value, and the respondent was thereby prevented from taking proper measures to protect the package and to bestow upon it care commensurate with its actual value.

This seems to be more of an argument on the merits of the general contention than one tending to distinguish the cases.

It is also said that the facts mentioned distinguish this case and bring it within the language of the Supreme Court in the Hart Case. The language there is favorable to the respondent in some respects but that case was based upon a different state of facts. An agreed and signed valuation was a feature there which does not appear here.

It does not seem that the case under consideration can be distinguished from the cited case, and that rests upon the statement made there and the authorities cited.

There will be a decree for the libellant, with an order of reference.

McCALDIN BROS. CO. v. DONALD S. S. CO. et al.

(District Court, S. D. New York. February 25, 1907.)

ADMIRALTY (§ 61*)—PRACTICE—EXCEPTIONS TO PORTIONS OF ANSWER.

Held that matters in connection with the subject of the libel can, under analogy to the 59th Rule, be properly litigated in one action; but the rule cannot be extended to bring in matters not connected with the original controversy, though arising under the same charter party.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. § 497; Dec. Dig. § 61.*]

(Syllabus by the Judge.)

Convers & Kirlin (John M. Woolsey, of counsel), for Donald Steamship Company.

Wheeler, Cortis & Haight, for Atlantic Fruit Company.

ADAMS, District Judge. The McCaldin Brothers Company filed a libel against the Donald Steamship Company to recover for certain services alleged to have been rendered for the latter and at its request in connection with the steamship Athos on the 22nd and 24th of August, 1905. The Donald Company answered the libel and filed a petition to bring in the Atlantic Fruit Company. The petition alleged:

"Sixth: On or about the 22nd day of August, 1905, it was agreed between the Atlantic Fruit Company and the Donald Steamship Company that a tug should attend the steamship Athos which was then lying off the port of New York, to take on board certain stores sent on behalf of the owners and certain laborers sent on behalf of the Atlantic Fruit Company to clean the holds of the Athos. Accordingly, it was arranged by and between the Atlantic Fruit Company, your petitioner, and the McCaldin Brothers Company that the steam lighter Stranahan should be sent down to the Athos with the stores and

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

laborers above referred to. Accordingly, some thirty men were shipped on board the Stranahan, and her captain, representing the libellant McCaldin Brothers Company, stated that the tug would be alongside the Athos within two or two and a half hours. Owing to the negligence and errors in navigation on the part of the captain of the tug, however, the tug lost its bearings and could not locate the Athos, and eventually, after having searched for her for some time had to come to anchor and remain at anchor over night. The tug started for the Athos at or about four o'clock in the afternoon of the 22nd day of August, 1905, and by reason of the negligence and errors in navigation aforesaid did not arrive at the steamship until about eight o'clock a. m. on the morning of August 23rd. The delay was wholly unnecessary and was due to the negligence and fault of the master of the tug and was not caused by or contributed to in any manner by your petitioner.

Seventh: The services alleged to have been rendered on the 24th day of August by the steam tug William J. McCaldin in towing the Athos from Sandy Hook to New York City were rendered for and on account of the Atlantic Fruit Company, the charterer herein, and under the provisions of the charter party above referred to the cost of such services were to be borne by the Atlantic Fruit Company as charterer."

The answer of the Fruit Company to the petition denied these allegations and alleged:

"Eighth: * * * The respondent alleges that the ends of justice will not be subserved by bringing in this respondent; that there is now pending in the United States District Court for the Southern District of New York an action between the Atlantic Fruit Company and the Donald Steamship Company, wherein the Atlantic Fruit Company is libellant and the Donald Steamship Company is respondent; said action having been brought by the Atlantic Fruit Company to recover from the Donald Steamship Company its damages resulting from the failure of the Donald Steamship Company to maintain the steamship Athos in a seaworthy condition in accordance with the provisions of charter party of November 20th, 1905; that all claims of the Donald Steamship Company against your petitioner arising under said charter party should be properly litigated in said action. * * *

Eleventh: Further answering the petition herein and as a separate and distinct defense and counterclaim hereto, the respondent further alleges that on or about the 20th day of February, 1905, a charter party in writing was entered into between the Donald Steamship Company and this respondent whereby this respondent agreed to let and the Donald Steamship Company agreed to hire the steamship Athos for a period of three years. The said charter contained among others the following clauses:

'* * * And being tight, strong and in every way fitted for the service, having steam winches and donkey boiler, with capacity to run all the steam winches at one and the same time, including necessary dunnage (and with full complement of officers), seamen, engineers and firemen for a vessel of her tonnage, to be employed in carrying lawful merchandise. * * *'

'1. That the owners shall provide and pay for all provisions, wages and consular shipping and discharging fees of captain, officers, engineers and crew; shall pay for the insurance of the vessel, also for all engine room and deck stores, and maintain her in a thoroughly efficient state in hull and machinery for and during the services guaranteeing to maintain the boilers in a condition to bear a working pressure of at least 60 pounds (and this pressure to be carried continuously) during the whole term of this charter, and to victual and provide for all passengers in the best manner according to their class * * *.'

Said charter party is hereby referred to and made a part of this libel.

Twelfth: The respondent is engaged in the business of transporting bananas and other perishable cargoes from the West Indies to ports in the United States and chartered the steamship Athos for such trade; all of which was well known to the Donald Steamship Company at the time the charter party before mentioned was made, and long prior thereto.

Thirteenth: Thereafter and in or about March, 1905, the steamship Athos

was delivered by the Donald Steamship Company to the respondent and entered upon the charter party aforementioned.

The Donald Steamship Company failed to maintain the steamship in a seaworthy condition and to maintain her engines and boilers in a thoroughly efficient or in an efficient state. The respondent protested against the aforesaid failure and requested the Donald Steamship Company to maintain the steamship Athos in accordance with the terms of the charter party aforementioned.

In consequence of the aforesaid failure of the Donald Steamship Company the machinery of the steamship Athos on a voyage which she made from Port Antonio, Jamaica, to New York on or about the 28th day of July, 1905, became completely disabled and could not be repaired because of her unseaworthy condition. In consequence of said breakdown the cargo of fruit laden upon said vessel decayed and was rendered valueless to the respondent's damage in the sum of $18,909.98. The breakdown of the steamship was not caused by 'an act of God' or any other exemption within the charter party, but was caused solely by the failure of the Donald Steamship Company to keep the said steamship and her machinery in a proper and thoroughly efficient state. The respondent has performed all of the obligations upon its part to be performed."

The Donald Steamship Company excepted as follows:

"The Donald Steamship Company, respondent and petitioner herein, excepts to the answer of the Atlantic Fruit Company to the petition of the Donald Steamship Company herein for the following reasons and in the following respects.

First: It excepts to that part of the eighth article thereof from the words 'that there is now pending' to the end of the said article, on the grounds that it does not state facts sufficient to constitute a defence in whole or in part to the petition herein.

Second: It excepts to the eleventh, twelfth, and thirteenth articles of the said answer on the ground that they do not state facts sufficient to constitute a defence in whole or in part to the petition herein."

It would seem from the allegations of the libel that the employment of the libellant's steamers was for the account of both the Donald Company and the Fruit Company and the matters in connection with such employment should be litigated in this action.

Anything more than that would go beyond any extension of the analogy of the 59th Rule which has heretofore been made. The issues in these matters are now the subject of another pending litigation between these parties and should be tried out in that action and not confuse those in suit here.

It is urged by the Fruit Company that it claims a larger sum of money from the Donald Company because of matters arising out of the same charter party and should not be compelled to pay the Donald Company money here and then be obliged to take its chance of recovering against it in another action. I fail to see how that affects this controversy. Although arising under the same charter party, it does not follow that they are the same matters in controversy here. We can not go beyond such matters in the present motion. If a judgment should be obtained here against the Fruit Company, it can take some further steps, if necessary, to protect itself by way of staying enforcement pending the determination of the counterclaim.

The exceptions will be sustained.

THE SYLFID.

(District Court, S. D. Alabama, S. D. April 22, 1909.)

No. 1,185.

PILOTS (§ 16*)—LIABILITY FOR NEGLIGENCE.

Respondent, shown to have been a competent and experienced pilot, well acquainted with the harbor, was taking a ship into a slip with two tugs, being in charge of the navigation of all three vessels. A barge was lying at the end of the pier, and when the ship was passing it she struck on an obstruction on the bottom, unknown to any of the pilots, and began to swing towards the barge. Respondent at once gave orders to the tugs which attempted to stop her swinging, but before it could be done a collision occurred. *Held*, that respondent was not chargeable with want of reasonable care which rendered him liable for the damage done either because he did not move the barge, or drop the ship's anchor; it appearing that vessels were usually taken in with safety under the same circumstances, and that the dropping of the anchor would not have availed to prevent the collision.

[Ed. Note.—For other cases, see Pilots, Cent. Dig. § 19; Dec. Dig. § 16.*]

In Admiralty.

Stevens & Lyons, for libelant.

Pillans, Hanaw & Pillans and Webb & McAlpine, for respondents.

TOULMIN, District Judge. It is my opinion, on the evidence in this case, that the ship Sylfid is not liable for the damages claimed. Whether the libelant is entitled to recover against the respondent Timothy Dorgan depends upon the question whether said Dorgan was guilty of negligence in the navigation and management of said ship in bringing her from her anchorage in the river to her berth at the dock; and whether such negligence was the cause of the collision complained of.

Said Dorgan was the pilot in charge of said ship and of her navigation, as well as in control of the tugs which were towing her. His services were employed at the instance and expense of the libelant, through the manager of the dock. The tugs towing the ship were in like manner employed. The ship had been removed from her berth in the slip at the dock at the request of the libelant and for his benefit, and was being returned to such berth after the libelant's occupation and use of it by his barge had ended. The libelant had agreed with the manager of the dock to pay all expenses incurred in said removal and return. The barge had been removed from the slip and was moored at the end of the pier adjoining said slip to let the ship in. The ship in charge of the tugs was proceeding in the usual course and over the ordinary way of travel of vessels bound for the particular dock and slip. There was no apparent danger in the way until the ship struck some obstruction in the channel theretofore unknown by the defendant Dorgan and by the pilots in charge of the tugs respectively. The ship caught on this obstruction at or near her stern and began to swing, as on a pivot, towards the left or port side of the ship and

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

in the direction of the barge. The tugs in charge of the ship—one being lashed to her starboard bow, and the other with a line over her bow—were ordered by the defendant Dorgan, the pilot on the ship, the one to back full speed, and the other to go ahead full speed, in the endeavor to keep her head off; but the evidence tended to show that, owing to the current and wind and the nearness of the ship to the barge at the time the ship took ground, they were unable to change the course of the ship sufficiently to keep her "head off" before her jib boom struck the barge and caused the injury complained of.

The contention on the part of the libelant is: (1) That said Dorgan, being deputy harbor master as well as pilot, seeing the barge moored in a dangerous place, was negligent in not ordering her removed before undertaking to bring the ship into the slip, near the entrance to which the barge lay; and (2) that he was negligent in not letting go the ship's anchor at the time she began to swing, as an important, if not necessary, means of holding her up stream and away from the barge.

In answer to the first contention, the evidence showed that ships had often been carried over the same ground and to the same dock and slip to which this ship was being carried, and with barges lying as this barge was, without accident or danger, and the evidence also tended to show that this ship would have entered the slip without this accident but for her unforeseen grounding or danger thereof. The pilot was required to take no precautions when there was no apparent danger. He was not bound to take any steps to avoid a collision until danger of a collision became apparent. The Grace Girdler, 7 Wall. 196, 19 L. Ed. 113; The Sunnyside, 91 U. S. 208, 23 L. Ed. 302.

In answer to the second contention, let us consider whether said Dorgan was guilty of any negligence or fault when danger of a collision became apparent, or did he use proper precautions against danger? Did he exercise, under the circumstances, ordinary care, caution, and maritime skill to prevent the occurrence? The highest degree of caution that can be used is not required. It is enough that it is reasonable under the circumstances—such as is usual in similar cases, and has been found by long experience to be sufficient to answer the end in view. The Grace Girdler, 7 Wall. 203, 19 L. Ed. 113; In re Tyler, 149 U. S. 171, 13 Sup. Ct. 785, 37 L. Ed. 689.

The only evidence on this subject is that of Dorgan himself, and of the two masters and pilots of the tugs that were engaged in the service. They testified to what was done, and that the same was reasonable and usual in similar cases and all that could have been reasonably done under the circumstances. The evidence further was that Dorgan was an experienced pilot and reputed to be first class. There was no evidence to the contrary. But it is said that he failed to exercise due care and maritime skill in not putting out the anchor. This contention is based on the testimony of the master of the ship. He said if he "had been a pilot on his part he would let go the starboard anchor." Said master further stated that he did not say that the collision could have been prevented by dropping the anchor, but that it might have

been tried. Dorgan stated that the letting go the anchor would not, under the existing conditions, have availed anything, and gave reasons for his opinion on the subject. There was no other evidence on this point.

I do not find from the evidence there was any negligence or fault on the part of said pilot. My opinion is that the accident occurred from causes over which the pilot could at the time exercise no control. When this is the case, the rule is that the loss must rest where it fell.

The libel is dismissed as to both respondents.

The evidence showed certain damages done to the ship, and a loss incurred in the use and breaking of a line belonging to the ship. This line was used by the pilot and tugs in pulling or trying to pull the ship's head off the barge, and in such use was broken. The evidence showed that it cost the ship to replace this line $111.36, and that it incurred small expense for the other damages mentioned, and that what was left of the broken line was worth $15. The ship claims in a cross-libel against the libelant and its co-respondent Dorgan these expenses. These expenses were incurred by the ship and were incident to, and caused by her removal from, her berth at the dock. It seems to me that she, in right and justice, is entitled to be reimbursed therefor. By whom? Clearly by the libelant, who procured the ship's removal and for whose use and benefit she was removed, and who had agreed to pay for all expenses incurred in such removal. I think the libelant is liable to the ship for them. If the pilot was guilty of negligence or fault in the services performed by him for the libelant, in the performance of which the loss for which this expense was incurred, he would probably be liable to the libelant; but, finding no negligence or fault on his part, this court can render no decree against him.

Decree on the cross-libel against the libelant, James Gibboney & Co., for $111.36.

In re MAHER.

(District Court, N. D. Georgia. April 24, 1909.)

1. LIENS (§ 1*)—DEFINITION.

The term "lien," in a narrow technical sense, signifies a right by which a person in possession of personal property holds and detains it against the owner in satisfaction of a demand. The term, however, has a more extensive meaning, being used to denote a legal claim or charge on property, real or personal, for the payment of a debt or duty; every such claim or charge being still a "lien," though the property be not in the possession of him to whom the debt or duty is due. It is a hold or claim which one has on the property of another as security for some debt or charge and may exist independent of possession. As in maritime law and in equity, the term is used as synonymous with a charge or incumbrance on the thing where there is neither jus in re nor ad rem, nor possession of the thing. [Citing Words and Phrases, vol. 5, p. 4144 et seq.]

[Ed. Note.—For other cases, see Liens, Cent. Dig. § 23; Dec. Dig. § 1.*

For other definitions, see Words and Phrases, vol. 5, pp. 4144–4152; vol. 8, p. 7707.]

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

2. BANKRUPTCY (§ 195*)—ADMINISTRATION OF ESTATE—GARNISHMENT.
More than four months prior to the filing of a bankrupt's petition, claimant sued the bankrupt on an open account and garnished certain debtors of the bankrupt, who held sufficient funds to cover any judgment that might be rendered in the main suit. The bankrupt gave a bond dissolving the garnishment, depositing with the sureties $1,000 to secure them against loss. *Held*, that claimant acquired a lien as against the garnishees under the express provisions of Laws Ga. 1901, p. 55.
[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 195.*]

3. BANKRUPTCY (§ 415*)—APPLICATION FOR DISCHARGE—STAY.
A claimant holding a lien against garnishees indebted to a bankrupt is entitled to a stay of the bankrupt's discharge for a reasonable time to enable claimant to enforce his rights against the garnishees and sureties on a bond to dissolve the garnishment.
[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 415.*]

In Bankruptcy.

Hudson Moore, for bankrupt.
Leonard Haas, for V. H. Kriegshaber.

NEWMAN, District Judge. W. R. Maher, bankrupt, made application for discharge. Thereupon V. H. Kriegshaber filed a petition praying that the discharge of the bankrupt be stayed on the following stated facts: V. H. Kriegshaber, on February 19, 1908, more than four months before the petition in bankruptcy was filed, sued W. R. Maher upon an open account for materials furnished, and at the same time served summons of garnishment upon L. A. Mullins and the Carolina & Western Railway Company. It is agreed by the parties that the garnishees held in their hands at the time of the service of the summons sufficient funds to cover any judgment that might be rendered in the main suit. Subsequently W. R. Maher gave a bond dissolving the garnishment, depositing with the sureties who went on the bond to dissolve the garnishment $1,000 to secure them against loss. The ground upon which V. H. Kriegshaber now asks that the discharge be stayed is to give him an opportunity to enforce the rights which he claims he has acquired against the garnishees and against the sureties on the bond to dissolve the garnishment.

Counsel for the trustee in bankruptcy claims that Kriegshaber by garnishment proceedings acquired no lien, and that the $1,000 given the sureties on the bond dissolving the garnishment should go into the hands of the trustee for the purpose of dividing it among the creditors of the bankrupt. So the question is whether or not Kriegshaber, by this garnishment, acquired any lien or peculiar rights against the funds in the hands of the sureties on the bond as are referred to in Lockwood v. Exchange Bank, 190 U. S. 294, 23 Sup. Ct. 751, 47 L. Ed. 1061, in that case, in speaking of creditors having peculiar rights by reason of holding notes in which there was a waiver of homestead exemption, the court, speaking through Mr. Justice White, says:

"The rights of creditors having no lien, as in the case at bar, but having a remedy under the state law against the exempt property, may be protected by the court of bankruptcy since, certainly, there would exist in favor of a creditor holding a waiver note, like that possessed by the petitioning creditor

in the case at bar, an equity entitling him to a reasonable postponement of the discharge of the bankrupt, in order to allow the institution in the state court of such proceedings as might be necessary to make effective the rights possessed by the creditor."

It is urged by counsel for the trustee in bankruptcy that this case is controlled by the case of A. Klipstein & Company v. Allen-Miles Company, 136 Fed. 385, 69 C. C. A. 229, decided originally in this district and affirmed in the Circuit Court of Appeals for this circuit. I do not think so. In that case Allen-Miles Company had been discharged in bankruptcy, and, besides, the garnishment proceeding was taken out within four months from the time that the petition in bankruptcy was filed.

Whatever may have been the view formerly held as to the existence of a lien by reason of the service of summons of garnishment, pending suit against the funds or property in the hands of the garnishees, it seems to be now pretty well settled that the plaintiff in such proceeding has, if not a "lien" in the common acceptation of that term, at least peculiar rights against such funds or property.

In National Surety Company v. Medlock, 2 Ga. App. 665, 672, 58 S. E. 1131, 1135, in the opinion by Powell, J., it is said:

"Whether the summons of garnishment creates a lien depends upon the particular shade of meaning given to the word 'lien.' If it be used in the old common-law sense of the right to immediately grasp or hold in manual possession a chattel till something be performed or done by the owner, then a summons of garnishment does not create a lien on the funds in the hands of the garnishee; but the word has also a broader meaning. 'The term "lien," in a narrow and more technical sense, signifies the right by which a person in possession of personal property holds and detains it against the owner in satisfaction of a demand; but it has a more extensive meaning, and in common acceptation is understood and used to denote a legal claim or charge on property, either real or personal, for the payment of any debt or duty. Every such claim or charge is still a lien on the property, although the property be not in the possession of him to whom the debt or duty is due.' 'A lien is defined to be a hold or claim which one has upon the property of another as security for some debt or charge. At common law there could be no lien without possession. It is therein defined as a right in one man to retain that which is in possession and belonging to another. In maritime law, liens exist independently of possession, either actual or constructive, and in the courts of equity the term "lien" is used as synonymous with a charge or incumbrance upon the thing where there is neither jus in re nor ad rem, nor possession of the thing.' See 5 Words & Phrases Judicially Defined, 4144 et seq., where these and a variety of similar definitions are given. See, also, In re Byrne (D. C.) 97 Fed. 762, 764; Downer v. Brackett, 21 Vt. 599, 602, Fed. Cas. No. 4,043; U. S. Blowpipe Company v. Spencer, 40 W. Va. 698, 21 S. E. 769. Whether the service of a summons of garnishment creates a technical lien on the funds in the hands of the garnishee or not, still, especially when the garnishee admits liability and pays the fund into court, or in lieu of such actual payment a statutory bond is substituted, the court acquires such a hold upon the money or the res, such a right to retain and administer the fund (or what has been substituted for the fund, the bond), that the subsequent adjudication in bankruptcy, made more than four months thereafter, will not disturb it. Pickens v. Roy, 187 U. S. 177, 23 Sup. Ct. 78, 47 L. Ed. 128, s. c. 9 Am. Bankr. Rep. 47, sub nom. Pickens v. Dent, 106 Fed. 653, 45 C. C. A. 522. In that case the court, reasserting the rule that the court which first obtains rightful jurisdiction over the subject-matter shall hold it, quotes approvingly from Frazier v. Southern Loan & Trust Company, 99 Fed. 707, 40 C. C. A. 76, 3 Am. Bankr. Rep. 710, as follows: 'Bankr. Act July 1, 1898, c. 541, § 1, 30 Stat. 544 (U. S. Comp. St.

1901, p. 3418), does not in the least modify this rule, but with unusual carefulness guards it in all of its detail, provided the suit pending in the state court was instituted more than four months before the District Court of the United States had adjudicated the bankrupt of the party entitled to or interested in the subject-matter of such controversy.' See, also, in the same connection, Metcalf v. Barker, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122; Collier on Bankruptcy (6th Ed.) 571; Boston Mercantile Company v. Ould-Carter Co., 123 Ga. 458, 15 S. E. 466."

In view of this ruling it would seem that the plaintiff in a garnishment proceeding would at least have as much right against the funds and property in the hands of the garnishee as would a creditor holding a waiver of exemption note against the exemption of a bankrupt. But by the act of the Legislature of Georgia, approved November 11, 1901 (Laws Ga. 1901, p. 55), it is enacted, among other things, as follows:

"The service of a summons of garnishment shall in all cases operate as a lien on all the garnishee's indebtedness at the date of the service and also on all future indebtedness accruing up to the date of the answer, and such lien shall not be defeated by any payments by the garnishee or overdrafts by the defendant or other arrangements between the defendant and the garnishee."

How far the lien provided for by this act would be effective against other general judgments obtained against the defendant in other suits prior to a judgment in the main suit in which the garnishment was taken out may be questioned; but there seems to be no doubt under this act that, as between the plaintiff in the suit on which the garnishment is based and the garnishee, a lien exists in favor of the plaintiff against the funds in the hands of the garnishee.

I do not decide now whether the trustee in bankruptcy has any rights as to the $1,000 in the hands of the sureties on the bond to dissolve the garnishment. I need only say this: That if the surety is held liable on the bond in the state court, and it appears that the $1,000 was placed in the hands of the sureties on the bond at the time the same was executed and more than four months before the bankruptcy proceedings, it would be questionable at least if there existed any such rights.

The conclusion is that V. H. Kriegshaber is entitled on his petition to have the discharge of the bankrupt stayed for a reasonable time, and an order may be made for the present staying the discharge for 60 days.

In re ARNOLD.

(District Court, N. D. Georgia, E. D. May 10, 1909.)

BANKRUPTCY (§ 396*)—EXEMPTIONS—SALE OF PROPERTY—DISTRIBUTION OF PROCEEDS.

A bankrupt claimed $1,600 worth of property as exempt under the state law, whereupon the trustee filed a report setting apart the exemption as claimed from the bankrupt's stock valuing the goods assigned at $1,600. It was thereafter agreed to sell the entire stock, including the goods exempted, and that the exemption should be paid to the bankrupt out of the proceeds. The stock was thereupon sold for 66 per cent. of the inventoried

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

value. *Held*, that the bankrupt was only entitled to his pro rata share of the proceeds of the sale, and not to an allowance of $1,600 therefrom.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 662; Dec. Dig. § 396.*]

In Bankruptcy. Certificate of referee to the judge for review.

J. H. Felker, for bankrupt.

George B. Rush, for creditors.

NEWMAN, District Judge. Attached to the schedule filed in this case, the bankrupt sets up his claim for exemption, as follows:

"The bankrupt claims to be exempt by state laws (section 2827 et seq. and section 5912 of the Code of Georgia) $1,600 worth of property, and he will claim this amount to be invested in a homestead for his family, consisting of his wife and two minor girl children, six and four years of age. This exemption is claimed out of the stock of goods, but the bankrupt is willing for the goods to be sold, as the stock would be incapable of division without injury, and all parties, including the bankrupt would be benefited by a sale of the property as a whole."

The schedule to which this claim of exemption is attached was filed March 27, 1908. On May 28, 1908, it appears that the trustee filed his report setting apart for the bankrupt the exemption as claimed from the stock of goods, and valued the same at $1,600. A list or inventory of the property so set apart from the bankrupt's stock of merchandise filed by the trustee is in the record sent to the District Court by the referee. It shows various articles of merchandise such as would be kept in the stock of a general dealer.

There seems to have been no objection filed to the trustee's action in setting apart the exemption, except that there appears to have been some difference between the trustee and the bankrupt as to the value of the goods so allowed the bankrupt. Counsel for the trustee claim that the goods so selected and set apart were moved and placed in a separate part of the store. This I understand to be denied by the counsel for the bankrupt, and the record is silent on the subject; but, whatever may be true about this, there is no doubt that particular and specific articles were designated and set apart.

In this stage of the matter, and while there was some controversy between the bankrupt and the trustee as to the valuation of the goods so set apart, it was agreed that it would be to the interest of both the bankrupt and the creditors that the stock should be sold as an entirety, and that it should be left for the district judge to decide whether or not the bankrupt is entitled to $1,600, as claimed by him, or the pro rata part of the proceeds arising from the sale of the goods. This agreement to leave the matter to the district judge was because the then referee in bankruptcy was disqualified from acting in the case.

The stock of goods was sold in accordance with agreement and brought 66 per cent. of the inventory value. After this, a new referee having been appointed for that portion of the district in which this case was pending, the matter was by consent submitted to him for determination. His decision is as follows:

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

"Really there seems to be no 'dispute' as to the value of the bankrupt's exemption, and it would therefore seem that all the referee can do is to advise or recommend some basis for a just and equitable settlement between the trustee and the bankrupt. The effect of the agreement appears to be that the bankrupt turned over his exempted articles, selected by himself and duly set apart to him by the trustee, to the trustee to sell and convert into cash for him; both he and the trustee believing that the goods selected by him and that left for creditors would together as a whole secure a better price than if sold in a condition of separation. In Re Gerson Richards, 2 Am. Bankr. Rep. 506, 94 Fed. 633, and in Re Ansley Bros., 18 Am. Bankr. Rep. 457, 153 Fed. 983, is found the best and most satisfactory authority for the solution of the instant proposition, which is that, in a case like this, 'it is proper to pay to the bankrupt from the proceeds of the sale the pro rata value of the exempt property to the proceeds of the sale of the entire stock,' and, it is therefore ordered that the trustee pay over to the bankrupt from the proceeds of the sale of the stock of goods, which included the exemption set apart to the bankrupt, the amount in cash due him, according to the above ratio."

I think the decision of the referee in this case was correct, whatever may be true as to the rights of a bankrupt to an exemption generally out of goods sold for less than their inventory value. What the bankrupt would have received if he had not consented to the sale of the stock of merchandise as a whole would have been the particular articles designated and set apart for him by the trustee. On account of the expected benefit he would receive from the sale of the stock as a whole, he agreed to it, and I do not think he can now, as against the creditors of the estate, claim anything more than the proportion that the purchase price bears to the inventory value of the stock. To hold otherwise would be to allow the bankrupt to take several hundred dollars from the proceeds of that portion of the stock of goods which was left in the hands of the trustee for the benefit of creditors after the goods allowed the bankrupt as an exemption had been separated therefrom. I do not think this would be right.

The action of the referee is approved.

In re COE et al.

(District Court, S. D. New York. May 7, 1909.)

No. 9,649.

1. BAILMENT (§ 25*)—MISAPPROPRIATION BY BAILEES—RIGHTS OF BAILORS.

Goods were shipped under bills of lading consigned to claimant bank, and on arrival drafts accompanying the bills were paid by the bank, which thereupon drew other bills for an equivalent amount on the bankrupts, which were accepted. The goods were then delivered to the bankrupts on their executing trust receipts by which the bank retained title to the goods and their proceeds; the bankrupts agreeing to sell the goods and account and pay over the proceeds to the bank as collected. This they did not do, but misappropriated the same. *Held*, that the bankrupt firm and its members were jointly liable to the bank on a simple contract liability on the acceptances, and also jointly and severally liable on a claim either in tort, or quasi contract at the bank's election for such misappropriation.

[Ed. Note.—For other cases, see Bailment, Dec. Dig. § 25.*]

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

2. BANKRUPTCY (§ 309*)—PARTNERSHIP—COMPOSITION OF CLAIM AGAINST PARTNER—EFFECT.

Where a bankrupt firm and its partners were jointly liable to a bank on certain acceptances, and were jointly and severally liable in tort, or on a quasi contract for misappropriation of the proceeds of goods belonging to the bank, the latter was entitled to file a double proof of claim against the partnership assets, and against the individual assets of each partner, and hence the bank, by releasing its claim against one of the partners for a payment of 20 per cent. of its original claim, expressly reserving all other rights, did not elect to treat the indebtedness as a simple contract debt of the firm on the acceptances nor preclude itself from enforcing the remainder of its claim against the firm assets and those of the other partner.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 309.*]

See, also, 157 Fed. 308.

Rounds, Hatch, Dillingham & Debevoise (Ralph S. Rounds, of counsel), for claimant Sovereign Bank of Canada.

White & Case (Joseph M. Hartfield, of counsel), for trustee.

HOLT, District Judge. This is a proceeding to review an order of the referee expunging a claim for $56,926, filed by the Sovereign Bank of Canada against the separate estate of the bankrupt Coe. On February 15, 1907, the firm of Cadenas & Coe, composed of Edward P. Coe and William H. Knox, were put into bankruptcy. The firm had been for many years previously engaged in business in New York as importers of African goods. Some time prior to the bankruptcy, they made an arrangement for a credit with the Sovereign Bank of Canada, which had an agency in New York. Under this arrangement they purchased a large amount of ostrich feathers in Africa, paying for them by drafts on the Sovereign Bank of Canada. The goods were consigned to the bank. The bills of lading given for the goods described the bank as their owner. When the drafts, accompanied by the bills of lading, reached the bank, they were paid. The bank thereupon drew bills for an equivalent amount upon Cadenas & Coe, which were duly accepted. They also transferred the bills of lading to Cadenas & Coe, taking from them trust receipts, which recited that Cadenas & Coe had received from the Sovereign Bank of Canada the bills of lading and invoices for the ostrich feathers, and that Cadenas & Coe thereby undertook to sell the property for account of the bank, and to collect the proceeds of the sales thereof, and to deposit the same immediately on receipt thereof in the said bank at New York. The receipts acknowledged that Cadenas & Coe were bailees for the said property for the said bank, that the bank might at any time cancel the bailment or trust, and that, in such event, Cadenas & Coe undertook and agreed to return all unsold goods at once on demand, or to pay the value of the said goods. Thereupon Cadenas & Coe sold the goods on a term of credit, usually, of about 60 days. It was understood by both parties that the goods were to be sold on credit. Cadenas & Coe collected from the proceeds of said goods about $70,000, but did not turn it over to the bank. When the bank-

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

ruptcy occurred, the entire amount substantially had been disposed of by Cadenas & Coe.

Shortly after the bankruptcy, a composition was proposed in behalf of the partner Knox individually, and of the firm of Cadenas & Coe, but not in behalf of the partner Coe individually. This composition provided for the payment of 20 per cent. of the firm indebtedness. It was assented to by the requisite number of creditors, and was duly authorized by an order of this court. The Sovereign Bank of Canada did not formally sign the consent to the composition, but its representative announced, at a meeting of creditors, when the composition was under consideration, that it had no objection to it. It had at that time filed no proof of claim either against the firm or against the individual partners, and the amount of its claim was not then exactly liquidated. A statement was subsequently made up, showing an indebtedness of about $71,000. Thereupon a stipulation was entered into between the bankrupt Knox and the attorneys for the bank, deciding the amount of the indebtedness to be at least $71,158, and stating that an order might be entered forthwith, directing the trustee to draw a check in payment of the dividend due upon said sum pursuant to the order of this court, dated October 29, 1907, and "that neither the bankrupts nor the Sovereign Bank of Canada waives any rights by this stipulation." Thereupon an order was entered authorizing the payment, and the trustee paid 20 per cent. of the amount to the bank. Thereafter, and within a year after the beginning of the bankruptcy proceedings, the bank filed a separate proof of claim against the bankrupt Coe individually for $56,926, being the amount of the indebtedness after crediting upon it the 20 per cent. received on the original claim. The trustee moved to expunge this claim, and the referee granted the motion, and to review the order of the referee this proceeding is brought.

The bills of lading under which the goods were shipped consigned the goods to the Sovereign Bank of Canada. When they arrived in New York, and the drafts accompanying the bills had been paid, the Sovereign Bank of Canada had the legal title to the goods. When it authorized the delivery of the goods to the firm of Cadenas & Coe, it took trust receipts which, by express agreement, retained the title to the goods and their proceeds in the Sovereign Bank of Canada. By those receipts the firm of Cadenas & Coe agreed to turn over the proceeds to the bank as soon as they were collected. They did not do so, but appropriated such proceeds to their own purposes. Therefore the members of the firm of Cadenas & Coe were jointly liable to the bank upon a simple contract liability upon the acceptances, and also jointly and severally liable to the bank upon a claim either in tort or upon quasi contract, at the election of the bank, for the misappropriation of the proceeds of the goods. The measure of the liability undoubtedly was the amount of the acceptances. If the proceeds of the goods had exceeded the amount of the acceptances, the surplus would have been returned to the firm, but under the trust receipts the bank was entitled to have paid to it all the proceeds of the sales of the ostrich feathers, and any neglect to turn over such proceeds was a misap-

propriation of the money. For such misappropriation Cadenas & Coe were liable jointly and severally, and upon their bankruptcy the bank could file a double proof, both against the partnership assets and against the individual assets of each partner. In re Baxter, Fed. Cas. No. 1,119, 18 N. B. R. 62; In re Jordan (D. C.) 2 Fed. 319; In re Blackford, 35 App. Div. 330, 54 N. Y. Supp. 972; Lindley on Partnership (5th Ed.) 703; Loveland on Bankruptcy, 315, and cases cited; In re Parkers, 19 Q. B. Div. 84.

It is claimed by the counsel for the trustee that the receipt of the dividend under the composition was an election to treat the indebtedness as a simple contract indebtedness of the firm on the acceptances; but I cannot see that the doctrine of election has any application here. The bank could have originally put in a double proof, against the firm assets and against the individual assets of each partner. As the composition in terms did not propose to make any arrangement for the settlement of the individual indebtedness of Coe, no occasion arose for the exercise of an election, if the doctrine of election applies to such a case at all.

It is also urged by the counsel for the trustee that the receipt by the bank of the dividend under the composition was an admission that the claim made was a simple contract claim against the firm on the acceptances; but the stipulation made did not take any position as to the grounds of the claim. It simply fixed the amount of the claim at $71,158, and expressly reserved the rights of the bank. As the composition did not purport to settle any questions of the individual liability of Coe, whatever rights the bank had as against his individual estate remained unaffected.

The trustee's counsel in his brief, and the referee in his opinion, gives much weight to the cases of Chapman v. Forsyth, 2 How. 207, 11 L. Ed. 236, and Crawford v. Burke, 195 U. S. 176, 25 Sup. Ct. 9, 49 L. Ed. 147. These cases, and other similar cases, have established the rule that such a liability as existed in this case, notwithstanding the tortious element in the claim growing out of the misappropriation of the proceeds of the goods, is provable and dischargeable in bankruptcy; but I do not see that these cases have much application to the question involved in this case, or that they support the position of the trustee; the reverse rather. They establish that the claim of the bank is provable, but they do not seem to me to have any bearing on the real question in this case, whether the bank was entitled to make double proof against the firm assets and the individual assets of each partner.

My conclusion is that the order of the referee under review should be reversed, and that the proof of claim filed by the Sovereign Bank of Canada against the separate estate of Coe should be allowed.

In re BURLAGE BROS.

(District Court, N. D. Iowa, E. D. May 10, 1909.)

No. 620.

1. BANKRUPTCY (§ 166*)—VOIDABLE PREFERENCE—ELEMENTS.
It is an essential element of a voidable preference that the preferred creditor had grounds to believe that a preference was intended.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250–258; Dec. Dig. § 166.*]

2. BANKRUPTCY (§ 184*)—LIENS—RECORD OF INSTRUMENT AFTER BANKRUPTCY.
Where an unrecorded bill of sale executed more than four months before bankruptcy is attacked as a voidable preference, its record after bankruptcy had intervened avails nothing.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 276; Dec. Dig. § 184.*]

3. BANKRUPTCY (§ 184*) — UNRECORDED BILL OF SALE — LIEN — VALIDITY — STATE LAW.
Code Iowa, § 2906, declares that no sale or mortgage of personal property where the vendor or mortgagor retains actual possession is valid as against existing creditors or subsequent purchasers without notice, unless the instrument is filed for record. Bankr. Act July 1, 1898, c. 541, § 70 (5), 30 Stat. 565 (U. S. Comp. St. 1901, p. 3451), declares that such title as the bankrupts may have conveyed or their creditors may have acquired by seizure passes to the trustee, and section 67a declares that claims which for want of record would not have been valid liens as against the claims of the bankrupts' creditors shall not be liens against his estate. *Held*, that a bill of sale executed by a bankrupt more than four months before bankruptcy, which was in fact a chattel mortgage, but never recorded, was invalid as against other creditors of the bankrupt, though taken in good faith.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 276; Dec. Dig. § 184.*]

4. BANKRUPTCY (§ 314*)—CLAIMS—RIGHT TO PROVE.
Where claimant sold certain carriages to the bankrupts, and, the purchase price not being paid, claimant took from the bankrupts a bill of sale of the carriages, which was in fact a mortgage more than four months before bankruptcy, but such bill was unenforceable as against other creditors of the bankrupt for want of record, claimant was entitled to prove its claim for the purchase price of the carriages as an unsecured claim against the bankrupts' estate.
[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 314.*]

In Bankruptcy.

On petition of the Hercules Buggy Company for review of the order of the referee denying its claim to certain property in the custody of the trustee.

John A. Cunningham, for petitioner.
C. M. Thorne and D. E. Maguire, for trustee.

REED, District Judge. On June 26, 1908, a few days more than four months before the bankruptcy, the bankrupts made to the Hercules Buggy Company, a bill of sale of a number of carriages or buggies for the expressed consideration of upwards of $500. Under this instrument the buggy company presented to the referee a claim for

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

the specific carriages described therein, and asked that an order be made requiring the trustee to turn them, or such thereof as were still in his custody, over to it. The trustee objected to the claim upon the ground that the instrument had never been recorded as required by the law of Iowa. The referee sustained the objection and denied the claim, and the buggy company petitions for a review of this order.

No evidence was introduced before the referee, but the parties made and filed with him a stipulation of facts upon which the matter was submitted to him, which stipulation is as follows:

"Stipulation of Facts.

"It is hereby stipulated by and between D. E. Maguire, trustee, and the Hercules Buggy Company, by and through its attorney of record John A. Cunningham, that:

"(1) The bill of sale was executed as set forth on the 26th day of June, 1908.

"(2) That the bill of sale referred to was never recorded in the records of Dubuque county, Iowa.

"(3) That prior to June 26, 1908, the goods and chattels in question were the property of Burlage Bros., sold to them by the Hercules Buggy Company, and that they were not paid for, and that the bill of sale was made for the purpose of reconveying this property to said Hercules Buggy Company on the date mentioned.

"(4) That the chattels remained in the possession of Burlage Bros. until the filing of the petition in bankruptcy.

"(5) It is admitted by John A. Cunningham, the attorney for the Hercules Buggy Company, that on the 26th day of June, 1908, at the time of the execution of the bill of sale set out in the application, the firm of Burlage Bros. and Nick Burlage and Simon Burlage, Jr., were insolvent. But it is denied by the said Hercules Buggy Company that it had reasonable cause to believe that it was intended thereby to give a preference."

It was conceded upon the argument that the bankrupts retained possession of the carriages after the execution of the bill of sale, with authority to sell them and account to the petitioner for the proceeds, less a commission for selling, to apply upon its debt against them. This made the transaction in effect a mortgage, though the instrument is in form an absolute sale of the property; and in either form it might be a preference, yet, if it had been recorded at the time it was made, it would have been valid as against the trustee. It was valid as between the parties without record, and it is contended on behalf of the petitioner that the trustee stands only in the shoes of the bankrupts, and can assert no greater right to the property as against it than the bankrupts could have asserted. On the other hand, the trustee maintains that, inasmuch as the instrument was never recorded as required by the Iowa statute, it may still be avoided by him as a preference. First Nat. Bank v. Connett, 142 Fed. 33, 73 C. C. A. 219. But the petitioner denied before the referee that it had any grounds to believe that a preference was intended by the bill of sale, and there is no proof that it did have. An essential element of a voidable preference is therefore lacking in the proof, and there is neither issue nor proof that the bill of sale was made to defraud creditors. Of course, the record of the instrument after the bankruptcy could avail nothing, and unless the presentation of a claim to the property under the instrument after the adjudication evinces an intent on the part

of the petitioner to then create and accept a preference, and the adjudication is sufficient proof of knowledge upon its part that one was then intended, there is no proof of a voidable preference within the four months prior to the bankruptcy. Whether or not the legal effect of presenting the claim to the referee for the specific property would be the same as the prior record of the instrument need not be determined, for the claim must be denied upon other grounds.

Section 2906 of the Iowa Code of 1897 provided:

"No sale or mortgage of personal property, where the vendor or mortgagor retains actual possession thereof, is valid against existing creditors or subsequent purchasers, without notice, unless a written instrument conveying the same is executed, acknowledged like conveyances of real estate, and filed for record with the recorder of the county where the holder of the property resides."

The bill of sale was clearly invalid as against existing creditors of, or subsequent purchasers from, the bankrupts, unless it was recorded as required by this section of the Iowa statute. Security Warehousing Co. v. Hand, 206 U. S. 415–425, 27 Sup. Ct. 720, 51 L. Ed. 1117; In re Gerstman, 157 Fed. 549–551, 85 C. C. A. 211.

Any person could therefore, prior to the bankruptcy have purchased any of this property from the bankrupts in good faith, or any of their creditors, without notice of the instrument, could have seized and sold any of it under judicial process against them, and such purchase, or seizure and sale, would have been valid as against the petitioner; and such title as the bankrupts could so have conveyed, or their creditors could so have seized, passed to the trustee under section 70(5) of the bankruptcy act of July 1, 1898, c. 541, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3451). Not only this, but section 67a of the act provides:

"Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate."

And section 67d provides:

"Liens given or accepted in good faith and not in contemplation of, or in fraud upon this act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall not be affected by this act."

While there is no proof of fraud, neither is there any that the bill of sale was for a present consideration; and it was not recorded. That record of the bill of sale was necessary, under the section of the Iowa Code above quoted, to impart notice thereof to creditors or purchasers, seems to admit of no doubt. The order of the referee denying the claim to the specific property is therefore approved. But the petitioner may prove its claim for the unpaid price of the carriages as an unsecured claim against the estate, and the matter is referred back to the referee that it may do so if it shall be so advised. It is ordered accordingly.

EMPIRE CIRCUIT CO. v. SULLIVAN et al.

(Circuit Court, S. D. New York. April 6, 1909.)

1. COURTS (§ 262*)—JURISDICTION—ADEQUATE REMEDY AT LAW.
In determining whether or not a complainant has a plain, adequate, and complete remedy at law which will deprive a federal court of equity of jurisdiction, recourse is to be had to the principles of equity, and not to the statutes of the state in which the court sits.
[Ed. Note.—For other cases, see Courts, Cent. Dig. § 797; Dec. Dig. § 262.*]

2. EQUITY (§ 46*)—JURISDICTION—ADEQUATE REMEDY AT LAW.
A court of equity will take jurisdiction when the particular machinery of that court can do more complete justice between the parties than that of a court of law.
[Ed. Note.—For other cases, see Equity, Cent. Dig. § 151; Dec. Dig. § 46.*]

3. ACCOUNT (§ 3*)—JURISDICTION—SUIT FOR ACCOUNTING BY TRUSTEE.
A contract based on a valid consideration, by which defendants agreed to account for and pay over to the other party a certain percentage of the receipts of a theater operated by defendants during a season, created a trust relation between the parties which, on the refusal of defendants to render an account, gives a court of equity jurisdiction to compel such accounting and payment.
[Ed. Note.—For other cases, see Account, Cent. Dig. §§ 10–12; Dec. Dig. § 3.*]

4. ACCOUNT (§ 17*)—ACTION—SUFFICIENCY OF BILL.
A bill to compel an accounting by defendants as trustees under a contract *held* insufficient as failure to show that complainant was the party to whom the contract required the accounting to be made.
[Ed. Note.—For other cases, see Account, Cent. Dig. §§ 77, 78; Dec. Dig. § 17.*]

In Equity. On demurrer to bill.

Stuart G. Gibboney, for complainant.
House, Grossman & Vorhaus, for defendants.

MARTIN, District Judge. This is a demurrer to the orator's bill of complaint. The complainant alleges an agreement with the Union Theaters Company, whereby the complainant, among other things, is to procure shows for certain theaters for the period of 10 years, the proceeds thereof to be divided as set forth in the bill; that the defendants, "under the name of Sullivan & Kraus, were copartners in the management of certain theaters in the city of New York, and the corporation hereinafter mentioned as the Union Theaters Company was organized pursuant to the laws of the state of New York, with a small capital of a few thousand dollars, by the respondents as an aid to them in managing their theaters; * * * that about the 26th day of May, 1906, an agreement was entered into by and between your orator and the said Union Theaters Company, whereby, among other things, it was agreed that the said Union Theaters Company lease to your orator for the period of 10 years from the opening of the regular theater season in August, 1906, the Circle Theater, in the city of New

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

York, for the theatrical season each year, consisting of about 40 weeks from August in the fall to June in the following summer of each year, for the production of certain burlesque shows in weekly rotation, according to a schedule or route sheet, which your orator was to prepare each year, in conjunction with other theaters in other cities; and the gross receipts from the performances of each of said shows were to be divided; * * *" that subsequently the defendants, "who were the main owners of the stock of said Union Theaters Company," were desirous of making a change in said contract, and thereupon an agreement was entered into between the orator and the Union Theaters Company, with the approval of the respondents, to the effect that, instead of the shows managed by the orator being given in weekly rotation at said Circle Theater, the defendants should produce plays for a run and pay 5 per cent. of the gross receipts during the season of 1907–08; that the respondents took proceedings to have the Union Theaters Company dissolved, and thereupon assumed the management of the Circle Theater and assumed the contracts between the said Union Theaters Company and the orator; that plays were produced at said Circle Theater during said season of 1907–08, and there were receipts therefrom, but the orator does not know the amount of said receipts; that the defendants have never accounted to the orator for the gross receipts of said Circle Theater during said season of 1907–08 and have never paid the 5 per cent. thereof; and that the amount due the orator is upwards of $7,000.

There are also the usual allegations as to diverse citizenship and a prayer: That the defendants "make full disclosure and discovery of all the matters aforesaid, and according to the best and utmost of their knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to the matters hereinbefore stated and charged, but not under oath," etc.; "that the respondents may be decreed to account for and pay over the aforesaid 5 per cent. of the receipts of the said Circle Theater during said season."

The first ground of demurrer is that the orator "has a plain and adequate remedy by law," and that "the bill doth not contain any matter of equity." It was claimed in argument that the statute of New York affords adequate relief for an accounting in a case like this in a court of law. In determining whether there is a plain, adequate, and complete remedy at law, recourse is to be had to the principles of equity, not to the laws of the state in which the court sits. Robinson v. Campbell, 3 Wheat. 212, 4 L. Ed. 372; Barber v. Barber, 21 How. 583, 16 L. Ed. 226; Gordon v. Hobart, 2 Sumn. 401, Fed. Cas. No. 5,609.

It is also contended that the court of equity has no jurisdiction of such an accounting as is prayed for in this bill. Courts of equity will take jurisdiction when the particular machinery of that court can do more complete justice between the parties. Sullivan v. Portland & Kennebec R. R. Co., 94 U. S. 811, 24 L. Ed. 324. If it is true that these parties entered into a contract, for a valid consideration, whereby the defendants agreed to account for and pay over to the orator 5 per cent. of the receipts for the theater season of the year 1907–08, and they failed to account or make payment therefor, and have re-

fused or neglected upon request both to render an account and make payment, the court of equity should take jurisdiction and compel the defendants to account, and, if an amount sufficient to give the federal court jurisdiction is found to be due the orator, decree payment of that sum. Such a contract creates a trust relation. The party agreeing to pay 5 per cent. is trusted to render an account of the receipts and pass over to the other party the amount, in dollars and cents, of said 5 per cent. The orator trusts in him to make that accounting, and, if he fails to do it, the court of chancery should compel it. Should the parties be turned out of equity and compelled to proceed on the law side of the court, impanel a jury and try out each item—hear testimony as to the number of people that attended each of several hundred performances? Does the law furnish an equal remedy in such a case? I think not.

It is said that, under the English common law, equity may have concurrent jurisdiction with courts of law in all cases where the common-law action of account would lie. Fonblanque, Eq. 1, 10; Cooper, Tr. 26; Bispham, Eq. 483. In all cases where the accounts are intricate and a discovery is demanded, or where there should be an accounting for money held in trust, equity will take jurisdiction. If, as in this case, a trust is created in a contract for an accounting for receipts, I can see no reason why the same principle should not apply.

The trouble is, however, that the averments of this complaint are insufficient in bringing before the court just that state of things. Agreement Exhibit No. 1 appears to have been entered into between the Union Theaters Company and the Empire Circuit Company and the amount of 50 per cent. of the gross receipts is payable to the manager or owner of the show. The bill of complaint does not connect the orator with such manager, and agreement Exhibit No. 2 is based upon Exhibit No. 1 for its consideration. The failure of an averment in this regard is fatal to the bill without amendment.

Clause 4 of the bill of complaint avers the dissolution of the Union Theaters Company by the defendants, and that the defendants "thereby assumed the management of the Circle Theater and assumed the contracts between the Union Theaters Company and the orator, as hereinbefore set forth." This is simply an allegation that they assumed the contracts with an agreement to pay the "manager or owner of the show." The only value of that averment is that it shows what became of the Union Theaters Company and who succeeded it.

The averment in clause 5 of the bill is deficient on demurrer. It does not set forth any consideration for the agreement therein related and names but one party to that agreement. Its language is this:

"It was agreed that the respondents should produce plays for a run rather than by the week, and should pay, as before, 5 per cent. of the gross receipts of said Circle Theater during that season, to wit, the season of 1907–08."

Whether this agreement was made by the defendants with the orator or with the "manager or owner of the show" does not appear, neither does it appear for what consideration said agreement was made.

The demurrer is sustained.

SCHULER v. WOODWARD et al.

(Circuit Court, S. D. New York. February 24, 1909.)

CORPORATIONS (§ 312*)—REORGANIZATION OF BANKRUPT CORPORATION—RIGHTS OF STOCKHOLDERS.

A minority stockholder of a bankrupt corporation is not entitled to an injunction to restrain the carrying out of a plan of reorganization by the majority, which contemplates the acquisition of the company's property only through purchase when sold at public sale under order of the court of bankruptcy.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1384; Dec. Dig. § 312.*]

In Equity. On motion for preliminary injunction.

Kellogg & Rose, for complainant.
Hornblower, Miller & Potter, for defendants.

NOYES, Circuit Judge. It is not clear, from the plan of reorganization as stated in the papers, in what manner it is proposed that the new company shall "take over" the properties of the bankrupt corporation, the Southern Steel Company. Counsel for the reorganization committee, however, has explicitly stated, and the secretary of the committee has sworn, that it is the intention of the committee only to acquire the properties by purchase at a public sale from the trustees in bankruptcy. I think it is my duty, upon this application, to accept these statements as true. In case of such a trustees' sale, therefore, it must be presumed that the bankruptcy court will take the proper steps to secure a fair price for the properties to be sold, and to distribute the proceeds of the sale among creditors and stockholders of the bankrupt corporation in accordance with their respective interests; and, if the reorganization is only to take place after a judicial sale, it follows that the complainant has not presented a case calling for the issuance of a preliminary injunction. It is admitted that the complainant and all other stockholders have had the privilege of participating in the reorganization upon the same basis. The fact that those who advance new funds will receive far more in new securities than those who advance nothing is only the ordinary incident of a reorganization after a judicial sale. It does not indicate fraud, nor that the majority stockholders joining in the reorganization have failed in any duty owed by them to the minority.

But these conclusions only follow in the case of a reorganization after a judicial sale. If the plan were, with the consent of creditors, to take the properties of the corporation out of the bankruptcy court and transfer them to the new company in exchange for its stock by voting the majority shares, the case presented would be essentially different. In case of the sale by the action of the majority of the entire assets of a corporation, a minority stockholder has generally the right to insist that only a monetary consideration shall be received. He cannot be put off with "chips and whetstones," instead of cash. The complainant should have the right to renew this application in case the

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

committee should not carry out their present intention, and should take any steps to consummate a reorganization except as following the purchase of the property of the corporation at public sale in bankruptcy.

The application for a preliminary injunction is denied, without costs, and without prejudice to the right of the complainant to institute such proceedings in the District Court for the Northern District of Alabama as he may deem expedient, and also without prejudice to his right to renew this application, should the situation be changed as above indicated.

UNITED STATES v. BOLOGNESI et al.

(Circuit Court, S. D. New York. April 22, 1909.)

POST OFFICE (§ 18*)—MONEY ORDERS—LIABILITY OF RECIPIENT FOR ORDERS ILLEGALLY ISSUED.

It is no defense to an action by the United States to recover the amount paid in redemption of postal money orders from the payees to whom they were paid, and to whom they were issued by a post office clerk without authority and in violation of law, without first receiving applications and payment therefor, that defendants took such orders in good faith from said clerk in payment of sums justly due them from him as a banker, or that their invalidity did not appear from their face.

[Ed. Note.—For other cases, see Post Office, Dec. Dig. § 18.*]

On Demurrer to Amended Answer.

Felix Frankfurter, for trustees.

Mayer & Gilbert, for defendants.

WARD, Circuit Judge. A demurrer to the separate defense, in the answer in this case having been sustained (164 Fed. 159), the defendants served an amended answer containing a separate defense, to which the government has again demurred. The new allegations in the amended answer are intended to show the inquiry which the defendants made with reference to Marone's authority, although a banker, to issue money orders as a post office clerk, and, further, what means the defendants had of ascertaining whether Marone had deposited funds to cover the money orders, and are as follows:

"(14) That in or about the year 1904 the post office inspectors made inquiry into the business dealings of the said Marone with these defendants, and made inquiry into the issuance of the large number of money orders, above referred to, to these defendants, and as early as the year 1904 said post office inspectors had actual knowledge of the fact that Marone had these dealings with these defendants and paid these defendants in money orders issued by him as post office clerk, acting for the said Roberts as Brooklyn postmaster, and had actual knowledge of the fact that the said Marone had continued his business as banker, dealer in foreign money, and dealer in transportation tickets, and at that time called upon these defendants and were informed of all of the facts, but made no objection thereto, and, on the contrary, the said post office inspectors assured the defendants that the transactions were in every respect right and proper.

"(15) That subsequently thereto these defendants inquired of one of the auditors in the Post Office Department of the plaintiff government as to the practice pursued by Marone, and were assured by the said auditor that there was no reason why the said Marone as a banker could not pay these defend-

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

ants by money orders issued by him as post office clerk, acting for said Roberts as said Brooklyn postmaster. Said auditor is an employé (or clerk) in the New York post office, charged with auditing and checking the accounts of the said post office, and all the determinations and actions of said auditor are subject to control and review by the Auditor of the Post Office Department at Washington. * * *

"(17) * * * That it was impossible for these defendants to tell from the face of the money orders themselves that any one or more of the money orders delivered to them and payable to them were defective in any way; that they were all issued over the name of Roberts as Brooklyn postmaster, all initialed by the letter "M," all upon the official money order blanks of the United States government, and were all signed by the person authorized to sign and issue the same; and no person could by any possibility, from an examination of these money orders, discover any defect therein upon their face. * * *

"(19) Defendants further allege that the records of the Post Office Department and of the various branch post offices are not public records, and are not subject to public inspection, and that it was not possible at any time during the period in question for these defendants to have examined in person any records, papers, applications, or documents in the office of the Brooklyn postmaster or in station 102, so as to discover whether proper application had been filed for money orders issued payable to these defendants, or whether the proper sums of money were deposited with the postmaster or the clerk in charge of the branch post office for said money orders. On the other hand, however, the post office inspectors did have access to all of said records, and it was their duty to inspect and examine the same."

The government contends that these allegations constitute no defense, because, first, money orders not being negotiable instruments (United States v. Stock Growers' National Bank [C. C.] 30 Fed. 912; Fine Arts Society v. Union Bank of London, L. R. Q. B. Div. 705), it can show against any holder of them that they were issued in violation of law; second, that, even if they are negotiable, they are so only after having been transferred by the payee, and that they are subject to any defense the government has in the hands of the defendants, who are themselves the payees. Section 60 of the negotiable instruments law (Laws N. Y. 1897, p. 728, c. 612) provides:

"Sec. 60. What constitutes negotiation.—An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer it is negotiated by delivery; if payable to order it is negotiated by the indorsement of the holder completed by delivery."

I agree with these propositions, and, as the money orders were concededly issued by Marone in violation of law, the inquiry and the circumstances set forth in the amended answer constitute no defense to the government's claim. The allegations contained in articles 14 and 15 show that the government inspectors and the government auditor in the New York post office assured the defendants that Marone, although a banker, could lawfully pay them with money orders issued by him; but this must be taken subject to the condition that he deposited funds to cover the money orders as required by law. The allegations in articles 17 and 19 that the defendants could not tell from the money orders themselves that Marone had not deposited funds to cover them, and could not examine the records in the post office to ascertain that fact, even if admitted by the demurrer, seem to me to make no difference in the result.

The demurrer is sustained.

BOIREAU v. RHODE ISLAND CO.

(Circuit Court, D. Rhode Island. April 20, 1909.)

No. 2,807.

PLEADING (§ 64*)—DECLARATION—DUPLICITY.

The declaration in an action to recover damages for a personal injury resulting from the derailment of a street car is not bad for duplicity because it alleges in the same count as acts of negligence defects in both the car and roadbed; plaintiff being entitled to allege and prove any or all of such defects to establish the primary proposition that the car was derailed as a result of defendant's negligence.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 64.*]

At Law. On demurrer to declaration.

George H. Mellen, for plaintiff.
J. C. Sweeney, for defendant.

BROWN, District Judge. The action is for personal injuries caused by the derailment of a car.

The first count of the declaration charges that the defendant "allowed its roadbed, rails, ties, tracks, car wheels, brakes, controllers of said car to be in a defective, unsafe, out of repair, and dangerous condition," and that in consequence of said condition the car was derailed, causing personal injuries to the complainant.

The defendant demurs specially for duplicity, in that several distinct acts of negligence are set forth in each count. He relies upon La Porte v. Cook, 20 R. I. 261, 38 Atl. 700; Flynn v. International Power Co., 24 R. I. 291, 52 Atl. 1089.

The mere fact that the declaration in a single count charges negligence in several particulars does not make it bad for duplicity. It is charged, in substance, that the derailment was due to the condition of the tracks and to the condition of the controlling appliances of the car. This is not duplicity, for it well may be that the condition of the roadbed and of the car both contributed to the derailment, and that neither by itself would have been sufficient. The plaintiff should not be compelled to assign as the sole cause of the derailment either the defect in the car or the defect in the roadbed; nor is it necessary that the plaintiff should prove negligence in every particular alleged in order to maintain the primary proposition that the car was derailed in consequence of the defendant's negligence. A stricter rule should not be applied in civil cases than in cases involving a criminal indictment.

In the case of Andersen v. United States, 170 U. S. 481, 18 Sup. Ct. 689, 42 L. Ed. 1116, the indictment charged murder by shooting and by throwing from a vessel into the sea and drowning. The court said:

"In our opinion the indictment was not objectionable on the ground of duplicity or uncertainty. Granting that death could not occur from shooting and drowning at the same identical instant, yet the charge that it ensued from both involved no repugnancy in the pleading; for the indictment charged the transaction as continuous, and that two lethal means were employed co-opera-

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

tively by the accused to accomplish his murderous intent, and whether the vital spark had fled before the riddled body struck the water, or lingered until extinguished by the waves, was immaterial. If the mate had been shot in the rigging and fallen thence into the sea, an indictment alleging death by shooting and drowning would have been sustainable. The government was not required to make the charge in the alternative in separate counts. The mate was shot and his body immediately thrown overboard, and there was no doubt that, if not then dead, the sea completed what the pistol had begun."

There is cited in the opinion Commonwealth v. Butterick, 100 Mass. 1, 97 Am. Dec. 65, wherein the indictment alleged that death was caused by wounding and exposure and starving. It was held not to be bad for duplicity, and it was ruled that it was sufficient to allege that the death resulted from all these means, and to prove that it resulted from all or any of them. See, also, Washington & Georgetown Railroad Co. v. Hickey, 166 U. S. 521, 17 Sup. Ct. 661, 41 L. Ed. 1101; Crain v. United States, 162 U. S. 625–636, 16 Sup. Ct. 952, 40 L. Ed. 1097.

The rule applicable to this case is stated in Stephen on Pleading, p. 262:

"No matters, however multifarious, will operate to make a pleading double, that together constitute but one connected proposition or entire point. Thus, to an action for assault and imprisonment, if the defendant plead that he arrested the plaintiff on suspicion of felony, he may set forth any number of circumstances of suspicion, though each circumstance may be alone sufficient to justify the arrest; for all of them taken together do but amount to one connected cause of suspicion."

The rule against duplicity should not be so applied as to force the pleader to make a fallacious division of an entire group of related facts. Thus there is no duplicity in alleging that a collision at sea was due to excessive speed, the absence of a lookout, improper lights, and violation of the rules of navigation. To compel the pleader to assign each of these as the sole cause of the collision would be logically unsound. So, where it is alleged that a defendant was negligent in respect to the condition of his machinery or premises, and also in a failure to warn an inexperienced workman of the dangers arising from the defects, it is erroneous in my opinion to so apply the rule against duplicity as to compel the pleader to assign either the defect in the machinery, or the failure to give warning, as the sole cause of injury.

Demurrer overruled.

In re BUCHAN'S SOAP CORPORATION.

(District Court, S. D. New York. May 4, 1909.)

No. 10,929.

1. BANKRUPTCY (§ 363*)—PROOF OF CLAIM—RIGHT OF ACTION—WAIVER.
The filing of proof of claim in bankruptcy is not a waiver of a right of action on the claim in another court.
[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 363.*]

2. BANKRUPTCY (§ 320*)—UNLIQUIDATED CLAIMS—SUIT.
Under Bankr. Act March 2, 1867, c. 176, 14 Stat. 517, providing that unliquidated claims shall be liquidated in such manner as the court shall direct, they may be liquidated by hearing before the referee, by a plenary suit in a court of competent jurisdiction, or by permitting an action pending in any court to proceed to judgment.
[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 320.*]

3. BANKRUPTCY (§ 319*)—CLAIMS—LIQUIDATION.
Where an action on an unliquidated claim is pending in a state court when bankruptcy occurs, and the trustee does not apply for a stay, but permits the case to go to judgment, the claim is thereby liquidated, and the judgment affords proper proof of the amount of the claim as liquidated.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 491; Dec. Dig. § 319.*]

4. ABATEMENT AND REVIVAL (§ 12*)—OTHER ACTION PENDING—ACTION IN STATE AND FEDERAL COURTS.
Since an action pending in a state court is no bar to another action on the same claim in a federal court, and vice versa, the pendency of a bankruptcy proceeding is not a bar to a proceeding in a state court for the liquidation of a claim.
[Ed. Note.—For other cases, see Abatement and Revival, Dec. Dig. § 12.*]

5. ABATEMENT AND REVIVAL (§ 17*)—OTHER ACTION PENDING—PLEADING.
The defense of a former action pending must be pleaded in the second action, to be available.
[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 123-136; Dec. Dig. § 17.*]

6. BANKRUPTCY (§ 320*)—CLAIMS—LIQUIDATION IN STATE COURT.
A bankrupt's trustee cannot abstain from obtaining a stay of a suit pending in a state court on a claim against a bankrupt, and then, if the judgment is unsatisfactory, have the claim liquidated over again by a proceeding in the bankruptcy court.
[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 320.*]

In Bankruptcy.

Philbin, Beekman & Menken (S. Stanwood Menken and William C. Armstrong, of counsel), for trustee.

Frankenthaler & Sapinsky (Joseph Sapinsky and Eli J. Blair, of counsel), for creditor.

HOLT, District Judge. I am not able to concur with the conclusion of the referee in this case. Under the bankrupt act of March 2, 1867 (14 Stat. 517, c. 176), the filing of the proof of claim was a waiver of a right of action on the claim in another court. The present bankrupt act does not contain such a provision, but it provides

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

that unliquidated claims shall be liquidated in such a manner as the court shall direct. This may be done either by directing a hearing before the referee in charge, or by directing a plenary suit to be brought in any court having jurisdiction, or by permitting an action pending in any court to proceed to judgment. When an action on an unliquidated claim is pending in a state court at the time that bankruptcy occurs, and the receiver or trustee applies for an order to stay proceedings in such action, such an order is usually made, in view of the greater simplicity and promptness of a proceeding before the referee; but if a trustee does not apply for a stay, and permits the case to go to judgment, in an action pending in a state court, the claim is thereby liquidated, and the judgment affords proper proof of the amount of the claim as liquidated.

I do not think that the doctrine that an action pending in a court is a bar to a subsequent action on the same claim in the same court has any application. In the first place, an action pending in a state court is no bar to another action on the same claim in the United States court, and vice versa. In the second place, if the case is pending in the same court, the defense of a former action pending must be duly pleaded in the second action. The defendant in such second action cannot let the case go to judgment, and then, if the judgment does not suit him, claim that the pendency of the former action is a bar. So a trustee in bankruptcy cannot abstain from obtaining a stay of a suit pending in a state court, and then, if the judgment recovered is unsatisfactory to him, claim the right to have the claim liquidated over again by a proceeding in the bankruptcy court. Moreover, in this case the action was brought in the state court before the defendant went into bankruptcy, so that, if this doctrine had any application, the state court suit would bar the proceeding to reliquidate in bankruptcy; but the entire doctrine has no application to such cases, in my opinion. If the trustee is dissatisfied with the amount of the judgment, his remedy is to apply in the state court to open the default.

If no such application is made, or if such an application is made and denied by the state court, I think that the proof of claim on the judgment should stand, and the other two proofs of claim should be withdrawn from the referee's files.

In re WHELPLEY.

(District Court, D. New Hampshire. May 8, 1909.)

No. 1,322.

1. BANKRUPTCY (§ 143*)—ASSETS—LIFE INSURANCE POLICIES.
   Partly paid up life insurance policies, with the usual contingencies and provisions as to changing the beneficiaries and as to surrendering policies and receiving the benefits thereof, are assets of the insured's estate in bankruptcy to which creditors are entitled.
   [Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 201; Dec. Dig. § 143.*]

2. BANKRUPTCY (§ 396*)—EXEMPTIONS—LIFE INSURANCE.
   Pub. St. N. H. 1901, c. 171, §§ 1, 2, provide that a life insurance policy for the benefit of a married woman shall inure to her benefit, or in case of her death to her children, if any, against the claims of creditors or representatives of the person effecting it, and, if effected for a third person or his representatives, the beneficiary shall be entitled against the claims of the creditors or representatives of the party effecting it. *Held*, that insurance policies on the life of a bankrupt which would otherwise constitute assets for the benefit of his creditors are by such sections exempt from any claim by the trustee.
   [Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 396.*]

Arthur L. Whelpley, pro se.
Irving E. Forbes, for trustee.

ALDRICH, District Judge. In the Massachusetts district partly paid up life insurance policies, with the usual contingencies and provisions as to changing the beneficiaries and as to surrendering policies and receiving the benefits thereof, are treated as an asset of a bankrupt estate to which the creditors are entitled. In re Hayden (No. 12,477) was so decided by the referee upon the ground that it was something somewhat analogous to liquor licenses and stock exchange seats. The order of the referee was affirmed by Judge Dodge without opinion. In re Whitney (No. 13, 834) was similarly decided by the referee, and the order was likewise affirmed by the District Court without an opinion. The case was taken to the Court of Appeals for review, where the decree of the District Court was affirmed upon consent.

I am inclined to hold that independent of state statutes an insurance policy like the one in question is an asset which the trustee is entitled to hold for the benefit of creditors. The policy in question, however, is apparently within the New Hampshire statutory exemptions (Pub. St. N. H. 1901, c. 171, §§ 1, 2), and I think it is controlled by the state law, and therefore not to be held by the trustee in bankruptcy for the benefit of the creditors. See Remington on Bankruptcy, § 1003, and cases cited in the notes.

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

MEMORANDUM DECISIONS.

In re BACK BAY AUTOMOBILE CO. (Circuit Court of Appeals, First Circuit. October 15, 1908.) No. 786. Appeal from the District Court of the United States for the District of Massachusetts. Henry W. Beal, for petitioner. Arthur Lord, for respondent. Before COLT, PUTNAM, and LOWELL, Circuit Judges.

PER CURIAM. Counsel for both parties consenting, it is ordered that this petition be dismissed, without costs for either party. See 158 Fed. 679.

CAROLINA TRUST CO. v. WATSON et al. (Circuit Court of Appeals, Fourth Circuit. March 12, 1909.) No. 832. Petition for Revision of Proceedings of the District Court of the United States for the Eastern District of North Carolina, at Raleigh, in Bankruptcy. Robert C. Strong, for petitioner. John W. Hinsdale, for respondents.

PER CURIAM. Petition for review withdrawn by consent. Petition and order of court filed. See 162 Fed. 42.

GAY et al. v. HUDSON RIVER ELECTRIC POWER CO. et al. (two cases). (Circuit Court of Appeals, Second Circuit. May 21, 1909.) No. 293. Appeal from the Circuit Court of the United States for the Northern District of New York. William Dewey Loucks (Nash Rockwood, of counsel), for appellants. Charles H. Hotchkiss, for Knickerbocker Trust Co. A. W. Putnam, for Morton Trust Co. Glenn M. Congdon, for bondholders' committee. O. D. Young, for Boston bondholders' committee. C. J. Hermance, for New York bondholders' committee. Abram J. Rose, for receivers. J. A. Van Voast, for Schenectady Trust Co. Before LACOMBE, COXE, and NOYES, Circuit Judges. See, also, 166 Fed. 771.

PER CURIAM. A majority of the court (Judge NOYES dissenting) are satisfied that, in view of the circumstance that, before appeal was taken, the money was paid over by receivers to the Trust Company of America, and a considerable amount of such money turned over to bondholders, the questions argued upon said appeal need not be now considered. We all concur, however, in the opinion that notice and opportunity to be heard should be given to all parties interested and who have intervened before making such orders, and that a reasonable time to appeal therefrom should be allowed to elapse before carrying them out. Suggestion was made upon the argument that some of the mortgage trustees were willing, if receivers would default in payment of interest, so that foreclosure suits might be brought in the Circuit Court and receivership extended under their several mortgages, to delay the prosecution of such suits to foreclosure and sale until in the opinion of that court a reasonable time shall have elapsed to perfect a proper and satisfactory reorganization of the various interests in these properties. If such suggestion should be renewed in the Circuit Court, which is the proper tribunal for its consideration, it would seem to afford opportunity for a fair and equitable disposition of the complicated situation which now exists.

HAARMAN-DE LAIRE-SCHAEFER CO. v. VAN DYK & CO. (Circuit Court of Appeals, Second Circuit. May 25, 1909.) No. 269. Appeal from the Circuit Court of the United States for the Southern District of New York. George H. Bruce, for appellant. Arthur von Briesen and Hans von Briesen, for appellee. Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. Decree (165 Fed. 934) affirmed, with costs.

HARDEE v. WHEELESS. (Circuit Court of Appeals, Fourth Circuit. June 20, 1908.) No. 831. Appeal from the District Court of the United States for the Eastern District of North Carolina, at Raleigh, in Bankruptcy. James H. Pou and T. T. Thorne, for appellant. Jacob Battle, for appellee.

PER CURIAM. Dismissed, under rule 20 (150 Fed. xxxi, 79 C. C. A. xxxi); costs to be paid by appellant. Stipulation of attorneys filed. See 161 Fed. 584.

HOGG v. HALSEY ELECTRIC GENERATOR CO. (Circuit Court of Appeals, Third Circuit. March 22, 1909.) No. 31. Petition for Revision of Proceedings of the District Court of the United States for the District of New Jersey. Adrian Riker, for petitioner. Robert H. McCarter, for respondent.

PER CURIAM. Stipulation of counsel to dismiss petition without costs to either party. See 163 Fed. 118.

KINNEY et al. v. HANLEY et al. (Circuit Court of Appeals, Ninth Circuit. May 3, 1909.) No. 1,644. Appeal from the Circuit Court of the United States for the Eastern Division of the Eastern District of Washington. O. C. Moore and W. T. Stoll, for appellants. Myron A. Folsom, for appellees. Before GILBERT, ROSS, and MORROW, Circuit Judges.

PER CURIAM. The complainants brought this suit as surviving heirs of W. A. Kinney, deceased, to establish an alleged trust in respect to an undivided one-eighth interest in a certain mine, called the "Skookum," and its proceeds; the complainants claiming to be entitled to one-half of the interest held by Hanley in that mine and to one-half of the proceeds received by him therefrom. The suit was not brought until about 16 years after Kinney's death and more than 6 years after Hanley acquired the interest in the Skookum claim. The case was submitted to the court below upon certain documentary evidence and the testimony of witnesses on behalf of the complainants and defendant taken in open court before the trial judge who found the proof insufficient in his opinion to justify a decree for the complainants. Counsel for the appellants concede that the case turns upon the credibility of conflicting testimony and the weight of the evidence. A careful consideration of the record satisfies us that we would not be justified in reversing the judgment of the court below, especially in view of the staleness of the demand. The judgment is affirmed.

MORSE v. UNITED STATES. (Circuit Court of Appeals, Second Circuit. April 19, 1909.) In Error to the Circuit Court of the United States for the Southern District of New York. See, also, 161 Fed. 429; 164 Fed. 1023; 168 Fed. 49. Henry L. Stimson, for the motion. Martin W. Littleton, opposed. Before LACOMBE, WARD, and NOYES, Circuit Judges.

PER CURIAM. The motion of the district attorney to set the appeal now for argument at the May session, and, in case of opposition to such disposition to vacate the stay, is denied. If plaintiff in error wishes to apply for a hearing on any day prior to June 30th, we will hear such application on May 10th, and then fix a day for such hearing.

NORFOLK & W. RY. CO. v. SALMONS. (Circuit Court of Appeals, Fourth Circuit. August 4, 1908.) No. 845. In Error to the Circuit Court of the United States for the Southern District of West Virginia. John H. Holt, for plaintiff in error. Marcum & Marcum, for defendant in error.

PER CURIAM. Writ of error dismissed, under rule 20 (150 Fed. xxxi; 79 C. C. A. xxxi); costs to be paid by plaintiff in error. Stipulation of attorneys filed. See 162 Fed. 722.

RIVER SPINNING CO. v. ATLANTIC MILLS. (Circuit Court of Appeals, First Circuit. January 13, 1909.) No. 770. In Error to the Circuit Court of the United States for the District of Rhode Island. Walter F. Angell, Frank H. Swan, and Edwards & Angell, for plaintiff in error. Rathbone Gardner and Gardner, Pirce & Thornley, for defendant in error.

PER CURIAM. Case dismissed without costs. Settled by parties. See 155 Fed. 466.

In re ROBERTS. (Circuit Court of Appeals, Second Circuit. April 13, 1909.) No. 247. Petition to Review Order of the District Court of the United States for the Southern District of New York. L. & A. U. Zinke (L. Zinke, of counsel), for petitioner. Before LACOMBE, WARD, and NOYES, Circuit Judges.

PER CURIAM. The state suit is brought against the receiver and his clerk personally. The question raised here has already been decided by this court in Re Kalb & Berger Manfg. Co., 165 Fed. 895. The order of the bankrupt court, restraining the prosecution of suit in the state court, is reversed.

RUPRECHT v. DELACAMP et al. (Circuit Court of Appeals, Second Circuit. May 19, 1909.) No. 271. Appeal from the District Court of the United States for the Southern District of New York. Robinson, Biddle & Benedict (E. G. Benedict, of counsel), for appellants. Convers & Kirlin (J. Parker Kirlin, of counsel), for appellee. Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. Decree (165 Fed. 381) affirmed, on the opinion of the District Court.

SANDERS, Collector, v. RUMSEY et al. (Circuit Court of Appeals, Second Circuit. May 19, 1909.) No. 291. In Error to the Circuit Court of the United States for the Western District of New York. John Lord O'Brien, U. S. Atty., for plaintiff in error. Wilcox & Bull (Ansley Wilcox, of counsel), for defendants in error. Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. Following Eidman v. Tilghman, 136 Fed. 141, 69 C. C. A. 139, and Kinney v. Conant (C. C. A.) 166 Fed. 720, judgment is affirmed. Submitted without argument.

TRAVIS et al. v. METROPOLITAN TRUST CO. OF NEW YORK. (Circuit Court of Appeals, Fourth Circuit. December 2, 1908.) No. 846. Appeal from the Circuit Court of the United States for the Eastern District of North Carolina, at Raleigh. Day, Bell & Allen, for appellants. F. H. Busbee, for appellee.

PER CURIAM. Appeal dismissed, record not having been printed as required by rule 23 (150 Fed. xxxii; 79 C. C. A. xxxii). Decree filed. See 162 Fed. 170.

LEHMAN v. UNITED STATES INDUSTRIAL ALCOHOL CO. (Circuit Court, S. D. New York. March 26, 1909.) On Motion for Production of Books. Leventritt, Cook & Nathan, for plaintiff. Alexander & Green, for defendant.

NOYES, Circuit Judge. In case the defendant forthwith file a formal stipulation stating that it was, on and prior to April 1, 1908, the owner of the entire capital stock of the Alcohol Utilities Company, this motion, in so far as it relates to that subject, will be denied. In case the defendant does not forthwith file such stipulation, an order may be entered directing it to produce before trial, and at such time as may be fixed in the order, and place in the custody of the clerk of this court for inspection by the plaintiff or her attorney under the direction of the clerk, its books or records showing its ownership of shares of said Alcohol Utilities Company. And in case the defendant forthwith files a similar stipulation, stating that said Alcohol Utilities Company was organized and has been conducted as a department of its business, this motion, in so far as it relates to that subject, will be denied. In case the defendant does not forthwith file such stipulation, an order similar to that already stated may be entered directing the defendant to produce the following books: (1) Its books of account, showing any payments by way of stock subscriptions to said Alcohol Utilities Company; (2) its books of account, showing any indebtedness of said Alcohol Utilities Company assumed or paid since the organization of that company; (3) its books of account, showing all moneys collected or received for the account of the Alcohol Utilities Company; (4) its books, showing all receipts by way of dividends from the Alcohol Utilities Company; (5) its books of records, showing the names of all its employés. In all other respects the motion for the production of books is denied.

NEW JERSEY PATENT CO. et al. v. WALKER. (Circuit Court, E. D. Pennsylvania. May 17, 1909.) No. 255. Second Motion for Preliminary Injunction. For opinion on first motion, see 169 Fed. 146. Charles N. Butler, for complainants. Duke Walker, pro se.

McPHERSON, District Judge. As it seems to me, the new affidavits offered by the complainants do not satisfactorily establish the charge that the defendant has bought or threatens to buy phonographs or records from any licensed dealer, and the situation presented upon this second motion for a preliminary injunction is therefore the same as when the original motion was denied. The preliminary injunction now asked for is refused.

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§ 140. Contract between petitioner and bankrupt *held* to create an enforceable trust, and not a conditional sale.—Walter A. Wood Co. v. Eubanks (C. C. A.) 929.

§ 140. A contract by which certain vehicles were furnished by petitioner to the bankrupt *held* not a conditional sale but the creation of a trust, and was valid as between the petitioner and the bankrupt though not recorded.—Corbitt Buggy Co. v. Ricaud (C. C. A.) 935.

§ 143. An award made by the Secretary of the Treasury to an informant as a reward for information leading to the seizure of smuggled goods, under Act June 22, 1874, c. 391, § 4, 18 Stat. 186 (U. S. Comp. St. 1901, p. 2019), although not paid over, being assignable, under Rev. St. § 3477 (U. S. Comp. St. 1901, p. 2320), is property which the claimant could have transferred, and passes to his trustee on his subsequent bankruptcy, under Bankr. Act July 1, 1898, c. 541, § 70a(5), 30 Stat. 565, 566, (U. S. Comp. St. 1901, p. 3451).—In re Ghazal (D. C.) 147.

§ 143. Partly paid up life insurance policies *held* assets of the insured's estate in bankruptcy for the benefit of creditors.—In re Whelpley (D. C.) 1019.

§ 149. Bankr. Act July 1, 1898, c. 541, § 5h, 30 Stat. 548 (U. S. Comp. St. 1901, p. 3424), applies only to a case where one or more, but not all, of the members of a partnership are adjudged bankrupt, while the partnership as such is not before the court.—In re Junck & Balthazard (D. C.) 481.

§ 151. A bankrupt's trustee occupies the same relation to the creditor that the bankrupt

sustained prior to the date of the adjudication.—Walter A. Wood Co. v. Eubanks (C. C. A.) 929.

(C) PREFERENCES AND TRANSFERS BY BANKRUPT, AND ATTACHMENTS AND OTHER LIENS.

§ 160. Where a transfer by a bankrupt is required to be recorded or registered, whether it constitutes a preference is to be determined under Bankr. Act July 1, 1898, c. 541, § 60a, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445), as of the date it was filed for record.—McElvain v. Hardesty (C. C. A.) 31.

§ 160. Buyers of a saloon business *held* insolvent at the time their contract creating a lien for the unpaid portions of the price was recorded by the seller, and that such transfer constituted a preference.—McElvain v. Hardesty (C. C. A.) 31.

§ 166. It is an essential element of a voidable preference that the preferred creditor had grounds to believe that a preference was intended.—In re Burlage Bros. (D. C.) 1006.

§ 177. The bankruptcy law does not attempt to supervise insolvency proceedings undertaken more than four months before bankruptcy, nor to inquire into prior assignments and transfers.—In re Boner (D. C.) 727.

§ 184. A contract for the sale of a saloon *held* a chattel mortgage or a conditional sale, which was invalid as against creditors of the mortgagors or vendors under Rev. St. Mo. 1899, §§ 3404, 3410, 3412 (Ann. St. 1906, pp. 1936, 1940, 1945), until recorded, as against the purchaser's subsequent creditors represented by their trustee in bankruptcy.—McElvain v. Hardesty (C. C. A.) 31.

§ 184. Record of a bill of sale attacked as a voidable preference after bankruptcy had intervened avails nothing.—In re Burlage Bros. (D. C.) 1006.

§ 184. Under Code Iowa, § 2906, and Bankr. Act July 1, 1898, c. 541, §§ 67a and 70 (5), 30 Stat. 564, 565 (U. S. Comp. St. 1901, pp. 3449, 3451), an unrecorded bill of sale which was in fact a mortgage given more than four months prior to bankruptcy *held* invalid as against the bankrupts' other creditors.—In re Burlage Bros. (D. C.) 1006.

§ 195. Claimant, having acquired a lien by garnishment proceedings under Laws Ga. 1901, p. 55, more than four months prior to bankruptcy, *held* entitled to a stay of an application for the bankrupt's discharge to enable claimant to enforce his rights against the garnishees and the sureties on the dissolving bond.—In re Maher (D. C.) 997.

§ 205. Where a lien creditor at the time of enforcing his lien, which constituted a voidable preference, paid to the bankrupts the difference between his debt and the value of the property taken, the creditor was not accountable to the bankrupt's trustee for such difference.—McElvain v. Hardesty (C. C. A.) 31.

(D) ADMINISTRATION OF ESTATE.

§ 228. The weight to be given to a finding by a referee in bankruptcy, on review by the judge, depends on the character of the evidence; it being entitled to less weight, if a deduction from established facts, than if based on conflicting evidence.—In re McCrary Bros. (D. C.) 485.

§ 228. Findings of fact by a referee in bankruptcy are not to be disturbed unless clearly erroneous.—In re Braselton (D. C.) 960.

(E) ACTIONS BY OR AGAINST TRUSTEE.

§ 293. A court of bankruptcy under Bankr. Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445), had jurisdiction of a suit by a bankrupt's trustee to recover the value of property taken by a lien creditor pursuant to a voidable preference.—McElvain v. Hardesty (C. C. A.) 31.

§ 303. Evidence *held* to charge a lien creditor of the bankrupts with notice of their insolvency at the time he recorded his lien contract, and to charge him with knowledge that the bankrupts intended by such contract to give him a preference.—McElvain v. Hardesty (C. C. A.) 31.

§ 303. In a suit by a bankrupt's trustee to recover the value of property taken pursuant to a voidable preference, evidence *held* insufficient to justify a charge for the good will of a business in which the property taken was used.—McElvain v. Hardesty (C. C. A.) 31.

§ 305. A trustee in bankruptcy may recover the value of property transferred by means of a voidable preference, where the property cannot be restored.—McElvain v. Hardesty (C. C. A.) 31.

(F) CLAIMS AGAINST AND DISTRIBUTION OF ESTATE.

§ 308. Right of obligee in bond or the holder of a claim on which several are liable to prove his claim against estates of those who have become bankrupt and at the same time pursue the others at law, determined.—Board of County Com'rs of Shawnee County, Kansas, v. Hurley (C. C. A.) 92.

§ 309. Acceptance by a bank of 20 per cent. of its claim against a bankrupt firm and its partners, pursuant to a composition of the individual liability of one of the partners, *held* not to preclude it from claiming the balance against the assets of the firm and the individual assets of the other partner.—In re Coe (D. C.) 1002.

§ 310. Where a conditional sale was invalid as against subsequent creditors for omission to record, the conditional vendor was only entitled to have his claim allowed as an unsecured claim and to share with general creditors.—In re Braselton (D. C.) 960.

§ 314. Where a bill of sale executed by the bankrupt to claimant more than four months before bankruptcy was void for want of record, the claimant was entitled to prove its claim for the purchase price of the goods sold, as an un-

secured claim against the bankrupts' estate.—In re Burlage Bros. (D. C.) 1006.

§ 319. Where an action on an unliquidated claim against a bankrupt is permitted to go to judgment in a state court by the trustee, the judgment affords proper proof of the amount of the claim as liquidated.—In re Buchan's Soap Corp. (D. C.) 1017.

§ 320. An unliquidated claim against a bankrupt may be liquidated by hearing before a referee, by a plenary suit, or by permitting a pending action to proceed to judgment.—In re Buchan's Soap Corp. (D. C.) 1017.

§ 320. A bankrupt's trustee, having failed to obtain a stay of proceeding on a claim in a state court, could not after judgment claim the right to have the claim liquidated over again in a bankruptcy court.—In re Buchan's Soap Corp. (D. C.) 1017.

§ 326. Claims arising under a contract of bailment for the transfer of the possession of a mercantile business to the bankrupts *held* mutual debits and credits within Bankr. Act July 1, 1898, c. 541, § 68, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3450).—Walther v. Williams Mercantile Co. (C. C. A.) 270; Williams Mercantile Co. v. Walther, Id.

§ 326. A lien claimant against a bankrupt firm *held* liable to creditors for the amount lost to them by his voluntary release of the security to the firm.—In re Stoddard Bros. Lumber Co. (D. C.) 190.

§ 332. Informality in the statements of a claim against a bankrupt *held* not to justify its rejection.—In re Watertown Paper Co. (C. C. A.) 252.

§ 340. Evidence *held* insufficient to justify the rejection of a claim of one corporation against the bankrupt corporation on the ground that the two were so closely identified as to constitute in fact but one corporation.—In re Watertown Paper Co. (C. C. A.) 252.

§ 340. Facts *held* to establish a prima facie case of claimants' knowledge of the insolvency, and the intention of the bankrupts to give her a preference by a deed of trust, under which she claimed a lien.—In re Sanger (D. C.) 722.

§ 340. Where a lien is claimed under a trust deed executed within four months prior to an adjudication in bankruptcy, the burden is generally on the creditors to show that the bankrupt was insolvent and that it was intended as a preference, etc.—In re Sanger (D. C.) 722.

§ 345. A trust creditor of a bankrupt is not entitled to a preference over general creditors merely because of the character of his claim; but he must show that the trust fund or property into which it was converted came into the hands of the trustee in bankruptcy, although the specific property need not be identified.—In re Brunsing, Tolle & Postel (D. C.) 668.

§ 355. A purchaser of notes and accounts of a bankrupt, secured by bonds of a corporation the stock of which was owned by such purchaser, *held* not entitled to have such claims allowed against the bankrupt's estate as unsecured.—In re Watertown Paper Co. (C. C. A.) 252.

§ 359. Filing of a petition in bankruptcy vests in each creditor of the bankrupt an equitable estate in such proportion of his property as the creditor's claim bears to the entire amount of the provable claims.—Board of County Com'rs of Shawnee County, Kansas, v. Hurley (C. C. A.) 92.

§ 363. The filing of proof of claim in bankruptcy is not a waiver of a right of action on the claim in another court.—In re Buchan's Soap Corp. (D. C.) 1017.

V. RIGHTS, REMEDIES, AND DISCHARGE OF BANKRUPT.

Bankruptcy court following state statutes as to exemption as interpreted by highest court of state, see Courts, § 366.

§ 396. Where a bankrupt's exemptions were set off out of a stock of goods in kind after inventory, and the entire stock was sold with the bankrupt's consent for 66 per cent. of the inventoried value, the bankrupt was only entitled to a pro rata share of the proceeds of the sale.—In re Arnold (D. C.) 1000.

§ 396. Insurance policies on the life of a bankrupt for the benefit of another *held* exempt by Pub. St. N. H. 1901, c. 171, §§ 1 and 2, from any claim of the bankrupt's trustee.—In re Whelpley (D. C.) 1019.

§ 397. Bankrupt partners *held* not entitled to homestead exemption from property bought with partnership funds, under Code Ala. 1907, § 4166.—In re McCrary Bros. (D. C.) 485.

§ 407. Where a bankrupt has obtained goods from a creditor on credit by means of a materially false financial statement, he cannot obtain a discharge under Bankr. Act July 1, 1898, c. 541, § 14, subd. b, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3427), as amended by Act Cong. Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 (U. S. Comp. St. Supp. 1907, p. 1026), though the statement was not intentionally false.—In re Shaffer (D. C.) 724.

§ 408. A bankrupt *held* not entitled to a discharge because of his having made a false oath that he had included all of his property in the schedule.—In re Guilbert (D. C.) 149.

§ 408. That a bankrupt, several months before bankruptcy, indulged in improvident transactions, and failed to pay over to an assignee for the benefit of creditors $1,000 received from a farm by gift of his father, *held* no ground for refusing a discharge.—In re Boner (D. C.) 727.

§ 414. Evidence *held* to sustain a specification of objection to a bankrupt's discharge, on the ground that he had procured certain property in which he had an equitable interest to be transferred to his wife, in fraud of his creditors.—In re Guilbert (D. C.) 149.

§ 415. Claimant holding lien against garnishee indebted to bankrupt *held* entitled to stay of discharge to enforce rights against gar-

nishees and sureties on a bond to dissolve the garnishment.—In re Maher (D. C.) 997.

§ 424. Under Bankr. Act July 1, 1898, c. 541, § 17a (2), 30 Stat. 550 (U. S. Comp. St. 1901, p. 3428), as amended Feb. 5, 1903, c. 487, § 5, 32 Stat. 798 (U. S. Comp. St. Supp. 1907, p. 1026), the discharge of a bankrupt does not release him from "liabilities * * * for willful and malicious injuries to the person or property of another," whether reduced to judgment or not.—Thompson v. Judy (C. C. A.) 553.

VI. APPEAL AND REVISION OF PROCEEDINGS.

(A) SUPERINTENDENCE AND REVISION.

§ 439. Where a bankruptcy petition is dismissed for want of jurisdiction, the trustee may have the order reviewed on an original petition in the Circuit Court of Appeals.—In re New England Breeders' Club (C. C. A.) 586; Ex parte Hub Const. Co., Id.

§ 446. Where a bankruptcy court found that the bankrupt had concealed assets and ordered him to pay over money, it would be presumed that the assets consisted of money and that the bankrupt was able to comply.—In re Baum (C. C. A.) 410.

§ 446. Where, on a petition to revise and review, the record did not contain the evidence, only matters of law apparent on the face of the record could be considered; it being presumed that the evidence sustained the findings and order.—In re Baum (C. C. A.) 410.

(B) APPEAL.

§ 462. An appeal from an adjudication in bankruptcy not having been taken within the time specified by Bankr. Act July 1, 1898, c. 541, § 25, 30 Stat. 553 (U. S. Comp. St. 1901, p. 3432), and no supersedeas having been issued, while an insufficient answer to an order to show cause why schedules should not be filed, would justify a postponement for a term sufficient to afford the parties an opportunity to move to dismiss the appeal.—In re Brady (D. C.) 152.

VII. COSTS AND FEES.

§ 477. A demand for attorney's fees by counsel for objecting creditors in bankruptcy should be first presented to and passed on by the referee.—In re Stoddard Bros. Lumber Co. (D. C.) 190.

§ 482. Where two petitions in involuntary bankruptcy were filed by different creditors against a corporation, one of which did not present grounds upon which it could legally be adjudged a bankrupt, and the adjudication was made on grounds alleged in the other, the attorneys in the latter are entitled to the fee allowed for filing the petition and procuring the adjudication.—In re Southern Steel Co. (D. C.) 702.

§ 482. Attorneys for petitioning creditors who became attorneys for receivers and were paid as such *held* not entitled to an allowance also of fees as attorneys for the creditors.—In re Southern Steel Co. (D. C.) 702.

VIII. OFFENSES AGAINST BANKRUPT LAWS.

§ 485. Where a bankrupt's schedules contained only a general description of his property, it was no defense to a prosecution for concealing assets that all of his property passed under such description to the trustee.—Kern v. United States (C. C. A.) 617.

§ 491. The offenses of false swearing and concealment by a bankrupt could not be retrieved by subsequent disclosure of the assets concealed.—Kern v. United States (C. C. A.) 617.

BANKS AND BANKING.

II. BANKING CORPORATIONS AND ASSOCIATIONS.

(D) OFFICERS AND AGENTS.

Fidelity insurance, see Insurance, §§ 285, 332.

III. FUNCTIONS AND DEALINGS.

(C) DEPOSITS.

§ 148. Failure of a bank depositor to make an examination of his account and object to the payment of forged checks was no defense to the bank's liability, if the bank's negligence in paying the checks was the proximate cause of the loss.—New York Produce Exchange Bank v. Houston (C. C. A.) 785.

§ 148. Negligence of a depositor, not directly connected with the forging of checks on his account, *held* not to estop him to claim that such checks were improperly charged against his account.—New York Produce Exchange Bank v. Houston (C. C. A.) 785.

IV. NATIONAL BANKS.

Embezzlement by agent of bank, see Embezzlement, § 20.

§ 256. The inclusion of a note as a loan and discount in a report of a national bank's condition to the Comptroller of the Currency *held* not a false entry, in violation of Rev. St. § 5209 (U. S. Comp. St. 1901, p. 3497).—Hayes v. United States (C. C. A.) 101.

§ 256. Entry in a report required by law by the officers of a national bank, including a note of an irresponsible person, procured by the bank's officers to magnify the bank's assets, with either of the intents denounced by Rev. St. § 5209 (U. S. Comp. St. 1901, p. 3497), is a false entry.—Hayes v. United States (C. C. A.) 101.

BENEFICIAL ASSOCIATIONS.

See Associations.

BEQUESTS.

See Wills.

BETTING.

See Gaming.

BILL OF DISCOVERY.

See Discovery, §§ 17–27.

BILL OF EXCHANGE.

See Bills and Notes.

BILLS AND NOTES.

Notes given by partner as firm debts, see Partnership, § 146.

II. CONSTRUCTION AND OPERATION.

§ 123. Signature and indorsement of notes of a city by the city treasurer *held* only to give the notes currency, and did not make the city treasurer personally liable thereon.—Citizens' Sav. Bank v. City of Newburyport (C. C. A.) 766; City of Newburyport v. Citizens' Sav. Bank, Id.

V. RIGHTS AND LIABILITIES ON INDORSEMENT OR TRANSFER.

(D) BONA FIDE PURCHASERS.

Of notes issued by municipalities, see Municipal Corporations, § 948.

VIII. ACTIONS.

Parol or extrinsic evidence, see Evidence, § 459.

BONA FIDE PURCHASERS.

Of notes issued by city, see Municipal Corporations, § 948.

BONDS.

Contractors' bonds, see United States, § 67.

BREACH.

Of condition, see Insurance, §§ 285, 332.
Of contract, see Contracts, § 312; Sales, §§ 175, 177.
Of warranty, see Insurance, §§ 285, 332.

BRIDGES.

II. REGULATION AND USE FOR TRAVEL.

§ 35. Damages sustained by injuries to persons as well as to property are recoverable for failure of a city to exercise reasonable care to keep its streets and bridges safe for travelers.—City of Winona v. Botzet (C. C. A.) 321. Same v. Nichols, Id.

§ 37. Duty of a city to keep its bridge or street reasonably safe extends to acts outside the bridge or street that render it unsafe.—City of Winona v. Botzet (C. C. A.) 321; Same v. Nichols, Id.

BROKERS.

See Principal and Agent.

Right of ticket broker to priority over other unsecured creditors of transportation company on insolvency of principal, see Insolvency, § 118.

BUILDING AND LOAN ASSOCIATIONS.

See Associations.

CALENDARS.

Computation of time, see Time.

CANCELLATION OF INSTRUMENTS.

See Reformation of Instruments.

Grounds for cancellation or rescission of particular instruments.

Certificate of naturalization, see Aliens, § 69.
Contracts in general, see Contracts, §§ 259, 272.
Insurance policy, see Insurance, § 249.
Patent license, see Patents, § 214.

II. PROCEEDINGS AND RELIEF.

§ 37. A bill for the cancellation of a deed to lands sold to an innocent purchaser to pay debts which were a legal charge upon them, where the complainant does not offer to pay the debt, is without equity.—Chicago-Texas Land & Lumber Co. v. Robertson (C. C. A.) 287.

CARGO.

See Shipping.

CARRIERS.

Carriage of goods by vessels, see Shipping, §§ 125–153.
Carriage of passengers by vessels, see Shipping, §§ 158–166.
Right of ticket broker to priority over other unsecured creditors of transportation company on insolvency of principal, see Insolvency, § 118.

I. CONTROL AND REGULATION OF COMMON CARRIERS.

(B) INTERSTATE AND INTERNATIONAL TRANSPORTATION.

District of federal court in which suit must be brought for penalty for violation of twenty-eight-hour law, see Courts, § 274.

§ 32. An interstate carrier refunding elevator charges on grain at the point of shipment after payment of the freight without any filed or published schedule therefor *held* guilty of rebating in violation of Elkins Act, § 1 (Act Cong. Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1907, p. 880]).—Wisconsin Cent. Ry. Co. v. United States (C. C. A.) 76.

§ 37. The word "willfully," as used in the penalty clause of the 28-hour law (Act June

29, 1906, c. 3594, 34 Stat. 607 [U. S. Comp. St. Supp. 1907, p. 918]), does not imply a vicious or evil intent, but means intentionally or voluntarily.—United States v. Union Pac. R. Co. (C. C. A.) 65.

§ 37. A great and unusual press of business does not, unexplained and of itself, excuse the confinement of live stock by a railroad company beyond 28 hours limited by Act June 29, 1906, c. 3594, 34 Stat. 607 (U. S. Comp. St. Supp. 1907, p. 918), nor constitute a defense to an action to recover the penalty for its violation.—United States v. Union Pac. R. Co. (C. C. A.) 65.

§ 37. The words "knowingly and willfully" in Act June 29, 1906, c. 3594, 34 Stat. 607 (U. S. Comp. St. Supp. 1907, p. 918), punishing a carrier who knowingly and willfully fails to feed, water, and rest cattle shipped, describe an essential element of every right to the penalty therein prescribed.—St Louis & S. F. R. Co. v. United States (C. C. A.) 69.

§ 37. "Knowingly," as used in penal section of 28-hour law (Act June 29, 1906, c. 3594, 34 Stat. 607 [U. S. Comp. St. Supp. 1907, p. 918]), defined.—St. Louis & S. F. R. Co. v. United States (C. C. A.) 69.

§ 37. "Willfully," as used in the penal section of the 28-hour law (Act June 29, 1906, c. 3594, 34 Stat. 607 [U. S. Comp. St. Supp. 1907, p. 918]), defined.—St. Louis & S. F. R. Co. v. United States (C. C. A.) 69.

§ 38. In a prosecution by a carrier for rebating, facts *held* to sustain a charge in the indictment that defendant intentionally paid to a shipper a certain rebate from freight charges before then received from the shipper.—Wisconsin Cent. Ry. Co. v. United States (C. C. A.) 76.

III. CARRIAGE OF LIVE STOCK.

District of federal court in which suit must be brought for penalty for violation of twenty-eight-hour law, see Courts, § 274.

IV. CARRIAGE OF PASSENGERS.

(B) FARES, TICKETS, AND SPECIAL CONTRACTS.

Right of ticket broker to priority over other unsecured creditors of transportation company on insolvency of principal, see Insolvency, § 118.

(D) PERSONAL INJURIES.

Applicability of instructions to case in action for injuries to passenger, see Trial, § 251.
Duplicity in pleading in action for injuries to passenger, see Pleading, § 64.

§ 317. In an action for injuries to a street car passenger in endeavoring to alight, certain city ordinances regulating the operation of cars approaching track intersections and stopping places *held* admissible.—Grady v. St. Louis Transit Co. (C. C. A.) 400.

§ 317. In an action for injuries to a street car passenger in endeavoring to alight, evidence of defendant's rules regulating the operation of cars at street intersections *held* admissible.—Grady v. St. Louis Transit Co. (C. C. A.) 400.

(E) CONTRIBUTORY NEGLIGENCE OF PERSON INJURED.

§ 331. Evidence *held* not to show negligence on the part of a passenger on a street car which contributed to his injury.—Cincinnati Traction Co. v. Leach (C. C. A.) 549.

§ 344. Where, in an action by a passenger against a street railroad company to recover for a personal injury, plaintiff shows that while a passenger he was injured, the burden shifts to the defendant to satisfy the jury by a preponderance of the evidence that it was guilty of no negligence that proximately contributed to the injury.—Cincinnati Traction Co. v. Leach (C. C. A.) 549.

CERTIFICATE.

Receiver's certificates, see Receivers, § 128.

CHANCERY.

See Equity.

CHARGE.

To jury in civil actions, see Trial, §§ 191–281.

CHARITIES.

Jurisdiction of federal court in action by heirs to have charitable gift declared void, see Courts, § 262.

CHARTER PARTIES.

See Shipping, §§ 39–51.

CHATTEL MORTGAGES.

See Pledges.
Effect of proceedings in bankruptcy, see Bankruptcy, § 184.

II. FILING, RECORDING, AND REGISTRATION.

(A) ORIGINAL.

Mortgages on railroad property, see Railroads, § 165.

§ 84. Under the laws of North Carolina, a chattel mortgage is valid between the parties without registration.—Walter A. Wood Co. v. Eubanks (C. C. A.) 929.

V. RIGHTS AND REMEDIES OF CREDITORS.

Validity as against creditors of bankrupt, see Bankruptcy, § 184.

CHEAT.

See False Pretenses.

CHECKS.

See Bills and Notes.

CHROME ALUM.

Duties on, see Customs Duties, § 38.

CIRCUIT COURTS OF APPEALS.

See Courts, § 405.

CITIES.

See Municipal Corporations.

CITIZENS.

See Aliens; Indians.
Citizenship, ground of jurisdiction of United States courts, see Courts, §§ 303-322.
Equal protection of laws, see Constitutional Law, §§ 245, 247.

CIVIL RIGHTS.

See Constitutional Law, §§ 245, 247.
Jurisdiction of federal courts in action for damages brought by negro against white citizen of same state, see Courts, § 282.

§ 1. Citizens of African descent have the same rights as other citizens in the states in which they make their home; the privileges and immunities protected from infringement by Rev. St. § 1979 (U. S. Comp. St. 1901, p. 1262), being common to all citizens.—Brawner v. Irvin (C. C.) 964.

§ 13. Rev. St. § 5510 (U. S. Comp. St. 1901, p. 3713), prohibiting the deprivation of rights, privileges and immunities created by the Constitution by reason of race or color, etc., is a penal statute, the infringement of which will not give rise to a civil action.—Brawner v. Irvin (C. C.) 964.

§ 13. The rights, privileges, and immunities referred to in Rev. St. § 1979 (U. S. Comp. St. 1901, p. 1262), are those created by the Constitution and the laws of the United States and do not include the right of an individual to life, liberty, and property.—Brawner v. Irvin (C. C.) 964.

CLAIMS.

Against estate of bankrupt, see Bankruptcy, §§ 308-363.
Against estate of insolvent, see Insolvency, §§ 118, 122.
Mining claims, see Mines and Minerals, § 38.
Of patent, see Patents, § 167.

CLUBS.

See Associations.

COLLATERAL ATTACK.

On decree in condemnation proceedings, see Eminent Domain, § 242.

COLLATERAL SECURITY.

See Pledges.

COLLEGES AND UNIVERSITIES.

University lands, see Public Lands, § 51.

COLLISION.

I. RULES AND PRECAUTIONS FOR PREVENTING COLLISIONS IN GENERAL.

§ 16. Rev. St. § 4412 (U. S. Comp. St. 1901, p. 3020), providing for regulations for the operation of steam vessels, applies only to regulations to be observed by such vessels in passing each other.—Beck v. Johnson (C. C.) 154.

VI. VESSELS IN TOW.

§ 60. A collision between a tug passing down East River with a tow in the channel east of Blackwell's Island *held* solely in fault for a collision with the tow of a meeting tug, on the ground that she had no lookout, and failed to see or hear the signal of the meeting tug in time.—The Dictator (C. C. A.) 789; The Transfer No. 7.

VII. VESSELS AT REST, AT ANCHOR, OR AT PIERS.

§ 70. A vessel, when properly moored out of the usual track of moving vessels, is under no legal duty to maintain a watch nor to exhibit any light to warn approaching vessels of danger, unless the local harbor regulations require it.—The Lucille (D. C.) 719.

§ 73. The fact of a collision between a vessel anchored, or at rest upon the water, or aground, and a moving vessel, being shown, the burden of proof is upon the one moving to show that it was free from fault, and it must repel the presumption of its negligence or suffer the damages incurred.—The Lucille (D. C.) 719.

VIII. LIGHTS, SIGNALS, AND LOOKOUTS.

§ 75. Rev. St. § 4233 (U. S. Comp. St. 1901, p. 2893), providing for masthead lights on steam vessels engaged in towing, *held* inapplicable to such vessels operating on inland rivers of the United States.—Beck v. Johnson (C. C.) 154.

XII. SUITS FOR DAMAGES.

(D) DAMAGES.

§ 133. Damages determined for the sinking of a launch in collision.—The Lucille (D. C.) 719.

COLORED PERSONS.

Civil rights, see Civil Rights, § 1.
Right of negro to resort to federal court in action to recover damages for assault committed by white citizen of same state under color of executive authority, see Courts, § 282.

COLOR OF TITLE.

To sustain adverse possession, see Adverse Possession.

COMBINATIONS.

See Conspiracy; Monopolies, §§ 8–28.
Patentability, see Patents, § 22.

COMITY.

Between courts, see Courts, §§ 497, 502.

COMMERCE.

Carriage of goods and passengers, see Carriers; Shipping.

I. POWER TO REGULATE IN GENERAL.

§ 5. Congress *held* to have power to regulate relation of master and servant of carriers engaged in interstate commerce.—Watson v. St. Louis, I. M. & S. Ry. Co. (C. C.) 942.

II. SUBJECTS OF REGULATION.

§ 27. Stockyards company owning extensive stockyards and hauling by its own locomotives and servants cars from various railroads on its own tracks *held* engaged in interstate commerce within the meaning of the safety appliance law of Congress.—Union Stockyards Co. of Omaha v. United States (C. C. A.) 404.

III. MEANS AND METHODS OF REGULATION.

§ 58. The employer's liability act of Congress (Act April 22, 1908, c. 149, 35 Stat. 65) is a valid exercise of the powers granted to Congress by the commerce clause of the Constitution.—Watson v. St. Louis, I. M. & S. Ry. Co. (C. C.) 942.

IV. INTERSTATE COMMERCE COMMISSION.

§ 93. In a suit by a railroad company against the Interstate Commerce Commission to enjoin or annul an order or requirement of the commission, third parties interested in such orders are not entitled to intervene as of right, but may be permitted to do so at the request of the commission, on condition that the hearing shall not thereby be delayed.—Delaware, L. & W. R. Co. v. Interstate Commerce Commission (C. C.) 894.

COMMISSION.

Interstate commerce commission, see Commerce, § 93.
To take testimony, see Depositions.

COMMISSIONS.

Of receiver, see Receivers, § 196.

COMMON CARRIERS.

See Carriers.

COMPENSATION.

Of receiver, see Receivers, § 196.
Of servant, see Master and Servant, § 80.

COMPETENCY.

Of evidence in criminal prosecutions, see Criminal Law, § 396.
Of experts as witnesses, see Evidence, § 539.

COMPLAINT.

In civil actions, see Pleading, §§ 63, 64.
In criminal prosecution, see Indictment and Information.

COMPUTATION.

Of period of limitation, see Limitation of Actions, §§ 72, 127
Of time, see Time.

CONCEALMENT.

Of property by bankrupt, see Bankruptcy, § 485.

CONCURRENT JURISDICTION.

Of courts, see Courts, §§ 497, 502.

CONDEMNATION.

Taking property for public use, see Eminent Domain.

CONDITIONAL SALES.

See Sales, §§ 465, 474.

CONDITIONS.

Conditions precedent to right to maintain petition for limitation of shipowner's liability, see Shipping, § 209.
In insurance policies, see Insurance, §§ 285, 332.

CONFLICT OF LAWS.

As to gambling transactions, see Gaming, § 2.
Conflicting jurisdiction of courts, see Courts, §§ 497, 502.

CONSPIRACY.

Combinations to monopolize trade, see Monopolies, §§ 8–28.
Evidence of acts and declarations of conspirators, see Criminal Law, § 427.
Restraining, see Injunction, § 101.

I. CIVIL LIABILITY.

(A) ACTS CONSTITUTING CONSPIRACY AND LIABILITY THEREFOR.

§ 1. "Conspiracy" and "civil conspiracy" defined.—National Fireproofing Co. v. Mason Builders' Ass'n (C. C. A.) 259.

§ 3. A combination, the chief object of which is to injure or oppress third persons, is illegal, but not so if it was organized to carry out a lawful purpose, though its operation incidentally injures or oppresses another.—National Fireproofing Co. v. Mason Builders' Ass'n (C. C. A.) 259.

§ 3. Laborers and builders may combine so long as the motive is not malicious, the object unlawful, and the means deceitful, or fraudulent, though the result works injury to others.—National Fireproofing Co. v. Mason Builders' Ass'n (C. C. A.) 259.

§ 3. An agreement between a mason builders' association and bricklayers' unions prohibiting the subletting of interior brickwork, fireproofing, etc., *held* not a conspiracy against which complainant, a nonresident corporation engaged in fireproofing, had any remedy, though it operated to its prejudice.—National Fireproofing Co. v. Mason Builders' Ass'n (C. C. A.) 259.

§ 3. An agreement between a mason builders' association and bricklayers' unions in the city of New York prohibiting the subletting of interior brickwork, fireproofing, etc., *held* not a conspiracy in violation of Pen. Code N. Y. § 168, subds. 5, 6.—National Fireproofing Co. v. Mason Builders' Ass'n (C. C. A.) 259.

§ 6. To warrant an action for conspiracy, damage must have resulted from the combination.—National Fireproofing Co. v. Mason Builders' Ass'n (C. C. A.) 259.

II. CRIMINAL RESPONSIBILITY.

(A) OFFENSES.

§ 27. A conspiracy is not indictable in the absence of an overt act tending to carry out the object of the conspiracy by one or more of the conspirators.—United States v. McLaughlin (D. C.) 302.

§ 27. Letters and postal cards *held* not to constitute an overt act required to establish a criminal conspiracy.—United States v. McLaughlin (D. C.) 302.

(B) PROSECUTION AND PUNISHMENT.

Admissions as evidence, see Criminal Law, § 409.

§ 43. An indictment under Rev. St. § 5440 (U. S. Comp. St. 1901, p. 3676), for conspiracy to defraud the United States of the title and possession of certain lands, considered, and *held* sufficient.—Perrin v. United States (C. C. A.) 17; Benson v. Same (C. C. A.) 31.

CONSTITUTIONAL LAW.

Protection of civil rights, see Civil Rights.
Relating to commerce, see Commerce.
Relating to jury, see Jury, §§ 11–33.

II. CONSTRUCTION, OPERATION, AND ENFORCEMENT OF CONSTITUTIONAL PROVISIONS.

§ 18. When a constitutional provision has received a settled construction, and is afterward incorporated into a new or revised Constitution, it must be presumed to have been retained with a knowledge of that construction, and the courts will therefore feel bound to adhere to that construction.—Western Union Telegraph Co. v. Julian (C. C.) 166.

X. EQUAL PROTECTION OF LAWS.

§ 245. The employer's liability act of Congress (Act April 22, 1908, c. 149, 35 Stat. 65), abolishing the fellow-servant rule and limiting its application to carriers by rail, is neither an arbitrary nor unreasonable classification.—Watson v. St. Louis, I. M. & S. Ry. Co. (C. C.) 942.

§ 247. The provision of Code Ala. 1907, §§ 3642–3658, that foreign corporations licensed to do business in the state shall forfeit such right if they remove a suit from a state to a federal court, is in violation of section 240 of the state Constitution of 1901, and void.—Western Union Telegraph Co. v. Julian (C. C.) 166.

§ 247. The provision of Code Ala. 1907, §§ 3642–3658, relating to corporations, which requires the forfeiture of the license of any foreign corporation to do business in the state if it shall remove a case from a state to a federal court, is unconstitutional and void as denying to such corporations equal protection of the laws.—Western Union Telegraph Co. v. Julian (C. C.) 166.

XI. DUE PROCESS OF LAW.

§ 251. The fifth amendment to the United States Constitution applies only to privileges and immunities arising out of the natural and essential character of the national government or specifically granted to all citizens.—Watson v. St. Louis, I. M. & S. Ry. Co. (C. C.) 942.

§ 278. A statute, though it indirectly works harm to individuals, is not a taking of property without due process of law.—Watson v. St. Louis, I. M. & S. Ry. Co. (C. C.) 942.

§ 309. Ky. St. 1903, § 2294, authorizing service of notice in forcible detainer, *held* not unconstitutional as to nonresidents, as depriving them of their property without due process of law.—Weber v. Grand Lodge of Kentucky, F. & A. M. (C. C. A.) 522.

CONSTRUCTION.

Of contracts, instruments, or judicial acts and proceedings.

See Bills and Notes, § 123; Contracts, § 169; Patents, §§ 157, 167; Pleading, § 34; Statutes, § 220; Treaties, § 8.

Charter party, see Shipping, § 39.
Contract of sale, see Sales, § 71.
Government contract, see United States, § 70.
Oil lease, see Mines and Minerals, §§ 73, 78.

CONSTRUCTIVE TRUSTS.

See Trusts, § 95.

CONTRACTS.

Cancellation, see Cancellation of Instruments.
Jurisdiction of admiralty of settlement of wages of seamen, see Admiralty, § 13.
Operation and effect of gaming laws, see Gaming, §§ 2–49.
Parol or extrinsic evidence, see Evidence, §§ 397–459.
Reformation, see Reformation of Instruments.
Restraining performance or breach, see Injunction, § 60.
Specific performance, see Specific Performance.
Validity of contract executed on Sunday, see Sunday, § 17.

Contracts of particular classes of persons.

See Associations, § 18; Corporations, § 482; Master and Servant; Municipal Corporations, § 254; Partnership; United States, §§ 67, 70.

Contracts relating to particular subjects.

See Copyrights, §§ 47, 50; Mines and Minerals, §§ 73, 78; Patents, §§ 214, 218.

Particular classes of express contracts.

See Bailment; Bills and Notes; Chattel Mortgages; Insurance; Liens; Sales.
Affreightment, see Shipping, §§ 125–153.
Agency, see Principal and Agent.
Charter parties, see Shipping, §§ 39–51.
Employment, see Master and Servant.
Leases, see Landlord and Tenant.
Sales of realty, see Vendor and Purchaser.

I. REQUISITES AND VALIDITY.

(F) LEGALITY OF OBJECT AND OF CONSIDERATION.

§ 136. Agreements in restraint of trade, and tending to create a monopoly, *held* not illegal in the sense of giving third persons a right of action for an injury sustained, nor as justifying an injunction against threatened injury.—National Fireproofing Co. v. Mason Builders' Ass'n (C. C. A.) 259.

II. CONSTRUCTION AND OPERATION.

(A) GENERAL RULES OF CONSTRUCTION.

§ 169. Where a written contract is ambiguous or contains provisions which may be conflicting, extrinsic evidence is admissible to show the surrounding conditions and circumstances, in the light of which the parties made it, to aid in its construction.—Marx v. American Malting Co. (C. C. A.) 582.

IV. RESCISSION AND ABANDONMENT.

§ 259. The right to rescind a contract on the ground of fraud depends on the existence of the fraud, and not on the accuracy or conclusiveness of the party's knowledge of it when he exercises the right.—Cunningham v. Pettigrew (C. C. A.) 335.

§ 272. Where a party to an executory contract after part performance unequivocally refused to further perform on the ground of fraud, and his refusal was accepted by the other parties as conclusive, there was a complete rescission which fixed the rights of the parties without the necessity of a suit.—Cunningham v. Pettigrew (C. C. A.) 335.

V. PERFORMANCE OR BREACH.

§ 312. A contract to give K. credit in printed matter relating to automatic train stops on a certain railroad system *held* not broken by a failure to give such credit with reference to an automatic train-stopping system, including an automatic train stop as one of its factors only.—Kinsman Block System Co. v. Union Switch & Signal Co. (C. C.) 670.

CONTRIBUTORY NEGLIGENCE.

See Negligence, §§ 66–93.

CONVERSION.

Wrongful conversion of personal property, see Trover and Conversion.

CONVEYANCES.

See Chattel Mortgages; Deeds.
Of mining property, see Mines and Minerals, § 54.

COPYRIGHTS.

See Literary Property.

I. NATURE AND ACQUISITION.

§ 4. The word "writings," as used in Const. U. S. art. 1, § 8, relating to copyrights, defined.—Harper Bros. v. Kalem Co. (C. C. A.) 61.

§ 7. There may be several dramatizations of the same story, each capable of being copyrighted.—Harper Bros. v. Kalem Co. (C. C. A.) 61.

§ 9. A series of photographs for use in a moving picture machine constitutes a single picture, capable of copyright.—Harper Bros. v. Kalem Co. (C. C. A.) 61.

§ 12. An author may copyright an arrangement and combination in a new form of old materials; but such copyright cannot prevent others from using the same old material in a new and different manner.—West Pub. Co. v. Edward Thompson Co. (C. C.) 833.

§ 15. Conceding the right of the official reporter of the Supreme Court of the United

States to secure a copyright on his work in the volumes of published reports, the mere arrangement of reported cases in sequence, their paging and distribution into volumes, are not features of such importance as to entitle him to copyright protection of such details.—Banks Law Pub. Co. v. Lawyers' Co-operative Pub. Co. (C. C. A.) 386.

§ 15. Digest and syllabus paragraphs, stated in language of the opinions, are only subject to copyright so far as they vary from the statement of the point in the original source.—West Pub. Co. v. Edward Thompson Co. (C. C.) 833.

§ 28. A dramatic composition is not a "book" within the meaning of Rev. St. § 4956, as amended in 1891 (U. S. Comp. St. 1901, p. 3407), and is not included in the proviso requiring the copies of books, etc., deposited to be printed from type set or plates made in the United States, although it is printed in book form.—Hervieu v. J. S. Ogilvie Pub. Co. (C. C.) 978.

§ 29. Where copyrighted material contained in pamphlets is subsequently merged in bound volumes, the latter should show the date of the copyright of each pamphlet.—West Pub. Co. v. Edward Thompson Co. (C. C.) 833.

§ 29. "Edition" defined.—West Pub. Co. v. Edward Thompson Co. (C. C.) 833.

§ 33. Under the copyright statute, a valid renewal of copyright can be made only in the name of the author, "or his widow or children if he be dead," and not in the name of the assignee of the person or persons entitled to such renewal.—West Pub. Co. v. Edward Thompson Co. (C. C.) 833.

§ 36. The entire right of copyright is that defined by Rev. St. § 4952 (U. S. Comp. St. 1901, p. 3406.)—West Pub. Co. v. Edward Thompson Co. (C. C.) 833.

§ 39. A law reporter's copyright, so far as the official reports are concerned, is limited to the syllabus or statement by the reporter and any statement of facts produced by his original work and not filed as a part of the decision.—West Pub. Co. v. Edward Thompson Co. (C. C.) 833.

§ 40. A copyright is abandoned if the owner licenses the publication of the material by another under a new copyright.—West Pub. Co. v. Edward Thompson Co. (C. C.) 833.

§ 40. Copyright on headnotes, digest paragraphs, and the index black-letter lines, published in advance sheets by a law publisher, was abandoned by the subsequent publication of the same material in a bound volume not containing the original copyright notices.—West Pub. Co. v. Edward Thompson Co. (C. C.) 833.

§ 40. The license of rights to publish copyrighted material amounts to an abandonment, unless it provides for an insertion of the appropriate copyright notices whenever the use approaches the extent of what would be considered an "edition."—West Pub. Co. v. Edward Thompson Co. (C. C.) 833.

II. TITLE, CONVEYANCES, CONTRACTS, AND REGULATIONS.

§ 47. An assignee of a copyright is limited to the same rights as the author, so far as the abandonment or loss of the copyright is concerned.—West Pub. Co. v. Edward Thompson Co. (C. C.) 833.

§ 50. The owner of a copyrighted story may assign the sole right of performing a particular copyrighted drama therefrom to one, and the right of performing a different dramatic composition to another, while the assignee could not publicly perform another dramatization than that authorized.—Harper Bros. v. Kalem Co. (C. C. A.) 61.

III. INFRINGEMENT.

(A) WHAT CONSTITUTES INFRINGEMENT.

§ 51. Copyright and unfair competition distinguished.—West Pub. Co. v. Edward Thompson Co. (C. C.) 833.

§ 52. While a corporation is responsible for copyright infringement in its work as published, its efforts to avoid infringement may be considered in determining whether equitable relief should be granted.—West Pub. Co. v. Edward Thompson Co. (C. C.) 833.

§ 53. Paraphrasing may constitute an actionable infringement of copyright, and may be proved by testimony as to the manner of the work, or by a sequence of ideas and language of the infringing publication, showing that the copyrighted work was the source of the infringing publication.—West Pub. Co. v. Edward Thompson Co. (C. C.) 833.

§ 55. Moving pictures of a dramatization of a copyrighted story as a photograph do not constitute an infringement of the book or drama.—Harper Bros. v. Kalem Co. (C. C. A.) 61.

§ 55. A series of pictures, representing an artist's conception of the copyrighted story Ben Hur, when placed on a moving picture machine for reproduction and the films sold, are offered for sale for public exhibition. *Held* an infringement of the story copyright.—Harper Bros. v. Kalem Co. (C. C. A.) 61.

§ 56. A subsequent writer may be guided by earlier work, may consult original authorities, and may use such as he considers applicable in support of his own text, without being guilty of copyright infringement.—West Pub. Co. v. Edward Thompson Co. (C. C.) 833.

§ 56. Defendant's use of complainant's copyrighted material in the preparation of the Am. & Eng. Enc. Law (2d Ed.) and in Enc. Pl. & Pr., without original digesting or renoting of citations, *held* to constitute an infringement.—West Pub. Co. v. Edward Thompson Co. (C. C.) 833.

§ 56. Law writers are entitled to consult copyrighted digests for clues to the case, and subject to verification to collect the cases cited and classify them under the same head, if the literary work or arrangement is not appropriat-

ed.—West Pub. Co. v. Edward Thompson Co. (C. C.) 833.

§ 56. A law writer, after proper verification, may direct his stenographer to add to the text citations shown by all of the copyrighted digests, without being guilty of infringement.—West Pub. Co. v. Edward Thompson Co. (C. C.) 833.

§ 56. Use of copyrighted digest paragraphs and syllabus headnotes by a law writer, after he has verified them in the official publications or in works as to which rights of copyrights have been lost, is not an infringement.—West Pub. Co. v. Edward Thompson Co. (C. C.) 833.

§ 56. The arrangement and classification of a series of citations and notes, which, when completed, resembled the arrangement in copyrighted digests from which the lists were obtained, *held* not to constitute an unfair use.—West Pub. Co. v. Edward Thompson Co. (C. C.) 833.

§ 57. A copyright is invaded if so much of the work of the original author is taken as substantially diminishes the value of the original work, or the labors of the original author are substantially, to an injurious extent, appropriated.—West Pub. Co. v. Edward Thompson Co. (C. C.) 833.

§ 57. "Copying" defined.—West Pub. Co. v. Edward Thompson Co. (C. C.) 833.

(B) ACTIONS.

§ 69. An author's right to multiply copies and to prevent infringement of copyrighted material, granted by Rev. St. § 4952 (U. S. Comp. St. 1901, p. 3406), includes the right to recover damages and to an injunction under sections 4967, 4970 (U. S. Comp. St. 1901, p. 3416).—West Pub. Co. v. Edward Thompson Co. (C. C.) 833.

§ 73. Where an infringing publication had become no longer a salable book at the time suit for copyright infringement was instituted, complainant was not entitled to an injunction, nor to an accounting of damages as an incident to equitable relief.—West Pub. Co. v. Edward Thompson Co. (C. C.) 833.

§ 73. A copyright owner, though not entitled to an injunction, is entitled to damages for unfair use of his work, though not constituting literary piracy, if used by another writer as a cheap method of transcribing his original material or to save handwriting or stenographic preparation.—West Pub. Co. v. Edward Thompson Co. (C. C.) 833.

§ 73. In a suit for infringement of copyright, complainant *held* not entitled to injunction or to an accounting of the profits, but would be left to its remedy at law.—West Pub. Co. v. Edward Thompson Co. (C. C.) 833.

§ 73. Where damage from copyright infringement extended only to the expense of additional copying, and there was no unfair competition or appropriation of literary property, complainant's remedy is by an action for damages, and not for an injunction.—West Pub. Co. v. Edward Thompson Co. (C. C.) 833.

§ 73. An author's right to multiply copies and to prevent infringement of copyrighted material, granted by Rev. St. § 4952 (U. S. Comp. St. 1901, p. 3406), includes the right to recover damages and to an injunction under sections 4967, 4970 (U. S. Comp. St. 1901, p. 3416).—West Pub. Co. v. Edward Thompson Co. (C. C.) 833.

§ 74. The owner of a copyrighted legal digest is not entitled to equitable relief against the writer of another publication, because the writer saved stenographic labor by cutting and copying citations, without an appropriation of literary ability in the arrangement or collection of the cases.—West Pub. Co. v. Edward Thompson Co. (C. C.) 833.

§ 75. In an action for the infringement of copyright, it was no defense that defendant instructed its editors generally not to use the copyrighted material.—West Pub. Co. v. Edward Thompson Co. (C. C.) 833.

§ 80. In a suit to restrain infringement of copyright, complainant *held* not barred by laches or acquiescence from obtaining relief.—West Pub. Co. v. Edward Thompson Co. (C. C.) 833.

§ 83. Where, in a suit for copyright infringement, exhibits were filed, to which were attached conclusions and arguments calling attention to the points of similarity, the presence of such conclusions and arguments was not ground for excluding the exhibits.—West Pub. Co. v. Edward Thompson Co. (C. C.) 833.

§ 83. Paraphrasing may constitute an actionable infringement of copyright, and may be proved by testimony as to the manner of work, or by a sequence of ideas and language of the infringing publication, showing that the copyrighted work was the source of the infringing publication.—West Pub. Co. v. Edward Thompson Co. (C. C.) 833.

§ 83. Evidence *held* to warrant a finding that the entire Am. & Eng. Enc. Law (1st Ed.) and various articles in the Second Edition and the Enc. of Pl. & Pr. infringed digest copyrights so far as the use of material was concerned.—West Pub. Co. v. Edward Thompson Co. (C. C.) 833.

§ 83. In a suit for copyright infringement, evidence of the identity of errors, and from which a similar course of writing could be presumed for the entire book, *held* to require a finding that the entire work was an infringement.—West Pub. Co. v. Edward Thompson Co. (C. C.) 833.

§ 83. Use of complainant's copyrighted material and attributing it to another source *held* to warrant an inference that such use was unfair and not in good faith.—West Pub. Co. v. Edward Thompson Co. (C. C.) 833.

§ 83. Evidence of a custom and course of business of a publisher *held* to raise a presumption that, except in occasional and unintentional instances, proper steps were taken to obtain copyrights.—West Pub. Co. v. Edward Thompson Co. (C. C.) 833.

§ 86. The unfair saving of labor and expense by appropriating the copyrighted work of an-

other animo furandi is ground for injunction.—West Pub. Co. v. Edward Thompson Co. (C. C.) 833.

§ 86. Injunction may be an appropriate remedy for a copyright infringement after expiration of the copyright, if the unfair taking occurred while the copyright was in force and there is no adequate legal remedy.—West Pub. Co. v. Edward Thompson Co. (C. C.) 833.

§ 86. Where some substantial use of copyrighted material is shown, injunction will be granted against the entire infringing publication, unless defendant affirmatively justifies as to particular portions free from infringement.—West Pub. Co. v. Edward Thompson Co. (C. C.) 833.

CORPORATIONS.

Particular classes of corporations.

See Municipal Corporations; Railroads; Street Railroads.

Insurance companies, see Insurance.

IV. CAPITAL, STOCK, AND DIVIDENDS.

(B) SUBSCRIPTION TO STOCK.

Use of mails to defraud in sale of stock, see Post Office, § 48.

VI. OFFICERS AND AGENTS.

(C) RIGHTS, DUTIES, AND LIABILITIES AS TO CORPORATION AND ITS MEMBERS.

§ 312. Minority stockholder of bankrupt corporation is not entitled to an injunction to restrain carrying out of plan of reorganization by the majority, which contemplates the acquisition of the company's property only through purchase when sold at public sale under order of court of bankruptcy.—Schuler v. Woodward (C. C.) 1012.

VII. CORPORATE POWERS AND LIABILITIES.

(A) EXTENT AND EXERCISE OF POWERS IN GENERAL.

§ 378. That stockholders of two separately chartered corporations are identical, that one owns shares in the other, and that they have mutual dealings, will not in general merge them, or prevent the enforcement of otherwise valid claims by one against the other.—In re Watertown Paper Co. (C. C. A.) 252.

§ 378. Separate organization of two corporations *held* not fraudulent, nor its affairs so conducted that one was merely an adjunct of the other, so as to prevent the enforcement of claims by one against the other.—In re Watertown Paper Co. (C. C. A.) 252.

(B) REPRESENTATION OF CORPORATION BY OFFICERS AND AGENTS.

Authority of officer by admissions to commit act of bankruptcy in behalf of corporation, see Bankruptcy, § 63.

(D) CONTRACTS AND INDEBTEDNESS.

Priority between mortgage and receivers' certificates, see Receivers, § 128.

§ 482. A trial court in a suit in equity *held* within its discretion in denying a motion to vacate a decree to permit the bringing in of new parties.—Nowell v. International Trust Co. (C. C. A.) 497.

XII. FOREIGN CORPORATIONS.

Foreign railroad companies, see Railroads, § 33.

Validity of regulation as dependent on granting equal protection of law, see Constitutional Law, § 247.

§ 651. Under Const. Ala. 1901, § 239, the Legislature has no power to deprive a foreign telegraph company of the right to maintain and operate its lines established in the state because it exercises its right, under the Constitution and laws of the United States, to remove a suit from a state to a federal court.—Western Union Telegraph Co. v. Julian (C. C.) 166.

§ 651. While a state has sovereign power to exclude a foreign corporation from carrying on a local business within the state where such a corporation has gone into the state and has acquired property and made contracts therein under the sanction of its Constitution and laws, the state is estopped to expel it either arbitrarily or because of the exercise of its lawful right to remove suits from the state to the federal courts.—Western Union Telegraph Co. v. Julian (C. C.) 166.

§ 656. A mortgage on land in Idaho to a foreign corporation not authorized to do business therein *held* not rendered void by Rev. St. Idaho 1887, § 2653, as amended by Act March 10, 1903 (Laws 1903, p. 49).—Colby v. Cleaver (C. C.) 206; C. H. Colby & Co. v. McBirney, Id.

§ 661. Rev. St. Idaho 1887, § 2653, *held* not to prevent a foreign corporation not having complied with the Idaho law from suing in the federal courts in that state to enforce a mortgage executed to it on land therein.—Colby v. Cleaver (C. C.) 206; C. H. Colby & Co. v. McBirney, Id.

CORRECTION.

Of record on appeal or writ of error, see Appeal and Error, § 653.

COSTS.

In bankruptcy, see Bankruptcy, §§ 477, 482.

I. NATURE, GROUNDS, AND EXTENT OF RIGHT IN GENERAL.

§ 32. Where a complainant was refused a mandatory injunction by a court of equity to compel the removal of a dam, and although offered the right to prove and recover his damages for flowage in the pending suit refused to do so, and prosecuted an appeal which was unsuccessful, except that he was given the same right, he is not entitled to recover costs incurred prior to the time when, after remand, he avails himself

of such right.—Andrus v. Berkshire Power Co. (C. C.) 732; Hughes v. Same, Id.

VI. TAXATION.

§ 204. All costs at circuit abide the event, and are taxable in the successful party's final bill of costs.—Berthold v. Burton (C. C.) 495.

VII. ON APPEAL OR ERROR, AND ON NEW TRIAL OR MOTION THEREFOR.

§ 254. Fees paid to the clerk of the Circuit Court for a citation, writ of error, and for certifying the transcript of record are costs of the appeal, though taxed before the Circuit Court. —Berthold v. Burton (C. C.) 495.

§ 264. Where a judgment was reversed, "with costs of this appeal," the Circuit Court could not direct that certain of such costs should abide the event.—Berthold v. Burton (C. C.) 495.

COUNTERVAILING DUTIES.

See Customs Duties, § 38.

COUNTIES.

See Municipal Corporations.

COUPLERS.

Automatic couplers, defects in as affecting contributory negligence of railroad employé, see Master and Servant, § 234.
Automatic couplers, penalties for violations of regulations, see Railroads, § 254.
Automatic couplers, statutory requirements, see Railroads, § 229.

COURTS.

Province of court and jury, see Trial, §§ 191, 192.
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, §§ 11–33.

II. ESTABLISHMENT, ORGANIZATION, AND PROCEDURE IN GENERAL.

(C) RULES OF COURT AND CONDUCT OF BUSINESS.

§ 85. The rules promulgated by the Supreme Court of the United States for the guidance of federal courts have the force and effect of law. —United States v. Barber Lumber Co. (C. C.) 184.

(D) RULES OF DECISION, ADJUDICATIONS, OPINIONS, AND RECORDS.

§ 92. "Obiter dicta" defined.—Watson v. St. Louis, I. M. & S. Ry. Co. (C. C.) 942.

§ 96. The decision in a customs case in another district should be followed, in order to avoid conflicting rates of duty in the two districts.—Wanamaker v. United States (C. C.) 664.

VII. UNITED STATES COURTS.

Construction of statutes relating to bringing of action in by foreign corporations, see Corporations, §§ 651, 656, 661.

(A) JURISDICTION AND POWERS IN GENERAL.

§ 259. If a suit, when viewed in the light of recognized principles of jurisprudence, appears to be a suit of a civil nature at common law or in equity, a federal court cannot be deprived of jurisdiction in a proper case by a local statute reserving exclusive cognizance over such suits to the courts of the state generally or to some specially designated local tribunal.—Spencer v. Watkins (C. C. A.) 379.

§ 259. The laws of a state enlarging the jurisdiction of the probate courts, to include suits formerly cognizable in the form of ordinary suits at law or in equity in courts of general jurisdiction, cannot restrict the jurisdiction of the federal courts over such suits.—Spencer v. Watkins (C. C. A.) 379.

§ 260. The United States Circuit Courts in equity have no jurisdiction of pure probate proceedings quasi in rem, establishing the succession of a decedent's property.—Underground Electric Rys. Co. of London, Limited, v. Owsley (C. C.) 671.

§ 260. Federal courts act with reference to decedents' estates only to ascertain and enforce claims between citizens of different states after probate of the will or establishment of intestacy. —Underground Electric Rys. Co. of London, Limited, v. Owsley (C. C.) 671.

§ 260. While probate proceedings are in abeyance, the federal Circuit Court may appoint receivers to preserve the estate.—Underground Electric Rys. Co. of London, Limited, v. Owsley (C. C.) 671.

§ 260. A nonresident creditor of a decedent's estate *held* entitled to the appointment of a receiver to conserve the assets pending administration proceedings.—Underground Electric Rys. Co. of London, Limited, v. Owsley (C. C.) 671.

§ 262. A suit by heirs at law to have a charitable bequest made by a will declared void as in violation of the laws of the state *held* not a probate proceeding, but a plenary suit inter partes, of which a federal court had jurisdiction.—Spencer v. Watkins (C. C. A.) 379.

§ 262. In determining whether or not a complainant has a plain, adequate, and complete remedy at law which will deprive a federal court of equity of jurisdiction, recourse is to be had to the principles of equity, and not to the statutes of the state in which the court sits.— Empire Circuit Co. v. Sullivan (C. C.) 1009.

§ 272. An action by an assignee in a federal court *held* properly brought in the district where the assignee resided.—Ferguson v. Consolidated Rubber Tire Co. (C. C.) 888.

§ 274. Action under the 28-hour law (Act June 29, 1906, c. 3594, 34 Stat. 607 [U. S. Comp. St. Supp. 1907, p. 918]) may be brought under section 4 in the district where the defendant resides or carries on business, without violating Const. art. 3, § 2, nor the sixth amendment.—St. Louis & S. F. R. Co. v. United States (C. C. A.) 69.

§ 280. The rule that a federal court is bound to take notice of want of jurisdiction does not apply when based on an issue of fact determinable only after hearing.—Donovan v. Wells Fargo & Co. (C. C. A.) 363.

§ 280. No presumption will be indulged as to the existence of facts conferring jurisdiction on federal courts.—Yeandle v. Pennsylvania R. Co. (C. C. A.) 938.

(B) JURISDICTION DEPENDENT ON NATURE OF SUBJECT-MATTER.

§ 282. The federal court has no jurisdiction of an action for damages by a citizen of African descent against an Anglo-Saxon citizen of the same state for an alleged unlawful assault committed under color of executive authority.—Brawner v. Irvin (C. C.) 964.

§ 282. The fourteenth and fifteenth amendments of the federal Constitution are limitations on the states and did not confer rights on persons of color primarily enforceable in the federal courts.—Brawner v. Irvin (C. C.) 964.

(C) JURISDICTION DEPENDENT ON CITIZENSHIP, RESIDENCE, OR CHARACTER OF PARTIES.

§ 303. A suit against state officers charged with the enforcement of a statute of the state to enjoin the enforcement of such statute on the ground that it is in violation of the Constitution of the United States is not a suit against the state within the meaning of the eleventh constitutional amendment, and is within the jurisdiction of a federal court.—Western Union Telegraph Co. v. Julian (C. C. A.) 166.

§ 312. Negotiable notes of a city payable to bearer are excepted from Act Aug. 13, 1888, c. 866, 25 Stat. 433 (U. S. Comp. St. 1901, p. 508), prohibiting an assignee of a chose in action from suing in a federal court unless his assignor could have done so.—Citizens' Sav. Bank v. City of Newburyport (C. C. A.) 766; City of Newburyport v. Citizens' Sav. Bank, Id.

§ 322. A declaration *held* not to contain a sufficient allegation of diverse citizenship to confer federal jurisdiction.—Yeandle v. Pennsylvania R. Co. (C. C. A.) 938.

(E) PROCEDURE, AND ADOPTION OF PRACTICE OF STATE COURTS.

§ 347. The action of a federal court in striking out a plea of the statute of limitations before trial *held* within its discretion under the New Jersey practice, where all the facts appeared from the pleading.—Snare & Triest Co. v. Friedman (C. C. A.) 1.

§ 347. It was within the discretion of a federal court to permit the amendment of declaration at the close of the evidence in a case by alleging a different act of negligence on the part of defendant to conform to the evidence.—Snare & Triest Co. v. Friedman (C. C. A.) 1.

§ 347. Congress having adopted Rev. St. § 954 (U. S. Comp. St. 1901, p. 696), regulating amendment of pleadings, federal courts are not bound to follow the state courts in their construction of local statutes regulating such subjects.—Manitowoc Malting Co. v. Fuechtwanger (C. C.) 983.

§ 347. Under Rev. St. § 954 (U. S. Comp. St. 1901, p. 696), a federal court had power in the exercise of its discretion to permit amendment of the complaint to conform to the proof so as to raise the amount of damages demanded.—Manitowoc Malting Co. v. Fuechtwanger (C. C.) 983.

§ 352. Code Civ. Prac. Cal. § 631, permitting waiver of a jury by oral consent in open court entered on the minutes *held* not a substitute for a written waiver in actions at law tried in federal courts sitting in California within Rev. St. §§ 649, 700 (U. S. Comp. St. 1901, pp. 525, 570).—Erkel v. United States (C. C. A.) 623.

§ 356. Where an action at law in a district court triable by jury under Rev. St. § 566 (U. S. Comp. St. 1901, p. 461), is by consent tried by the court, no question of law or fact can be examined on appeal.—United States v. St. Louis, I. M. & S. Ry. Co. (C. C. A.) 73.

§ 356. Rev. St. §§ 649, 700 (U. S. Comp. St. 1901, pp. 525, 570), providing for waiving of a jury and a review of the judgments in cases tried to the court, apply to Circuit Courts only, and not to District Courts.—United States v. St. Louis, I. M. & S. Ry. Co. (C. C. A.) 73.

(F) STATE LAWS AS RULES OF DECISION.

§ 365. Rev. St. § 721 (U. S. Comp. St. 1901 p. 581), does not make state decisions as to the common law in force in the state conclusive on the federal courts, unless they have so clearly established a settled rule as to make it a part of the peculiar local law.—Snare & Triest Co. v. Friedman (C. C. A.) 1.

§ 366. Whether nonresident Italian aliens may recover for wrongful death of an Italian alien resident of Pennsylvania depends on the statutes of that state, concerning which the federal courts are bound by the decisions of the Pennsylvania Supreme Court.—Fulco v. Schuylkill Stone Co. (C. C. A.) 98.

§ 366. The validity of an unregistered mortgage as between the parties is a question as to which the decisions of the highest courts of the states are controlling on the federal courts sitting therein.—Walter A. Wood Co. v. Eubanks (C. C. A.) 929.

§ 366. A clear and definite construction of a provision of a state Constitution by the highest court of the state is binding on all other courts, state or federal.—Western Union Telegraph Co. v. Julian (C. C.) 166.

§ 366. A federal District Court of concurrent jurisdiction on considerations of comity would reach a conclusion as to the construction of

the state law in harmony with that of the state court.—United States v. Andersen (D. C.) 201.

§ 366. The bankruptcy court has exclusive jurisdiction to determine all claims of the bankrupt to exemptions, but will follow the state statutes as interpreted by the highest court of the state.—In re McCrary Bros. (D. C.) 485.

§ 372. The question of liability for negligence, when not modified or governed by statute law, is one of general law, upon which federal courts are not required to follow the state decisions, although there may be such a decision based on the identical facts.—Snare & Triest Co. v. Friedman (C. C. A.) 1.

§ 372. The rights of bona fide holders of notes of a city sued on in a federal court are not conclusively determined by the local law under Rev. St. § 721 (U. S. Comp. St. 1901, p. 581).—Citizens' Sav. Bank v. City of Newburyport (C. C. A.) 766; City of Newburyport v. Citizens' Sav. Bank, Id.

§ 372. A provision in a negotiable note for the payment by the maker of attorney's fees if collected by suit will not be enforced by a court of admiralty on foreclosure of a mortgage on a vessel securing the note.—The Avalon (D. C.) 696.

(H) CIRCUIT COURTS OF APPEALS.

Computation of limitations in proceedings for review, see Time, § 10.

§ 405. Under Act Cong. June 30, 1906, c. 3934, § 3, 34 Stat. 815 (U. S. Comp. St. Supp. 1907, p. 798), authorizing appeals and writs of error from the United States Court for China, a judgment at law, erroneously brought to the Circuit Court of Appeals by appeal, instead of by writ of error, could not be reviewed.—Price v. United States (C. C. A.) 791.

§ 405. The Circuit Court of Appeals will notice the failure of the record to show federal jurisdiction, though no jurisdictional objection is raised by the parties.—Yeandle v. Pennsylvania R. Co. (C. C. A.) 938.

(J) DISTRICT COURTS.

§ 424. Where a state court in naturalization proceedings determined that it had jurisdiction, and no appeal was taken from an order granting the petition, a federal District Court would not consider a petition by the government to revoke the certificate, having only concurrent and not revisory jurisdiction.—United States v. Andersen (D. C.) 201.

VIII. CONCURRENT AND CONFLICTING JURISDICTION, AND COMITY.

(B) STATE COURTS AND UNITED STATES COURTS.

§ 497. Property seized by United States marshal under a federal writ is within the exclusive jurisdiction of the federal court, so that the state court has no jurisdiction to interfere with the marshal's custody by injunction.—Frank v. Leopold & Feron Co. (C. C.) 922.

§ 502. A court of admiralty, by reason of the filing therein of a libel in rem, *held* to have acquired priority of jurisdiction of a vessel over a state court which subsequently obtained possession through a general assignment made by the owner, although the original libel described a different vessel by a mistake which was cured by amendment.—Charles Barnes Co. v. One Dredge Boat (D. C.) 895.

CREDIBILITY.

Of witness, see Witnesses, § 380.

CREDITORS.

See Bankruptcy; Insolvency.

CRIMINAL LAW.

Grand jury, see Grand Jury.
Indictment, information, or complaint, see Indictment and Information.

Offenses by particular classes of persons.

Bank officers, see Banks and Banking, § 256.

Particular offenses.

See Conspiracy, §§ 27, 43; Embezzlement; False Pretenses; Perjury.
Against bankrupt laws, see Bankruptcy, §§ 408, 485, 491.
Against immigration law, see Aliens, § 57.
Against postal laws, see Post Office, § 48.
Enclosure of public lands, see Public Lands, § 21.
Rebating by carrier, see Carriers, § 38.

V. VENUE.

(A) PLACE OF BRINGING PROSECUTION.

§ 108. The offense of bringing into and landing in the United States an alien not lawfully entitled to admission, made a misdemeanor by Act Feb. 20, 1907, c. 1134, § 8, 34 Stat. 900 (U. S. Comp. St. Supp. 1907, p. 394), can be prosecuted only in the district where such alien is landed.—United States v. Capella (D. C.) 890.

X. EVIDENCE.

In prosecution for perjury, see Perjury, § 34.

(D) MATERIALITY AND COMPETENCY IN GENERAL.

§ 396. The admission in evidence against a defendant, charged with conspiracy to defraud the United States, of a contract claimed to evidence the conspiracy, *held* to entitle defendant to show that such contract had been superseded and abandoned.—Perrin v. United States (C. C. A.) 17; Benson v. Same (C. C. A.) 31.

(F) ADMISSIONS, DECLARATIONS, AND HEARSAY.

§ 409. Where a letter written by a defendant charged with a criminal offense and a document inclosed therein were admitted in evidence as an admission or declaration, it was

error to exclude other documents also inclosed and forming a part of the statement as an entirety.—Perrin v. United States (C. C. A.) 17; Benson v. Same (C. C. A.) 31.

(G) ACTS AND DECLARATIONS OF CONSPIRATORS AND CODEFENDANTS.

§ 427. In a prosecution for using the mails in conducting a scheme to defraud, in violation of Rev. St. § 5480 (U. S. Comp. St. 1901, p. 3696), there is no hard and fast rule requiring that concert of action between two defendants should first be shown before evidence of acts of one can be admitted against the other, but the order of evidence is within the discretion of the court.—Doyle v. United States (C. C. A.) 625.

(M) WEIGHT AND SUFFICIENCY.

In prosecution for perjury, see Perjury, § 34.

§ 552. Circumstantial evidence, to be sufficient to sustain a conviction of a crime, must rise to that degree of convincing power which satisfies the mind of guilt beyond a reasonable doubt.—Hayes v. United States (C. C. A.) 101.

XII. TRIAL.

(B) COURSE AND CONDUCT OF TRIAL IN GENERAL.

§ 655. In a prosecution of a bankrupt for false swearing and concealment of assets, a remark by the court that a man could not be allowed to file an amended schedule and escape the result of a criminal prosecution was not error.—Kern v. United States (C. C. A.) 617.

(F) PROVINCE OF COURT AND JURY IN GENERAL.

§ 736. The question whether a confession was voluntary or involuntary is solely for the court.—Harrold v. Territory of Oklahoma (C. C. A.) 47.

XV. APPEAL AND ERROR, AND CERTIORARI.

(A) FORM OF REMEDY, JURISDICTION, AND RIGHT OF REVIEW.

§ 1022. A federal District Judge having no authority to hear a plea of not guilty in a criminal case without a jury, his conclusions of fact in so doing are not reviewable on a writ of error.—Low v. United States (C. C. A.) 86.

(G) REVIEW.

§ 1134. Where, in a criminal case, the Circuit Court of Appeals had no power to review the conclusions of fact of the trial judge, it was limited to a review of such defects as should have prevented the rendition of the judgment and for which it should have been arrested.—Low v. United States (C. C. A.) 86.

§ 1170½. Failure to restrict a cross-examination to the subjects of the direct examination is reversible error.—Harrold v. Territory of Oklahoma (C. C. A.) 47.

§ 1177. Where a judgment against accused did not exceed what would have been warranted on any count of the indictment, and it was sustained by at least one of them, it was immaterial that it was not warranted by the others.—Wisconsin Cent. Ry. Co. v. United States (C. C. A.) 76.

CROSS-BILL.

See Equity, §§ 196, 198.

CROSS-EXAMINATION.

See Witnesses, § 269.

CURTAINS.

Duties on, see Customs Duties, § 37.

CUSTOMS DUTIES.

II. GOODS SUBJECT TO DUTY, RATE, AND AMOUNT.

§ 25. The term "paste," in Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 112, 30 Stat. 158 (U. S. Comp. St. 1901, p. 1635), does not include rice paste, but only the form that is a variety of glass.—Morimura Bros. v. United States (C. C. A.) 279.

§ 26. Steel stamped or pressed into an open or raised pattern and used in the manufacture of ornaments, etc., is dutiable as "pressed, or stamped shapes," under Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 135, 30 Stat. 161 (U. S. Comp. St. 1901, p. 1638).—United States v. A. & H. Veith (C. C.) 665.

§ 26. A steel slab, advanced into some other completed commercial article, is not dutiable as "plates and steel in all forms and shapes," under Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 135, 30 Stat. 161 (U. S. Comp. St. 1901, p. 1638).—Theodore W. Morris & Co. v. United States (C. C.) 666.

§ 33. Without proof it will not be held that certain conventional ornaments added to drawnwork articles are covered by the term "embroidered," in Tariff Act July 24, 1897, c. 11, § 1, Schedule J, par. 339, 30 Stat. 181 (U. S. Comp. St. 1901, p. 1662).—United States v. J. R. Simon & Co. (C. C. A.) 106.

§ 33. Lace cannot be held dutiable as embroidery, because Congress has in successive tariff acts distinguished between the two.—United States v. J. R. Simon & Co. (C. C. A.) 106.

§ 37. Rice paste curtains are dutiable as "articles * * * in part of beads," under Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 408, 30 Stat. 189 (U. S. Comp. St. 1901, p. 1673).—Morimura Bros. v. United States (C. C. A.) 279.

§ 38. The countervailing duty provided by Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 626, 30 Stat. 199 (U. S. Comp. St. 1901, p. 1685), on petroleum products, does not apply where the product is manufactured in a country

imposing no duty on American petroleum or its products.—United States v. Swan & Finch Co. (C. C. A.) 108.

§ 38. Chrome alum, that has been subjected to a purifying process, is not in a "crude state," within the meaning of Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 482, 30 Stat. 195 (U. S. Comp. St. 1901, p. 1680).—Kuttroff, Pickhardt & Co. v. United States (C. C. A.) 283.

§ 44. Trimmed and untrimmed hats, and braids, composed of horsehair, are respectively dutiable by similitude as straw hats, trimmed and untrimmed, and straw braids, suitable for hats, under Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 409, 30 Stat. 189 (U. S. Comp. St. 1901, p. 1673).—Rheims Co. v. United States (C. C.) 662.

§ 44. Untrimmed horsehair hats are dutiable by similitude to "hats of straw * * * untrimmed," under Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 409, 30 Stat. 189 (U. S. Comp. St. 1901, p. 1673).—Wanamaker v. United States (C. C.) 664.

§ 52. The character of imports may be proved otherwise than by the production of samples.—Rheims Co. v. United States (C. C.) 662.

VII. VIOLATIONS OF CUSTOMS LAWS.

Unpaid reward as property of claimant passing to his trustee in bankruptcy, see Bankruptcy, § 143.

DAMAGES.

Damages for particular injuries.

See Collision, § 133; Conspiracy, § 6.
Breach by buyer of contract for sale of goods, see Sales, § 384.
Cutting and removal of timber from public land, see Public Lands, § 13.
Injuries to passenger on vessel, see Shipping, § 166.

VI. MEASURE OF DAMAGES.

(B) INJURIES TO PROPERTY.

Cutting and removal of timber from public land, see Public Lands, § 13.

§ 106. Vessel, delayed by damage caused by negligence of defendant in making repairs, *held* entitled to compensation for the detention, less the amount saved by not being obliged to pay overtime charges.—American-Hawaiian S. S. Co. v. Morse Dry Dock & Repair Co. (D. C.) 678.

DAYS.

Excluding or including in computation of time, see Time, § 10.

DEAD BODIES.

Disinterment of body of insured and autopsy thereon to be used as evidence, see Discovery, §§ 17, 27.

DEATH.

II. ACTIONS FOR CAUSING DEATH.

(A) RIGHT OF ACTION AND DEFENSES.

Authority in federal court of decisions of state court as to right of alien to maintain action for wrongful death, see Courts, § 366.

§ 31. A nonresident alien cannot recover for the wrongful death of a nonresident relative under Act Pa. April 15, 1851 (P. L. 674), §§ 18, 19, nor Act April 26, 1855 (P. L. 309), § 1.—Fulco v. Schuylkill Stone Co. (C. C. A.) 98.

(D) PLEADING AND EVIDENCE.

§ 47. By Kentucky practice, to which federal courts in that state are bound to conform under Rev. St. § 914 (U. S. Comp. St. 1901, p. 684), it is only necessary in an action for wrongful death for plaintiff to allege that intestate's death was caused by defendant's negligence.—Beck v. Johnson (C. C.) 154.

§ 57. Under a general allegation of negligence, evidence showing a failure to observe a federal or state statute, or a federal, state, or municipal regulation, is admissible.—Beck v. Johnson (C. C.) 154.

DEBTOR AND CREDITOR.

See Bankruptcy; Insolvency.

DECLARATION.

In pleading, see Pleading, §§ 63, 64.
Of intention to become a citizen, see Aliens, § 68.

DECREE.

In equity, see Equity, § 427.

DEEDS.

Cancellation, see Cancellation of Instruments.
Of mining land, see Mines and Minerals, § 54.
Reformation, see Reformation of Instruments.

I. REQUISITES AND VALIDITY.

(E) VALIDITY.

§ 69. A deed by certain vendors to the United States, and powers of attorney authorizing B. to select, in place of the land conveyed, certain lieu land, *held* not forgeries, nor void.—United States v. Conklin (C. C.) 177.

DEFECTS.

In automatic couplers on railroad car as affecting liability for injuries to railroad employé, see Master and Servant, § 234.

DELAY.

Laches, see Equity, §§ 67–87.

DELIVERY.

Of goods sold, see Sales, §§ 175, 177.

DEMURRAGE.

See Shipping, §§ 175–179.

DEMURRER.

In pleading, see Equity, § 229.
To indictment, see Indictment and Information, § 150.

DEPOSITIONS.

See Witnesses.

§ 95. Reading of a part only of deposition *held* not objectionable.—Crotty v. Chicago Great Western Ry. Co. (C. C. A.) 593.

DEPOSITS.

In bank, see Banks and Banking, § 148.

DESCENT AND DISTRIBUTION.

See Wills.

DEVISES.

See Wills.

DIRECTING VERDICT.

In civil actions, see Trial, § 169.

DISABILITIES.

Contributory negligence of persons under disability, see Negligence, § 85.
Effect on limitation, see Limitation of Actions, § 72.

DISCHARGE.

From indebtedness, see Bankruptcy, §§ 396–424.

DISCOVERY.

I. IN EQUITY.

§ 17. A widow, who was the owner of a cemetery lot in which her husband's body was interred, was a proper party to a bill to discover evidence by means of disinterment and autopsy, to be used in an action at law, though the widow was not a party thereto.—Griesa v. Mutual Life Ins. Co. of New York (C. C. A.) 509.

§ 20. Where a bill asks for relief and discovery and is insufficient as to the former, it cannot be sustained as to the latter.—Griesa v. Mutual Life Ins. Co. of New York (C. C. A.) 509.

§ 27. Where insurer sued for the cancellation of a policy, and in such suit obtained discovery by motion, it was insurer's duty to take such discovery into an action at law then pending on the policy.—Griesa v. Mutual Life Ins. Co. of New York (C. C. A.) 509.

DISCRETION OF COURT.

Amendment of pleading, see Pleading, § 236.
Amendment of pleading in federal court, see Courts, § 347.
Striking out pleading in federal court, see Courts, § 347.

DISMISSAL AND NONSUIT.

At trial, see Trial, § 165.
Dismissal of appeal in bankruptcy proceedings, see Bankruptcy, § 462.
Dismissal of appeal or writ of error, see Appeal and Error, § 790.
Dismissal of cause removed from state court, see Removal of Causes, § 107.

DISSOLUTION.

Of injunction, see Injunction, § 169.

DISTRIBUTION.

Of estate of bankrupt, see Bankruptcy, §§ 308–363.
Of estate of insolvent, see Insolvency, §§ 118, 122.

DISTRICT AND PROSECUTING ATTORNEYS.

Participation in proceedings of grand jury, see Grand Jury, § 34.

DISTRICT COURTS.

See Courts, § 424.

DIVERSE CITIZENSHIP.

Ground of jurisdiction of United States courts, see Courts, §§ 303–322.

DOCKS.

See Wharves.

DOCUMENTS.

As evidence in civil actions, see Evidence, § 373.

DOMICILE.

Residence as ground of jurisdiction, see Courts, §§ 303–322.

DRAMATIC COMPOSITIONS.

As subjects of copyright, see Copyrights, § 7.
Proceedings to obtain copyright, see Copyrights, § 28.

DUE PROCESS OF LAW.

See Constitutional Law, §§ 251–309.

DUTIES.

Customs duties, see Customs Duties.
Excise duties, see Internal Revenue.

EARTHQUAKES.

Liability of insurer for loss from fire caused by earthquake, see Insurance, § 421.

EJECTMENT.

Judgment in forcible entry and detainer as bar to ejectment, see Judgment, § 554.

ELECTION.

Between testamentary provisions and other rights, see Wills, § 801.

EMBEZZLEMENT.

§ 20. Money collected by a bank runner on items delivered to him for collection *held* to belong to the bank and was therefore a proper subject of embezzlement by him.—Spencer v. United States (C. C. A.) 562.

EMBROIDERY.

Duties on, see Customs Duties, § 33.

EMINENT DOMAIN.

III. PROCEEDINGS TO TAKE PROPERTY AND ASSESS COMPENSATION.

§ 242. A landowner, who appeared in a state court in a condemnation proceeding by a railroad company, and filed a claim for damages on account of land taken from her, and had a hearing thereon, is estopped to deny the validity of the proceeding for want of notice or other irregularity, or to attack the decree collaterally by a suit in a federal court against the company, based on a claim of title in herself.—Robinson v. Sea View R. Co. (C. C.) 319.

EMPLOYES.

See Master and Servant.

ENTRY.

Of public lands, see Public Lands, § 38.
Re-entry by landlord, see Landlord and Tenant, §§ 288–291.

EQUITABLE ESTOPPEL.

See Estoppel, § 110.

EQUITY.

Equitable estoppel, see Estoppel, § 110.
Equity jurisdiction of United States courts, see Courts, § 262.

Particular subjects of equitable jurisdiction and equitable remedies.

See Account; Cancellation of Instruments; Discovery, §§ 17–27; Injunction; Interpleader; Receivers; Reformation of Instruments; Specific Performance; Trusts.
Suits for infringement of patents, see Patents, §§ 288–325.

I. JURISDICTION, PRINCIPLES, AND MAXIMS.

(B) REMEDY AT LAW AND MULTIPLICITY OF SUITS.

§ 44. Under Rev. St. § 723 (U. S. Comp. St. 1901, p. 583), there is no concurrent remedy in equity for fraud, where there is a plain, speedy, and adequate remedy at law.—Griesa v. Mutual Life Ins. Co. of New York (C. C. A.) 509.

§ 46. A court of equity will take jurisdiction when the particular machinery of that court can do more complete justice between the parties than that of a court of law.—Empire Circuit Co. v. Sullivan (C. C.) 1009.

(C) PRINCIPLES AND MAXIMS OF EQUITY.

§ 65. The inequity which will repel one from courts of equity under the maxim that "he who comes into a court of equity must do so with clean hands" must relate directly to the very transaction concerning which he complains.—Cunningham v. Pettigrew (C. C. A.) 335.

§ 65. Conduct by a complainant toward the defendant which would have been inequitable as between co-tenants cannot affect complainant's right to maintain the suit in equity, where any relation of co-tenancy between the parties had been previously wholly repudiated and was not recognized by either party.—Cunningham v. Pettigrew (C. C. A.) 335.

II. LACHES AND STALE DEMANDS.

§ 67. The defense of laches involves a negative course of action, while the defense of acquiescence is affirmative.—West Pub. Co. v. Edward Thompson Co. (C. C.) 833.

§ 75. The defense of laches is affected by the facts whether rights of innocent persons have intervened, whether witnesses are dead or have disappeared, whether the situation of the parties in interest has changed, and other like considerations.—Cunningham v. Pettigrew (C. C. A.) 335.

§ 87. A suit to establish a constructive trust on the ground of fraud *held* to have been brought within the time limited by Rev. St. 1898, Utah, § 2877, and by analogy not barred by laches.—Cunningham v. Pettigrew (C. C. A.) 335.

III. PARTIES AND PROCESS.

§ 115. It is not proper practice to permit one who is not a party to the original suit to be brought in by a cross-bill.—Central Trust Co. of New York v. Cincinnati, H. & D. Ry. Co. (C. C.) 466.

IV. PLEADING.

(A) ORIGINAL BILL.

§ 153. Whether a bill states a cause of action depends on the legal effect of its allegations.—United States v. Conklin (C. C.) 177.

(C) CROSS-BILL AND PLEA AND ANSWER THERETO.

§ 196. It is the general rule in equity that a defendant can obtain affirmative relief, as by injunction, only by filing a cross-bill.—Mitchell v. International Tailoring Co. (C. C.) 145.

§ 198. The defense of laches in bringing a suit or in prosecuting it after it is brought may be considered on final hearing although not pleaded, and a defendant will not be granted leave to file a cross-bill raising such issue to be disposed of before the hearing on the original bill.—Under-Feed Stoker Co. of America v. American Stoker Co. (C. C.) 891.

(D) REPLICATION.

§ 210. Where a replication in an equity suit was not filed within the time required, owing to the mistake or inadvertence of a former United States district attorney, his successor would be permitted to file a replication nunc pro tunc on condition that he speed the cause.—United States v. Barber Lumber Co. (C. C.) 184.

(E) DEMURRER, EXCEPTIONS, AND MOTIONS.

§ 229. A defendant will not be permitted to delay the trial of a cause by filing a second demurrer on grounds which should have been set up and disposed of in the first, but may be allowed to plead such matter in the answer.—Victor Talking Mach. Co. v. Hoschke (C. C.) 894.

(G) SIGNATURE, VERIFICATION, FILING, AND SERVICE.

§ 321. Where the United States voluntarily appears in a federal court against an individual, she is equally bound to comply with general equity rule 66, regulating the time for the filing of pleadings.—United States v. Barber Lumber Co. (C. C.) 184.

(I) DEFECTS AND OBJECTIONS, AND WAIVER THEREOF.

§ 330. Defense of multifariousness *held* waived.—West Pub. Co. v. Edward Thompson Co. (C. C.) 833.

X. DECREE AND ENFORCEMENT THEREOF.

§ 427. Where a bill prays for general relief, the court may give any relief consistent with the case made.—Underground Electric Rys. Co. of London, Limited, v. Owsley (C. C.) 671.

ERROR, WRIT OF.

See Appeal and Error.

ESTABLISHMENT.

Of courts, see Courts, §§ 85–96.
Of railroads, see Street Railroads, § 28.
Of trusts, see Trusts, § 357.

ESTATES.

Estates for years, see Landlord and Tenant.

ESTOPPEL.

By judgment, see Judgment, §§ 675–735.

III. EQUITABLE ESTOPPEL.

(E) PLEADING, EVIDENCE, TRIAL, AND REVIEW.

§ 110. Estoppel is a defense, which must be affirmatively pleaded and proved by one seeking to avail himself thereof.—In re Stoddard Bros. Lumber Co. (D. C.) 190.

EVIDENCE.

See Depositions; Discovery; Witnesses.
Applicability of instructions to evidence, see Trial, § 251.
Questions of fact for jury, see Trial, § 143.
Reception at trial, see Trial, §§ 46–83.

In actions by or against particular classes of persons.

Partners, see Partnership, § 217.

In particular civil actions or proceedings.

See Negligence, §§ 121–125.
Bankruptcy proceedings, see Bankruptcy, § 303.
For collision, see Collision, § 73.
For discharge of bankrupt, see Bankruptcy, § 414.
For infringement of copyright, see Copyrights, § 83.
For injuries to passenger, see Carriers, § 317.
For injuries to passenger on vessel, see Shipping, § 166.
For injuries to servant, see Master and Servant, § 276.
For loss of or injuries to cargo, see Shipping, § 125.
For wages, see Master and Servant, § 80.
On insurance policy, see Insurance, § 646.
On notes of partners, see Partnership, § 217.
To cancel deed of trust given for gambling transaction, see Gaming, § 41.
To cancel patent license, see Patents, § 214.
To cancel patent to public lands, see Public Lands, § 120.
To establish rights to mining claim, see Mines and Minerals, § 38.
To establish trust, see Trusts, § 88.

In criminal prosecutions.

See Criminal Law, §§ 396–736; False Pretenses, § 19.

Review and procedure thereon in appellate courts.

See Appeal and Error, § 1008.

Harmless error in rulings on, see Appeal and Error, § 1170½.

I. JUDICIAL NOTICE.

§ 34. State and federal courts take judicial notice of the laws and executive regulations of the United States.—Beck v. Johnson (C. C.) 154.

§ 47. State and federal courts take judicial notice of the laws and executive regulations of the United States.—Beck v. Johnson (C. C.) 154.

II. PRESUMPTIONS.

As to negligence, see Negligence, § 121.

III. BURDEN OF PROOF.

As to particular facts or issues.

See Negligence, § 122.

Fault of vessel in collision, see Collision, § 73.

Insolvency of bankrupt, see Bankruptcy, § 340.

In particular civil actions or proceedings.

For loss of or injuries to cargo, see Shipping, § 132.

On insurance policy, see Insurance, § 646.

To establish rights to mining claim, see Mines and Minerals, § 38.

IV. RELEVANCY, MATERIALITY, AND COMPETENCY IN GENERAL.

(D) MATERIALITY.

§ 143. On an issue as to whether an arc light in a railway station was burning at the time of an accident to plaintiff, a daily report of a watchman to the electrician of the building as to the condition of the lights, and which did not show any stoppage of lights, *held* inadmissible.—Central Union Depot & Ry. Co. v Mansfield (C. C. A.) 614.

VII. ADMISSIONS.

(E) PROOF AND EFFECT.

§ 263. The refusal to permit a defendant to testify in explanation of an affidavit introduced by plaintiff as an admission *held* error.—Morgan v. United States (C. C. A.) 242.

X. DOCUMENTARY EVIDENCE.

(D) PRODUCTION, AUTHENTICATION, AND EFFECT.

§ 373. Daily report of watchman to witness as to condition of lights in railway station, not being made by witness, and he having no personal knowledge as to facts, *held* inadmissible.—Central Union Depot & Ry. Co. v. Mansfield (C. C. A.) 614.

XI. PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS.

(A) CONTRADICTING, VARYING, OR ADDING TO TERMS OF WRITTEN INSTRUMENT.

§ 397. Parol evidence is inadmissible to change, contradict, qualify, or explain a written contract which is unambiguous; nor is it permissible to show a custom or usage when the words of the contract would be thereby contradicted or modified.—Hirsch v. Georgia Iron & Coal Co. (C. C. A.) 578.

(D) CONSTRUCTION OR APPLICATION OF LANGUAGE OF WRITTEN INSTRUMENT.

§ 459. Parol evidence that a party to a contract acted as agent for an undisclosed principal is not objectionable as contradicting the writing.—Block v. City of Meridian, Mississippi (C. C. A.) 516.

§ 459. Parol evidence *held* admissible to show that notes signed by the individual members of a firm were in fact the firm obligation.—In re Stoddard Bros. Lumber Co. (D. C.) 190.

XII. OPINION EVIDENCE.

(C) COMPETENCY OF EXPERTS.

§ 539. The competency of a witness to testify as an expert concerning the operation of defendant's engines *held* sufficiently shown.—Pennsylvania Co. v. Whitney (C. C. A.) 572.

XIV. WEIGHT AND SUFFICIENCY.

As to particular facts or issues.

Contributory negligence of passenger, see Carriers, § 331.

Fraud in entry on public land, see Public Lands, § 120.

Infringement of copyright, see Copyrights, § 83.

Notice of insolvency of bankrupt, see Bankruptcy, §§ 303, 340.

In particular civil actions or proceedings.

Bankruptcy proceedings, see Bankruptcy, § 303.

For injuries to servant, see Master and Servant, § 276.

§ 590. The court is bound to credit uncontradicted testimony of interested persons if substantiated and not inconsistent with well-known facts, experience, and reason.—Epremiam v. Ward (C. C.) 691.

EXAMINATION.

Of witnesses in general, see Witnesses, §§ 269, 305.

EXCEPTIONS.

Necessity for purpose of review, see Appeal and Error, § 273.

Taking exceptions at trial, see Trial, §§ 83, 279–281.

EXCISE.

Duties, see Internal Revenue.

EXCUSE.

For violation of law relating to carriage of live stock, see Carriers, § 37.

EXECUTORS AND ADMINISTRATORS.

See Wills.
Testamentary trustees, see Trusts.

X. ACTIONS.

Jurisdiction of federal court in action by heirs against executor and others to have charitable gift declared void, see Courts, § 262.

EXEMPTIONS.

To bankrupt, see Bankruptcy, § 396.

EXPERT TESTIMONY.

In civil actions, see Evidence, § 539.

EXTENSION.

Of franchise of street railroad company, see Street Railroads, § 28.

FACTORS.

See Principal and Agent.

FALSE PRETENSES.

§ 19. A statute prohibiting impersonation of a United States officer *held* to apply to every such impersonation and not limited to impersonation for the collection of a pretended claim of the United States.—Littell v. United States (C. C. A.) 620.

§ 19. Evidence *held* to warrant a finding that prosecutrix relied on defendant's representations that he was an officer of the United States in extending credit to him and in loaning him money.—Littell v. United States (C. C. A.) 620.

FALSE SWEARING.

See Perjury.

FEDERAL COURTS.

See Courts, §§ 259–424.
Construction of statutes relating to bringing of action in by foreign corporations, see Corporations, §§ 651, 656, 661.
Decisions in United States courts as authority in other United States courts, see Courts, § 96.

FEDERAL QUESTIONS.

Ground for jurisdiction, see Courts, § 282.
Ground for removal of cause, see Removal of Causes, §§ 19, 25.

FEES.

In bankruptcy, see Bankruptcy, §§ 477, 482.

FELLOW SERVANTS.

See Master and Servant, § 201.

FIDELITY INSURANCE.

See Insurance, §§ 285, 332.

FILING.

Chattel mortgage, see Chattel Mortgages, § 84.
Pleading, see Equity, § 321.

FINDINGS.

Of referee in bankruptcy, see Bankruptcy, § 228.
Review on appeal or writ of error, see Appeal and Error, § 1008.

FIRE INSURANCE.

See Insurance, §§ 421, 699.

FOLLOWING TRUST PROPERTY.

See Trusts, § 357.

FORCIBLE ENTRY AND DETAINER.

Judgment in action of as bar to ejectment, see Judgment, § 554.
To recover possession of demised premises, see Landlord and Tenant, §§ 288–291.

I. CIVIL LIABILITY.

Act authorizing substituted service of notice as denying due process of law, see Constitutional Law, § 309.

FORECLOSURE.

Of lien, see Railroads, §§ 180–190.
Of mortgage, see Railroads, §§ 180–190.

FOREIGN CORPORATIONS.

See Corporations, §§ 651–661.

FOREIGN JUDGMENTS.

See Judgment, § 828.

FORFEITURES.

Of patent license, see Patents, §§ 214, 218.

FORGERY.

Payment of forged paper by bank, see Banks and Banking, § 148.

FORMER ADJUDICATION.

See Judgment, §§ 675–735.

FORMS OF ACTION.

See Trover and Conversion.

FRANCHISES.

§ 3. Legislative or municipal grants of property, franchises, or privileges in which the government or public has an interest are to be construed strictly in favor of the public, and nothing passes by implication or which is not granted in clear and explicit terms.—Central Trust Co. of New York v. Municipal Traction Co. (C. C.) 308.

FRAUD.

See False Pretenses.

In acquisition of property as creating trust, see Trusts, § 95.

In particular classes of conveyances, contracts, transactions, or proceedings.

See Insurance, § 285.

Relating to public lands, see Public Lands, § 120.

Sale of realty, see Vendor and Purchaser, § 38.

II. ACTIONS.

(C) EVIDENCE.

Fraud in entry of public land, see Public Lands, § 120.

FRAUDULENT CONVEYANCES.

By bankrupt, see Bankruptcy, §§ 160–205.

FRIGHT.

Frightening animals on bridge, liability of municipal corporation, see Municipal Corporations, §§ 733, 747, 852.

GAMING.

I. GAMBLING CONTRACTS AND TRANSACTIONS.

(A) NATURE AND VALIDITY.

§ 2. Under Ann. Code Miss. 1892, §§ 1120, 2117, a deed of trust on land in Mississippi, given for losses in gambling transactions in futures, void in Tennessee, where it was executed, was also void in Mississippi.—Williamson v. Majors (C. C. A.) 754.

§ 2. The validity of a deed of trust on real estate in Mississippi given as the result of gambling transactions in futures must be determined according to the laws of that state.—Williamson v. Majors (C. C. A.) 754.

(B) RIGHTS AND REMEDIES OF PARTIES.

§ 34. Under Shannon's Code Tenn. §§ 3159, 3166, money lost on wagering contracts in futures may be recovered by the loser, whether the contracts are with reference to prices in a foreign market or the parties acting as agents advance money in aid thereof.—Williamson v. Majors (C. C. A.) 754.

§ 41. Under Ann. Code Miss. 1892, § 2116, equity will grant relief by the cancellation of a deed of trust given in consideration of losses in gambling transactions in cotton.—Williamson v. Majors (C. C. A.) 754.

§ 49. Evidence *held* to require a finding that plaintiff's transactions in cotton with defendant were gambling transactions and must have been so understood by both parties.—Williamson v. Majors (C. C. A.) 754.

GAS.

Lease of gas lands, see Mines and Minerals, §§ 73, 78.

GRAND JURY.

See Indictment and Information.

Introduction of incompetent testimony before grand jury as ground for quashing indictment, see Indictment and Information, § 137.

§ 3. An indictment found in the District Court of the United States for the Eastern District of the State of Oklahoma by a grand jury of 21 members for an offense committed in Indian Territory when Mansf. Dig. Arkansas, § 3991, requiring grand juries to be composed of 16 persons, was in force in such territory, *held* invalid.—United States v. Haskell (D. C.) 449.

§ 3. Rev. St. § 808 (U. S. Comp. St. 1901, p. 626), relating to grand juries and fixing the number, is expressly limited to the District and Circuit Courts of the United States, and does not apply to any courts in the territories.—United States v. Haskell (D. C.) 449.

§ 34. An inadvertent misstatement of the law by a prosecuting officer to a grand jury is not such misconduct as will affect the validity of an indictment found.—United States v. Haskell (D. C.) 449.

§ 34. The presence of two or more special attorneys designated by the Attorney General under Act June 30, 1906, c. 3935, 34 Stat. 816 (U. S. Comp. St. Supp. 1907, p. 44), in a grand jury room together, conducting the proceedings, and that one acts only as a stenographer, does not vitiate an indictment in a District Court.—United States v. Haskell (D. C.) 449.

GRANTS.

Of public lands, see Public Lands.

GUARDIAN AND WARD.

II. APPOINTMENT, QUALIFICATION, AND TENURE OF GUARDIAN.

Detention of vessel by quarantine regulation as affecting right to deduction from charter hire, see Shipping, § 49.

HARMLESS ERROR.

In civil actions, see Appeal and Error, §§ 1032–1048.
In criminal prosecutions, see Criminal Law, § 1170½.

HATS.

Duty on horsehair hats, see Customs Duties, § 44.

HIGHWAYS.

See Bridges; Municipal Corporations, §§ 755, 764.

HOLIDAYS.

See Sunday.

HORSEHAIR.

Duties on horsehair hats, see Customs Duties, § 44.

IMMIGRATION.

Regulation, see Aliens, § 57.

IMPEACHMENT.

Of witness, see Witnesses, § 380.

IMPORTS.

Duties, see Customs Duties.

IMPUTED NEGLIGENCE.

See Negligence, § 93.

INDIANS.

§ 12. Disclaimer by the state of Washington of all right to lands within Indian reservations *held* to apply to all lands within such reservations to which the primary occupancy of the Indians had not been extinguished.—Corrigan v. Brown (C. C.) 477.

§ 12. Under Washington disclaimer and certain Indian treaties, land within the reservation and extending to low-water mark *held* disposable by the United States to the Indians, and was not subject to disposition by the state as land bordering on navigable water.—Corrigan v. Brown (C. C.) 477.

INDICTMENT AND INFORMATION.

See Grand Jury.

For particular offenses.

See Conspiracy, § 43.
Against postal laws, see Post Office, § 48.
Inclosure of public lands, see Public Lands, § 21.

VII. MOTION TO QUASH OR DISMISS, AND DEMURRER.

§ 137. The mere introduction of incompetent testimony before a grand jury is not ground for quashing an indictment returned in the matter to which such evidence related.—Unites States v. Haskell (D. C.) 449.

§ 139. An objection to an indictment on the ground that the grand jury was illegally constituted when substantial, and not merely technical, may be taken at any time before arraignment.—United States v. Haskell (D. C.) 449.

§ 150. Where an indictment alleged in several counts separate schemes to defraud by the use of the post office establishment, whether the scheme was the same for the different offenses alleged could not be considered on demurrer to the indictment.—United States v. Palmieri (C. C.) 490.

INFANTS.

Contributory negligence on part of children, see Negligence, § 85.

VII. ACTIONS.

Applicability of general statutes of limitation, see Limitation of Actions, § 72.

INFORMATION.

Criminal accusation, see Indictment and Information.

INFRINGEMENT.

Of copyright, see Copyrights, §§ 51–57.
Of patent, see Patents, §§ 226–325.

INJUNCTION.

Relief against particular acts or proceedings.

Infringement of copyright, see Copyrights, § 86.
Infringement of patent, see Patents, §§ 294–303, 317.
Judicial proceedings, power of federal court to restrain proceedings in state court after removal of cause, see Removal of Causes, § 97.

II. SUBJECTS OF PROTECTION AND RELIEF.

(B) PROPERTY, CONVEYANCES, AND INCUMBRANCES.

§ 56. Mere employment of complainant's confidential servant by defendant, its business rival, *held* insufficient to justify an injunction against defendant and the servant, restraining the servant from imparting and defendant from receiving knowledge of complainant's trade secrets.—H. B. Wiggins Sons' Co. v. Cott-A-Lap Co. (C. C.) 150.

(C) CONTRACTS.

§ 60. Defendant having contracted to perform certain unique acrobatic feats for plaintiff, and in the meantime not to work for others, plaintiff was entitled to an injunction restraining her from performing a subsequent contract to act for another during the continuance of plaintiff's contract.—Keith v. Kellermann (C. C.) 196.

§ 61. Agreements in restraint of trade, and tending to create a monopoly, *held* not illegal in the sense of giving third persons a right of action for an injury sustained, nor as justifying an injunction against threatened injury.—National Fireproofing Co. v. Mason Builders' Ass'n (C. C. A.) 259.

(G) PERSONAL RIGHTS AND DUTIES.

§ 101. To justify an injunction against a conspiracy, damage must have been threatened. —National Fireproofing Co. v. Mason Builders' Ass'n (C. C. A.) 259.

IV. PRELIMINARY AND INTERLOCUTORY INJUNCTIONS.

(A) GROUNDS AND PROCEEDINGS TO PROCURE.

§ 136. An injunction pendente lite would be granted where, if it was not issued, complainant might suffer the very injury of which he complained before the cause could be heard, and defendant would not be especially harmed by the injunction.—Colgate v. James T. White & Co. (C. C.) 887.

(B) CONTINUING, MODIFYING, VACATING, OR DISSOLVING.

§ 169. An objection that a motion to dissolve an injunction was premature *held* unsustainable after the first day of the current term had passed.—Frank v. Leopold & Feron Co. (C. C.) 922.

IN PAIS.

Estoppel, see Estoppel, § 110.

INSOLVENCY.

See Bankruptcy.

III. ASSIGNMENT, ADMINISTRATION, AND DISTRIBUTION OF INSOLVENT'S ESTATE.

(F) CLAIMS AGAINST AND DISTRIBUTION OF ESTATE.

§ 118. An independent ticket agent, having contracted to sell defendant's tickets on commission, *held* not entitled to a priority over unsecured creditors of defendant in insolvency, as a laborer.—Van Raalte v. Enterprise Transp. Co. (C. C. A.) 606.

§ 122. An unsecured creditor, in order to be entitled to a preference in an insolvency proceeding, must show through the intrinsic nature of his claim that he has an equity superior to that of creditors over whom he claims a preference.—Van Raalte v. Enterprise Transp. Co. (C. C. A.) 606.

INSTRUCTIONS.

In civil actions, see Trial, §§ 191–281.

INSURANCE.

Exemption of life insurance of bankrupt, see Bankruptcy, § 396.

V. THE CONTRACT IN GENERAL.

Specific performance of contract, see Specific Performance, § 4.

VIII. CANCELLATION, SURRENDER, ABANDONMENT, OR RESCISSION OF POLICY.

§ 249. That an insurance policy provided for the delivery of bonds, instead of the payment of money, did not justify a suit in equity by the insurer for the surrender and cancellation of the policy for fraud.—Griesa v. Mutual Life Ins. Co. of New York (C. C. A.) 509.

§ 249. After insured's death a suit will not lie for the surrender and cancellation of the policy as obtained by fraud.—Griesa v. Mutual Life Ins. Co. of New York (C. C. A.) 509.

IX. AVOIDANCE OF POLICY FOR MISREPRESENTATION, FRAUD, OR BREACH OF WARRANTY OR CONDITION.

(B) MATTERS RELATING TO PROPERTY OR INTEREST INSURED.

§ 285. A warranty by an employer, in a fidelity bond indemnifying it against dishonesty of an employé, of the past honesty of such employé "so far as the employer has knowledge," although it turns out to be untrue in fact, does not invalidate the bond, unless such dishonesty was known to the employer at the time.—Ætna Indemnity Co. v. Farmers' Nat. Bank of Boyertown, Pa. (C. C. A.) 737.

§ 285. Where, in a bond indemnifying a bank against the dishonesty of the cashier, it was warranted that he had discharged his duties in good faith and with honesty, but the statement was false, there was a breach of warranty, avoiding the bond.—Ætna Indemnity Co. v. Farmers' Nat. Bank of Boyertown, Pa. (C. C. A.) 737.

§ 285. In an application to an indemnity company by a bank for a bond against loss by dishonesty of the cashier, a certificate by the officers of the bank that he had for many years performed his duties faithfully and had rendered correct accounts without default, if untrue to the knowledge of the officers of the bank, or if made without effort on their part to inform themselves thereon, renders the bond invalid.—Ætna Indemnity Co. v. Farmers' Nat. Bank of Boyertown, Pa. (C. C. A.) 737.

§ 285. Where, by a clause in indemnity bond of a bank cashier, the knowledge required of the dishonesty of the cashier, to avoid the bond, was the knowledge of the directors or an executive officer acting in the affairs of the corporation, it must have been known to the president or board of directors that the cashier was dishonest.—Ætna Indemnity Co. v. Farmers' Nat. Bank of Boyertown, Pa. (C. C. A.) 737.

X. FORFEITURE OF POLICY FOR BREACH OF PROMISSORY WARRANTY, COVENANT, OR CONDITION SUBSEQUENT.

(B) MATTERS RELATING TO PROPERTY OR INTEREST INSURED.

§ 332. A provision, in a fidelity bond indemnifying a bank against dishonesty of its cashier, that it should be void if the bank failed to promptly notify the insurer in case any act of dishonesty came to its knowledge, did not become operative because the officers or directors of the bank learned of acts of the cashier, which were in fact dishonest, if they were not known to be so at the time.—Ætna Indemnity Co. v. Farmers' Nat. Bank of Boyertown, Pa. (C. C. A.) 737.

XII. RISKS AND CAUSES OF LOSS.

(B) INSURANCE OF PROPERTY AND TITLES.

§ 421. Loss of insured's property *held* to have directly resulted from fire, and not to have been caused directly or indirectly, by earthquake.—Commercial Union Assur. Co. v. Pacific Union Club (C. C. A.) 776; Norwich Union Fire Ins. Society of Norwich & London, Eng., v. Same (C. C. A.) 778; Alliance Assur. Co., Limited, of London, Eng., v. Same, Id.

XVI. RIGHT TO PROCEEDS.

Statutory exemptions, see Bankruptcy, § 184.

XVII. PAYMENT OR DISCHARGE, CONTRIBUTION, AND SUBROGATION.

Rights of creditors as against bankrupt estate of insured, see Bankruptcy, § 143.

XVIII. ACTIONS ON POLICIES.

Disinterment of body of insured and autopsy thereon, see Discovery, §§ 17, 27.

§ 611. The filing of a bill to cancel an insurance policy after insured's death *held* a repudiation by the insurer of its obligations under the policy, rendering it liable to an action at law.—Griesa v. Mutual Life Ins. Co. of New York (C. C. A.) 509.

§ 646. Delivery of a formal receipt for the payment of an insurance premium *held* strong prima facie proof of payment, placing the burden of proving the contrary on the insurance company.—Security Mut. Life Ins. Co. v. Kleutsch (C. C. A.) 104.

§ 668. In an action on a life insurance policy, evidence *held* to justify submission to the jury of the question whether the last annual premium had been paid.—Security Mut. Life Ins. Co. v. Kleutsch (C. C. A.) 104.

§ 668. Where, by a clause in indemnity bond of a bank cashier, the knowledge required of the dishonesty of the cashier, to avoid the bond, was the knowledge of the directors or an executive officer acting in the affairs of the corporation, it must have been known to the president or board of directors that the cashier was dishonest.—Ætna Indemnity Co. v. Farmers' Nat. Bank of Boyertown, Pa. (C. C. A.) 737.

§ 668. Statements made by a bank president, in connection with an application for a bond indemnifying the bank against loss through the dishonesty of its cashier, *held* not willful misrepresentations which avoided the bond.—Ætna Indemnity Co. v. Farmers' Nat. Bank of Boyertown, Pa. (C. C. A.) 737.

§ 669. In an action on a fire policy, instructions on the question whether the destruction of the property was proximately caused by fire or by an earthquake *held* erroneous.—Richmond Coal Co. v. Commercial Union Assur. Co., Limited, of London, England (C. C. A.) 746.

INTERLOCUTORY INJUNCTION.

See Injunction, §§ 136, 169.

INTERLOCUTORY JUDGMENT.

Review on appeal or writ of error, see Appeal and Error, § 873.

INTERNAL REVENUE.

Right to trial by jury in prosecution for offenses, see Jury, § 21.

§ 15. The wholesale price or value of cigarettes manufactured by plaintiff's intestate *held* not more than $2 per thousand, including the stamp tax, within Rev. St. § 3394, as amended by Act Cong. July 24, 1897, c. 11, § 10, 30 Stat. 206 (U. S. Comp. St. 1901, p. 2221), and hence intestate was not liable to an assessment for insufficient tax under section 3371, as amended by Act March 1, 1879, c. 125, § 14, 20 Stat. 346 (U. S. Comp. St. 1901, p. 2205).—Epremiam v. Ward (C. C.) 691.

INTERNATIONAL LAW.

See Aliens; Treaties.

INTERPLEADER.

I. RIGHT TO INTERPLEADER.

§ 8. The nature and scope of the remedy by suit of interpleader stated.—Smith v. Mosier (C. C.) 430.

INTERPRETATION.

Of contracts, instruments or judicial acts and proceedings.

See Bills and Notes, § 123; Contracts, § 169; Patents, §§ 157, 167; Pleading, § 34; Statutes, § 220; Treaties, § 8.
Charter party, see Shipping, § 39.
Contract of sale, see Sales, § 71.
Government contract, see United States, § 70.
Oil lease, see Mines and Minerals, §§ 73, 78.

INTERROGATORIES.

To witnesses, see Depositions.

INTERSTATE COMMERCE.

Regulation, see Carriers, §§ 32–38; Commerce.

INTERVENTION.

By railroad bondholders in suit by trustee to foreclose mortgage, see Railroads, § 186.
In action by railroad company against interstate commerce commission, see Commerce, § 93.

INVENTION.

See Patents.

JOINT-STOCK COMPANIES.

See Associations.

JUDGES.

See Courts.
Remarks and conduct in criminal prosecution, see Criminal Law, § 655.

JUDGMENT.

As liability discharged in bankruptcy, see Bankruptcy, § 424.
Decisions of courts in general, see Courts, §§ 92, 96.

In particular civil actions or proceedings.

Bankruptcy proceedings, see Bankruptcy, § 305.
Decree in equity, see Equity, § 427.
To foreclose mortgage of corporation, see Corporations, § 482.
To recover possession of demised premises, see Landlord and Tenant, § 291.

Review.

See Appeal and Error.

XIII. MERGER AND BAR OF CAUSES OF ACTION AND DEFENSES.

(A) JUDGMENTS OPERATIVE AS BAR.

§ 554. A judgment in forcible detainer under Civ. Code Prac. Ky. § 460, is not a bar to ejectment by either party.—Weber v. Grand Lodge of Kentucky, F. & A. M. (C. C. A.) 522.

§ 570. Where the plaintiff in an action in a state court for a personal injury, grounded on defendant's negligence, after a verdict in her favor and an order granting a new trial on the ground that under the facts defendant was not negligent, voluntarily discontinued the action, the judgment did not bar a second action in a federal court on the same cause of action.—Snare & Triest Co. v. Friedman (C. C. A.) 1.

§ 570. A judgment striking from the files a complaint in intervention *held* to involve a determination on the merits of the validity of a charitable bequest and to be a bar to second suit by the interveners to relitigate such question.—Spencer v. Watkins (C. C. A.) 379.

§ 570. Where a suit of interpleader was dismissed on the ground that plaintiff could not maintain it, the judgment cannot constitute an adjudication of a claim made by a defendant against the plaintiff which will bar a subsequent action thereon, such an issue being immaterial in the suit.—Smith v. Mosier (C. C.) 430.

(B) CAUSES OF ACTION AND DEFENSES MERGED, BARRED, OR CONCLUDED.

§ 584. To render a judgment conclusive as an estoppel between parties to a suit, it is not always essential that there should have been a formal joinder of issue between such parties, nor does it matter that the question decided was purely one of law, and the decision rendered on motion or demurrer provided the merits were involved and decided, and the decision was final.—Spencer v. Watkins (C. C. A.) 379.

XIV. CONCLUSIVENESS OF ADJUDICATION.

(B) PERSONS CONCLUDED.

§ 675. Where, in a suit for infringement of a patent against a customer, it was stipulated on the record that the manufacturer of the alleged infringing article was defending the suit, such manufacturer was a party in such sense that the decree was binding as between it and the complainant.—Bryant Electric Co. v. Marshall (C. C.) 426.

(C) MATTERS CONCLUDED.

§ 713. A decree dismissing a bill for infringement of a patent generally on the merits is a bar to a second suit between the same parties for infringement by the same acts, although in the second suit infringement is alleged of claims not discussed or passed on in the first suit.—Bryant Electric Co. v. Marshall (C. C.) 426.

§ 735. A judgment against complainant on an underwriting agreement *held* not conclusive of the question whether defendant trust company had exercised due diligence in conserving and collecting the collateral.—Warburton v. Trust Co. of America (C. C.) 974.

§ 735. Complainant in a suit to restrain the collection of a judgment recovered by defendant trust company on an underwriting agreement *held* entitled to an adjudication therein as to whether the trust company had used reasonable diligence to conserve and collect certain collateral.—Warburton v. Trust Co. of America (C. C.) 974.

XVII. FOREIGN JUDGMENTS.

§ 828. A judgment rendered in a state court is to be given the same force and effect as a bar or an estoppel in a federal court as is given to it in the courts where rendered.—Smith v. Mosier (C. C.) 430.

XXII. PLEADING AND EVIDENCE OF JUDGMENT AS ESTOPPEL OR DEFENSE.

§ 948. Where an action at law and a suit in equity involved the same question, and both were tried nearly simultaneously, a judgment for defendant in the action at law was available in the equity suit as res judicata, though not pleaded.—Keely v. Ophir Hill Consol. Mining Co. (C. C. A.) 601.

§ 949. It is incumbent on a defendant setting up a prior judgment as a bar to an action to allege and prove that the particular point or question as to which he claims the estoppel was necessarily in issue and necessarily decided in such prior action.—Smith v. Moiser (C. C.) 430.

JUDICIAL NOTICE.

In civil actions, see Evidence, §§ 34, 47.

JURISDICTION.

Jurisdiction of particular actions or proceedings.

For infringement of patent, see Patents, § 288.

Special jurisdictions and jurisdictions of particular classes of courts.

See Admiralty, §§ 6, 13.

Appellate jurisdiction, see Criminal Law, § 1022.

Bankruptcy courts, see Bankruptcy, § 293.

Particular courts, see Courts.

JURY.

See Grand Jury.

Instructions in civil actions, see Trial, §§ 191–281.

Questions for jury in civil actions, see Trial, § 143.

Questions for jury in criminal prosecutions, see Criminal Law, § 736.

Taking case or question from jury at trial, see Trial, §§ 143–169.

II. RIGHT TO TRIAL BY JURY.

In federal court, see Courts, § 352.

Procedure on review in federal court, see Courts, § 356.

§ 11. There is no statute providing for trial by a federal court without a jury, except in cases of equity or maritime jurisdiction, or when so provided by the bankrupt law.—Low v. United States (C. C. A.) 86.

§ 11. Under the express provisions of Rev. St. § 566 (U. S. Comp. St. 1901, p. 461), the trial of issues of fact in a federal district court, save in the excepted cases, must be by jury.—Low v. United States (C. C. A.) 86.

§ 21. "Crime" and "infamous offense," for which a jury trial must be had under Fed. Const. art. 3, § 2, and the fifth and sixth amendments, defined.—Low v. United States (C. C. A.) 86.

§ 21. Unlawfully carrying on the business of a rectifier in violation of 1 Supp. Rev. St. p. 60, § 3242, unlawfully rectifying in violation of Rev. St. § 3317 (U. S. Comp. St. 1901, p. 2164), failure to put up signs as required by section 3279 (page 2126), and the changing of stamps and shifting of spirits contrary to section 3326 (page 2169), *held* "crimes" for which accused could only be punished after conviction by a jury.—Low v. United States (C. C. A.) 86.

§ 29. In a prosecution for a "crime" within Const. art. 3, § 2, a jury trial cannot be waived by an agreement of accused and the district attorney.—Low v. United States (C. C. A.) 86.

§ 29. Rev. St. § 649 (U. S. Comp. St. 1901, p. 525), providing for waiver of a jury on stipulation of the parties, applies only to the Circuit Court.—Low v. United States (C. C. A.) 86.

§ 33. Under Const. art. 6 of the amendments, Rev. St. § 802 (U. S. Comp. St. 1901, p. 625) *held* not unconstitutional in that it authorized the summoning of jurors from parts of the district other than the county where the crime was committed.—Spencer v. United States (C. C. A.) 562.

§ 33. Jurors as used in Rev. St. § 802 (U. S. Comp. St. 1901, p. 625) *held* to include both grand and petit jurors.—Spencer v. United States (C. C. A.) 562.

§ 33. Under Act Cong. July 20, 1882, c. 312, 22 Stat. 172 (U. S. Comp. St. 1901, p. 349) and Act June 1, 1900, c. 601, 31 Stat. 249 (U. S. Comp. St. 1901, p. 353) jurors drawn for service in the Central division of the Southern district of Iowa at the time residing within the district, but not within the division, were competent.—Spencer v. United States (C. C. A.) 562.

LACE.

Duties on, see Customs Duties, § 33.

LACHES.

Affecting particular rights, remedies, or proceedings.

See Equity, §§ 67–87.

To restrain infringement of copyright, see Copyrights, § 80.

LAND.

See Public Lands.

LANDLORD AND TENANT.

Mining leases, see Mines and Minerals, §§ 73, 78.

IV. TERMS FOR YEARS.

(C) EXTENSIONS, RENEWALS, AND OPTIONS TO PURCHASE OR SELL.

§ 86. Lessors *held* entitled to treat their lessees' refusal to meet an offer to pay higher rent for renewal of the term as a definite refusal to avail themselves of an option contained in the

lease and to act accordingly.—Weber v. Grand Lodge of Kentucky, F. & A. M. (C. C. A.) 522.

§ 86. Lessees *held* not entitled to take advantage of the premature renting of the property by the lessor and his refusal to reopen negotiations after the lessees' refusal to meet an offer to pay higher rent for renewal.—Weber v. Grand Lodge of Kentucky, F. & A. M. (C. C. A.) 522.

IX. RE-ENTRY AND RECOVERY OF POSSESSION BY LANDLORD.

§ 288. The only issue in a landlord's forcible detainer suit is whether the relation existed and the tenant's term had expired.—Weber v. Grand Lodge of Kentucky, F. & A. M. (C. C. A.) 522.

§ 289. Ky. St. 1903, § 2294, providing for substituted service in forcible detainer, *held* not repealed by Act March 29, 1902, p. 272, c. 122, as re-enacting Civ. Code Prac. § 455.—Weber v. Grand Lodge of Kentucky, F. & A. M. (C. C. A.) 522.

§ 291. Under Civ. Code Prac. Ky. § 460, the only judgment in a landlord's action of forcible detainer, if for plaintiff, is for restitution and costs.—Weber v. Grand Lodge of Kentucky, F. & A. M. (C. C. A.) 522.

§ 291. Civ. Code Prac. Ky. § 460, relating to forcible entry and detainer, does not apply to a case where actual notice cannot be given the defendant.—Weber v. Grand Lodge of Kentucky, F. & A. M. (C. C. A.) 522.

LARCENY.

See Embezzlement; False Pretenses.

LAW OF THE CASE.

Decision on appeal, see Appeal and Error, § 1097.

LAW REPORTS.

Copyright of, see Copyrights, § 15.

LEASES.

See Landlord and Tenant.

LEGACIES.

See Wills.

LETTERS PATENT.

For inventions, see Patents.

LICENSES.

For making, use, or sale of patented articles, see Patents, §§ 214, 218.
For mining, see Mines and Minerals, §§ 73, 78.
Injuries to licensees, see Railroads, § 282.

LIENS.

Effect of proceedings in bankruptcy, see Bankruptcy, §§ 195, 205.

Particular classes of liens.
See Maritime Liens; Railroads, §§ 163–190.
Pledge, see Pledges.

§ 1. "Lien" defined.—In re Maher (D. C.) 997.

LIFE INSURANCE.

See Insurance.

LIFE PRESERVERS.

Penalties for failure to equip boat with life preservers, see Shipping, § 16.

LIGHTS.

Of vessels, see Collision, § 75.

LIMITATION.

Of claim of patent, see Patents, § 167.

LIMITATION OF ACTIONS.

See Adverse Possession.
Laches, see Equity, §§ 67–87.
To restrain infringement of copyright, see Copyrights, § 80.

II. COMPUTATION OF PERIOD OF LIMITATION.

(C) PERSONAL DISABILITIES AND PRIVILEGES.

§ 72. Under 2 Gen. St. 1895, N. J. p. 1975, § 4, an infant may maintain an action for a personal injury at any time before the expiration of two years after attaining majority, and the bringing of an action during minority, which is dismissed, does not start the statute to running.—Snare & Triest Co. v. Friedman (C. C. A.) 1.

(H) COMMENCEMENT OF ACTION OR OTHER PROCEEDING.

§ 127. An amendment to a petition setting up no new cause of action relates back to the commencement of the action and arrests limitations at that point.—Crotty v. Chicago Great Western Ry. Co. (C. C. A.) 593.

V. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

Procedure in federal court on motion to strike out plea of limitations, see Courts, § 347.

LIMITATION OF LIABILITY.

Of owner of vessel, see Shipping, §§ 205, 209.
Of vessel, see Shipping, §§ 140, 141.

LIS PENDENS.

Pendency of other action ground for abatement, see Abatement and Revival, § 12.

LITERARY PROPERTY.

See Copyrights.

§ 1. The common-law right of property in literary material is superseded by the copyright act (Rev. St. § 4956 [U. S. Comp. St. 1901, p. 3407]).—West Pub. Co. v. Edward Thompson Co. (C. C.) 833.

LOCATION.

Of mining claim, see Mines and Minerals, § 38.

LOGS AND LOGGING.

Cutting and removal of timber from public lands, see Public Lands, § 13.
Sale of stone and timber lands, see Public Lands, § 38.

§ 3. A complainant *held* entitled to enforce a contract for the reconveyance to him of timber trees deeded absolutely by him to defendant to secure the performance by him of another contract.—Chapman v. Yellow Poplar Lumber Co. (C. C. A.) 81.

LUMBER.

See Logs and Logging.

MACHINERY.

Liability of employer for defects, see Master and Servant, §§ 101–116.

MAIL.

See Post Office, § 18.

MARITIME LIENS.

I. NATURE, GROUNDS, AND SUBJECT-MATTER IN GENERAL.

(A) UNDER MARITIME LAW.

§ 14. Banks lending money to a "steamer and owners" without knowing, or making any effort to know, for what purpose it was expended, are not entitled to maritime liens on the general testimony of the master that the money was used in the operation of the boat.—The Avalon (D. C.) 696.

(B) UNDER STATUTORY PROVISIONS.

§ 19. Where material and supplies were bought for the purpose of being incorporated into a vessel, and were delivered by the seller to the vessel in a state the laws of which entitled him to a lien, and were so incorporated, the right to a lien is not affected by the fact that the contract of purchase was made in another state.—Berwind-White Coal Mining Co. v. Metropolitan S. S. Co. (C. C.) 491; American Trust Co. v. Same, Id.

§ 25. Under Act N. J. March 20, 1857 (P. L. p. 382), as amended by Act April 24, 1884 (P. L. p. 248), a contractor furnishing and installing machinery for a steamship is entitled to a lien for the amount paid to the owner of a patent on certain of the essential machinery, for the right to use the same, as a part of the cost of such machinery.—Berwind-White Coal Mining Co. v. Metropolitan S. S. Co. (C. C.) 493; American Trust Co. v. Same, Id.

II. CREATION, OPERATION, AND EFFECT.

§ 28. Where the owner of a disabled tug bought supplies and directed that they be charged to her, and afterwards approved such charge and obtained an extension of time for payment, he is estopped to deny the seller's right to a lien, although he may in fact have used the supplies on another vessel.—The Gracie Kent (D. C.) 893.

MASTER AND SERVANT.

Employer's liability act as denying equal protection of laws, see Constitutional Law, § 245.

I. THE RELATION.

(A) CREATION AND EXISTENCE.

§ 3. Two agreements executed on the same day, covering winter and summer seasons for performances by defendant, *held* to constitute a single contract.—Keith v. Kellermann (C. C.) 196.

§ 3. A contract for acrobatic performances by defendant *held* not objectionable for want of equitable mutuality.—Keith v. Kellermann (C. C.) 196.

§ 3. A contract for the performance by defendant of certain acrobatic feats during the summer season *held* unenforceable for want of mutuality of obligation.—Keith v. Kellermann (C. C.) 196.

§ 7. Where there was a definite contract of employment between plaintiff and defendant company, there could be no modification thereof so as to substitute others for defendant, in the absence of a meeting of minds.—United States Coal Co. v. Pinkerton (C. C. A.) 536.

II. SERVICES AND COMPENSATION.

(A) PERFORMANCE OF SERVICES.

Restraining divulgence or use of trade secrets, see Injunction, § 56.

§ 60. An employé may not utilize his knowledge of his employer's trade secret to his disadvantage, whether an agreement that he will not do so is expressed in the employment contract or only implied.—H. B. Wiggins Sons' Co. v. Cott-A-Lap Co. (C. C.) 150.

§ 60. An employé, on the termination of his employment, has no right to carry away records or documents containing trade secrets or other confidential matters relating to the master's business; and if he does so a court of equity will grant relief by requiring him to return the same and enjoining him from using or com-

municating their contents to others.—Union Switch & Signal Co. v. Sperry (C. C.) 926.

(B) WAGES AND OTHER REMUNERATION.

§ 80. Evidence *held* to warrant a finding that complainant understood its services to be for the benefit and on the credit of defendant company, and not on the credit of an indefinite committee of coal operators.—United States Coal Co. v. Pinkerton (C. C. A.) 536.

III. MASTER'S LIABILITY FOR INJURIES TO SERVANT.

(B) TOOLS, MACHINERY, APPLIANCES, AND PLACES FOR WORK.

§ 101. It is the duty of an employer to furnish appliances free from defects discoverable by ordinary care.—Miller v. Missouri, K. & T. Ry. Co. (C. C. A.) 567.

§ 111. The rule requiring the master to furnish reasonably safe and suitable machinery, etc., does not apply to defective cars and engines being removed to repair shops for repairs.—Southern Ry. Co. v. Lyons (C. C. A.) 557.

§ 116. In an action for injuries to a carpenter by the fall of a defective scaffold, defendant *held* not negligent in failing to provide suitable material.—Noble v. C. Crane & Co. (C. C. A.) 55.

§ 116. Ohio Rev. St. 1908, §§ 4238–18, 4238–19, 4238–o, 4238–o1, do not create a liability on the part of the master for injuries to a servant by the fall of a scaffold, in the absence of evidence of the master's negligence.—Noble v. C. Crane & Co. (C. C. A.) 55.

(E) FELLOW SERVANTS.

Power of Congress under commerce clause of United States Constitution to regulate relation of master and servant, see Commerce, §§ 5, 58.

§ 201. That the negligence of a fellow servant contributed to the injury of an employé does not relieve the master from liability where its own negligence was also a contributing cause.—Chicago Junction Ry. Co. v. King (C. C. A.) 372.

(F) RISKS ASSUMED BY SERVANT.

§ 208. The rule that an employé does not assume the risks arising from his employer's neglect in failing to provide proper appliances does not apply where the employé continues to use a defective appliance with knowledge thereof without notice to his employer.—Miller v. Missouri, K. & T. Ry. Co. (C. C. A.) 567.

§ 210. A railroad fireman accompanying a crippled engine to the shops *held* to have assumed the risk of injury by the absence of handholds previously attached to the cab which had been removed.—Southern Ry. Co. v. Lyons (C. C. A.) 557.

§ 216. Enhanced and extraordinary peril to a brakeman arising from the conductor's negligence is not a risk assumed by the brakeman.—Crotty v. Chicago Great Western Ry. Co. (C. C. A.) 593.

§ 217. Where an employé handles defective appliances without complaint to the employer, and the defects are known to him or plainly observable, he assumes the risk.—Southern Ry. Co. v. Lyons (C. C. A.) 557.

(G) CONTRIBUTORY NEGLIGENCE OF SERVANT.

§ 231. Intestate, run down and killed by a following train while operating a gasoline motor car, *held* entitled to assume that following trains would exercise due caution not to run him down.—Yeandle v. Pennsylvania R. Co. (C. C. A.) 938.

§ 234. The protection given to railroad employés by the safety appliance act (Act March 2, 1893, c. 196, § 2, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]), prohibiting the moving of cars without automatic couplers is not restricted to employés when engaged in coupling or uncoupling cars, but extends to an employé injured by its violation while he was repairing a defective coupling.—Chicago Junction Ry. Co. v. King (C. C. A.) 372.

§ 248. Where a brakeman is injured by the supervening negligence of the conductor the master is liable for the injuries under a statute attributing the conductor's negligence to the master.—Crotty v. Chicago Great Western Ry. Co. (C. C. A.) 593.

(H) ACTIONS.

Amendment to conform to proofs, see Pleading, § 237.
Assumptions by judge as to facts, see Trial, § 191.
Expert testimony, see Evidence, § 539.
Venue of action against railroad company, see Railroads, § 22.

§ 276. A verdict for plaintiff in an action for injuries to a servant *held* not objectionable on the theory that the manner in which plaintiff claimed he was injured was contrary to natural laws.—Pennsylvania Co. v. Whitney (C. C. A.) 572.

§ 285. In an action for injuries to a railroad brakeman by a defective handhold, whether the handhold came loose by reason of a latent defect not discoverable by the exercise of ordinary care or by reason of the decayed condition of the wood which would have been discovered by the exercise of such care *held* for the jury.—Miller v. Missouri, K. & T. Ry. Co. (C. C. A.) 567.

§ 289. The question of the contributory negligence of an employé *held* under the evidence properly submitted to the jury in an action for his injury against the master.—Chicago Junction Ry. Co. v. King (C. C. A.) 372.

§ 289. In an action for death of a railroad employé by being run into by a following train, whether intestate was negligent *held* for the jury.—Yeandle v. Pennsylvania R. Co. (C. C. A.) 938.

§ 291. An instruction *held* not objectionable as permitting a recovery on evidence introduced by defendant constituting a variance, in the absence of any claim by defendant that it was misled thereby.—Pennsylvania Co. v. Whitney (C. C. A.) 572.

MATERIALITY.

Of evidence in civil actions, see Evidence, § 143.
Of evidence in criminal prosecutions, see Criminal Law, § 396.

MAXIMS.

Of equity, see Equity, § 65.

MEASURE OF DAMAGES.

See Damages, § 106.

MINES AND MINERALS.

I. PUBLIC MINERAL LANDS.

(B) LOCATION AND ACQUISITION OF CLAIMS.

§ 38. The burden of proof that an apex vein dips and descends to and underneath another claim so as to defeat the presumptive ownership in the owner of the surface of the claim underneath, where the claimed ore is located, rests on him who asserts it.—Keely v. Ophir Hill Consol. Mining Co. (C. C. A.) 601.

§ 38. Under a statute for the determination of adverse mining claims, a judgment as between the owners of neighboring claims, who may be entitled to extralateral rights, is only conclusive as to their rights concerning the claims actually discovered.—Keely v. Ophir Hill Consol. Mining Co. (C. C. A.) 601.

II. TITLE, CONVEYANCES, AND CONTRACTS.

(B) CONVEYANCES IN GENERAL.

§ 54. Fraudulent representations and concealment on the part of joint purchasers of property by which a complainant was defrauded *held* to entitle him to relief against the property in the hands of one who had knowledge of and assisted in the fraud.—Cunningham v. Pettigrew (C. C. A.) 335.

(C) LEASES, LICENSES, AND CONTRACTS.

§ 73. An oil and gas lease on agricultural land, providing for a return in case the lease was detrimental to a sale of the place, *held* not to require a rescission to enable the lessor to sell his oil and gas rights to greater advantage.—Duntley v. Anderson (C. C. A.) 391.

§ 73. A lessor of oil and gas rights, while using gas under the lease, *held* not entitled to a rescission thereof in equity as detrimental to a sale of his property.—Duntley v. Anderson (C. C. A.) 391.

§ 78. Use of gas by a lessor under an oil and gas lease *held* a waiver of his right to forfeit the lease because of the lessee's failure to sink a well on the premises within twelve months.—Duntley v. Anderson (C. C. A.) 391.

MISREPRESENTATION.

See False Pretenses.
By insured, see Insurance, § 285.

MODIFICATION.

Of contract of employment, see Master Servant, § 7.

MONEY ORDERS.

See Post Office, § 18.

MONOPOLIES.

II. TRUSTS AND OTHER COMBINATIONS IN RESTRAINT OF TRADE.

§ 8. "Monopoly" defined.—National Fireproofing Co. v. Mason Builders' Ass'n (C. C. A.) 259.

§ 12. An agreement between a mason builders' association and members of bricklayers' unions in the city of New York, prohibiting the subletting of inside brickwork, fireproofing, etc., *held* not invalid as creating a monopoly, within the New York anti-monopoly law.—National Fireproofing Co. v. Mason Builders' Ass'n (C. C. A.) 259.

§ 24. A person injured by a violation of the federal anti-trust act can only sue for threefold damages; the injunctive remedy being available to the government only.—National Fireproofing Co. v. Mason Builders' Ass'n (C. C. A.) 259.

§ 28. A person injured by a violation of the federal anti-trust act can only sue for threefold damages; the injunctive remedy being available to the government only.—National Fireproofing Co. v. Mason Builders' Ass'n (C. C. A.) 259.

MORTGAGES.

Cancellation of deed of trust in consideration for which was losses in gambling transaction, see Gaming, § 41.

Mortgages by or to particular classes of persons.
See Corporations, § 482; Railroads, § 163.
Foreign corporations, see Corporations, § 656.

Mortgages of particular species of, or estates or interest in, property.
Of railroads, see Railroads, §§ 163–190.
Personal property, see Chattel Mortgages.

I. REQUISITES AND VALIDITY.

Mortgage to secure losses in gambling transaction, see Gaming, § 2.

(D) VALIDITY.

Cancellation of deed of trust given for gambling consideration, see Gaming, § 41.

MOTIONS.

For particular purposes or relief.

Direction of verdict in civil actions, see Trial, § 169.
Dismissal or nonsuit on trial, see Trial, § 165.
Presentation of objections for review, see Appeal and Error, §§ 209, 216.
Quashing indictment or information, see Indictment and Information, §§ 137, 139.
Remand of cause removed from state court, see Removal of Causes, § 107.

MOVING PICTURE SHOWS.

Copyright of pictures, see Copyrights, § 9.
Copyright of pictures, infringement, see Copyrights, § 55.

MUNICIPAL CORPORATIONS.

Regulation of railroads, see Railroads, §§ 229, 254.
Street railroads, see Street Railroads.

II. GOVERNMENTAL POWERS AND FUNCTIONS IN GENERAL.

§ 57. Public and private business of municipalities defined.—City of Winona v. Botzet (C. C. A.) 321; Same v. Nichols, Id.

§ 60. A city ordinance requiring the city's finance committee to negotiate all loans could not prevent a subsequent city counsel from authorizing the city treasurer with the approval of the finance committee to borrow money from the city in anticipation of taxes.—Citizens' Sav. Bank v. City of Newburyport (C. C. A.) 766; City of Newburyport v. Citizens' Sav. Bank, Id.

VII. CONTRACTS IN GENERAL.

§ 254. A resolution by a city council annulling a prior contract for lighting *held* a breach entitling the opposite parties to sue at once.—Block v. City of Meridian, Mississippi (C. C. A.) 516.

XII. TORTS.

(A) EXERCISE OF GOVERNMENTAL AND CORPORATE POWERS IN GENERAL.

§ 733. Blowing steam whistle at waterworks to notify employés of the time of day *held* an exercise by a city of its power to maintain waterworks and care for its own property.—City of Winona v. Botzet (C. C. A.) 321; Same v. Nichols, Id.

(B) ACTS OR OMISSIONS OF OFFICERS OR AGENTS.

§ 745½. Cities are not liable for damages for the acts and omissions of their officers and agents in the exercise of a public business, but are liable for the negligent acts of their officers and agents within the scope of their authority in the exercise of the private business of municipalities.—City of Winona v. Botzet (C. C. A.) 321; Same v. Nichols, Id.

§ 747. The municipal power to construct, maintain, and operate waterworks is a private or business power, making a city liable for damages caused by the negligent acts of its officers or agents in the exercise of such power.—City of Winona v. Botzet (C. C. A.) 321; Same v. Nichols, Id.

(C) DEFECTS OR OBSTRUCTIONS IN STREETS AND OTHER PUBLIC WAYS.

§ 755. Damages sustained by injuries to persons as well as to property are recoverable for failure of a city to exercise reasonable care to keep its streets and bridges safe for travelers.—City of Winona v. Botzet (C. C. A.) 321; Same v. Nichols, Id.

§ 764. Duty of a city to keep its bridge or street reasonably safe extends to acts outside the bridge or street that render it unsafe.—City of Winona v. Botzet (C. C. A.) 321; Same v. Nichols, Id.

(E) CONDITION OR USE OF PUBLIC BUILDINGS AND OTHER PROPERTY.

§ 847. The duty of a city to so use its property as to do no unnecessary injury to others extends to effects produced by the use beyond the limits of its property.—City of Winona v. Botzet (C. C. A.) 321; Same v. Nichols, Id.

§ 852. A city by blowing a steam whistle near a bridge to notify employés of the time of day, whereby horses on the bridge were frightened, *held* to fail in its duty to use reasonable care to keep the bridge reasonably safe for travelers.—City of Winona v. Botzet (C. C. A.) 321; Same v. Nichols, Id.

XIII. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.

(C) BONDS AND OTHER SECURITIES, AND SINKING FUNDS.

§ 908. A vote of the city's finance committee authorizing the mayor and treasurer to negotiate notes of the city authorized by a prior vote of the council *held* to supersede a prior general vote, so that notes executed by the mayor and treasurer and approved by the mayor for the finance committee were valid municipal obligations.—Citizens' Sav. Bank v. City of Newburyport (C. C. A.) 766; City of Newburyport v. Citizens' Sav. Bank, Id.

§ 948. That certain notes issued by a city constituted an overissue *held* no defense as against a bona fide holder.—Citizens' Sav. Bank v. City of Newburyport (C. C. A.) 766; City of Newburyport v. Citizens' Sav. Bank, Id.

§ 948. A purchaser of notes of a city *held* not bound to follow the proceeds of a check given therefor to see that they were not applied to the payment of a note of the city which constituted an illegal overissue.—Citizens' Sav. Bank v. City of Newburyport (C. C. A.) 766; City of Newburyport v. Citizens' Sav. Bank, Id.

§ 948. A bona fide holder of a city's negotiable paper *held* not required to ascertain that a warrant had issued in accordance with a city

ordinance prohibiting the payment of money except on written order of the mayor countersigned by the clerk, where there is no corresponding statutory provision.—Citizens' Sav. Bank v. City of Newburyport (C. C. A.) 766; City of Newburyport v. Citizens' Sav. Bank, Id.

NATIONAL BANKS.

See Banks and Banking, § 256.

NATURALIZATION.

See Aliens, §§ 68, 69.

NAVIGABLE WATERS.

See Wharves.

II. LANDS UNDER WATER.

Conveyance to Indians, see Indians, § 12.

§ 36. Land above the line which in the surveys of public lands of the United States constituted the boundary between land and navigable water, prima facie belongs to the United States, and not to the state, as the shores and bed of navigable waters.—Corrigan v. Brown (C. C.) 477.

§ 36. Lands boardering on navigable waters *held* land of the United States, and not of the state, as the shore of navigable waters.—Corrigan v. Brown (C. C.) 477.

NAVIGATION.

Rules for preventing collisions, see Collision, § 16.

NEGLIGENCE.

Causing death, see Death, §§ 31–57.

By particular classes of persons.

See Carriers, § 317; Municipal Corporations, §§ 733–852; Railroads, §§ 229–282.

Employers, see Master and Servant, §§ 101–291.

Pilot, see Pilots, § 16.

Condition or use of particular species of property, works, machinery, or other instrumentalities.

See Bridges, §§ 35, 37; Railroads, §§ 229–282.

I. ACTS OR OMISSIONS CONSTITUTING NEGLIGENCE.

(C) CONDITION AND USE OF LAND, BUILDINGS, AND OTHER STRUCTURES.

§ 29. One who maintains a dangerous structure or appliance, whether on his own land or lawfully on a public highway, is under duty to use reasonable care to protect from injury, not only those of mature age who are bound to use their faculties to protect themselves, but also children of tender years who may without their fault become exposed to the danger.—Snare & Triest Co. v. Friedman (C. C. A.) 1.

§ 55. A contractor which piled steel beams in a street, where it had a right to do so, *held* under duty to children, who with its knowledge were accustomed to play in the street, to keep the piles in a reasonably secure condition to prevent the beams from falling and injuring such children, and liable for an injury to a child resulting from its failure to perform such duty.—Snare & Triest Co. v. Friedman (C. C. A.) 1.

II. PROXIMATE CAUSE OF INJURY.

§ 56. The blast of a whistle *held* the proximate cause of an injury, where it frightened horses and they ran away.—City of Winona v. Botzet (C. C. A.) 321; Same v. Nichols, Id.

§ 58. "Proximate cause" defined.—City of Winona v. Botzet (C. C. A.) 321; Same v. Nichols, Id.

§ 62. "Intervening cause" defined.—City of Winona v. Botzet (C. C. A.) 321; Same v. Nichols, Id.

III. CONTRIBUTORY NEGLIGENCE.

Of passenger, see Carriers, §§ 331, 344.
Of servant, see Master and Servant, §§ 231–248.

(A) PERSONS INJURED IN GENERAL.

§ 66. Notice or knowledge and appreciation of danger are indispensable to an assumption of the risk of it.—City of Winona v. Botzet (C. C. A.) 321; Same v. Nichols, Id.

(B) CHILDREN AND OTHERS UNDER DISABILITY.

§ 85. A child 4½ years old, who was injured while playing on a pile of steel beams in a street, could not, by reason of her age, be charged with contributory negligence, or with being a trespasser.—Snare & Triest Co. v. Friedman (C. C. A.) 1.

(C) IMPUTED NEGLIGENCE.

§ 93. The negligence of a driver may not be imputed to a passenger who is riding with him without charge.—City of Winona v. Botzet (C. C. A.) 321; Same v. Nichols, Id.

IV. ACTIONS.

(B) EVIDENCE.

§ 121. In an action for injuries by the breaking of a rope, defendant's evidence *held* to rebut any presumption of negligence in failing to provide a safe rope raised by the doctrine res ipsa loquitur.—Nebraska Bridge Supply & Lumber Co. v. Jeffery (C. C. A.) 609.

§ 122. The burden of proof to establish contributory negligence is on defendant.—City of Winona v. Botzet (C. C. A.) 321; Same v. Nichols, Id.

§ 125. In an action for damages caused by frightening horses on the highway by the blast of a whistle, evidence that gentle horses had been frightened before by blasts of the whistle under similar circumstances was competent.—

City of Winona v. Botzet (C. C. A.) 321; Same v. Nichols, Id.

(C) TRIAL, JUDGMENT, AND REVIEW.

§ 136. It is only when evidence of contributory negligence is so clear that the court would not sustain a finding to the contrary that it is his duty to instruct the jury that plaintiff was guilty of contributory negligence.—City of Winona v. Botzet (C. C. A.) 321; Same v. Nichols, Id.

§ 136. It is only when the material facts are so clearly established that but one finding could be sustained that the question of negligence is for the court; otherwise it is for the jury.—City of Winona v. Botzet (C. C. A.) 321; Same v. Nichols, Id.

§ 136. Where there is uncertainty as to negligence or contributory negligence, the question is for the jury whether the uncertainty is from a conflict in the testimony or because fair-minded men may draw different conclusions therefrom.—Miller v. Missouri, K. & T. Ry. Co. (C. C. A.) 567.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

NEGROES.

Civil rights, see Civil Rights, § 1.
Right of negro to resort to federal court in action to recover damages for assault committed by white citizen of same state under color of executive authority, see Courts, § 282.

NEWLY DISCOVERED EVIDENCE.

Ground for new trial in civil actions, see New Trial, § 108.

NEW TRIAL.

Costs, see Costs, §§ 254, 264.

II. GROUNDS.

(H) NEWLY DISCOVERED EVIDENCE.

§ 108. Newly discovered evidence *held* insufficient to justify the granting of a new trial of an action tried before the court, which, if introduced, would not have required different findings.—Boardman v. McKinnon (C. C.) 496.

NONSUIT.

On trial, see Trial, § 165.

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Promissory notes, see Bills and Notes.

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Of withdrawal of partner from firm, see Partnership, § 241.

NUISANCE.

I. PRIVATE NUISANCES.

(A) NATURE OF INJURY, AND LIABILITY THEREFOR.

§ 6. Where the use of a legislative grant does not necessarily create a nuisance, but the nuisance results from the method of the use, the grant is no defense to an action because of the nuisance or its effects.—City of Winona v. Botzet (C. C. A.) 321; Same v. Nichols, Id.

NUNC PRO TUNC.

Amendment of declaration of intention to become a citizen, see Aliens, § 68.

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Of proof, see Trial, § 46.

OFFICERS.

Embezzlement, see Embezzlement.
False personation of United States officer, see False Pretenses, § 19.

Particular classes of officers.

See Receivers.
Bank officers, see Banks and Banking, § 256.
Corporate officers, see Corporations, § 312.
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OILS.

Lease of oil lands, see Mines and Minerals, §§ 73, 78.

OPINION EVIDENCE.

In civil actions, see Evidence, § 539.

OPINIONS.

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OPTIONS.

To purchase or sell demised premises, see Landlord and Tenant, § 86.

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At trial, see Trial, § 62.

ORDERS.

Review of appealable orders, see Appeal and Error.

OVERT ACTS.

See Conspiracy, § 27.

PAROL EVIDENCE.

In civil actions, see Evidence, §§ 397–459.

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Character ground of jurisdiction, see Courts, §§ 303–322.
In discovery, see Discovery, § 17.
In equitable proceeding, see Equity, § 115.
Interpleading, see Interpleader.
Parties entitled to allege error, see Appeal and Error, § 878.
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To bill or note, see Bills and Notes, § 123.

III. NEW PARTIES AND CHANGE OF PARTIES.

Bondholders in action to foreclose corporation mortgage, see Corporations, § 482.
By railroad bondholders in suit by trustee to foreclose mortgage, see Railroads, § 186.
In action by railroad company against interstate commerce commission, see Commerce, § 93.

PARTNERSHIP.

See Associations.
Adjudication against partnership in bankruptcy proceedings, see Bankruptcy, § 51.
Claims against bankrupt partnership and individual partners, see Bankruptcy, § 309.
Exemptions to bankrupt partners, see Bankruptcy, § 397.
Partners as persons who may become voluntary bankrupts, see Bankruptcy, § 42.

I. THE RELATION.

(A) CREATION AND REQUISITES.

§ 1. The test of a partnership is whether the parties are jointly interested as principals and may bind each other within the scope of the enterprise.—Keith v. Kellermann (C. C.) 196.

§ 9. An agreement between a manager and an acrobatic performer *held* a contract of employment and not a partnership.—Keith v. Kellermann (C. C.) 196.

IV. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

(A) REPRESENTATION OF FIRM BY PARTNER.

§ 146. Notes given a retiring partner for his interest by a remaining partner individually *held* not debts of the firm.—In re Stoddard Bros. Lumber Co. (D. C.) 190.

(B) NATURE AND EXTENT OF FIRM LIABILITIES.

Parol or extrinsic evidence, see Evidence, § 459.

(D) ACTIONS BY OR AGAINST FIRMS OR PARTNERS.

§ 217. A prima facie case that a note signed by the individual members of a firm was their individual debt, made by the instrument, would control, unless overcome by clear and convincing evidence.—In re Stoddard Bros. Lumber Co. (D. C.) 190.

V. RETIREMENT AND ADMISSION OF PARTNERS.

§ 241. The principle underlying the responsibility of a partner, who retires without publishing proper notice, to subsequent creditors of the firm, is that of estoppel.—In re Stoddard Bros. Lumber Co. (D. C.) 190.

§ 241. An unknown or dormant partner need not give notice of his withdrawal from the firm.—In re Stoddard Bros. Lumber Co. (D. C.) 190.

§ 241. Subsequent creditors of a firm *held* not entitled to assert the responsibility of a former partner, who did not publish notice of his retirement, unless they had knowledge of his former membership and were misled to extend credit to the firm on the faith thereof.—In re Stoddard Bros. Lumber Co. (D. C.) 190.

PASSENGERS.

See Carriers, §§ 317–344.

PASTE.

Duties on, see Customs Duties, §§ 25, 37.

PATENTS.

I. SUBJECTS OF PATENTS.

§ 6. The mere function or operation of a machine or other device, as distinguished from the machine or device itself, is not patentable.—Denning Wire & Fence Co. v. American Steel & Wire Co. of New Jersey (C. C. A.) 793.

§ 6. While the principle of a machine or device and the mode of its operation are required to be set out in the specification of a patent therefor, they cannot be made the subject of a patent, but only the machine or device itself is patentable.—Denning Wire & Fence Co. v. American Steel & Wire Co. of New Jersey (C. C. A.) 793.

§ 6. The phrase "functions of a machine," as used in the patent law, defined.—Denning Wire & Fence Co. v. American Steel & Wire Co. of New Jersey (C. C. A.) 793.

§ 7. A patent cannot cover generally any and every means or method for producing a given result.—Denning Wire & Fence Co. v. American Steel & Wire Co. of New Jersey (C. C. A.) 793.

II. PATENTABILITY.

(A) INVENTION.

§ 22. The substitution of a cam for a toggle joint in a patented mechanical combination does not avoid infringement, where the two have the same purpose in the combination and effect it in substantially the same manner.—Westinghouse Electric & Mfg. Co. v. Cutter Electric & Mfg. Co. (C. C. A.) 634.

§ 26. The combination of a well-known and unpatentable idea with a particular form of

device described in an expired patent cannot be made the basis for a valid patent for a new term, when no new use or device is shown except in that the particular combination has never been made between exactly the same elements before, and when the same use has been shown in connection with equivalent devices differing only in immaterial respects.—Jacobs Mfg. Co. v. T. R. Almond Mfg. Co. (C. C.) 134.

(B) NOVELTY.

§ 39. The validity of a patent for a product or structure is not affected by the process or means by which it is made or whether it is made by hand or by machinery.—American Steel & Wire Co. v. Denning Wire & Fence Co. (C. C. A.) 413.

§ 42. A new combination of old elements or devices whereby a new and useful product or an old product is attained in a more efficient and economical way may be protected by a patent.—Denning Wire & Fence Co. v. American Steel & Wire Co. of New Jersey (C. C. A.) 793.

(D) ANTICIPATION.

§ 51. The use of a composition for lining pulp digesters in the practical lining of digesters for use in a number of different plants by persons to whom it had been disclosed without secrecy was a public use, which, if continued for more than two years, would bar a patent whether such use was known to the inventor or not, unless the delay was for the purpose of perfecting the invention.—Hentschel v. Carthage Sulphite Pulp Co. (C. C.) 114.

IV. APPLICATIONS AND PROCEEDINGS THEREON.

§ 112. Irregularities in the Patent Office in relation to the issuance of an original or reissued patent must not only be pleaded but established affirmatively by full and satisfactory proof to defeat the patent or reissue.—Peter T. Coffield & Son v. Spears & Riddle (C. C.) 641.

VII. REISSUES.

§ 136. The remedy for a mistaken limitation in the claims of a patent is by a reissue and not by construction.—Dey Time-Register Co. v. W. H. Bundy Recording Co. (C. C.) 807.

IX. CONSTRUCTION AND OPERATION OF LETTERS PATENT.

(A) IN GENERAL.

§ 157. No patented invention can be practically or fairly understood or explained if the language of the claims is entirely disassociated from the specification, and the claims and specification should be read together.—1900 Washer Co. v. Cramer (C. C. A.) 629.

§ 157. General rules for the construction of patents stated.—Denning Wire & Fence Co. v. American Steel & Wire Co. of New Jersey (C. C. A.) 793.

(B) LIMITATION OF CLAIMS.

§ 167. Claims of a patent are to be construed in the light of the specifications, and while, when plain and specific, they cannot be extended, they may be limited thereby, and a claim is not to be defeated because it is broad in its language when it is limited by the specifications and is susceptible of limitation.—Dey Time-Register Co. v. W. H. Bundy Recording Co. (C. C.) 807.

X. TITLE, CONVEYANCES, AND CONTRACTS.

(C) LICENSES AND CONTRACTS.

§ 214. Evidence considered, and *held* not to entitle a licensor to a forfeiture and cancellation in equity of a license contract under a patent.—Critcher v. Linker (C. C.) 653.

§ 214. A licensor under a patent *held* not entitled to a forfeiture of the license for failure of the licensees to make periodical reports thereunder.—Critcher v. Linker (C. C.) 653.

§ 218. A license contract under a patent construed in respect to royalties.—Critcher v. Linker (C. C.) 653.

XII. INFRINGEMENT.

(A) WHAT CONSTITUTES INFRINGEMENT.

§ 226. Patents cover the means employed to effect results, and to be an infringer one must not only reach the same result, but he must reach it by the same or substantially equivalent means.—Dey Time-Register Co. v. W. H. Bundy Recording Co. (C. C.) 807.

§ 229. The mere transposition of some of the steps in a patented process does not avoid infringement, where neither the principle, mode of operation, nor result is changed.—Malignani v. Germania Electric Lamp Co. (C. C.) 299.

§ 234. The inventor of a practical working machine will not be *held* to have infringed a prior patent for an unsuccessful machine, which in fact added nothing substantial to the art, merely because its claims are broad enough to cover the successful structure.—Lovell v. Seybold Mach. Co. (C. C. A.) 288.

§ 237. The term "mechanical equivalents," as used in the patent law, defined.—Denning Wire & Fence Co. v. American Steel & Wire Co. of New Jersey (C. C. A.) 793.

§ 237. The replacing of a coil spring in patented machine by a flat or leaf spring which performs the same function in substantially the same way is merely the substitution of a mechanical equivalent and does not avoid infringement.—Peter T. Coffield & Son v. Spears & Riddle (C. C.) 641.

(C) SUITS IN EQUITY.

Persons bound by decree, see Judgment, § 675.

§ 288. The fact that a patent had but 48 days to run at the time of the commencement of a suit to enjoin its infringement does not

deprive a court of equity of jurisdiction.—American Sulphite Pulp Co. v. Crown-Columbia Pulp & Paper Co. (C. C.) 140.

§ 288. Allegations in a bill for infringement showing that complainant derives his benefit from the patent through the granting of licenses does not deprive equity of jurisdiction on the ground that he has an adequate remedy at law, where it also shows that there is no established license fee for all users and prays an accounting of profits.—American Sulphite Pulp Co. v. Crown-Columbia Pulp & Paper Co. (C. C.) 140.

§ 294. An injunction denied to the defendant in a pending suit for infringement of a patent to restrain complainant from sending circulars to defendant's customers giving notice of the suit, and warning them against contributory infringement, where the statements made in such circulars were true, and there was no evidence of bad faith.—Mitchell v. International Tailoring Co. (C. C.) 145.

§ 297. A preliminary injunction may be granted against infringement of a patent, although unadjudicated, by defendants, who are clearly shown to have fraudulently appropriated the invention from the patentee, and sought to patent it as their own.—Weston Electrical Instrument Co. v. American Instrument Co. (C. C.) 659.

§ 298. A preliminary injunction against infringement of a patent will not be granted, when the question of infringement is in serious doubt.—Scott v. Lazell (C. C.) 661.

§ 303. Whether the reservation by the manufacturer of a patented article of the right to fix the price at which such article may be sold at retail follows such article after it has been once sold to an actual user, is a question which will not be determined on a motion for a preliminary injunction.—National Phonograph Co. v. Walker (C. C.) 146.

§ 310. A patent will not be *held* invalid, on demurrer to a bill for its infringement, unless the court is entirely satisfied from its face that by no possible proof can patentable invention and validity be made to appear.—Neidich v. Edwards (C. C.) 424.

§ 310. A bill for infringement *held* demurrable for multifariousness and other defects.—Electric Goods Mfg. Co. v. Benjamin Electric Mfg. Co. (C. C.) 832.

§ 317. A bill for infringement filed before the expiration of the patent, showing that defendant has in its possession and is using infringing structures, states grounds for the granting of a perpetual injunction against their further use even after the patent has expired.—American Sulphite Pulp Co. v. Crown-Columbia Pulp & Paper Co. (C. C.) 140.

§ 325. Where, in a suit in equity on several patents, the complainant succeeds as to some and is defeated as to others, the costs are in the discretion of the court, and will be awarded according to the circumstances of the particular case.—Draper Co. v. American Loom Co. (C. C.) 298.

XIII. DECISIONS ON THE VALIDITY, CONSTRUCTION, AND INFRINGEMENT OF PARTICULAR PATENTS.

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3,479. Electric railway signal, cited..... 294

1884.

8,460. Electric signal system for railways, cited..... 420

GERMAN.

70,477. Composition for digester linings, cited 116

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11,922. Carving machine, cited.....651, 652
58,704. Drill-chuck, cited..... 138
82,571. Drill-chuck, cited.....138, 139
83,349. Drill-chuck, cited..... 138
143,529. Electric railway signal, cited.... 294
144,097. Faucet, cited..... 112
153,836. Carving machine, cited..... 651
164,227. Electric railway signal, cited.... 294
164,228. Electric railway signal, cited.... 294
168,059. Electric railway signal, cited.... 274
173,152. Drill-chuck, cited..... 136
182,015. Globe valves, cited..... 112
186,863. Valves for hydraulic elevators, cited 112
190,797. Tracing machine, cited..... 651
200,871. Water regulators, cited..... 112
203,571. Drill-chuck, cited..... 138
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216,661. Water faucet, cited..... 112
235,331. Barb-wire machine, cited..... 801
237,129. Machine for winding barbed fence wire, cited..... 801
246,737. Engraving machine, cited..... 651
249,735. Barbing-wire machine, cited..... 800
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251,867. Electric railway signal, cited.... 294
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275,618. Engraving machine, cited..... 651
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299,888. Water-closet valve, cited..... 112
326,317. Manufacture of artificial stone or marble, cited..... 118
332,990. Machine for cutting type punches, cited..... 652
350,790. Electric signal system for railways, cited..... 420
354,148. Stop and waste cock, cited..... 112
360,638. Signaling apparatus, cited..... 295
362,409. Electric signal system for railways, cited..... 420
382,828. Thill coupling, cited..... 826
384,995. Carving machine, cited..... 651
385,034. Electric signal system for railways, cited..... 420
387,595. Engraving machine, cited..... 651
394,710. Carving machine, cited..... 651
405,896. Electric railway signal system, cited 418
409,695. Carving machine, cited..... 651
412,789. Hydraulic valve mechanism, cited 112

414,844. Wire fence machine, cited..... 803
418,377. Cock, cited..... 112
430,263. Electric signal system for railways, cited..... 420
453,230. Workmen's time-recorder, cited.. 822
454,115. Pneumatic wheel tires, held not infringed 831
455,406. Wire fence machine, cited..... 803
463,836. Carving machine, cited..... 652
468,787. Electric signal system for railways, cited..... 418
470,813. Electric Railway signal construed, held not anticipated and valid. Claim 1, as so construed held infringed 290, 291
479,138. Electric signal system for railways, cited..... 418
480,934. Digester lining, cited..... 117
485,810. Paper-pulp digester, cited..... 117
490,877. Book trimming machine construed and held not infringed..... 289
493,774. Faucet, cited..... 112
497,408. Electric railway signal system, construed and held not anticipated, valid and not infringed 413, 415
497,482. Electrical resistance, cited..... 660
504,528. Automatic circuit breaker, cited.. 636
517,680. Machine for engraving metal blanks, held not anticipated, valid and infringed..... 647
528,400. Composition for digester linings, cited 117, 118
529,809. Bolster for railway cars, cited... 110
534,858. Workman's time-recorder, cited.. 823
537,693. Process of evacuating incandescent lamps held infringed..... a 299
543,416. Time-recording apparatus, cited.. 821
548,977. Valve, cited..... 112
552,232. Workman's time-recorder, cited.. 822
556,133. Self-closing cock or faucet, cited 112
558,787. Square-mesh fence machine, cited 802
558,956. Pneumatic wheel tires, held not infringed 831
561,193. Woven wire fencing, held void for lack of invention..... 413
571,023. Tank supply valve, cited..... 112
573,530. Ball-cock valve, cited..... 112
574,116. Bolster for railway cars, held void for lack of invention.....109, 110
574,616. Mold for casting rolls, construed and held not infringed..... 422
575,187. Sanding machine, held void for lack of patentable novelty and invention 640
577,639. Machine for making wire fence, held not anticipated, valid and infringed 794
586,996. Valve mechanism for water faucets, held valid and infringed.. 110
591,561. Thill coupling, held void for anticipation 825, 826
611,907. Reinforced concrete girder construed and held not infringed 287, 288
624,460. Angle clamp for glass plates, held valid and infringed..... 830
630,146. Washing machine, cited..... 632
633,772. Automatic circuit breaker, claims 2 and 5, held not anticipated valid and infringed..... 634
640,013. Method of assimilating printed and typewritten work, held not void on its face..... 425
654,181. Calculating machine, cited..... 823
662,013. Water pressure regulator, cited.. 112
709,014. Drill-chuck, construed and held void for lack of invention, Claim 3, also held not infringed if conceded validity.....134, 135
719,216. Composition for digester linings, held void for anticipation and prior use, also held infringed.. 114
726,546. Workman's time-recorder, cited.. 821
734,907. Book trimming machine construed and held not infringed....289, 290
759,848. Ribbon mechanism for calculating machines, cited..... 823
772,405. Wire fence machine, cited..... 804
781,635. Combination underwear for women, cited..... 654
784,695. Insulating lining, cited..... 427
786,011. Time-recorder, claims 35, 54, 60–64, construed and held not infringed 807
788,305. Wire fence machine, cited..... 794
806,779. Water motor, held not anticipated, valid and infringed..... 641
829,631. Washing machine, held not anticipated, valid and infringed..... 630
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856,992. Water motor, cited..... 645
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9,485. Barbing-wire machine, cited..... 800
12,719. Water motor, held not anticipated, valid and infringed..... 641

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For violation of regulations by carrier, see Carriers, § 37.

PERFORMANCE.

Of contract, see Sales, §§ 175, 177.

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Exemption of vessels from particular risks, see Shipping, § 141.

PERJURY.

I. OFFENSES AND RESPONSIBILITY THEREFOR.

§ 13. Under Act Cong. June 3, 1878, c. 151, § 2, 20 Stat. 89 (U. S. Comp. St. 1901, p. 1545), relating to stone and timber entries, an indictment charging that defendant induced an entryman to falsely swear in his original application that he had personally examined the land and

had personal knowledge that it was unfit for cultivation *held* not to state an offense.—Robnett v. United States (C. C. A.) 778.

II. PROSECUTION AND PUNISHMENT.

§ 34. A conviction of perjury may be sustained on the testimony of one witness and corroborating circumstances.—Hashagen v. United States (C. C. A.) 396.

§ 34. In a prosecution for perjury evidence *held* to sustain a verdict finding that the testimony alleged to have been perjured was false.—Hashagen v. United States (C. C. A.) 396.

PERSONAL INJURIES.

Particular causes or means of injury.

See Negligence.

Operation of railroads, see Railroads, § 282.

Particular classes of persons injured.

Employé, see Master and Servant, §§ 101–291.
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See Wharves.

PILOTS.

§ 16. A pilot *held* not chargeable with negligence in moving a vessel into a slip which rendered him liable for a collision.—The Sylfid (D. C.) 995.

PLEA.

In civil actions, see Equity, §§ 196, 198.

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Allegations in pleading affecting right to remove cause to federal court, see Removal of Causes, § 25.
Allegations of diverse citizenship to confer federal jurisdiction, see Courts, § 322.
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Allegations as to particular facts, acts, or transactions.

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For causing death, see Death, § 47.
For infringement of patent, see Patents, § 310.
Indictment or criminal information or complaint, see Indictment and Information.
To compel accounting, see Account, § 17.

I. FORM AND ALLEGATIONS IN GENERAL.

§ 34. A general averment in a pleading is always controlled and limited by specific allegations on the same subject-matter.—United States v. Union Pac. R. Co. (C. C. A.) 65.

II. DECLARATION, COMPLAINT, PETITION, OR STATEMENT.

In action to compel accounting, see Account, § 17.

§ 63. A petition founded on a special statute must state facts sufficient to bring the case within the terms of the statute.—Beck v. Johnson (C. C.) 154.

§ 64. The declaration in an action to recover damages for a personal injury resulting from the derailment of a street car is not bad for duplicity because it alleges in the same count as acts of negligence defects in both the car and roadbed.—Boireau v. Rhode Island Co. (C. C.) 1015.

III. PLEA OR ANSWER, CROSS-COMPLAINT, AND AFFIDAVIT OF DEFENSE.

In action for libel of vessel, see Admiralty, § 61.

VI. AMENDED AND SUPPLEMENTAL PLEADINGS AND REPLEADER.

Amendment of pleading affecting limitations, see Limitation of Actions, § 127.
Procedure in federal court, see Courts, § 347.

§ 236. Under Wis. St. 1898, § 2830, the only limitation on the court's right to permit an amendment of the complaint is that plaintiff's claim shall not be substantially changed and that sound discretion shall not be overstepped.—Manitowoc Malting Co. v. Fuechtwanger (C. C.) 983.

§ 237. If a portion of the charge presenting an issue raised by defendant is excepted to because of an alleged variance, an amendment of the petition to meet the proofs may be allowed.—Pennsylvania Co. v. Whitney (C. C. A.) 572.

§ 245. Plaintiff *held* not estopped to ask permission to amend so as to raise the amount sued for to conform to the proof after verdict by failing to earlier apply, defendants not having been prejudiced thereby.—Manitowoc Malting Co. v. Fuechtwanger (C. C.) 983.

§ 245. Facts *held* to justify the court in its discretion to permit plaintiff to amend the ad damnum clause of its complaint after verdict to conform to the proof.—Manitowoc Malting Co v. Fuechtwanger (C. C.) 983.

VII. SIGNATURE AND VERIFICATION.

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XI. MOTIONS.

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XII. ISSUES, PROOF, AND VARIANCE.

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PLEDGES.

§ 1. A bond or chose in action, transferred as collateral, is under the dominion of the creditor to make his claim out of it.—Warburton v. Trust Co. of America (C. C.) 974.

§ 30. A trust company, receiving corporate bonds as collateral to complainant's liability under an underwriting agreement, *held* bound to exercise reasonable diligence to collect all moneys possible on the bonds by presenting them in bankruptcy proceedings against the corporation.—Warburton v. Trust Co. of America (C. C.) 974.

POLICY.

Of insurance, see Insurance.

POSSESSION.

See Adverse Possession.

Of demised premises, see Landlord and Tenant, §§ 288–291.

POST OFFICE.

II. MAILABLE MATTER, TRANSMISSION AND DELIVERY OF MAIL, AND MONEY ORDERS.

§ 18. An answer *held* not to state a defense to an action by the United States to recover from the payees the amounts paid to them in redemption of postal money orders issued without applications therefor in violation of law.—United States v. Bolognesi (C. C.) 1013.

III. OFFENSES AGAINST POSTAL LAWS.

Act of co-conspirators, see Criminal Law, § 427.

§ 48. An indictment for using the post office in furtherance of a scheme to defraud *held* not demurrable for failure to charge that stock expected to be sold by means of such scheme was valueless.—United States v. Palmieri (C. C.) 490.

§ 48. An indictment for devising a scheme to defraud by means of the post office *held* not demurrable because the particulars in which the representations alleged were false were not set forth.—United States v. Palmieri (C. C.) 490.

POWERS.

Of attorney, see Principal and Agent.

PRACTICE.

Adoption by United States courts of practice of state courts, see Courts, §§ 347–356.

In patent office, see Patents, § 112.

In particular civil actions or proceedings.

See Account, § 17; Interpleader.

Condemnation proceedings, see Eminent Domain, § 242.

Particular proceedings in actions.

See Abatement and Revival; Costs; Depositions; Evidence; Judgment; Jury; Limitation of Actions; Pleading; Removal of Causes; Trial.

Nonsuit, see Trial, § 165.

Particular remedies in or incident to actions.

See Discovery; Injunction; Receivers.

Procedure in criminal prosecutions.

See Criminal Law.

Procedure in exercise of special or limited jurisdiction.

In admiralty, see Admiralty; Collision, § 133; Shipping, §§ 205, 209.

In bankruptcy, see Bankruptcy, §§ 42, 51.

In equity, see Equity.

In insolvency, see Insolvency.

Procedure in or by particular courts or tribunals.

See Courts.

Procedure on review.

See Appeal and Error; New Trial.

PREFERENCES.

Effect of proceedings in bankruptcy, see Bankruptcy, §§ 160–205.

PREJUDICE.

Ground for reversal in civil actions, see Appeal and Error, §§ 1032–1048.

PRELIMINARY INJUNCTION.

See Injunction, §§ 136, 169.

PRESCRIPTION.

Acquisition of rights, see Adverse Possession, § 8.

PRINCIPAL AND AGENT.

Agency of partner for firm, see Partnership, § 146.

Corporate agents, see Corporations, § 312.

Municipal agents, see Municipal Corporations, §§ 745½, 747.

III. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

(F) ACTIONS.

§ 183. An undisclosed principal may sue in his own name on a contract made by an agent for the principal's benefit.—Block v. City of Meridian, Mississippi (C. C. A.) 516.

PRIORITIES.

Between claims against bankrupt, see Bankruptcy, § 345.
Between claims against insolvent, see Insolvency, § 118.
Between mortgages and other claims against vessels, see Shipping, § 32.

PRIVATE NUISANCES.

See Nuisance, § 6.

PRIVILEGE.

Effect on limitation, see Limitation of Actions, § 72.
Of witness as to testimony, see Witnesses, § 305.

PROCEDURE.

See cross-references under Practice.

PROCESS.

See Injunction.

II. SERVICE.

(B) SUBSTITUTED SERVICE.

Act authorizing substituted service of notice as denying due process of law, see Constitutional Law, § 309.

PROMISSORY NOTES.

See Bills and Notes.

PROPERTY.

Constitutional guaranties of rights of property, see Constitutional Law, §§ 251–309.

Particular species of property.

See Copyrights; Franchises; Literary Property; Mines and Minerals.
Timber, see Logs and Logging.
Vessels, see Shipping.

Remedies involving or affecting property.

Protection of rights of property by injunction, see Injunction, § 56.

Transfers and other matters affecting title.

See Adverse Possession.
Taking for public use, see Eminent Domain.

PROVINCE OF COURT AND JURY.

In civil actions, see Trial, §§ 191, 192.
In criminal prosecutions, see Criminal Law, § 736.

PROXIMATE CAUSE.

Of injuries in general, see Negligence, §§ 56–62.

PUBLIC BUILDINGS.

See Municipal Corporations, §§ 847, 852.

PUBLIC DEBT.

See Municipal Corporations, §§ 908, 948.

PUBLIC LANDS.

Indian lands, see Indians, § 12.
Lands under water, see Navigable Waters, § 36.
Mineral lands, see Mines and Minerals, § 38.

I. GOVERNMENT OWNERSHIP.

§ 6. "Public lands" defined.—Union Pac. Ry. Co. v. Karges (C. C.) 459.

§ 7. Prior to Act Cong. April 19, 1864, c. 59, 13 Stat. 47, vesting title to land reserved for school purposes in Nebraska, Congress had power to dispose of such land as it saw fit.—Union Pac. Ry. Co. v. Karges (C. C.) 459.

§ 13. A person who cut and removed timber from public land in good faith in the belief that he had a lawful right to do so under Act June 3, 1878, c. 150, § 1, 20 Stat. 88 (U. S. Comp. St. 1901, p. 1528), permitting the cutting of timber from mineral lands for certain purposes, if not so justified, is liable in damages for the stumpage value of the timber only, and not for the manufactured value.—Morgan v. United States (C. C. A.) 242.

§ 13. To justify the cutting of timber from public land under Act June 3, 1878, c. 150, § 1, 20 Stat. 88 (U. S. Comp. St. 1901, p. 1528), it is not essential to prove that the land could, in the opinion of competent experts, be mined at a profit.—Morgan v. United States (C. C. A.) 242.

§ 13. The right to cut timber from public mineral lands under Act June 3, 1878, c. 150, § 1, 20 Stat. 88 (U. S. Comp. St. 1901, p. 1528), permitting such cutting of timber for certain purposes, is not restricted to the particular spot or minor tract on which mining is being carried on, but extends to adjacent lands, they being mineral; and the question of their mineral character is one for the jury, in an action to recover the value of the timber cut.—Morgan v. United States (C. C. A.) 242.

§ 21. An indictment for fencing public land in violation of Act Cong. Feb. 25, 1885, c. 149, § 1, 23 Stat. 321 (U. S. Comp. St. 1901, p. 1524), *held* not objectionable for failure to charge that, at the time when the inclosure was made, defendant had no claim or color of title to the land, made or acquired in good faith, or asserted right with a view to entry.—Bircher v. United States (C. C. A.) 589; Cardwell v. Same (C. C. A.) 592.

II. SURVEY AND DISPOSAL OF LANDS OF UNITED STATES.

(B) ENTRIES, SALES, AND POSSESSORY RIGHTS.

Subornation of perjury by applicant for purchase of stone and timber land, see Perjury, § 13.

§ 38. Act Cong. June 3, 1878, c. 151, § 2, 20 Stat. 89 (U. S. Comp. St. 1901, p. 1545), providing for the sale of stone and timber land, *held* not to require the applicant to swear in his initial statements that he had personally examined the land applied for and stated on his personal knowledge that it was unfit for cultivation, etc.—Robnett v. United States (C. C. A.) 778.

(E) SCHOOL AND UNIVERSITY LANDS.

§ 51. Act Cong. May 30, 1854, c. 59, § 16, 10 Stat. 283, was a mere reservation of school lands in Nebraska; such lands not having been granted until by Enabling Act April 19, 1864, c. 59, § 7, 13 Stat. 49.—Union Pac. Ry. Co. v. Karges (C. C.) 459.

(H) GRANTS IN AID OF RAILROADS.

Adverse possession of right of way, see Adverse Possession, § 8.

§ 71. Act July 1, 1862, c. 120, § 2, 12 Stat. 491, *held* to vest in the Union Pacific Railway Company a right of way over land reserved for school purposes in Nebraska but to which the state had acquired no vested right prior to Enabling Act of April 19, 1864, c. 59, § 7, 13 Stat. 49.—Union Pac. Ry. Co. v. Karges (C. C.) 459.

(K) REMEDIES IN CASES OF FRAUD, MISTAKE, OR TRUST.

Conspiracy to make fraudulent entry, see Conspiracy, § 43.

§ 120. False acknowledgment to a deed of land conveyed to the United States *held* not ground for rescission of a patent for lieu land executed in place of the land conveyed.—United States v. Conklin (C. C.) 177.

§ 120. In the absence of fraud, the United States *held* not entitled to cancel a patent for lieu land, because the grantors of the land conveyed in exchange did not have an unincumbered title.—United States v. Conklin (C. C.) 177.

§ 120. The government cannot vacate a patent for lieu land for fraud in conveying the land exchanged therefor, in the absence of proof of damages from the fraud.—United States v. Conklin (C. C.) 177.

§ 120. Grantors of land to the United States in exchange for lieu land cannot take advantage of their own fraud, if any, in conveying the land exchanged as against the United States.—United States v. Conklin (C. C.) 177.

§ 120. Evidence considered and *held* insufficient to establish fraud in the final proof on a homestead entry under Rev. St. § 2291 (U. S. Comp. St. 1901, p. 1390), which entitled the United States to a cancellation of the patent issued thereon.—United States v. Mills (C. C.) 686.

§ 120. In a suit by the United States to cancel a patent to public land on the ground of fraud the burden of proof to establish the fraud is on the government, and the evidence, whether direct and positive or circumstantial, must be clear, unequivocal, and convincing.—United States v. Mills (C. C.) 686.

III. DISPOSAL OF LANDS OF THE STATES.

§ 185. The state of Washington has power to sell its tide and shore lands.—Corrigan v. Brown (C. C.) 477.

PUBLIC SERVICE CORPORATIONS.

See Carriers; Railroads; Street Railroads.

PUBLIC USE.

Taking property for public use, see Eminent Domain.

PUMP BOATS.

As vessels subject to admiralty jurisdiction, see Admiralty, § 6.

QUARANTINE.

Detention of vessel by as affecting right to deduction from charter hire, see Shipping, § 49.

QUASHING.

Indictment or information, see Indictment and Information, §§ 137, 139.

QUESTIONS FOR JURY.

In civil actions, see Trial, § 143.
In criminal prosecutions, see Criminal Law, § 736.

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, § 71.

II. RAILROAD COMPANIES.

§ 22. The line of a carrier in K. county, Ky., *held* to have been operated by a bridge company, and not by the carrier, and hence the carrier was not liable to be sued for injury to a person who resided in that county under Ky. Civ. Code Prac. § 73.—Fisher v. Cleveland, C., C. & St. L. Ry. Co. (C. C.) 956.

§ 22. Under Ky. Civ. Code Prac. § 73, an action against a carrier could not be brought in a county into which defendant's line passed, but in which plaintiff did not reside, nor in a county in which defendant had no agent on

whom process could be served.—Fisher v. Cleveland, C., C. & St. L. Ry. Co. (C. C.) 956.

§ 22. Where defendant railroad company's line passed into a county in Kentucky, some Kentucky court had jurisdiction of an action against it, though none of such courts were strictly within Ky. Civ. Code Prac. § 73.—Fisher v. Cleveland, C., C. & St. L. Ry. Co. (C. C.) 956.

§ 33. A railroad company *held* to be doing business in New York, and subject to service of process there, though its railroad is not located in that state.—Cafasso v. Philadelphia & R. Ry. Co. (C. C.) 887.

VIII. INDEBTEDNESS, SECURITIES, LIENS, AND MORTGAGES.

(A) NATURE AND EXTENT OF LIABILITIES.

§ 163. Act May 14, 1898, c. 299, 30 Stat. 409 (U. S. Comp. St. 1901, p. 1575), granting right of way to railroads in Alaska, etc., construed, and a mortgage executed by a railroad company *held* authorized thereby.—Washington Trust Co. of City of New York v. Dunaway (C. C. A.) 37.

§ 165. A mortgage executed by a railroad company on its property in Alaska under Act May 14, 1898, c. 299, § 6, 30 Stat. 411 (U. S. Comp. St. 1901, p. 1578), and recorded as therein provided, *held* not affected by the provisions of Code Alaska June 6, 1900 (Carter's Ann. Codes Alaska, §§ 514, 515), relating to the recording of chattel mortgages.—Washington Trust Co. of City of New York v. Dunaway (C. C. A.) 37.

(B) FORECLOSURE OF LIENS AND MORTGAGES.

§ 180. A trustee under a railroad mortgage is bound to recognize the rights of the holders of all bonds which are prima facie valid, and to act on their request to foreclose when made by the requisite number.—Central Trust Co. of New York v. Cincinnati, H. & D. Ry. Co. (C. C.) 466.

§ 186. Railroad bondholders *held* not entitled to intervene in a suit to foreclose the mortgage for the purpose of litigating the validity of other bonds prior to a decree of sale.—Central Trust Co. of New York v. Cincinnati, H. & D. Ry. Co. (C. C.) 466.

§ 186. A trustee appointed by a railroad company to which bonds are pledged to secure negotiable notes does not represent the note holders in such sense that notice to it of defenses to the notes will bind bona fide holders or purchasers, or that its presence as a party in a suit to foreclose the mortgage will authorize the court to pass on the validity of the notes unless such holders are made parties.—Central Trust Co. of New York v. Cincinnati, H. & D. Ry. Co. (C. C.) 466.

§ 186. A trustee in a railroad mortgage in bringing a suit to foreclose acts for the benefit of every bondholder who may show his right to share in the proceeds of the sale, and the fact that it may in a different capacity represent certain of the bondholders does not incapacitate it from acting for the others in bringing and maintaining the suit, although there may be controversy between them as to distribution of the proceeds.—Central Trust Co. of New York v. Cincinnati, H. & D. Ry. Co. (C. C.) 466.

§ 190. In a suit to foreclose a railroad mortgage securing bonds, the court has power to order a sale before the final determination of the validity and amount of bonds held by each holder, and it is the recognized practice in such cases to postpone the final determination of all such questions until after the sale.—Central Trust Co. of New York v. Cincinnati, H. & D. Ry. Co. (C. C.) 466.

X. OPERATION.

(B) STATUTORY, MUNICIPAL, AND OFFICIAL REGULATIONS.

Protection of railroad employés, see Master and Servant, § 234.
Regulation of interstate commerce, see Commerce, § 27.

§ 229. The duty of seeing that no cars used in interstate commerce are hauled by a railroad company unless equipped with the required safety appliances is imposed by the statute on the company, and cannot be evaded by delegating the same to the conductor of a train or other employé whose action in that respect is that of the company.—Chicago Junction Ry. Co. v. King (C. C. A.) 372.

§ 229. Under the safety appliance act (Act March 2, 1893, c. 196, § 2, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]), it is unlawful to move a car used in interstate traffic, the automatic coupler on which is broken and inoperative merely because it is more convenient to repair it at another place.—Chicago Junction Ry. Co. v. King (C. C. A.) 372.

§ 229. A carrier's duty to equip its cars with automatic couplers, imposed by the safety appliance acts (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]; Act April 1, 1896, c. 87, 29 Stat. 85; Act March 2, 1903, c. 976, 32 Stat. 943 [U. S. Comp. St. Supp. 1907, p. 885]), *held* not performed by the exercise of reasonable care.—United States v. Southern Pac. Co. (C. C. A.) 407.

§ 254. An instruction authorizing the moving of defective cars in interstate traffic, or in connection therewith, so long as it was reasonably necessary to get the cars repaired, *held* error.—United States v. Southern Pac. Co. (C. C. A.) 407.

(D) INJURIES TO LICENSEES OR TRESPASSERS IN GENERAL.

§ 282. An action for personal injury to a licensee alleged to have resulted from defendant's negligence *held* properly submitted to the jury on conflicting evidence.—Central Union Depot & Ry. Co. v. Mansfield (C. C. A.) 614.

RATIFICATION.

Of acts of officers of associations, see Associations, § 18.

REBUTTAL.

Evidence, see Trial, § 62.

RECEIPTS.

For insurance premiums as evidence in action on policy, see Insurance, § 646.

RECEIVERS.

I. NATURE AND GROUNDS OF RECEIVERSHIP.

(B) GROUNDS OF APPOINTMENT OF RECEIVER.

§ 14. A wife's possession of property of the husband's estate after she had elected not to take under her husband's will, after expiration of 40 days from his death, during which she is given possession by Real Property Law N. Y. (Laws 1896, p. 587, c. 547), § 184, *held* unavailable in federal courts as against the legal title as affecting the right to appointment of receiver.—Underground Electric Rys. Co. of London, Limited, v. Owsley (C. C.) 671.

§ 21. The complaint, in a suit by a simple contract creditor against corporations, *held* not to state any grounds for the appointment of a receiver.—Nowell v. International Trust Co. (C. C. A.) 497.

II. APPOINTMENT, QUALIFICATION, AND TENURE.

Jurisdiction of federal courts to appoint receiver for decedent's estate, see Courts, § 260.

IV. MANAGEMENT AND DISPOSITION OF PROPERTY.

(C) RECEIVER'S CERTIFICATES.

§ 128. The expenses of a receivership continued without lawful authority over the property of mining companies, and certificates issued by the receiver, *held* not chargeable upon the property to the postponement of a mortgage, where neither the mortgage trustee nor the bondholders were parties to the suit.—Nowell v. International Trust Co. (C. C. A.) 497.

VII. ACCOUNTING AND COMPENSATION.

§ 196. Where a receiver has unnecessarily prolonged a receivership, when justice required that he be discharged and the receivership ended, or where a receiver has been guilty of misconduct in the management of the property committed to his charge, the court may, if the circumstances warrant, deny his compensation.—Nowell v. International Trust Co. (C. C. A.) 497.

RECORDS.

Of particular facts, acts, instruments, or proceedings not judicial.

See Chattel Mortgages, § 84.
Conditional sale, see Sales, § 465.
Contract of bailment, see Bailment, § 3.

Of judicial proceedings.

Transcript on appeal or writ of error, see Appeal and Error, §§ 653, 712.

REFERENCE.

In bankruptcy, see Bankruptcy, § 228.

REFORMATION OF INSTRUMENTS.

See Cancellation of Instruments.

I. RIGHT OF ACTION AND DEFENSES.

§ 19. A complainant *held* entitled to the reformation of a contract to grant a right of flowage by a dam to be built on the ground of a mutual mistake as to the amount of land which would be affected.—Griffith v. Berkshire Power Co. (C. C.) 734.

REGISTRATION.

See Chattel Mortgages, § 84.
Of conditional sale, see Sales, § 465.

REHEARING.

See New Trial.

REISSUE.

Of patent, see Patents, § 136.

RELEVANCY.

Of evidence in civil actions, see Evidence, § 143.

REMAND.

Of cause removed from state court, see Removal of Causes, § 107.

REMEDY AT LAW.

Effect on jurisdiction of equity, see Equity, §§ 44–65.

REMOVAL OF CAUSES.

II. ORIGIN, NATURE, AND SUBJECT OF CONTROVERSY.

§ 19. An action is removable as arising under the Constitution or laws of the United States whenever its correct decision depends on the construction of either.—Beck v. Johnson (C. C.) 154.

§ 19. The phrase, "laws of the United States," within the removal acts, means acts of Congress and not executive rules and regu-

lations, unless a recovery of damages is expressly authorized for a disregard thereof.—Beck v. Johnson (C. C.) 154.

§ 19. An injunction suit to restrain the United States marshal from proceeding further under a federal writ under which he had levied on real estate *held* removable as a case arising under the laws of the United States, though the marshal was joined with the defendant, over whom jurisdiction depended on other considerations.—Frank v. Leopold & Feron Co. (C. C.) 922.

§ 25. Whether an action is removable as arising under the laws of the United States depends on the averments of plaintiff's petition alone.—Beck v. Johnson (C. C.) 154.

VI. PROCEEDINGS TO PROCURE AND EFFECT OF REMOVAL.

§ 86. An unverified petition for the removal of a cause to the federal court is not for that reason defective under Judiciary Act Aug. 13, 1888, c. 866, § 3, 25 Stat. 435 (U. S. Comp. St. 1901, p. 510).—Donovan v. Wells Fargo & Co. (C. C. A.) 363.

§ 86. A petition for the removal of a cause *held* sufficient.—Donovan v. Wells Fargo & Co. (C. C. A.) 363.

§ 86. A petition for removal may allege the citizenship of the parties regardless of the allegations of the plaintiff's pleading, and where its allegations show the requisite citizenship to authorize the removal they are to be deemed true unless controverted by the plaintiff.—Harrington v. Great Northern Ry. Co. (C. C.) 714.

§ 86. A removal petition by an alien, failing to allege that he is a nonresident of the state, is fatally defective.—Mayer v. Karaghuesian (C. C.) 736.

§ 89. Judiciary Act Aug. 13, 1888, c. 866, § 3, 25 Stat. 435 (U. S. Comp. St. 1901, p. 510), authorizes the removal of causes by the filing of a petition disclosing the right to remove and giving the prescribed bond.—Donovan v. Wells Fargo & Co. (C. C. A.) 363.

§ 89. On the filing of a removal petition on showing a removable cause, the state court is bound to surrender jurisdiction.—Donovan v. Wells Fargo & Co. (C. C. A.) 363.

§ 89. A removal petition presents to the state court a question of law whether, assuming the facts to be true, the face of the record discloses a removable cause.—Donovan v. Wells Fargo & Co. (C. C. A.) 363.

§ 89. If a removal petition is inartificial but not demurrable, it is effective to transfer jurisdiction to the federal court.—Donovan v. Wells Fargo & Co. (C. C. A.) 363.

§ 89. A petitioner for the removal of a cause was not bound to prove an alleged fraudulent joinder of defendants to prevent a removal until issue was joined on such allegation.—Donovan v. Wells Fargo & Co. (C. C. A.) 363.

§ 92. Where a state court refuses to order the removal of a cause, jurisdiction may be transferred by petitioner filing a copy of the record and having the cause docketed in the federal court.—Donovan v. Wells Fargo & Co. (C. C. A.) 363.

§ 97. Exercise of jurisdiction by a state court after removal of a cause would be enjoined by the federal court.—Donovan v. Wells Fargo & Co. (C. C. A.) 363.

§ 97. A bill to restrain a state court from proceeding in an action at law after jurisdiction had been removed to the federal court *held* maintainable as an auxiliary proceeding to protect the federal court's jurisdiction, etc.—Donovan v. Wells Fargo & Co. (C. C. A.) 363.

§ 97. Where a federal court restrained a plaintiff from proceeding in a state court after the removal of an action at law until the determination of an issue on which the federal court's jurisdiction depended, such issue should be determined in the federal court having jurisdiction of the law action, and not in the injunction proceeding.—Donovan v. Wells Fargo & Co. (C. C. A.) 363.

VII. REMAND OR DISMISSAL OF CAUSE.

§ 107. A removal petition *held* amendable to cure a failure to set out in sufficient detail the facts constituting an alleged fraudulent joinder of parties defendant.—Donovan v. Wells Fargo & Co. (C. C. A.) 363.

§ 107. Where a removal petition alleged fraudulent joinder of defendants to prevent removal, plaintiff should either submit to the court's jurisdiction on the merits or take issue on the facts alleged, in which case the court's jurisdiction exists to determine the issue of such joinder.—Donovan v. Wells Fargo & Co. (C. C. A.) 363.

§ 107. If plaintiff desires to controvert the facts in a removal petition, he must make an issue in the federal court where it must be tried.—Donovan v. Wells Fargo & Co. (C. C. A.) 363.

§ 107. Under the judiciary act of March 3, 1875, c. 137, § 5, 18 Stat. 472 (U. S. Comp. St. 1901, p. 511), a Circuit Court may consider a motion to remand a cause removed from a state court immediately on the filing of the record by either party.—Harrington v. Great Northern Ry. Co. (C. C.) 714.

§ 107. A motion to remand is properly determinable on the facts appearing on the face of the record, but, where it controverts allegations of fact in the petition for removal necessary to sustain the jurisdiction of the court, it may by the practice of the court be treated as a plea to the jurisdiction and the parties required to take evidence on such issues.—Harrington v. Great Northern Ry. Co. (C. C.) 714.

RENEWAL.

Of copyright, see Copyrights, § 33.
Of lease, see Landlord and Tenant, § 86.

REPEAL.

Of statute, see Statutes, § 162.

REPLICATION.

In pleading, see Equity, § 210.

RESCISSION.

Cancellation of written instrument, see Cancellation of Instruments.
Of contracts, see Contracts, §§ 259, 272.

RESERVATIONS.

Indian reservations, see Indians, § 12.

RESIDENCE.

Validity of statute authorizing summoning of jurors from parts of federal district not containing the county in which the crime was committed, see Jury, § 33.

RES JUDICATA.

See Judgment, §§ 675–735.

RESTRAINT OF TRADE.

Restraining contract, see Injunction, § 61.
Trusts and other combinations, see Monopolies, §§ 8–28.

RESULTING TRUSTS.

See Trusts, §§ 81–88.

RETIRING PARTNERS.

See Partnership, § 241.

REVENUE.

See Customs Duties; Internal Revenue.

REVIEW.

See Appeal and Error; Criminal Law, §§ 1022–1177.

REWARDS.

Reward not paid over to claimant as property passing to his trustee in bankruptcy, see Bankruptcy, § 143.

RISKS.

Assumed by employé, see Master and Servant, §§ 208–217.
Within insurance policy, see Insurance, § 421.

ROADS.

Streets in cities, see Municipal Corporations, §§ 755, 764.

ROYALTIES.

Under patent, see Patents, § 218.

RULES OF COURT.

See Courts, § 85.

RULES OF NAVIGATION.

See Collision, § 16.

SAFETY APPLIANCES.

On railroad trains, penalties for violations of regulations, see Railroads, § 254.
On railroad trains, protection of railroad employés, see Master and Servant, § 234.
On railroad trains, requirement of as regulation of commerce, see Commerce, § 27.
On railroad trains, statutory regulation in general, see Railroads, § 229.

SALES.

Sales of particular species of, or estates or interests in, property.

See Public Lands, § 38.
Realty, see Vendor and Purchaser.
Timber, see Logs and Logging, § 3.

I. REQUISITES AND VALIDITY OF CONTRACT.

§ 4. A contract for the transfer of a business and stock of goods for a year *held* a contract of bailment, and not a sale, and was valid under the Michigan law.—Walther v. Williams Mercantile Co. (C. C. A.) 270; Williams Mercantile Co. v. Walther, Id.

§ 52. Evidence *held* to warrant a finding that a contract for the sale of railroad equipment, etc., was made with testator and on his credit.—Portland Co. v. Searle (C. C.) 968.

II. CONSTRUCTION OF CONTRACT.

§ 71. Contracts for the supply of the material required for use in a certain business for a certain time limited are sufficiently certain as to quantity and are valid.—Marx v. American Malting Co. (C. C. A.) 582.

§ 71. A contract for the sale of malt to a brewery *held* to bind the seller to deliver all the malt required for use in the purchaser's plant during a specified time.—Marx v. American Malting Co. (C. C. A.) 582.

IV. PERFORMANCE OF CONTRACT.

(B) BILLS OF SALE.

Unrecorded bill of sale as voidable preference on bankruptcy of seller, see Bankruptcy, § 184.

(C) DELIVERY AND ACCEPTANCE OF GOODS.

§ 175. Where the purchaser of a quantity of iron refused to accept delivery as required by

the contract, the seller was under no duty to comply with the demand of the purchaser that it be otherwise delivered at an increased expense to the seller, but had the right to stand upon the contract and recover damages for its breach. —Hirsch v. Georgia Iron & Coal Co. (C. C. A.) 578.

§ 177. Under a contract for the sale and purchase of 3,000 tons of pig iron, to be delivered about equally during three specified months f. o. b. cars at the seller's furnace, the buyer was obligated to accept delivery during the time specified on board cars at the furnace, and his refusal to give shipping directions so that delivery could be so made was a breach of the contract.—Hirsch v. Georgia Iron & Coal Co. (C. C. A.) 578.

VII. REMEDIES OF SELLER.

(A) STOPPAGE IN TRANSITU.

§ 289. A carrier cannot change his character so as to become the buyer's agent or warehouseman without the buyer's assent, nor can the buyer change the carrier's capacity as a bailee without the carrier's assent, to the prejudice of the seller's right of stoppage in transitu.—In re New York House Furnishing Goods Co. (C. C. A.) 612.

§ 296. A right of stoppage in transitu may be exercised so long as the goods are in the possession of the carrier, either as carrier or warehouseman, without actual or constructive delivery.—In re New York House Furnishing Goods Co. (C. C. A.) 612.

§ 296. A seller of goods while still in the possession of the carrier *held* entitled to exercise its right of stoppage in transitu, though the goods had been levied on as the property of the buyer.—In re New York House Furnishing Goods Co. (C. C. A.) 612.

(F) ACTIONS FOR DAMAGES.

§ 370. Defendant executor having repudiated a contract between plaintiff and his testator for the purchase of railroad equipment before the time for delivery had arrived, plaintiff was entitled to treat the contract as terminated and sue at once for its breach.—Portland Co. v. Searle (C. C.) 968.

§ 384. In an action for breach of an executory contract for the construction and sale of narrow-gauge railroad equipment, plaintiff's measure of damage was the value of outlay and expenses, less the value of materials on hand and the profits which might have been realized by performing the contract.—Portland Co. v. Searle (C. C.) 968.

IX. CONDITIONAL SALES.

As affecting title of trustee in bankruptcy, see Bankruptcy, § 140.
Effect of proceedings in bankruptcy, see Bankruptcy, § 184.

§ 465. Under the law of North Carolina, a conditional sale is valid between the parties without registration.—Walter A. Wood Co. v. Eubanks (C. C. A.) 929.

§ 465. Under the laws of North Carolina, a conditional sale is good between the parties without registration.—Corbitt Buggy Co. v. Ricaud (C. C. A.) 935.

§ 474. Under Civ. Code Ga. 1895. §§ 2776, 2777, a written conditional sale, though not properly recorded, is valid between the parties and against creditors with liens antedating the sale, but not against subsequent creditors.—In re Braselton (D. C.) 960.

SCAFFOLDS.

Liability of master for injuries caused by defects, see Master and Servant, § 116.

SCHOOL LANDS.

See Public Lands, § 51.

SEAMEN.

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§ 23. The acceptance by a master of notes given by seamen to a boarding housekeeper, executed after the shipping articles were signed, without any agreement to pay the same, *held* not to constitute a violation of Act Dec. 21, 1898, c. 28, § 24, 30 Stat. 763 (U. S. Comp. St. 1901, p. 3079), so as to invalidate the contract under Rev. St. § 4523 (U. S. Comp. St. 1901, p. 3075).—The Albani (D. C.) 220.

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§ 3. All vessels carrying passengers within the jurisdiction of the United States are subject to regulations prescribed by Congress, even if the waters navigated are entirely within a state. —The Scow No. 1 (D. C.) 717.

§ 16. A scow used as a barge for carrying a picnic party, and not provided with life preservers as required by the regulations of the board of supervising inspectors, pursuant to Rev. St. § 4492 (U. S. Comp. St. 1901, p. 3058), *held* liable for the penalty imposed by said section.—The Scow No. 1 (D. C.) 717.

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§ 32. A mortgage made by part owners of a vessel on their interest *held* entitled to priority from the proceeds of such part when sold in admiralty over debts which were not liens.—The Avalon (D. C.) 696.

§ 33. A re-registry of a vessel at a different port does not necessitate the re-recording in the collector's office at that port of a mortgage duly recorded when made at the former port.—The Avalon (D. C.) 696.

III. CHARTERS.

§ 39. A charter party construed with respect to a provision mutually excepting certain causes as breaches of covenants which should create liability.—Clyde Commercial S. S. Co. v. West India S. S. Co. (C. C. A.) 275.

§ 39. A time charter of a steamer to be officered, manned, provisioned, maintained, and navigated by the owner, and to be placed at the disposal of the charterer to the extent of her cargo space, is not a demise of the vessel, although the charter party speaks of her "delivery to the charterer.—Clyde Commercial S. S. Co. v. West India S. S. Co. (C. C. A.) 275.

§ 49. The detention of a vessel under the quarantine laws of a state *held* not to entitle the time charterer to a deduction of charter hire.—Clyde Commercial S. S. Co. v. West India S. S. Co. (C. C. A.) 275.

§ 51. In action by charterer to recover for deficiency in steamer's speed, he must show that representations of owner were false and that the charterer relied thereon.—The Hurstdale (D. C.) 912.

V. LIABILITIES OF VESSELS AND OWNERS IN GENERAL.

§ 79. A passing steamer *held* solely in fault for an injury to a floating dry dock by the swell caused by her excessive and negligent speed.—James Shewan & Sons v. New England Navigation Co. (C. C. A.) 285.

§ 84. A ship, under agreement to furnish to stevedores a winch and winchman to be used in loading, which furnished a winch in good order and a competent winchman, is not responsible for an act of negligence on the part of the winchman in loading, by which a stevedore's employé was injured.—The Maud (D. C.) 487.

VII. CARRIAGE OF GOODS.

§ 125. The stopping of a vessel at an intermediate port and her stay there awaiting cargo *held* not a deviation under the provisions of bills of lading which rendered her liable for damage to cargo.—The Citta di Messina (D. C.) 472.

§ 125. Delay of a vessel, even upon the route prescribed by a policy or bill of lading, may amount to deviation.—The Citta di Messina (D. C.) 472.

§ 125. Deviation of a vessel from her voyage, while belonging in the main to the law of marine insurance, also affects contracts of afreightment, and a deviation not warranted by the contract or by usage casts a subsequent loss or injury to either ship or cargo on the shipowner.—The Citta di Messina (D. C.) 472.

§ 125. Evidence *held* insufficient to render a vessel liable for injury to cargo, on the ground of negligence because of delay at an intermediate loading port, under the terms of the bills of lading.—The Citta di Messina (D. C.) 472.

§ 132. Where damage to cargo was prima facie within the exceptions in the bills of lading, the burden is on the shipper to establish that the goods are removed from the operation of such exceptions because of the carrier's negligence.—The Citta di Messina (D. C.) 472.

§ 140. Limitation in bill of lading that carrier shall not be liable for more than $100, unless a greater value is expressed, *held* not a defense to the carrier as against negligence.—Hohl v. Norddeutscher Lloyd (D. C.) 990.

§ 141. A steamship *held* liable for an injury to cargo during a voyage across the Atlantic on the ground of negligent stowage.—The Trignac (D. C.) 682.

§ 141. Where a contract provided that acts of God are excepted, special words of exemption from liability for the effects of a storm were not needed.—Unique Shipping Co. v. J. M. Guffey Petroleum Co. (D. C.) 905.

§ 153. Evidence *held* to show that the speed due from defendant's steamer was not attained on a voyage, because respondent failed to use tugs of sufficient power in the towing of the vessel as required by contract.—Unique Shipping Co. v. J. M. Guffey Petroleum Co. (D. C.) 905.

VIII. CARRIAGE OF PASSENGERS.

§ 158. Rev. St. § 4413 (U. S. Comp. St. 1901, p. 3020), only authorizes a recovery of damages for injuries caused by failure to observe regulations under section 4412 to passengers against pilots, engineers, mates, and masters of vessels.—Beck v. Johnson (C. C.) 154.

§ 158. Rev. St. §§ 4233, 4234, 4426 (U. S. Comp. St. 1901, pp. 2893, 3029), made applicable to vessels over 15 tons burden propelled by gas, fluid, naphtha, or electric motors by Act Cong. Jan. 18, 1897, c. 61, 29 Stat. 489 (U. S. Comp. St. 1901, p. 3029), *held* inapplicable to inland steam vessels.—Beck v. Johnson (C. C.) 154.

§ 166. An award of $1,000 to a passenger as damages for his imprisonment and mistreatment by the officers of a vessel *held* excessive, and reduced to $500, where his own conduct was not without blame.—Norfolk & Washington (D. C.) Steamboat Co. v. Ragland (C. C. A.) 286.

§ 166. In an action for injuries to a child while a passenger on a steamer, $600 allowed as compensation for suffering and the remains of a scar.—The North Star (D. C.) 711.

§ 166. In an action to recover for injuries to a child, evidence *held* not to show that the caretakers of the child, while a passenger on a steamer, were negligent.—The North Star (D. C.) 711.

§ 166. In an action by a female passenger to recover for injuries while on shipboard, *held*,

that the injury was caused by the negligence of the stewardess of the steamer, rendering the shipowner liable.—Korzib v. Netherlands-American Steam Navigation Co. (D. C.) 917.

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§ 175. A charterer *held*, under the terms of the charter party, not liable for demurrage on account of delay in loading, caused by the refusal of a third party, which owned the loading dock, to give the vessel proper dispatch.—Pyman S. S. Co. v. Mexican Cent. Ry. Co. (C. C. A.) 281.

§ 176. Where vessel is detained by port authorities for illness of master and steward, the hire ceases for the time lost to charterer.—Northern S. S. Co. v. Earn-Line S. S. Co. (D. C.) 708.

§ 179. Respondent *held* not entitled to recover for detention of a steamer, because she did not proceed with the towing, where the delay was caused by a storm constituting a vis major. —Unique Shipping Co. v. J. M. Guffey Petroleum Co. (D. C.) 905.

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§ 205. Evidence *held* not to sustain the allegations of a petition for limitation of liability for the death of a person killed on a vessel that the injury was occasioned without the privity or knowledge of petitioner.—The Captain Jack (D. C.) 455.

§ 209. Where a contractor for raising a sunken vessel employed in the work an outfit which it owned consisting of a scow on which was mounted a derrick and a tug to supply motive power in order to maintain a petition for limitation of liability for the killing of a person by the breaking of a part of the derrick during the work the contractor was required to surrender the entire outfit including the tug. —The Captain Jack (D. C.) 455.

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§ 4. A bill for specific performance of an insurance contract for the delivery of bonds, instead of the payment of money, on insured's death, *held* unsustainable.—Griesa v. Mutual Life Ins. Co. of New York (C. C. A.) 509.

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§ 70. Equity, upon a breach shown, will not decree the specific performance of a contract to convey shares of stock in a corporation, unless the facts shown present an unusual and exceptional situation in which the damages recoverable at law would be clearly incomplete and inadequate.—Bernier v. Griscom-Spencer Co. (C. C.) 889.

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§ 162. A special statute is not repealed by implication by a later general statute, although the latter is broad enough in its terms to include the same subject-matter, unless they are manifestly inconsistent.—Washington Trust Co. of City of New York v. Dunaway (C. C. A.) 37.

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Trial of particular civil actions or proceedings.

See Negligence, § 136.
For injuries to licensee on railroad, see Railroads, § 282.

For injuries to servant, see Master and Servant, § 285.
On insurance policy, see Insurance, § 668.
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See Criminal Law, §§ 655, 736.

IV. RECEPTION OF EVIDENCE.

(A) INTRODUCTION, OFFER, AND ADMISSION OF EVIDENCE IN GENERAL.

§ 46. Where the materiality of evidence is not apparent on objection thereto, the party offering it should advise the court of its purpose.—Morgan v. United States (C. C. A.) 242.

(B) ORDER OF PROOF, REBUTTAL, AND REOPENING CASE.

§ 62. On an issue as to payment of a life insurance premium, evidence that decedent habitually carried considerable sums on his person and frequently paid his obligations in cash *held* proper rebuttal.—Security Mut. Life Ins. Co. v. Kleutsch (C. C. A.) 104.

(C) OBJECTIONS, MOTIONS TO STRIKE OUT, AND EXCEPTIONS.

§ 83. A general objection to a question asked a witness as "immaterial" is insufficient to warrant the exclusion of the testimony sought to be elicited unless its immateriality is clearly manifest.—Morgan v. United States (C. C. A.) 242.

§ 83. An objection to evidence, the ground of which is not stated, is fatally defective.—Pennsylvania Co. v. Whitney (C. C. A.) 572.

VI. TAKING CASE OR QUESTION FROM JURY.

(A) QUESTIONS OF LAW OR OF FACT IN GENERAL.

As to particular facts, issues, or subjects.
See Negligence, § 136.
Contributory negligence of servant, see Master and Servant, § 289.

In particular civil actions or proceedings.
For injuries to servant, see Master and Servant, § 285.
On insurance policy, see Insurance, § 668.

§ 143. A conflict of evidence to prevent the direction of a verdict must be positive and real.—Noble v. C. Crane & Co. (C. C. A.) 55.

(C) DISMISSAL OR NONSUIT.

§ 165. It is the duty of a judge to direct a verdict if the evidence and inferences reasonably to be drawn therefrom would not sustain a verdict for the party having the burden of proof.—Noble v. C. Crane & Co. (C. C. A.) 55.

(D) DIRECTION OF VERDICT.

§ 169. The direction of a verdict in an action for breach of contract *held* justified by the insufficiency of the evidence to establish plaintiff's damages.—Chesapeake Transit Co. v. Mott (C. C. A.) 543.

VII. INSTRUCTIONS TO JURY.

Review as dependent on presentation of objections in lower court, see Appeal and Error, § 216.

In particular civil actions or proceedings.
For injuries to servant, see Master and Servant, § 291.
On insurance policy, see Insurance, § 669.

(A) PROVINCE OF COURT AND JURY IN GENERAL.

§ 191. In an action for injuries to a servant, an instruction *held* not objectionable as assuming a disputed fact.—Pennsylvania Co. v. Whitney (C. C. A.) 572.

§ 192. A federal court in its charge may assume facts which have been well established.—United States Coal Co. v. Pinkerton (C. C. A.) 536.

(D) APPLICABILITY TO PLEADINGS AND EVIDENCE.

§ 251. In an action for injuries to a street car passenger while endeavoring to alight, an instruction authorizing a recovery if the car had slowed down and was negligently started forward while plaintiff was endeavoring to alight, *held* properly refused as not within the issues.—Grady v. St. Louis Transit Co. (C. C. A.) 400.

§ 251. The failure of the trial court to instruct with respect to matters not put in issue by the pleadings *held* not reversible error, where no such instructions were requested and no objection or exception taken to the omission.—Chesapeake Transit Co. v. Mott (C. C. A.) 543.

(F) OBJECTIONS AND EXCEPTIONS.

§ 279. The ground of an exception to an instruction or the refusal of an instruction must be stated at the time, in order that the court shall have its attention directed to the error alleged to have been committed and may correct it.—Ætna Indemnity Co. v. Farmers' Nat. Bank of Boyertown, Pa. (C. C. A.) 737.

§ 280. An exception to a paragraph of the charge as assuming a certain state of facts *held* too broad.—United States Coal Co. v. Pinkerton (C. C. A.) 536.

§ 281. A general exception to the refusal of instructions in mass is not available if any one of the number was properly refused.—Morgan v. United States (C. C. A.) 242.

§ 281. An exception, "We except generally to the charge," is insufficient if the charge contains any correct proposition.—Pennsylvania Co. v. Whitney (C. C. A.) 572.

TROVER AND CONVERSION.

II. ACTIONS.

(A) RIGHT OF ACTION AND DEFENSES.

§ 23. Defendants *held* not chargeable with conversion of a crusher plant taken possession of by the United States under a public improvement contract and turned over to defendants for use in completing the work as the contractor's surety.—Tinker & Scott v. United States Fidelity & Guaranty Co. (C. C.) 211.

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Combinations to monopolize trade, see Monopolies, §§ 8–28.
Distinction between conditional sale and trust as affecting title of trustee in bankruptcy, see Bankruptcy, § 140.

I. CREATION, EXISTENCE, AND VALIDITY.

(B) RESULTING TRUSTS.

§ 81. Where land is conveyed to a wife, son, or near relative, or one to whom the purchaser has placed himself in loco parentis, there is no resulting trust.—Cole v. Thompson (C. C.) 729.

§ 82. A conveyance to a son-in-law by deed absolute, as an advancement to the wife, does not create a trust in her favor.—Cole v. Thompson (C. C.) 729.

§ 82. A deed *held* not to create a trust in the grantee for the benefit of the sons of his deceased wife.—Cole v. Thompson (C. C.) 729.

§ 88. A deed of advancement absolute on its face may be shown by parol to have been in fact a trust.—Cole v. Thompson (C. C.) 729.

(C) CONSTRUCTIVE TRUSTS.

§ 95. Where one was induced by fraud to contribute to the purchase price of real property, the title to which became vested in another, who was cognizant of the fraud and received the benefit of the payment, such owner and the property are both chargeable with a constructive trust, in favor of the person defrauded, to the extent of the amount paid by him.—Cunningham v. Pettigrew (C. C. A.) 335.

VII. ESTABLISHMENT AND ENFORCEMENT OF TRUST.

(B) RIGHT TO FOLLOW TRUST PROPERTY OR PROCEEDS THEREOF.

§ 357. Where a trustee, under a deed absolute on its face and not disclosing the trust, sells to an innocent purchaser, he can only pursue the proceeds of the sale in the hands of the trustee.—Cole v. Thompson (C. C.) 729.

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II. PROPERTY, CONTRACTS, AND LIABILITIES.

§ 67. A bond given by a contractor for government work under Act Aug. 13, 1894, c. 280, 28 Stat. 278 (U. S. Comp. St. 1901, p. 2523), secures payment for labor or materials furnished to a subcontractor and used in the work as well as to the contractor direct, and in a suit on such a claim payment to the subcontractor is not a defense.—Smith v. Mosier (C. C.) 430.

§ 70. The United States *held* not entitled to take possession of certain rock excavated and placed in position for crushing, by subcontractors, under a provision authorizing the government to take possession of materials owned by the contractor on termination of the contract.—Tinker & Scott v. United States Fidelity & Guaranty Co. (C. C.) 211.

§ 70. On the termination of a United States improvement contract for the contractor's default, the Secretary of the Interior could take all tools, appliances, etc., employed on the work, whether belonging to the contractor or subcontractor, but was only entitled to possession of such materials as belonged to the contractor and were then on the ground.—Tinker & Scott v. United States Fidelity & Guaranty Co. (C. C.) 211.

§ 70. Parties in interest other than the government *held* not entitled to insist on a provision in a government improvement contract that any assignment, transfer, or subletting might be regarded as an annulment thereof.—Tinker & Scott v. United States Fidelity & Guaranty Co. (C. C.) 211.

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I. REQUISITES AND VALIDITY OF CONTRACT.

§ 38. Where vendors of certain land, intending to execute deeds to B., instead, without knowing the character of the instruments, executed a deed to the United States and powers of attorney authorizing B. to select lieu land for the land conveyed, the transaction was not fraudulent as between B. and the vendors.—United States v. Conklin (C. C.) 177.

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WHARVES.

§ 20. Where a wharf used for hire is so located as to have a very small amount of water in a berth at low tide so that boats lying there necessarily rest on the bottom, the owner must be held responsible for injuries resulting from anything in the nature of permanent obstructions in the bottom.—The Manhattan (D. C.) 222.

§ 20. Where those in charge of a scow in a berth where she was injured by an obstruction on the bottom at each succeeding low tide allowed her to remain after knowledge of the obstruction, the owner is entitled to recover from the wharf owner only for the injury received before they had such knowledge.—The Manhattan (D. C.) 222.

WHISTLES.

Liability of city for injuries caused by blowing steam whistle on its waterworks building and frightening horse on adjacent bridge, see Municipal Corporations, §§ 733, 747, 852.

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§ 801. Where a widow elected not to take under her husband's will, after the expiration of 40 days from testator's death, she was required to vacate the home under Real Property Law N. Y. (Laws 1896, p. 587, c. 547) § 184.—Un-

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§ 269. The party against whom a witness is called has a right to a full examination on the subjects of the direct examination.—Harrold v. Territory of Oklahoma (C. C. A.) 47.

§ 269. The party on whose behalf a witness is called has the right to restrict his cross-examination to the subjects of his direct examination.—Harrold v. Territory of Oklahoma (C. C. A.) 47.

(C) PRIVILEGE OF WITNESS.

§ 305. Waiver by accused, testifying in his own behalf, against being compelled to testify against himself, extends only to a legal cross-examination.—Harrold v. Territory of Oklahoma (C. C. A.) 47.

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§ 380. Impeaching questions as to an involuntary confession not raised in the direct examination and its introduction to contradict the answers to such questions are erroneous.—Harrold v. Territory of Oklahoma (C. C. A.) 47.

§ 380. Involuntary confession of accused *held* incompetent to impeach the accused after he has testified as to other subjects only.—Harrold v. Territory of Oklahoma (C. C. A.) 47.

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