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

PERMANENT EDITION.

JULY—SEPTEMBER, 1909.

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OF THE

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

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\* Appointed February 2, 1909.
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Hon. GEORGE DONWORTH, District Judge, Washington..............................Seattle, Wash.

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

JONES v. UNITED STATES.
(Circuit Court of Appeals, Fourth Circuit. March 12, 1909.)
No. 875.

INTERNAL REVENUE (§ 40*)—VIOLATION OF REVENUE LAWS—PLACE OF SALE OF LIQUOR.
A retail liquor dealer who has his internal revenue tax paid stamp duly posted in his place of business is not subject to prosecution for carrying on business without paying the special tax therefor because of the shipment of a quantity of liquor from his stock on an order received by mail by an express company C. O. D. to the purchaser at another place. In such case the sale is completed, and the property passes when the goods are delivered to the carrier; the collection and transmission of the price being merely an incident of the express business.

[Ed. Note.—For other cases, see Internal Revenue, Dec. Dig. § 40.*]
Pritchard, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Northern District of West Virginia, at Clarksburg.
Melvin G. Sperry, for plaintiff in error.
Before GOFF and PRITCHARD, Circuit Judges, and BOYD, District Judge.

BOYD, District Judge. Charles H. Jones, the plaintiff in error, the defendant below, was indicted jointly with one J. R. Hickman (the two composing the firm of Jones & Hickman) on the charge of carrying on the business of retail liquor dealer without payment of the special tax imposed by law. Section 3242a, Rev. St. (U. S. Comp. St. 1901, p. 2095). Jones was tried separately on this indictment at Clarksburg, in the Northern District of West Virginia, at the October term, 1908, of the United States District Court for said District, was convicted by the jury, and was sentenced by the court to pay a fine of

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
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$100 and to be imprisoned in a jail for 30 days. The case is before us on a writ of error to review the action of the trial court in refusing to instruct the jury as requested by the defendant, and also upon exception to instructions given by the court to the jury.

The case went to the jury on the facts disclosed by the testimony offered by the government (the defendant did not introduce any testimony); the said facts being in substance as follows:

The firm of Jones & Hickman (composed of C. H. Jones and J. R. Hickman) was a retail liquor dealer in Clarksburg, W. Va., in the year 1905. The said firm had its located place of business at Clarksburg, and it had paid for, procured, and had posted in said place the special tax stamp required by the internal revenue laws of the United States, and the said stamp covered the time of the sale hereinafter mentioned. That in or about the month of December, 1905, one L. T. Horton, residing at Grafton, W. Va., sent a written order by mail addressed to Jones & Hickman at Clarksburg, W. Va., directing the said firm to ship him (Horton) at Grafton a half gallon of whisky by express C. O. D.; the price of the whisky being $2. In response to this order, Jones & Hickman segregated from the stock in their place of business at Clarksburg the half gallon of whisky so ordered, put it in a package, and delivered it to the express company's agent at Clarksburg, consigned to L. T. Horton, Grafton, W. Va., C. O. D. The package reached Grafton in due course, and was there delivered by the express agent to Horton upon the payment of $2, the price of the whisky, and the express charges for freight; and the $2, the price of the whisky, was thereafter remitted by the express company to Jones & Hickman at Clarksburg.

Upon this state of facts the defendant moved the court to charge the jury as follows:

"That the shipment of liquor made by the defendant from his place at Clarksburg, in Harrison county, to the town of Grafton, in Taylor county, by the United States Express Company C. O. D., and upon the written order of the purchaser living at Grafton, directing the same to be so shipped, was a sale at Clarksburg at the storehouse or saloon of the defendant, and not a sale at Grafton. * * *

The court refused to give the instruction, to which defendant's counsel excepted. The court then charged the jury as follows:

"Gentlemen, the court instructs you: That a sale involves at least three elements: First, on the part of the purchaser, a consent to buy; second, on the part of the seller a consent to sell; third, the delivery of the article; and ordinarily, fourth, the payment of the purchase price, and that all of those elements enter into a sale. That a whisky seller who has license to sell in Clarksburg and receives an order can send it to the person who orders it in the ordinary course of business and run the risk of the man's paying, in the ordinary course of business, but, if he sends it C. O. D.—in other words, makes of the express agent his agent to complete that sale and deliver it in case it is paid for at Grafton—that then he is guilty of selling at Grafton, and not at Clarksburg."

To this instruction as given by the court the defendant's counsel then and there duly excepted. The assignments of error are based upon bills of exception as above.
There is but a single question presented in this case, and that is
whether the transaction detailed constituted a sale of liquor at Grafton.
In other words, whether Jones & Hickman, who were doing a law-
ful business as retail liquor dealer in Clarksburg, violated the law
by taking a half gallon of whisky from the stock in their place of busi-
ness and delivering it to the express company at Clarksburg for ship-
ment upon Horton's order to him at Grafton C. O. D. The disposi-
tion of this question rests entirely upon where the sale was made.
Was it made at Clarksburg when the liquor was taken from the stock
of the dealer in its lawful place of business as ordered by Horton, or
at Grafton where Horton received the package and paid to the express
agent the amount of the C. O. D. and the express charges for car-
riage? It is insisted by the United States attorney in his argument
(by brief) that the sale to Horton was not consummated at Clarksburg,
that the contract was not completed until the package of liquor reach-
ed Grafton, and was there delivered to the purchaser upon the payment
by him of the price. It is true that, under local prohibitory laws of
some of the states, the place of delivery of spirituous liquors has been
made the place of sale, and the courts of these states have upheld these
laws, but aside from these we have found no declaration to that effect
from any source which we consider sufficiently authoritative to bind us.
In our opinion the bargain was struck and the sale was completed at
Clarksburg. The defendant's firm received Horton's letter, in which
he ordered the liquor, stated the price, directed the manner of ship-
ment and the method of payment. By the terms of the order the sale
was consummated at the place of business in Clarksburg, and the
express company was constituted the agent of the purchaser to trans-
port the article purchased, and to receive and remit to the seller the
price. We find this view of transactions of the character involved here
very forcibly presented in a number of decisions by the Supreme Court
of the state of West Virginia, notably in the case of State v. Flanagan,
38 W. Va. 53, 17 S. E. 792, 22 L. R. A. 430, 45 Am. St. Rep. 826,
in which the court held:

"A licensed liquor dealer doing business as such in one county is not liable
to Indictment in another county for retailing liquors therein without a
license where he shipped by express C. O. D. to a person in the latter county
a package of whisky, as per his order by postal card, sent through the mail,
and which was received in the former county. Such facts show that the sale
was made in the former county, and not in the latter."

And also in the case of State v. Davis, 62 W. Va. 500, 60 S. E. 584,
14 L. R. A. (N. S.) 1142, decided by the Supreme Court of Appeals
of West Virginia in November, 1907, from which we quote as follows:

"A sale by a retail dealer in intoxicating liquors, in which delivery is made
within the town or county in which he has a license, in fulfillment of an or-
der received and accepted at the place of business designated in his license
from his stock of goods kept in that place, is deemed by the law a sale at
the place of business, and not a sale at the place of delivery, unless it appears
that the place of delivery was agreed upon as the place of sale."

The principle is also fully sustained in a leading Pennsylvania case.
Commonwealth v. Fleming, 130 Pa. 138, 18 Atl. 622, 5 L. R. A. 470,
17 Am. St. Rep. 763. In the opinion in that case our view is distinctly stated in the following language:

"Where a purchaser orders goods sent him C. O. D. and the order is accepted by the seller, and goods delivered to the carrier, the sale on the part of the seller is complete. When the purchaser orders goods sent him C. O. D. and the order is accepted by the seller and the goods delivered to the carrier, the latter becomes the agent for the receipt and transmission of the price. The sale is complete on the part of the seller. And, whether the carrier receives the price or not at the time of delivery, he is liable to the seller for the price. A licensed liquor dealer who receives an order from a purchaser residing in another county where the dealer has no license to send him liquor C. O. D., and accepts the order and delivers the liquor to a carrier under agreement to collect on delivery, cannot be convicted of selling liquor without a license in the county where the purchaser resides, as the sale is complete on the part of the dealer when he delivers the liquor to the carrier at his place of business."

In the case of the United States v. Lackey (C. C.) 120 Fed. 577, Judge McDowell, of the Western District of Virginia, held that, where "a licensed liquor seller received orders from customers living in a place where he was not authorized to sell, and filled such orders by separating the liquor from his stock in his place of business, and delivering the packages, marked with the customers' names, to a private carrier, to be carried to the customers and to be delivered at their places of residence on payment of the price, under such circumstances the sales were completed in the seller's place of business, where he was licensed to sell." State decisions almost without number could be collected sustaining the general proposition that upon an order for goods to be shipped by the vendor to the vendee the sale is complete when such goods are delivered to the carrier. In the case of Ober & Sons v. Smith, 78 N. C. 313 (reprint 274), the Supreme Court of that state, Faircloth, J., delivering the opinion, holds that:

"As soon as an order for goods is accepted by the vendor, the contract is completed without further notice to the vendee; and such contract is fully performed on part of vendor by delivery of the goods in good condition to the proper carrier. A delivery to a carrier designated by the vendee is of the same legal effect as a delivery to the vendee himself."

And in Gwyn v. Railway Company, 85 N. C. 429, 39 Am. Rep. 708, Chief Justice Smith delivering the opinion of the court, it is decided that the sale of a specific chattel by words "in præsenti" transfers the vendor's title to the vendee with a right to retain possession until the purchase money is paid, in the absence of any contrary intent expressed or implied. In this last case the court cites with approval Ober v. Smith, supra. In another case, that of the Norfolk Southern Railway v. Barnes, 104 N. C. 25, 10 S. E. 83, 5 L. R. A. 611, Shepherd, J., delivering the opinion of the court, it is held that where a buggy was sold by A. to B., and delivered to a carrier by the vendor to be delivered to the vendee upon the payment of the price, as soon as the vehicle was delivered to the carrier, the right of property passed to the vendee, and the right of possession remained in the vendor until the price was paid. And the same doctrine is reiterated in Bank v. Miller, 106 N. C. 347, 11 S. E. 321. And the doctrine is also laid down as a general principle in both Benjamin and Hilliard on Sales.
We do not need to further cite declarations of the local courts to support the principle involved. The question, however, we are considering has not been directly before the Supreme Court of the United States, and therefore we have not the benefit of a decision of that court. There are several decisions, however, of the Supreme Court under the interstate commerce act in which the reasoning employed tends strongly to fortify the view we entertain. Notably the case of the American Express Company v. Iowa, 196 U. S. 133, 25 Sup. Ct. 182, 49 L. Ed. 417. The transaction involved in that case was a shipment by the American Express Company of four packages of intoxicating liquors from Rock Island, Ill., to Tama, Iowa, C. O. D., $3 to be collected on each package and 35 cents for carriage on each. These packages upon their arrival at Tama were seized in the hands of the express agent by the state authorities on the ground that they contained intoxicating liquor held by the express company for sale. The Supreme Court of the state of Iowa held that the seizure was legal, but upon writ of error the Supreme Court of the United States reversed that judgment. In that case reference is made to the case of Caldwell v. North Carolina, 187 U. S. 622, 23 Sup. Ct. 229, 47 L. Ed. 336. This was a case in which Caldwell was representing a Chicago company, which shipped pictures and frames to Greensboro, N. C., upon order. At Greensboro the company had this agent, who received the merchandise, put the pictures and frames together, and delivered them to the purchasers who had ordered them from Chicago. The state authorities sought to collect a tax from Caldwell, the agent, as a dealer in North Carolina. The Supreme Court held that he was not liable.

In the opinion in that case the court says:

"It would seem evident that if the vendor had sent the articles by an express company, which should collect on delivery, such a mode of delivery would not have subjected the transaction to state taxation. The same could be said if the vendor himself or by a personal agent had carried and delivered the goods to the purchaser."

When the Supreme Court declared that, if these goods shipped to Greensboro had been sent C. O. D., the transaction would have not been subject to state taxation, what did it mean? The court certainly did not intend to declare that, under the authority vested in Congress to regulate interstate commerce, legislation could be enacted which would deprive the state of North Carolina of its power to levy a tax upon sales of specific articles made within the limits of the state, nor can we believe that when the court held that a C. O. D. express package delivered to the vendee by the carrier, at the place of destination, could not be made the subject of taxation by the state in which the point of delivery was located as a sale in such state, the law still remained that such a delivery constitutes a sale at the place of destination which would subject the transaction to a tax on the part of the United States. It seems to us to follow, therefore, that what the court did intend to say was that where orders were sent from Greensboro to the Chicago concern directing the shipment of certain goods to the person sending the order, and the Chicago con-
cern did ship in obedience to the order and sent the goods by express to Greensboro C. O. D., the transaction was consummated in Chicago, and was therefore not taxable as a sale in North Carolina.

The case of the Norfolk & Western Railway Company v. Sims, 191 U. S. 441, 24 Sup. Ct. 151, 48 L. Ed. 254, is a case altogether in line with the Caldwell Case in support of the position we take. In this last case a resident of North Carolina ordered from a corporation in Chicago a sewing machine. The machine was shipped under a bill of lading to the order of the buyer, but this bill of lading was sent to the express agent at the point of delivery in North Carolina, with instructions to surrender the bill on payment of a C. O. D. charge. The contention was that the consummation of the transaction by the express agent in transferring the bill of lading upon payment of the C. O. D. charge was a sale of the machine in North Carolina, which subjected the company to a license tax. The contention was held untenable, and the contract of sale held to be completed in Chicago. Also in the case of the Adams Express Company v. Kentucky, reported in 206 U. S. 129, 27 Sup. Ct. 606, 51 L. Ed. 987, it is held that:

"A statute of Kentucky, making penal all shipments of liquor 'to be paid for on delivery, commonly called C. O. D. shipments,' and further providing that the place where the money is paid or the goods delivered shall be deemed to be the place of sale, and that the carrier and his agent delivering the goods shall be jointly liable with the vendor, is as applied to shipment from one state to another an attempt to regulate interstate commerce, and beyond the power of the state."

It is true that these decisions we have cited by the Supreme Court of the United States were rendered in construing and applying the interstate commerce act, and yet we must conclude that, if the Supreme Court entertained the opinion that a package of goods sent by express C. O. D. in obedience to an order from the consignee to the shipper that such a transaction did not constitute a sale until the package reached its destination and was delivered to the consignee upon the payment of the C. O. D. charges, these decisions would have contained some expression to that effect. On the contrary, however, the court especially in the case last cited, indirectly at least, discusses the proposition we have in the case before us. In the Kentucky case the state alleged that the liquor was being shipped into the state by the express company, and that the alleged consignee did not order the goods. In regard to this the Supreme Court, Mr. Justice Brewer delivering the opinion, says:

"We do not mean to intimate that an express company may not also be engaged in selling liquor in a state contrary to its laws, or that the fact that the consignee did not order a shipment might not be evidence for a jury to consider upon the question whether the company was not, in addition to its express business, also selling liquor contrary to the statute."

We understand from this language that, where a bona fide order had been sent and the goods shipped in response to it, that completed the transaction so far as the sale was concerned. But, if the express company without orders carried the goods and delivered them, that such might be shown as tending to prove that the company was the dealer, and the sale was made by the express company to the person
to whom it delivered the goods. The expressions of the Supreme Court which we have quoted discredit the suggestion that a C. O. D. package regularly sent upon a bona fide order is sold at the place of delivery. If such were the law, not only would the legal dealer in liquor who delivered his goods upon order to a carrier for shipment to a point other than his place of business be guilty, but the carrier's agent, who is the instrumentality for the delivery of the liquor and the receipt of the price, at the place of the destination would also be guilty of a violation of the law. We cannot construe the law so as to lead to such a result. In our case the express company acted simply as a common carrier, transported the package of liquor from Clarksburg to Grafton, there to be delivered to the purchaser; the collection of the C. O. D. charges and the transmission of the money to the seller being a mere incident of the express business. We may say as a general proposition that actual delivery of a chattel is not in all cases necessary to the consummation of a sale. The mutual assent of the parties to the contract that the property in the chattel is to pass from the seller to the buyer for the money or price offered constitutes a sale at common law. Therefore, when the defendant's firm received Horton's order at Clarksburg where a legal business was being conducted by his firm as a retail liquor dealer and the spirits ordered by Horton were separated from the stock, packed and delivered to the express agent, the sale was completed, and, as stated above, the express company was the agent of the purchaser to carry the spirits, deliver them to Horton, receive the price, and transmit it to the seller.

Mr. Benjamin in his work on Sales, § 362, discussing this proposition, cites as authority the case of Dutton v. Solomonson, 3 Bos. & P. 582, which says:

"It was treated as already settled law that, where a vendor delivered goods to a carrier by order of the purchaser, the appropriation is determined, the delivery to the carrier is a delivery to the vendee, and the property vests immediately."

We conclude, therefore, that the District Court was in error in its refusal to give the defendant's prayer for instruction to the jury, and also in error in the instruction as given by the court to the jury.

The judgment of the District Court is therefore reversed.

PRITCHARD, Circuit Judge (dissenting). I cannot concur in the conclusion reached by a majority of the court in this case. The question involved here is within a narrow compass, but it is far reaching in importance and demands serious consideration.

It appears from the record that the plaintiff in error was engaged in business at Clarksburg, in the state of West Virginia. It also appears that the town of Grafton, in that state, is situated some distance from the city of Clarksburg. It also appears that one T. L. Horton, residing at Grafton, ordered by letter addressed to Hickman & Jones and mailed to them at their place of business at Clarksburg one-half gallon of whisky. In the letter the purchaser informed Hickman & Jones of the quantity of liquor desired, the price to be paid
for the same, and directed them to ship it to him at Grafton, W. Va.,
C. O. D. The plaintiff in error was indicted as a member of said
firm. While it does not affirmatively appear that prohibition obtains
in the town of Grafton, yet it may be inferred from the facts and
circumstances as shown by the testimony of the witnesses in the court
below that the sale of liquor is prohibited in that town either by local
option or statute. Although this fact is not material in determining
the guilt or innocence of the accused, yet it is pertinent to the ques-
tion as to whether the federal courts in the enforcement of laws en-
acted by Congress should take into consideration the existence of local
statutes designed for the punishment of those charged with kindred
offenses. Sales of this character, as a general rule, are made to par-
ties residing in territories where the sale of liquor is prohibited, and,
if the contention of the plaintiff in error be correct, the enforcement
of prohibition laws would be well nigh impossible, and the govern-
ment would be deprived of the license tax to which it is entitled under
the internal revenue laws. It is within the common knowledge of all,
and the courts will take judicial notice of the fact, that several states,
as well as towns, cities, and counties, have adopted laws prohibiting
the sale and manufacture ofspiritualliquors. That the Legisla-
tures of the various states have the power to enact laws of this kind
is unquestioned. Such enactments are intended to promote the welfare
of the people residing in the communities affected thereby. It is a
matter of common knowledge that in many instances laws thus en-
acted by the state are violated by individuals who resort to various
kinds of subterfuge. In considering this question, the inquiry naturally
arises as to whether the will of the state Legislature in this respect
is to prevail, and also as to whether the federal courts in the admin-
istration of the internal revenue laws will, as far as possible, aid in
making the state statutes effective. I think it is the duty of a federal
court in cases like this to do all it can, without overstepping the law,
to aid the states in the enforcement of laws enacted for the manifest
purpose of maintaining law and order.
As an evidence that Congress is inclined to aid as far as possible
in the enforcement of the prohibition laws of the various states in
so far as interstate commerce transactions are concerned, I call atten-
tion to section 239 of Public Act No. 350, to codify, revise, and amend
the penal laws of the United States, passed at the recent session.
The section in question reads as follows:

“Sec. 239. Any railroad company, express company, or common carrier, or
any other person who, in connection with the transportation of any spirituous,
vinous, malted, fermented, or other intoxicating liquor of any kind from one
state, territory, or district of the United States, or place noncontiguous to
but subject to the jurisdiction thereof, into any other state, territory or dis-
trict of the United States, or place noncontiguous to but subject to the juris-
diction thereof, shall collect the purchase price or any part thereof, before,
on, or after delivery, from the consignee, or from any other person, or shall
in any manner act as the agent of the buyer or seller of any such liquor, for
the purpose of buying or selling or completing the sale thereof, save only in
the actual transportation and delivery of the same, shall be fined not more
than five thousand dollars.”
However, this law, having been enacted subsequent to the commission of the offense charged in the indictment and intended to apply only to cases where interstate shipments are made, can have no bearing upon the question sought to be determined by this writ of error, and is therefore quoted solely with the view of showing the policy of Congress in respect to this question. In this case the plaintiff in error was a licensed dealer in a territory where the sale of spirituous liquors was authorized by the laws of the state, and under these circumstances he had a perfect right at his place of business to sell to any one he pleased, but even in that territory he was not authorized to make a sale at a place other than his place of business. On payment of the special tax, the government issued a receipt to the defendant in error for the same, which designated the place of business at which he was authorized to make sales, and it has been repeatedly held that to sell at any other place would render him liable to indictment under the federal statute. Thus it will be seen that the federal statute in this respect is very rigid, and anything short of a strict compliance with the requirements contained in such receipt subjects the dealer to a heavy penalty upon conviction.

The only question to be determined is as to whether the shipment in this instance to Horton at Grafton C. O. D. constitutes a sale at that place, and, in order to correctly determine this point, it becomes necessary to ascertain what it takes to constitute a sale of personal property. In the case of Robinson v. Hirschfelder, 59 Ala. 503–506, it was held:

"That an agreement to sell does not become a sale if any term in which the seller must co-operate, or which imposes a liability or duty on him, remains to be performed, such as weighing, measuring, inspecting, and transporting goods to another place, to be there delivered and received. Things not in esse, actual or potential, cannot be the subject of sale."

Also the Supreme Court of Arkansas in the case of Berger v. State, 50 Ark. 20, 6 S. W. 15, among other things, said:

"Defendant was located in a nonliquor license town. An order for liquor was left with him, and he sent it to a licensed liquor dealer in another town, who filled the order by putting the designated liquor in a bottle and with many others of the same nature sent it labelled with the customer's name and inclosed in a locked box to the customer. Held, that the defendant was the agent of the liquor dealer, and that the sale was completed upon the delivery by defendant, and he was guilty of selling ardent spirits."

The Supreme Court of Georgia in the case of Crabb v. State, 88 Ga. 584, 15 S. E. 455; held that a sale of whisky sent by express C. O. D. is not completed until the whisky is delivered and paid for, and the express agent making the delivery and collection in the county where sale is lawfully prohibited is subject to indictment if he acts knowingly in completing the sale. That court also in the case of Doster v. State, 93 Ga. 43, 18 S. E. 997, held:

"Delivery whether made by the seller or his employé if requisite to complete a sale the contract for which with payment of the purchase price was made elsewhere is contrary to law if the seller has no license authorizing him to sell in the county where the delivery takes place. In such case the sale is to be treated as made, not where the contract was entered into and the purchase money paid, but where it was completed by delivery."
In the case of Vermont v. O’Neil, 58 Vt. 140, 2 Atl. 586, 56 Am. Rep. 557, the court said:

“The liquors were ordered by residents of Vermont from dealers doing business in the state of New York, who selected from their stock such quantities and kinds of goods as they thought proper in compliance with the terms of the orders, put them up in packages, directed them to the consignees, and delivered them to the express company as a common carrier of goods for transportation, accompanied with a bill or invoice, for collection. The shipment was in each instance which it is necessary here to consider ‘C. O. D.’ and the cases show that the effect of the transaction was a direction by the shipper to the express company not to deliver the goods to the consignee except upon payment of the amount specified in the C. O. D. bills, together with the charges for the transportation of the packages and for the return of the money paid. This direction was understood by the express company, which received the shipments coupled therewith."

The court also, among other things, said that whether or not and when the legal title in property sold passes from the vendor to the vendee depends upon intention of the parties, which is to be gathered from their acts and all the facts and circumstances of the case taken together, and cited Mason v. Thompson, 18 Pick. (Mass.) 305; Benjamin on Sales, 311, 319, note “c,” and 320, note “d”; Robert’s Vermont Digest, 610 et seq.

The court, in further discussion of the matter before them said:

“In the cases under consideration [viz., the present case, and another case against O’Neil, for keeping intoxicating liquors with the intent to sell, etc.] the vendors of the liquors shipped them in accordance with the terms of the orders received, and the mode of shipment was as above stated. They delivered the packages of liquors, properly addressed to the several persons ordering the same, to the express company, to be transported by that company and delivered by it to the consignees upon fulfillment by them of a specified condition precedent, namely, payment of the purchase price and transportation charges, and not otherwise. Attached to the very body of the contract, and to the act of delivery to the carrier, was the condition of payment before delivery of possession to the consignee. With this condition unfulfilled and not waived, it would be impossible to say that a delivery to the carrier was intended by the consignor as a delivery to the consignee, or as a surrender of the legal title. The goods were intrusted to the carrier to transport to the place of destination named, there to present them for acceptance to the consignee, and he accepted them and paid the accompanying invoice and the transportation charges, to deliver them to him; otherwise, to notify the consignor, and hold them subject to his order. It is difficult to see how a seller could more positively and unequivocally express his intention not to relinquish his right of property or possession in goods until payment of the purchase price than by this method of shipment. We do not think the case is distinguishable in principle from that of a vendor who sends his clerk or agent to deliver the goods or forwards them to or makes them deliverable upon the order of his agent, with instructions not to deliver them except on payment of the price, or performance of some other specified condition precedent by the vendee. The vendors made the express company their agent in the matter of the delivery of the goods, with instructions not to part with the possession of them except upon prior or contemporaneous receipt of the price. The contract of sale therefore remained inchoate or executory while the goods were in transit, or in the hands of the express company, and could only become executed and complete by their delivery to the consignee. There was a completed executory contract of sale in New York; but the completed sale was, or was to be, in this state."

In the case of the United States v. Shriver (decided by the District Court of the United States for the Southern District of Illinois) 23 Fed. 134, the court held:
"In deciding this case it only seems to be necessary to consider the effect of the sales made by shipment from Shawnetown to Fairfield by express O. O. D., to be delivered at Fairfield by the agent of the shipper to the consignee on payment of the price. It is clear that the express agent at Fairfield was also the actual agent of the defendant in receiving and delivering the liquor shipped to Fairfield, and in collecting the money for it; for the defendant employed him for that purpose, and agreed to pay him 10 per cent. on the money collected by him, without reference to whether the liquor was shipped C. O. D. or by tags attached to the jugs with the price and address marked thereon. Certainly, then, as to all the packages shipped C. O. D., the ownership and possession of the liquor remained in the defendant after reaching the hands of his agent in Fairfield just as completely as before it left his store in Shawnetown, and the sale did not take place until the defendant, by his agent, received the money at Fairfield, and delivered the liquor there to the purchaser. This would be true, too, even if the Fairfield express agent had not been specially employed as the defendant's agent in the handling of this liquor; for in the case of liquor shipped by the defendant to Fairfield by express C. O. D., the liquor is received by the express company at Shawnetown as the agent of the seller, and not as the agent of the buyer, and, on its reaching Fairfield, it is there held by the company as the agent of the seller until the consignee comes and pays the money, and then the company, as the agent of the seller, delivers the liquor to the purchaser. In such cases the possession of the express company is the possession of the seller, and generally the right of property remains in the seller until the payment of the price."

In the case of Adams Express Company v. Kentucky, 206 U. S. 129, 27 Sup. Ct. 606, 51 L. Ed. 987, it was sought to hold the express company liable for a violation of a state statute, making all shipments of liquor packages C. O. D. unlawful and also to make the carrier liable to the vendor for its violation. This case was instituted in the circuit court of Laurel county, Ky., in the indictment against Joe Newland and the Adams Express Company it being charged that:

"The said Joe Newland and the Adams Express Company, the latter being a partnership engaged in and carrying on the business of a common carrier of packages, goods, wares, and merchandise, by the method known as express, * * * did in Laurel county, Kentucky, on the seventeenth day of February, 1904, unlawfully and willfully carry for and deliver to George Meese a parcel, package shipment, and quantity of intoxicating, spirituous, vinous and malt liquors * * * to be and which, was paid for on delivery to East Bernstadt, in said Laurel county, same being at the time a shipment commonly known and called C. O. D. shipments, * * * said shipment and delivery being made and done at the time by said Joe Newland and said Adams Express Company in the usual course of business of said Adams Express Company."

Subsequently the action was dismissed as to Newland, and on a plea of not guilty the case was tried before a jury, and resulted in a verdict finding the company guilty and fixing the fine at $60. Judgment was entered on the verdict, which was affirmed by the Court of Appeals of the state. 87 S. W. 1111, 27 Ky. Law Rep. 1096. From that court the case was carried to the Supreme Court on writ of error. The act under which the prosecution was had is subsection 4, § 2557b, Ky. St. 1903, commonly called the "C. O. D. law," which is part of the general local option law as amended in 1902 (Laws 1902, p. 42, c. 14, § 4), and which reads:

"All the shipments of spirituous, vinous or malt liquors, to be paid for on delivery, commonly called C. O. D. shipments, into any county, city, town, district or precinct where this act is in force shall be unlawful and shall be deemed sales of such liquors at the place where the money is paid or the
goods delivered; the carrier and his agents selling or delivering such goods shall be liable jointly with the vendor thereof."

The Supreme Court of the United States held this statute to be an interference with interstate commerce. However, Mr. Justice Brewer in rendering the opinion, among other things, says:

"We do not mean to intimate that an express company may not also be engaged in selling liquor in a state contrary to its laws, or that the fact that the consignee did not order a shipment might not be evidence for a jury to consider upon the question whether the company was not, in addition to its express business, also selling liquor contrary to the statutes. It is enough to hold, as we do, that under the averments of this indictment such testimony is immaterial. It is, of course, a question of fact whether a carrier is confining itself strictly to its business as a carrier or participating in illegal sales. The consignor alone may be trying to evade the statute. * * * Much as we may sympathize with the efforts to put a stop to the sales of intoxicating liquors in defiance of the policy of a state, we are not at liberty to recognize any rule which will nullify or tend to weaken the power vested by the Constitution in Congress over interstate commerce."

Here the question as to whether upon a similar state of facts presented under a proper indictment against the shipper of the goods a conviction would be warranted is left open, and Mr. Justice Harlan, who dissented in all of these cases, at page 141 of 206 U. S., page 609 of 87 Sup. Ct. (51 L. Ed. 992), said:

"I do not think that these are cases of legitimate interstate commerce. They show only devices or tricks by the express company to evade or defeat the laws of Kentucky relating to the sale of spirituous, vinous, or malt liquors. I dissent from the opinion and judgment in each case."

In this case the goods were shipped C. O. D., as has already been stated, and under the circumstances the inquiry naturally arises as to why the seller should have chosen this method of dealing. Ordinarily goods are either paid for at the time they are shipped, or, if the purchaser is solvent, they are charged and shipped, and in such instances the sale is completed at the time the seller parts with the possession of his goods by delivering the same to the express company or railroad company as the case may be. There must have been some reason why the plaintiff in error refused to charge the article in this instance, and took the precaution to ship the goods C. O. D. He could have had but one motive for doing so, and that was to retain the title until he had been paid the price thereof. Otherwise it would have been a vain and foolish thing to ship the goods in the manner described. It must be admitted that this method of shipping goods is employed for the express purpose of protecting the seller, and enabling him at all times to keep under his control the possession of the article shipped until he has been paid the price exacted. A simple statement of this proposition it seems to me ought to be sufficient to show the fallacy of the contention of counsel for plaintiff in error. Suppose this package of whisky had been destroyed en route to Grafton, could it be reasonably contended that Horton, the vendee, would have been entitled to institute action against the express company for damages for its destruction? Could Horton, at any time after the goods reached Grafton, have secured possession of the same, by claim and delivery
or other suitable process, without first paying the purchase price? I think not, and this after all is the true test.

The Supreme Court of North Carolina in the case of Sims v. Norfolk & Western Railroad, 130 N. C. 556, 41 S. E. 673, in passing this phase of the question, among other things, said:

"By the 'facts agreed' in this case it appears that Sears, Roebuck & Co., of Chicago, have not paid said tax nor obtained a license, and that prior to this transaction they had made several deliveries at various points in North Carolina, on the lines of other interstate railroads running into this state, and that all these shipments, like the one here in question, were made on bills of lading providing that the sewing machine should not be delivered till it was paid for by the person named as consignee. Thus the title could not pass till such payment was made to the common carrier, acting as agent of the shipper. This was an executory contract in Illinois, but there was no sale till the payment was made, and thus the sale was executed in North Carolina and the shippers are liable to the above tax. The title to this machine having remained in the shipper until such payment (Tiedeman on Sales, §§ 95, 97), the machine was properly levied on before such payment for the license tax due by the shippers (Laws 1901, p. 151, c. 3, § 101, last paragraph of section). The well-known case of O'Neil v. Vermont, 144 U. S. 324, 12 Sup. Ct. 693, 36 L. Ed. 450, is decisive of the point. There in the shipment of liquor from New York into Vermont C. O. D., it was held that the completed executory contract was in New York, but the completed sale was in Vermont—as here."

One can well understand how a whisky dealer residing at Clarksburg and unacquainted with those who might desire to purchase his goods in the town of Grafton would have been unwilling to sell such party on a credit, and the only thing the seller could do under such circumstances to protect his interests would be to reserve the title to the property until it reached Grafton, and there surrender the same to the purchaser upon the payment of the purchase price, and this is exactly what occurred in this case. And the case now before us is just as strong as if the defendant, the plaintiff in error, had carried the goods to Grafton himself, and there delivered the same upon the payment of the purchase price.

The District Court of the United States for the Western District of North Carolina, Dick, District Judge, held in the case of the United States v. Cline, 26 Fed. 515:

"Contracts of sale of personal property at the common law should be so construed as to ascertain the intention of the parties in regard to the passing of the title of the subject-matter of the agreement. 'If a man agrees with another for goods at a certain price, he may not carry them away before he has paid for them, for it is no sale without payment unless the contrary is expressly agreed.' Where a sale is proposed by a vendor, and the offer is accepted by the vendee, the bargain is struck, but if, by the express terms of the contract, anything remains to be done by the vendor before delivery, or the delivery is to be made at a future day, and at a different place, on the payment of the price agreed upon, a complete present right of property is not vested in the vendee. The contract is, however, obligatory, and, if either party fails or refuses to comply with his agreement, he is responsible in damages if the other party is ready and willing to perform his part of the contract. When the terms of the bargain have been agreed on, and everything that the vendor has to do with the goods to put them in a condition for immediate delivery, the sale is absolute, without actual payment or delivery, so that the property is in the vendee, and the goods are at his risk as to accident and damage. The vendee is not entitled to the possession until he pays or tenders the price, or gets a future day for payment, for the vendor has a lien on the property for the price, and only payment or tender of payment gives the ven-
de a right of possession. If the vendee tenders the price to the vendor, and he refuses it, the vendee may seize the goods or have an action for obtaining them. When specific goods are sold on a credit, and there is no agreement as to the time of delivery, the vendee is entitled to immediate possession, and the right of property at once vests in him. If goods bargained for constitute only a part of a stock or larger quantity of the same kind, a title to the goods sold does not pass to the purchaser until they are set apart and designated as his portion. If the purchaser has paid for a certain quantity of the goods in bulk, and has agreed to be present, and have the goods set apart and ascertained and delivered on or before a certain day, and he fails to comply with this agreement, the goods contracted for remain at his risk of damage and accident. It is not necessary for a vendor and vendee to come together in order to complete a sale of personal property and a transfer of the title. This can be done by the intervention of agents, or by means of written correspondence. If an agent negotiates a purchase in the name of his principal, the transaction has all the elements of a contract made by the principal. If a proposition of purchase is made by letter, and is accepted by a vendor, and he delivers the article purchased to a common carrier as directed by the purchaser, such delivery completes the contract of sale, and transfers title, without payment of the price, as the common carrier is the agent of the purchaser, and the vendor only has the right of stoppage in transitu if the purchaser is ascertained to be insolvent. If a vendor delivers an article ordered to a common carrier, marked 'C. O. D.,' and directed to an intended purchaser, the contract of sale is completed at the place of delivery to the purchaser on the payment of the price, as the common carrier is the agent of the vendor for the purposes expressed, and the ownership of the property set apart for the purchaser does not pass to him until he pays the price. This principle of law was applied by me in this court several years ago in the trial of the case of U. S. v. Williams, and I am informed that the commissioner of internal revenue has so ruled in the collection of special taxes from dealers in liquors."

It is insisted that the decisions of the Supreme Court of West Virginia, as well as the courts of some of the other states, are in support of the contention that the sale in this instance was complete when the package was delivered to the express company at Clarksburg. While it is true that in West Virginia and in many of the other states the courts of last resort have so held, yet this court is not bound by any decision of a state court in a case like the one at bar. As a result of recent state and federal legislation, the various courts are gradually changing the rule in this respect, and it is well to remember in this connection that there has been no decision of the Supreme Court of the United States in conflict with the rule announced by the United States District Courts in the cases of the United States v. Shriver and United States v. Cline, supra.

If the facts in this case do not constitute a sale at the place where the whisky was delivered and paid for, then it would be an easy matter, under such circumstances, for a saloon keeper residing in a territory where under the state law he is authorized to sell liquor to invade the prohibition territory in such state by the method adopted in this instance, and thereby enjoy all the benefits and privileges accorded a licensed dealer in communities where the sale of liquor is authorized, and thus avoid the payment of the state, city, and county taxes and at the same time deprive the government of its tax. This would not only be so, but it would further result in greatly embarrassing the state, county, and city officials charged with the enforcement of the state statutes enacted for the purpose of prohibiting the sale of liquor in such territory.

The Legislature has power to prescribe or to change the rules of evidence, the parties having no vested right to have their case tried by such existing rules.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 260-263; Dec. Dig. § 109.*]


The Legislature, under pretense of making or changing a rule of evidence, cannot deprive a party of a vested right in property.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 260-263; Dec. Dig. § 109.*]

3. **Constitutional Law** (§ 92*) — "Vested Right."

A vested right protected by the federal and state Constitutions is some right or interest in property which has become fixed and established and is no longer open to doubt or controversy. It does not, however, include a claim to property which is contrary to justice and equity, nor does it include a right to property purchased pending litigation concerning the title bought, so as to free it from the effect of subsequent curative legislation.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 174; Dec. Dig. § 92.*

For other definitions, see Words and Phrases, vol. 8, pp. 7307-7309, 7829.]


Const. Tex., prohibiting retroactive legislation, does not preclude the passage of remedial or curative acts which do not deprive one of vested rights.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 536; Dec. Dig. § 193.*]


A married woman's deed containing an insufficient acknowledgment, but otherwise valid, was admissible as proof of title after the passage of Act 30th Leg. Tex., approved April 12, 1907 (Laws 1907, p. 308, c. 165), more than 10 years after the deed had been recorded, providing that under certain circumstances an instrument, if recorded for 10 years, whether proved or acknowledged in such manner as required at the time it was recorded or not, shall be admitted in evidence in any suit in the state without proof of its execution.

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

6. **Acknowledgment** (§ 6*) — Deed of Wife — "Void."

The term "void" can only accurately be applied to those contracts that have no effect whatsoever and which are mere nullities, such as those which are against law, illegal, criminal, or in contravention of law and incapable of confirmation or ratification; hence a married woman's deed defectively acknowledged is not void.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. § 51; Dec. Dig. § 6.*

For other definitions, see Words and Phrases, vol. 8, pp. 7332-7339, 7830, 7342.]

McCormick, Circuit Judge, dissents.

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
† Rehearing denied May 24, 1909.
In Error to the Circuit Court of the United States for the Eastern District of Texas.

In the court below there was a consolidation of the causes styled "Emma V. Powell vs. George E. Downs," and "E. A. Blount vs. George E. Downs et al.," both being actions of trespass to try title under the statutes of Texas. The land involved is the east half of the Joes Hoby league, situated in San Augustine county, Tex.

The original petition of Emma V. Powell was filed on February 27, 1904, the plaintiff therein claiming to be the owner of an undivided one-fourth interest in the east half of said league. The original petition of E. A. Blount was filed on October 5, 1907, the plaintiff therein claiming the east half of said league. On November 4, 1907, the Garrison-Norton Lumber Company filed its petition in intervention claiming the timber on the land in controversy. The plaintiff in error, George E. Downs, answered the petitions of the plaintiffs and intervener by a general demurrer, plea of "not guilty," and pleas of the statutes of three, five, and ten years' limitations, and, by cross-action, brought in S. W. Blount and F. G. Roberts, Jr., warrantors in the chain of title under which Downs held, and in his cross-action against the intervener he alleged that the claim of the intervener was a pretended and fictitious claim, and invalid and known to the intervener to be invalid, or it could have been known by the exercise of ordinary prudence, and asked for judgment for the timber cut and removed by said intervener.

S. W. Blount answered this cross-action with a general demurrer and plea of "not guilty." It appeared upon the trial that F. G. Roberts, Jr., was dead, and the cross-action was dismissed as to him. On November 18, 1907, the causes were consolidated. It appeared upon the trial of the consolidated causes that E. A. Blount had acquired the interest claimed by the plaintiff, Emma V. Powell, and he was substituted as plaintiff in her stead, and she was dismissed from the suit. The consolidated causes were tried before a jury on December 10, 1907, and, under peremptory instructions from the court, the jury brought in the following verdict:

"We, the jury, find in favor of the plaintiff, E. A. Blount, and against the defendant, George E. Downs, for the land in controversy, except the timber thereon sold by Blount to the intervener, Garrison-Norton Lumber Company; and as to said timber on said land so sold we find in favor of the intervener, Garrison-Norton Lumber Company, and against the defendant, George E. Downs, for such timber; and we find in favor of the defendant, George E. Downs, on his cross-action against the defendant, S. W. Blount, on his warranty for the sum of $2,435.40, together with 6 per cent. interest thereon from December 8, 1881."

Thereupon judgment was rendered upon said verdict in favor of the defendants in error, E. A. Blount and Garrison-Norton Lumber Company, against the plaintiff in error, George E. Downs, for the land and timber sued for, but with a judgment in favor of the plaintiff in error on his cross-action against S. W. Blount for $6,234.37, with 6 per cent. interest from date, to all of which rulings of the court the plaintiff in error duly excepted.

Both plaintiff in error and the defendants in error, in error claimed the land and timber involved in this suit from a common source of title, to wit, Martha R. Jones. Martha R. Jones acquired the land from Hilliard J. Jones, a brother-in-law, by deed dated March 27, 1854, filed for record April 16, 1855, and duly recorded. The title of the plaintiff in error from the common source down to himself is as follows:

(1) Martha R. Jones and her husband, Jas. A. Jones, to Jas. Vaughan, deed dated October 15, 1854, filed for record April 15, 1855, and duly recorded, the consideration being $3,000.

(2) The heirs of Jas. Vaughan, by their attorney in fact, J. R. Powell, a deed to S. W. Blount, Jr., and Felix Roberts, Jr., dated November 22, 1881, and duly recorded.

(3) The plaintiff in the first suit, Emma V. Powell, was one of the heirs of Jas. Vaughan, and she and her husband, Joe R. Powell, executed a deed to Stephen Blount and Felix Roberts, Jr., on December 1, 1881, filed December 8, 1881, and duly recorded.
From this deed on down the title of the plaintiff in error was regular and unquestioned. The defendant in error, E. A. Blount, claimed the land by purchase from the heirs of Martha R. Jones and Jas. A. Jones by deed dated May 6, 1857. A short time prior to that date said heirs executed deeds to the said Blount conveying the timber on said lands. The defendant in error, Garrison-Norton Lumber Company, based its claim to the timber upon the land in controversy on a deed from E. A. Blount.

The title of the plaintiff in error, George E. Downs, was regular, except for the married woman's acknowledgments to the deed from Martha R. Jones and her husband to Jas. Vaughan, and to the deed from Emma V. Powell and her husband to S. W. Blount and Felix Roberts, Jr. These deeds were both links in the chain of title of the plaintiff in error, and, because the acknowledgments were not in statutory form, the court refused to allow them to be introduced in evidence for any purpose, and to this action of the court the plaintiff in error duly excepted.

The deed of Martha R. Jones and her husband, which was rejected as evidence, is as follows:

"James A. Jones and Wife to James Vaughan.


"This Indenture made and entered into this, the ——— day of October, in the year one thousand eight hundred and fifty-four, by and between James A. Jones and Martha E. Jones, his wife, of the first part, and James Vaughan, of the second part, of the county of Ouachita, state of Arkansas, witnesseth: That the said party of the first part, for and in consideration of the sum of three thousand dollars, to them in hand paid, the receipt whereof they do hereby acknowledge, have the day of the date hereof granted, bargained, sold, aliened and confirmed, and by these presents do grant, bargain, sell, alien unto and with the said party of the second part all that certain tract or parcel of land situated in the state of Texas, county of San Augustine, and described as follows: Beginning on the south boundary line of Joshe Hoby headright survey of one league of land at a post oak 15 in. in dia. 4230 vars distant east of the Ayish bayou, from which a post oak a pine bears north 70 deg. west 12 vars; thence north magnetically until it intersects the northern boundary line to the league survey; thence east with the northern boundary line to the northeast corner or station of said survey; thence south with the eastern boundary of said league survey to its southeast station; thence west with the southern boundary line of said league survey to beginning, containing one-half of said league of land, more or less.

"To have and to hold the aforesaid tract of land together with all the hereditaments, appurtenances, improvements thereto belonging to the said party of the second part, his heirs and assigns, forever, and the said party of the first part will forever defend the title of said land to the party of the second part, his heirs and assigns, forever, against the lawful claims of all persons.

"In testimony whereof the said party of the first part have hereunto set their hands and affixed their seals day and date above written.

"J. A. Jones. [Seal.]
"Martha R. Jones. [Seal.]

"Attest: J. Maddon.
"Peter Pope.

"The State of Arkansas, County of Ouachita.

"Be it remembered that on this the 15th day of October, A. D. 1854, before me, Thomas Hubbard, as judge of the circuit court of said county, which is a court of record, personally came James A. Jones, whose signature appears to the foregoing deed, known to me, who acknowledged that he had executed the said deed for the purposes and consideration therein expressed; also Martha R. Jones, wife of the said James A. Jones, whose signature appears to the said deed, to me well known, voluntarily appeared before me and declared that she had signed and sealed and executed said deed for the purposes and con-
sideration therein contained and set forth without any compulsion of or unde influence of her said husband.

"Given under my hand and seal the date within written.

"Thomas Hubbard, [L. S.]

"Judge, C. C."

The plaintiff and intervener objected to this deed on the ground, in substance, that it showed that the property it purported to convey was the separate property of a married woman, Martha R. Jones, and that the certificate of acknowledgment was fatally defective in failing to comply with the statute of Texas relating to the acknowledgment of the deeds of married women in force at the date of the deed. These exceptions were sustained, and the deed was rejected as evidence. The refusal of the court to admit this deed (and a similar deed on like objections) is really the basis of all questions raised in the court below and of the assignment of errors here.

T. D. Cobbs (Baker, Botts, Parker & Garwood, of counsel), for plaintiff in error.

Greer, Minor & Miller and Goodrich & Synnott, for defendants in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge (after stating the facts as above). The land in controversy was conveyed to Martha R. Jones, the wife of James A. Jones, on March 27, 1854. Both parties to the suit deraign title from her. She and her husband conveyed the land on October 15, 1854, to James Vaughan, and the deed was filed for record April 15, 1855, and duly recorded. The chief controversy in the case relates to defects in the certificate of acknowledgment to this deed. James Vaughan and those who succeeded to his rights, including Downs, the plaintiff in error, claimed the land under this deed for more than a half century, no one else during that time asserting any adverse claim to it. Martha R. Jones and her husband lived in Arkansas when they made the deed, but they afterwards moved to Texas, and lived there till he died in 1864. She continued to live in Texas after his death, and died there in 1897. They had received $3,000 for the land. He lived 10 years, and she 42 years, after making the deed and receiving the purchase money, and neither of them ever repudiated the contract. The first original petition in this case was filed February 27, 1904. E. A. Blount, the defendant in error, on May 6, 1907, after the institution of the suit, and with knowledge of the claim of Downs to the land, purchased it from the surviving children and heirs of Martha R. and James A. Jones. The purchase of the timber was also made with notice of Downs' claim and pending the suit. Blount bought the land and timber relying on—and he now relies on—the defective certificate to the deed made by Martha R. Jones and her husband to Vaughan in 1854.

It may be conceded that the authorities cited by the learned counsel for the defendant in error are conclusive on the point that the certificate to the deed was not such as was required by the laws of Texas, and that the conveyance in question did not at the time of its execution and delivery convey the legal title.

Whether or not the written attempt to convey the title, for the
recited consideration, was absolutely void, is a question to be considered later.

The plaintiff in error contends that the Jones deed was admissible in evidence notwithstanding the defective certificate of acknowledgment, because of the curative statute passed by the Thirtieth Legislature and approved April 12, 1907 (Laws 1907, p. 308, c. 165). This statute was an amendment of article 2312 of the Revised Statutes of Texas of 1895. The article, as amended, is as follows, the amendment being shown by italics:

"Art. 2312. Every instrument of writing which is permitted or required by law to be recorded in the office of the clerk of the county court, and which has been, or hereafter may be so recorded, after being proven or acknowledged in the manner provided by the laws of this state in force at the time of its registration, or at the time it was proved or acknowledged, or every instrument which has been or hereafter may be actually recorded for a period of ten years in the book used by said clerk for the recording of such instruments, whether proved or acknowledged in such manner or not, shall be admitted as evidence in any suit in this state without the necessity of proving its execution; provided no claim adverse or inconsistent to the one evidenced by such instrument shall have been asserted during that ten years; provided, that the party who wishes to give (it) such instrument in evidence shall file the same among the papers of the suit in which he proposes to use it, at least three days before the commencement of the trial of such suit, and give notice of such filing to the opposite party or his attorney of record; and unless such opposite party, or some other person for him, shall, within three days before the trial of the cause, file an affidavit stating that he believes such instrument of writing to be forged. And whenever any party to a suit shall file among the papers of the cause an affidavit stating that any instrument of writing, recorded as aforesaid, has been lost, or that he can not procure the original, a certified copy of the record of any such instrument shall be admitted in like manner as the original could be. And after such instrument shall have been actually recorded as herein provided for a period of ten years, it shall be no objection to the admission of same, or a certified copy thereof, as evidence, that the certificate of the officer who took such proof or acknowledgment is not in form or substance such as required by the laws of this state, and said instrument shall be given the same effect as if it were not so defective."

The contention of the defendant in error is that, if the act is so construed as to make it applicable to this case, it would be in violation of the provision of the federal Constitution against impairing the obligation of contracts and of the due process clause of the fourteenth amendment; and that it would also be in violation of article 1, § 16, of the Texas Constitution of 1876, which declares that:

"No * * * retroactive law, or any law impairing the obligation of contracts, shall be made."

The court below excluded the deed because of the defective acknowledgment. The curative act provides in plain words that under certain circumstances the instrument, if it has been recorded for 10 years, "whether proved or acknowledged in such manner or not, shall be admitted as evidence in any suit in this state, without the necessity of proving its execution." There can be no doubt about the power of the Legislature to prescribe or to change rules of evidence. The right to have a case tried by existing rules of evidence is not a vested right. Such rules, like others affecting remedies, are at all times subject to modification and control by the Legislature, and the changes are.
applicable to existing causes of action, even in states where retrospective laws are forbidden. Cooley's Constitutional Limitations (6th Ed.) 451. Referring to such changes in the rules of evidence, Cooley gives the familiar instance of a Legislature making a tax deed prima facie evidence that all proceedings have been regular, thereby changing the burden of proof from one party to the other; and then he makes the significant observation that:

"Statutes making defective records evidence of valid conveyances are of a similar nature; and these usually, perhaps always, have reference to records before made, and provide for making them competent evidence where before they were merely void." Id. 452.

A Legislature, while it has the undoubted power to make a tax deed prima facie evidence of the regularity of the steps preceding the sale, could not make it conclusive evidence. Neither could the Texas Legislature make an imperfect and ineffective deed so conclusive as to cut off the right of a party to show its invalidity as being forged or otherwise. And it is true that, under pretense of making or changing a rule of evidence, the Legislature cannot deprive a party of a vested right in property. And this limitation of legislative power is urged with much earnestness on our attention. Whether or not Blount has a "vested right," within the meaning of the limitation, is a question that must be decided. In deciding it, we must consider what rights, if any, were conferred by the defective deed of the Joneses to Vaughan in 1854, as well as what rights, if any, were conferred by the deed of the Joneses heirs to E. A. Blount in 1907.

In this case, much depends on the meaning to be given to the phrase "a vested right." The phrase is not found either in the federal or the state Constitution. In this connection it must mean some right or interest in property that has become fixed and established and is no longer open to doubt or controversy. A claim to property, however, which is contrary to justice and equity, cannot be regarded as of that character; for, when called on to decide whether or not the right is vested, "the courts have never deemed it necessary to close their eyes to the equities of the case, but have frequently permitted their judgments to be influenced by the consideration that that which the Legislature has done in the way of disturbing rights acquired under existing laws was morally right, and in accordance with justice and fair dealing." Evans-Snider-Buel Company v. McFadden, 105 Fed. 293, 301, 44 C. C. A. 494, 502, 58 L. R. A. 900. It was said in an early case, and afterward approved by the Supreme Court, that "there is no such thing as a vested right to do wrong." Foster v. Essex Bank, 16 Mass. 244, 273, 8 Am. Dec. 135; Freeborn v. Smith, 2 Wall. 160, 175, 17 L. Ed. 922; Freeland v. Williams, 131 U. S. 405, 420, 9 Sup. Ct. 763, 33 L. Ed. 193.

Blount, with full knowledge of Downs' interest in and claim to the land, bought it for the avowed purpose of taking advantage of the defective certificate of acknowledgment. He knew that the Joneses had been paid for the land, and that Downs and those under whom he claimed had held it for a half century. The $3,000 paid for it when the Joneses sold it, at 6 per cent. interest, would amount to much
more than its present value. Morally and equitably, it would have been the duty of Mrs. Jones to have corrected the deed if she had known of the defect in her lifetime. Whatever rule may have prevailed in the courts, equitably and rightfully, Mrs. Jones, and her heirs after her death, had no right to hold both the land and the money paid by Vaughan for it. If we are to recognize the principle that there can be "no vested right to do wrong," it is difficult to see how Blount acquired a vested right protected from remedial and curative legislation by his purchase. At common law, his deed from the Jones heirs would be void, because no interest in land could be conveyed unless the grantor was in actual or constructive possession (Du Bois v. McLean, 4 McLean, 486, Fed. Cas. No. 4,107; 9 Am. & Eng. Ency. of Law [2d Ed.] 129); and the civil law "forbids a thing that is litigious to be alienated" (3 Washburn on Real Estate, 349). This rule of the common and civil law does not prevail in Texas; "in this state * * * the adverse possession of land in no way hinders or precludes its sale and conveyance by the owner." Campbell v. Everts, 47 Tex. 102. But Blount not only obtained his alleged title from grantors against whom the land was held adversely, but he bought it pending litigation concerning the very title he bought. The general rule seems to prevail in Texas that "he who purchases during the pendency of a suit is held bound by the decree against the person from whom he derives title." Lee v. Salinas, 15 Tex. 495, 497. At any rate—and that is all that concerns us here—a purchaser under such circumstances would not obtain a "vested right," in the sense that it was not subject to the curative legislation in question.

The prohibition against the enactment of retroactive laws in the Texas Constitution has not been applied literally so as to prevent the passage of any law which looks backward or affects past transactions. To so construe it would "create inextricable difficulties" and embarrass legislation. It does not cut off remedial laws nor curative statutes which do not deprive one of vested rights. De Cordova v. Galveston, 4 Tex. 470, 477. In Johnson v. Taylor, 60 Tex. 360, 366, the court calls attention to the fact that the same Texas Constitution that forbids the passage of retroactive laws impliedly recognizes the power to pass general laws giving effect to "informal or invalid wills or deeds." Const. Tex. art. 3, § 56. There is nothing in the local law that takes the case out of the general rule. The Legislature had the power to pass the law and make it applicable to the case at bar if it does not deprive Blount of a vested right within the legal meaning of that phrase. An act similar to the one in question here was upheld by the Supreme Court in Webb v. Den, 17 How. 576, 15 L. Ed. 35, the court saying:

"It is a wise and just act; it governs this case, and justifies the court in admitting this deed in evidence. It was registered in 1809, and some of the grantees have been in possession under it ever since. After such a length of time, the law presumes it to have been registered on lawful authority, without regard to the form of certificate of probate or acknowledgment. As a legal presumption it is conclusive that the deed was properly acknowledged, although the contrary may appear on the face of the papers. It is not a 'retrospective law' under the Constitution of Tennessee, which the Legislature is forbidden to pass. It is prospective, declaring what should thereafter be
received in courts as legal evidence of the authenticity of ancient deeds. It makes no exception as to the rights of married women, and the courts can make none. Informalities and errors in the acknowledgments of feme covert are those which the carelessness and ignorance of conveyancers were most liable to make, and which most required such curative legislation. The registration being thus validated, copies of such deeds stand on the same footing with other legally registered deeds, of which copies are made evidence by the law.”

In Randall v. Krieger, 23 Wall. 137, 23 L. Ed. 124, the court held that a Legislature may pass laws giving validity to past deeds of land, which were before ineffectual, such as a law validating an ineffectual acknowledgment of a married woman. See, also, Goshorn v. Purcell, 11 Ohio St. 641; Kobbe v. Harriman Land Company, 117 Tenn. 315, 98 S. W. 177.

But it is contended that there was in existence no defective deed to be perfected—that the instrument was a nullity.

Much of the argument of the learned counsel for the defendant in error is based on the proposition that the deed in question is void. The application of the statute to this deed is referred to as an attempt “to make a deed where none existed.” On the other hand, the attorneys for the plaintiff in error insist that the deed offered in evidence was not absolutely void, but that it is an instrument defectively executed, which at least conferred equitable rights. These contentions present a question of much importance, for while the Legislature might have the power to pass an act which removes a defect in an existing inchoate or ineffectual contract, it might not have the power to create a conveyance—to make a contract between the parties. Cases are cited from the Texas court of last resort, saying in plain words that the deed of a married woman defectively acknowledged and proved is void. If we accepted these expressions as conveying the real meaning of the court, these cases would be conclusive as to this contention. But we know that the word “void” is so often used in the sense of “voidable,” or invalid, or nonenforceable, that it has almost lost its primary meaning, and when it is found in a statute or judicial opinion it is often necessary to resort to the context to determine precisely what meaning is to be given to it. In Ewell v. Dagg, 108 U. S. 143, 2 Sup. Ct. 408, 27 L. Ed. 682, the Supreme Court held that a Texas statute which said that a contract of a certain kind was “void and of no effect” meant only that it was voidable. “It is quite true,” said Mr. Justice Matthews, speaking for the court, “that the usury statute referred to declares the contract of loan, so far as the whole interest is concerned, to be ‘void and of no effect.’ But these words are often used in statutes * * * in the sense of voidable merely—that is, capable of being avoided—and not as meaning that the act or transaction is absolutely a nullity, as if it never had existed, incapable of giving rise to any rights or obligations under any circumstances.” In holding that the deed of an insane person was voidable and not void, in Allis v. Billings, 6 Metc. (Mass.) 415, 39 Am. Dec. 744, the court said:

“The term ‘void,’ as applicable to conveyances or other agreements, has not at all times been used with technical precision, nor restricted to its peculiar and limited sense as contradistinguished from ‘voidable’; it being frequently introduced, even by legal writers and Jurists, where the purpose
is nothing further than to indicate that a contract was invalid and not binding in law. * * * The term 'void' can only be properly applied to those contracts that are of no effect whatsoever; such as are a mere nullity, and incapable of confirmation or ratification."

The deed in question here is in proper form, reciting a valuable consideration, and signed by the husband and wife. It is imperfect and ineffective only because of the defects in the acknowledgment, or the certificate of acknowledgment, in regard to the wife. If the acknowledgment and certificate had conformed to the statute, the conveyance would have been effective and perfect. Can it possibly be true that the deed was void, in the sense of nullity; that it was practically a piece of blank paper when presented to the magistrate for his certificate? To so hold would be to say that the magistrate's certificate is the only effective part of a married woman's deed. Although the deed was imperfect, it seems to us that it was evidence of an uncompleted contract, for, the next hour or the next day, the proper acknowledgment could have been made and the certificate attached that would have made perfect an imperfect conveyance. The truth is—and it is a conclusion that cannot be denied—the term "void," when we speak with technical accuracy, can only be applied to those contracts that are of no effect whatsoever, mere nullities, such, for example, as are against the law, illegal or criminal, or in contravention of that which the law requires, and incapable of confirmation or ratification. The fact that such deeds, though ineffective and defective, may be the subject of suits to perfect them (Rev. St. Tex. 1895, art. 4663), is, of itself, sufficient to show that the Supreme Court of Texas, in referring to them as "void," did not mean to use the word in its strict technical sense. In Johnson v. Taylor, supra, the court said, citing earlier Texas cases:

"Equities of persons claiming under instruments executed by married women, but not properly acknowledged and certified, have been recognized and protected."

We are advised that the Supreme Court of Texas has not yet construed or passed on the constitutionality of the statute in question. The following cases decided by the Texas Court of Civil Appeals tend to sustain our conclusion: Sims v. Sealy, 116 S. W. 630; Millwee v. Phelps, 115 S. W. 891; Ariola v. Newman, 113 S. W. 157; Haney v. Gartin, 113 S. W. 166. The case of Klumpp v. Stanley, 113 S. W. 602, also decided by the Texas Court of Civil Appeals, is to the contrary, but the conclusion of the learned court is based on the idea that the deed of a married woman, without the proper certificate of acknowledgment, is absolutely void.

We are of opinion that the deed was admissible in evidence, and that, when admitted, it should be "given the same effect as if it were not so defective." This conclusion is also applicable to the other deed which was excluded on the same grounds.

The judgment of the Circuit Court is reversed, and the cause remanded for a new trial.

McCORMICK, Circuit Judge, dissents.
HAYDEN et al. v. DOUGLAS COUNTY, WISCONSIN.

(Circuit Court of Appeals, Seventh Circuit. January 5, 1909.)

No. 1,522.

MUNICIPAL CORPORATIONS (§ 955*) — IMPROVEMENT BONDS—RIGHTS OF BONDHOLDER IN SPECIAL TAXES—SUIT AGAINST COUNTY AS COLLECTOR.

St. Wis. 1890, § 1114, provides that delinquent taxes returned by a city to the county uncollected “shall belong to the county” when the county levy is equal to or exceeds the amount of the delinquent taxes so returned, and that they shall be credited to the city when so returned. The charter of the city of Superior (Laws Wis. 1889, p. 349, c. 152) authorizes the city to issue improvement bonds for street improvements, to be secured by and paid from special assessments levied in installments on abutting property. Held, that such special assessments belong to the owners of the bonds until finally collected and paid over, and that when included in the delinquent taxes returned to the county treasurer pursuant to other charter provisions they do not come within the provision of St. § 1114, and that while the county assumes no liability on account of the same it is accountable to the city for the amount collected, and where its books are so kept that they do not show what if any collections on such delinquent special assessments have been returned to the city treasurer the county may be joined with the city as a defendant in a suit in equity by a bondholder and required to make an accounting.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 955.*]

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

The appellants filed their bill in the Circuit Court, as complainants, against the city of Superior and the county of Douglas, joined as defendants, for an accounting and equitable relief in respect of taxes alleged to be collected and received by the city and county respectively, as described in the bill, which were assessed to be paid and are payable upon so-called “improvement bonds” issued by the city and owned by the appellants. Separate demurrer was filed by the appellee, county of Douglas, averring want of equity, and was sustained by the trial court. This appeal is from a decree thereupon dismissing the bill as to such county.

The improvement bonds in controversy are of like character with those involved in a prior case reviewed by this court, reported as Jewell v. City of Superior, 135 Fed. 19, 67 C. C. A. 623; and like bonds were also involved in a prior bill against both city and county, in the trial court, reported as Olmsted v. City of Superior (C. C.) 155 Fed. 172.

The facts averred in the bill are fairly and sufficiently summarized in the brief for the appellants, as follows:

“The complainants were and are the owners of $10,000 of special assessment bonds issued by the city of Superior in anticipation of the collection of special assessments levied upon abutting property for the Improvement of Tower avenue, a street in the city of Superior, and in the county of Douglas, Wis. The bonds belonging to Hayden, Miller & Co. constitute 23.56% of the total bonds issued in anticipation of the collection of the particular assessments referred to. The bonds referred to were issued under the charter of the city of Superior for 1889 (being chapter 152, p. 349, of the Laws of the state of Wisconsin for that year). In brief these laws, in connection with the general municipal and county tax laws of the state of Wisconsin, provide for the collection by the city treasurer of special assessments as they fall due from time to time, and further provide that each year unpaid special assessments, as well as all other defaulted taxes (general and special) within the city limits, shall be turned over by the city treasurer to the county treas-

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
urer (in this case the treasurer of Douglas county, Wis., appellee herein), and that he shall before their collection on the county's books give the city credit therefor. The bill further alleges that the bonds referred to, having gone to default, the time of payment of the same was by consent extended under the authority of an act of the Legislature passed in April, 1897 (Laws 1897, p. 304, c. 184), and the bonds in question, in evidence of such extension, were stamped with suitable language. • • • It is further alleged that the city of Superior had up to January 1, 1908, collected assessments for the Tower avenue improvement amounting to $37,210.74, a total formed by adding the principal sum of $30,432.24 to interest upon the same at 4 per cent. to July 25, 1895, and at 1 per cent. to July 1, 1902. Of this amount 23.56% should, it is alleged, in equity, be applied to the payment of complainants' bonds, which formed 23.56% of the total issue. Under the extension act of 1897, $3,586.37 of unpaid assessments were extended as collected by the city of Superior, but were not paid over to the holders of the Tower avenue bonds. Six per cent. added to these extended payments makes a total of $5,620.60, of which 23.56% is $1,324.21, the amount properly applicable in equity towards the payment of complainants' bonds. Many delinquent Tower avenue assessments were, during the years succeeding the issue of the bonds, turned over by the city to Douglas county, Wis., for collection, and the county did in fact collect on account of delinquent Tower avenue assessments an amount which, with interest, makes a total of $17,181.77, 23.56% of which equals $4,048.02; which amount should be applied to the payment of complainants' bonds.

"It is alleged that the county of Douglas has received credit from the city of Superior for such amount of $4,048.02, but that the manner in which it did so receive such credit is as follows: I. e., that during the time referred to there were many other special assessments being collected by the city and county on city property for the Tower avenue improvement. There were also many delinquent general taxes collected. The practice was that, in settlements between the city treasurer and the county treasurer, the city treasurer retained for the city the cash payments on account of taxes and assessments, returning to the county the delinquent roll and county orders received in payment of taxes. The county then collected and set aside the amount of taxes each year out of moneys first received from the redemption and sale of certificates, regardless of whether the money first paid in represented general or special taxes. In the years 1891 to 1901 the delinquent rolls returned by the city treasurer to the county treasurer amounted to $3,266,193.83. The rolls included both special assessments and general taxes, not separated, but turned in as one lump sum. In the years referred to the county treasurer paid to the city treasurer $1,710,292.31, which amount included all money paid by the county treasurer during that period. No separate account was kept of the assessments or of the general taxes, except as to the $3,586.37 of special assessments extended as hereinbefore set forth, and no attempt was made to keep assessments separate from the general taxes. The city was charged in the fall of the year with state and county taxes, and credited in the spring with the delinquent roll. If the delinquent roll largely exceeded the amount of the county taxes, no attention was paid to what the balance consisted of or of the nature of the tax. The books contained in the offices of the county of Douglas do not show whether any portion of the assessments collected on account of the improvements in question have actually been paid to the city treasurer. The only account kept was with the delinquent tax represented by the aggregate of all the taxes and assessments. Complainants have demanded payment of 23.56% of the amount of the Tower avenue assessments collected by said city and county respectively, and both city and county have refused to pay. The prayer of the bill is that an accounting may be had, that the court may determine whether or not the county of Douglas has in fact paid over to the city of Superior the money collected by the county of Douglas on delinquent Tower avenue assessments; that, if the court shall find that the county has not so paid the assessments to the city of Superior, it be ordered so to do, and that then the city of Superior be ordered, out of the assessments collected by the city itself and out of those paid over to it by the county of Douglas, to pay to complainants 23.56% thereof."
H. B. McGraw, for appellants.
William R. Foley, for appellee.
Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

SEAMAN, Circuit Judge (after stating the facts as above). The
decree appealed from dismisses the appellants' bill, as against the coun-
ty of Douglas, on demurrer for want of equity, and no issue arises
upon the equities stated for relief against the city of Superior. Equi-
table relief in any form is denied as to the appellee county, and the
single question on this appeal is whether facts are averred which au-
thorize joinder of the county, for the relief sought, by way of account-
ing or otherwise.

Rights of the appellants, as holders of improvement bonds issued by
the city of Superior under the provisions of its charters, are clearly
stated in the bill, together with defaults in payment for which remedy
in some form is needful. Complications of fact in respect of the spe-
cial assessments required by the charter to be levied from year to year
upon the lots embraced in the improvement, to be collected and paid
upon such bonds in annual installments, are also stated, not remediable
at law, and without equitable relief no adequate remedy appears for
enforcement of the municipal obligations so incurred. Whether de-
fault in payment of the bonds has been due to confusion in the statu-
tory provisions, either of the charter or general statute, or to neglect
or mistake on the part of one or the other municipality in their admin-
istration, are questions raised by the bill, and equitable jurisdiction may
well be invoked for their solution. The difficulties which have been en-
countered by the holders of improvement bonds of the issue and class
described in the bill, in efforts for their collection, are distinctly aver-
red in the bill; and that, for one or another of these causes, much lit-
igation on their behalf has resulted either in defeat or insufficient re-
cover, is exemplified in prior cases brought to our attention on this
hearing, including several reviewed by this court, viz.: King v. City
of Superior, 54 C. C. A. 499, 117 Fed. 113; Jewell v. City of Superior,
67 C. C. A. 623, 135 Fed. 19; White River Sav. Bank v. City of Su-
perior, and other cases heard therewith, 148 Fed. 1, 10, 78 C. C. A. 169.

The improvement bonds described in this bill were issued under the
provisions of chapter 16 of the charter of 1889 for the city of Superior
(chapter 152, p. 349, Laws Wis. 1889), which are summarized with the
opinion of this court in White River Sav. Bank v. City of Superior,
supra. In reference to those provisions, we deem it sufficient to re-
mark that they plainly intend and require (section 161) that the bonds
so issued for street improvement shall be secured by special assess-
ments, made by the city upon lots named, for their payment; (section
163) that one-fifth of the amount assessed (with interest) is to "be ex-
tended on the tax roll as a special tax on said property," and "when col-
clected the same shall be credited to the fund against which payments
on said bonds are charged," and thus to continue annually until paid
up; and (section 162) that payments upon the bonds therefrom are
to be made by the city treasurer. The intention, therefore, is unmis-
takable, as stated in the opinion of Judge Jenkins, speaking for this
court, in Jewell v. City of Superior, supra, that "these special assessments are private property and belong to the owners of the bonds, not to the municipality," with the city made "trustee for collection."

Were the special assessments all collected by the city upon the tax roll, none of the complications mentioned in the bill could arise, and the way would be clear to enforce payment. But it is averred that they were mainly, if not wholly, uncollected under the tax roll, and were thus returned to the county treasurer as delinquent taxes, pursuant to section 1114, St. 1898—a course directed by section 119 of the charter, in reference generally to "delinquent taxes." With no express provision for the city to enforce these assessments directly, this general statutory means or agency was necessarily adopted, as all authority and machinery for the ultimate enforcement of delinquent taxes of cities and towns is vested in the county, under the general plan. Taxes levied for state and county purposes are apportioned to cities and towns and payable by each to the county; and section 1114 provides that the amount of the delinquent taxes returned shall be "credited" to each respectively by the county treasurer thereupon; that the credit so given shall apply upon such apportionment payable to the county, and that the "excess, when collected (with the interest and charges thereon) shall be returned to the town, city or village treasurer for the use of the town, city or village."

The bill avers, in substance, that returns of delinquent taxes which included these special assessments were so made by the city and credited to it by the county; that large amounts (specified) have been received by the city thereupon, for such assessments, which have not been paid upon the bonds; that the county has in fact collected other large amounts (specified) on account of such assessments which have not been applied in payment thereof; that no separation was made and no separate account kept by the county between the special assessments and general taxes, but all appear "as one lump sum"; that, in reference to the excess of delinquent taxes returned over the amount payable to the county, "no attention was paid to what the balance consisted of or of the nature of the tax"; and that "there is nothing to show from the books" of the county "whether any portion of the assessments collected on account of the improvements in question have actually been paid to the city treasurer, or whether the moneys have been used for other purposes." Notwithstanding the confusion and difficulty thus averred, and the property right of the appellants (as above mentioned) to their pro rata share of all sums collected upon the special assessments, the decree refuses equitable cognizance for any form of accountability on the part of the county; and the contentions against joinder of the county, for such complete relief as equity may thus afford, are in substance: (1) That no liability to the bondholders for these assessments is placed by either statute upon the county, nor is such liability incurred by it, when collections are made, for the reason that section 1114 prescribes: "All taxes so returned as delinquent shall belong to the county;" and (2) that no fact is averred in the bill of fraud, neglect, or violation of law on the part of the county to make it chargeable for any form of equitable relief. It may well be conceded
that these propositions, if tenable, would not only defeat recovery at law against the county, but prevent its joinder in any proceeding at law to that end. Whether either or all of them, united as objections to this bill in equity, can prevent such joinder for the relief sought, is quite another question; and each is considered in reference to its bearing on that inquiry.

Under the charter of the city two kinds of obligation are provided for payment of contracts for street improvements—both resting on like special assessments against lots embraced therein, which are separately levied and entered upon the tax roll for such purpose, made liens upon such lots and directly payable by the city treasurer (primarily) to the holder out of collections therefor coming to his hands—the one form issued as an "improvement certificate," charged against individual lots (section 155) and payable from a present assessment, and the other as an "improvement bond," made a charge upon all lots embraced in the improvement (section 159) and payable out of successive partial assessments against each lot so included. The only substantial distinction between them in the method of payment appears in section 156 of the charter, which provides, in reference to the certificates, "that all moneys collected by the city treasurer and all moneys collected by the county treasurer or county clerk, on account of such taxes, shall be delivered or paid to the owner of the same, on demand, upon surrender of such certificate"; while the city treasurer alone is named in section 162, directing payment of installments of interest and principal due upon the improvement bonds.

In State ex rel. Donnelly v. Hobe, 106 Wis. 411, 413, 82 N. W. 336, the Supreme Court of the state construed these provisions for special assessments—as renewed in the revised city charter of 1891 (Laws 1891, p. 774, c. 124)—in an instructive opinion, resulting in the issuance of a peremptory writ of mandamus against the county treasurer to pay over special assessments collected by him as delinquent taxes to the holder of improvement certificates issued therefor. The rule of direct liability thus applied, however, is referable to the above-mentioned provision for such certificates (section 156 of the charter, which appears in the charter of 1891 as section 129), and not applicable, in the light of such reference, to authorize like rule of liability in favor of the present bondholder. Nor is the decision of this court in Jewell v. City of Superior, supra, in any sense, authority for recovery by the bondholder, in direct suit against the county, for assessments collected by its treasurer or clerk, as no such issue was there involved; and the excerpt from the opinion in that case, quoted by counsel for the appellants as thus operative, appears in a mere arguendo reference to the assumed general rule of the Hobe Case—with the above-mentioned distinction between certificates and bonds in the method of payment, after assessments were returned as delinquent, neither called to attention nor involved in the Jewell decision—and is plainly inapplicable to charge the county with direct liability.

The averments of this bill appear to be framed for relief upon one or the other of these theories for which the appellants contend: (1) That the city of Superior is liable for the entire amount of assessments
returned as delinquent, credited by the county thereupon, if no liability is incurred by the county for such assessments, when collected in any form; (2) that, treating the county as the statutory agency for collection of the delinquent assessments, with the credit to the city a mere "matter of bookkeeping"—as held in the Jewell Case, supra—the county becomes directly liable to the bondholder for payment to him on collection; and, if both of these propositions of direct liability are overruled, (3) that the county is accountable to the city for all such collections, to be paid over to it for the benefit of the lienholders, so that the appellants are entitled to equitable relief against the county as well under the circumstances averred. We are of opinion that the first-mentioned contention was rightly overruled in the Jewell Case, supra, and is untenable, as well, under the present averments; and that no sanction appears under either statute for requiring the county to pay the amounts collected upon assessments directly to the bondholder. The remaining proposition, however, that the county may be required to account for such collections and pay them over to make up the trust fund provided by the charter for that purpose, rests upon equities which entitle the bondholders to such relief, unless the terms of the general statute (section 1114), providing that taxes "returned as delinquent shall belong to the county," must be construed to be destructive of his charter lien upon the assessments, as the appellee county (in effect) contends. The test of equitable cognizance, therefore, hinges on the meaning of this general provision, read in the light of the special charter provisions applicable as well to the delinquent returns.

That the special assessments in question are levied and pledged by the charter in favor of the lienholders, as private property belonging to such holders, "not to the municipality," and were not within the above-mentioned provision for taxes returned as delinquent to belong to the county, was expressly held by this court in the Jewell Case, supra; and we believe such ruling to be in conformity with the construction of these charter provisions and general statute adopted by the state Supreme Court in the Hobe Case, supra. While it is true (as before stated) that the rights there involved were those of a certificate holder, the various charter provisions for making the assessments and conferring ownership of the lien were the same under which (in the alternative form) these bonds were issued, and their interpretation became needful to ascertain the property rights of either lienholder in the assessments. The opinion is exhaustive and well considered, distinguishing such assessments from the taxes mentioned in section 1114 as owned by the county when returned delinquent, and establishes the rule, as we believe, for like distinction in the case at bar. As there stated:

"A general provision, covering a subject as a whole, must be deemed to have been intended as subordinate to a particular provision relating to a particular element included in such subject. Again, when there is a particular clause of an act, or a special act, and a general clause or act the language of which may be reasonably, though not necessarily, construed to include the subject of the particular clause or act, the presumption is that the latter was intended as an exception. Mason v. Ashland, 95 Wis. 540, 74 N.
W. 357.” Also, “Harmony, not confusion, is to be sought for by statutory construction.”

The earlier case, however, of Sheboygan County v. City of Sheboygan, 64 Wis. 415, 11 N. W. 598, is relied upon as controlling authority for the broad and independent construction of the general provision for which the appellee contends. We do not understand that case to be applicable, under the issue there involved for decision, irrespective of the question as to its weight with the Hobe Case standing as a direct and final interpretation. In Sheboygan v. Sheboygan, the county sued the city to recover the amount of “a special assessment for grading” which was returned delinquent by the city under section 1114, St. 1898, stating these facts alone for its complaint: That such assessment was so returned to the county treasurer with the delinquent list and “credited to the” city; was then “charged back” by order of the county board, and the city refused payment. General demurrer to this complaint was sustained below, and the only question for review was whether a cause of action was stated. The opinion states that “it is not alleged or claimed that the special assessment or tax was not legally levied, or that it is not a valid charge against the lots”; and that “the action is based solely upon the proposition that in his settlement with the city treasurer the county treasurer should not have allowed the amount of the grading tax or assessment, and therefore that the county had a valid claim” for such improper credit. Thus no other question arose, and the solution was plain, as there decided—under a charter provision that “delinquent special assessments in that city come under the general statute”—that such return was rightly made and credited, as within the purpose of section 1114. Other comments in the opinion upon the terms of section 1114 are without force, as we believe, under the present issue.

We are of opinion, therefore, that the interest of the appellants, as bondholders, under the averments of the bill, in the special assessments referred to, is that of ownership in the liens created pursuant to the charter provisions; that it continues unimpaired throughout all proceedings for return of delinquent taxes to the county treasurer, inclusive of the credit thereupon to the city treasurer, and for enforcement and collection of delinquent taxes on the part of the county; that when collected by county treasurer or clerk such special assessments are to be paid over to the city treasurer to be applied as directed by the charter; and that the averments authorize joinder of the county as a party for equitable relief to that end. The objections urged that no fraudulent conduct or violation of law appears on the part of the county, and that the appellants cannot have a recovery against the county for any collections made, are without force for denial of such joinder and relief in equity, however insuperable under the rigid rules of procedure at law. The doctrines of equity, with respect to parties and relief, differ from those at common law “in their fundamental conceptions, in their practical operation, in their adaptability to circumstances, and in their results upon the rights and duties of litigants”; and thus the rights and liabilities of all parties interested in the subject-matter are properly within the scope of equitable adjust-
ment and adjudication between all interests. 1 Pomeroy's Eq. Jur. §§ 113, 114, 115. One of the well-settled grounds for invoking such jurisdiction appears in the averments of difficulty and confusion in the records and accounts of the county in reference to the assessments.

The decree of the Circuit Court is reversed, accordingly, with direction to overrule the demurrer and proceed further consistently with this opinion.

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WASKEY et al. v. HAMMER et al.†
(Circuit Court of Appeals, Ninth Circuit. May 3, 1909.)

No. 1,609.

1. MINES AND MINERALS (§ 18*)—EXCESSIVE LOCATION—EFFECT.
An excessive mineral location made in good faith and otherwise conformable to law is not wholly void by reason of such excess, being only invalid as to the excessive area.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 35; Dec. Dig. § 18.*]

2. MINES AND MINERALS (§ 18*)—EXCESSIVE CLAIMS—LOCATION—REJECTION OF EXCESS.
Where an excessive mineral location is made in good faith, the locator may select the portion of the claim he will reject as such excess.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 35; Dec. Dig. § 18.*]

3. MINES AND MINERALS (§ 17*)—CLAIMS—LOCATION—ALTERATION IN BOUNDARIES—DISCOVERY OF MINERAL.
Under the rule that it is immaterial whether the discovery of mineral in the ground claimed is made before or after the marking of its boundaries, and that the performance of such acts, where recording notice of location is not required, perfects the location, the fact that a locator, on discovering that his boundaries exceeded the amount of ground to which he was entitled, drew in one of the lines so as to exclude the excess, and in so doing excluded the hole in which he made his discovery, did not vitiate his entire claim, provided he made another discovery within the boundaries as readjusted before any rights in the premises had been acquired by another.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 24–26; Dec. Dig. § 17.*]

4. MINES AND MINERALS (§ 11*)—LOCATIONS—QUALIFICATIONS OF LOCATOR—DEPUTY LAND SURVEYOR.
Rev. St. § 452 (U. S. Comp. St. 1901, p. 257), provides that the officers, clerks, and employees of the General Land Office are prohibited from purchasing or becoming interested in the purchase of any public lands. W., while competent to make a mineral location, located an excessive area, and thereafter readjusted the boundaries of his claim so as to exclude the point of discovery, and, before making a new discovery within the readjusted lines, was appointed a deputy surveyor of the Land Department. Held, that such section was applicable to the office of deputy surveyor, and that W.'s claim, perfected by a new discovery after his appointment, was therefore void.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 11.*]

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

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
† Rehearing denied May 26, 1909.

P. M. Bruner and Edward Lande, for defendants in error.

Charles E. Shepard, amicus curiae.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. The subject-matter of this action is a piece of mining ground in Alaska, covered by two overlapping mining locations; that under which the defendants in error (who were plaintiffs in the court below) claim having been made in January, 1904, under the name of "Golden Bull" claim, and that under which the plaintiffs in error (who were the defendants below) assert their rights having been made in January, 1902, under the name of "Bon Voyage" mining claim. The latter was made by the plaintiff in error Whittren, who afterwards executed a deed to Eadie of an undivided interest in it, the remaining plaintiffs in error holding under them as lessees, and, being in the actual possession of the disputed premises mining the same, the action was brought by the defendants in error to recover possession, with damages.

Upon the conclusion of all the evidence in the case, the court below directed a verdict for the plaintiffs, upon these grounds:

"First. That the location of the Bon Voyage claim, made in January, 1902, was invalid because no discovery of gold has been proved to have been made within the limits of the claim as surveyed on November 11, 1903, since such survey.

"Second. That the proofs showing that the locator of the Bon Voyage mining location, Mr. Whittren, was at the time of the survey in November, and of the subsequent discovery of gold by him on December 13, 1903, a deputy mineral surveyor of the United States, he is disqualified to acquire title to public mineral lands of the United States while holding that official position, and therefore that his present title and that of his grantee, Eadie, to the Bon Voyage, resting, as the title of both do, upon the location of December 13, 1903, is invalid."

The record shows that Whittren located the Bon Voyage as a placer claim on the 1st of January, 1902, and so marked its boundaries upon the ground that they could be readily traced, having previously discovered gold within such boundaries, and thereafter duly recorded the notice of his location. In respect to those matters there is no dispute. Being at that time a competent locator, the ground within the boundaries of his claim ceased to be open to location or appropriation by any one else so long as Whittren complied with the law applicable to the case.

The record shows that, notwithstanding Whittren's location, the defendant in error Halla, in July, 1902, undertook to make, for a man named Roth, a location that he called the "Golden Bull," embracing a part of the Bon Voyage claim, under which location by Halla, it is contended by counsel for the defendants in error, they acquired some right. We think it clear that there is nothing in that suggestion, for the reason that no part of the ground covered by the Bon Voyage claim was open to location at the time that Halla undertook to include it in his location of July, 1902. Nothing further in regard to that
claim of right on the part of the defendants in error, therefore, need be said.

At the trial Whittren testified, among other things, that on or about November 11, 1903, he went upon the Bon Voyage claim for the purpose of starting a man to do the assessment work thereon, and also for the purpose of making a survey of the claim, having with him two assistants for that purpose, who carried the tape, while he, Whittren, who was a surveyor, used the instrument. It appears that this actual survey disclosed the fact that the boundaries marked by Whittren in January, 1902, included a little over 20 acres of ground, and for the purpose of reducing the amount to the statutory limit of 20 acres Whittren drew in two of the corners; his testimony being in part as follows:

I 'started at point 2, northeast corner, put in a new stake at that point, 2x2. I found a stake placed by me in 1901 at that point after considerable trouble. Found it where that No. 2 stake now stands. The markings were not decipherable at once. It seems to me the stake was marked 'Max Roth, by Otto Halla, July 10th'—or something like that—'1902.' The stake which Otto Halla used was the original stake which I had placed there, the northeast corner stake. It had been whittled off nearly, but there was enough left so that I could decipher the 'B. V.' From point 2 at the northeast corner I took bearings on Sledge Island. The compass on the transit was broken, and I took the angle with the vernier. My field notes show from the northeast corner to the northwest corner, his the south peak of Sledge Island. That is the same as I originally staked it, lined up the same. It hit the center of the peak. When I put the instrument on I hit the center of the south peak of the contour of Sledge Island. This stake, which I found at the northeast corner of the Bon Voyage, having written on it 'Max Roth,' and having exposed thereon a part of the scribing 'B. V.,' I took up because I considered it my property and brought it back to Nome and put it in Dr. Westby's building, down on Front street. It remained there until it was burned up in the fire. The purpose for which I took this stake was in case of trouble arising over this claim I could have that to defend it. You could make out the scribing underneath the writing, if you knew the 'B. V.' was there. You could see part of the cutting, the number had been erased, originally marking that corner 'No. 4 B. V.' The 'No. 4' you could not make out, but you could make out part of the 'B. V.' All the stakes planted by me when I surveyed the claim were 2 by 2's, each designating the point 'N. E. B. V. S.;' 'N. W. B. V.;' 'S. E. B. V.;' 'S. W. B. V.' At the northeast corner I placed a stake 2 by 2 inches with a nail driven in the top to designate the point, and it was scribed 'N. E. B. V.' and driven in the ground. The bottom of that stake is there yet. It has been burned by a tundra fire. We found the bottom of it in 1906 and nailed a new stake to it. That stake remained there from the 11th of November, 1903, until the same was burned by tundra fire. In 1906, when surveying, I didn't take in the initial stake at all. I took up the four stakes there, the corners, by making the survey and tying each corner in, regardless of the initial stake. I ran a line from the points 10 to 2 that day. I made the angles of the claim 90 deg. From the northeast to the northwest corner is 660 feet. I had to pull in the northwest corner. It was about 20 feet out. I pulled it in so as to make it exactly 660 feet. I then turned a right angle and ran down to the southwest corner. I measured down 1,320 feet, and put up a stake at the point 4 instead of the point 12. I found the claim was going to be over 20 acres. I was cutting down the excess. I then turned a right angle and ran to the southeast corner. We may have moved that a foot more or less; that line was about right. We made the distance 660 feet. We ran it back, checked back to the northeast corner. I made the original field notes November 11, 1903, on the ground.'

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By this drawing in of one of the lines of the claim Whittren left out of its boundaries the hole in which he had made the original discovery.

His testimony in respect to the survey was corroborated by that of his two assistants, Taft and Lange; Taft also testifying that after finishing the survey he stayed on the claim and went to work placing mounds around the corner stakes and working on the shaft. Whittren also testified, among other things, as follows:

"I made a discovery of gold upon the Bon Voyage claim in the year 1903; that was within the boundaries of the Bon Voyage as they now stand; this was in December, 1903; it was about the middle of December; the discovery was made 354 feet from the northwest corner; it was at the representing shaft of 1903. The occasion of my being out there was to pass upon the work I was to pay for. I took the dirt off the surface of the ground where it had been thrown out of the shaft. I had made a discovery prior to that time. I went out there on that day partially to make a discovery. I was not there while the work was being done. I borrowed a sack from Phil Williams, and put the dirt in that and brought it to town and shawed it out."

At the time Whittren made the discovery in December, 1903, and at the time he made the survey in the preceding month of November, he was a deputy mineral surveyor, but he was not such at the time of his original discovery, nor at the time of his original location of the Bon Voyage in January, 1902; his appointment as such deputy being made in February, 1903. The first question in the case, therefore, is whether the leaving out of his original discovery hole or shaft when he drew in the line so as to reduce the area to the statutory limit of 20 acres invalidated the entire claim.

It is not contended that Whittren, in making his location in January, 1902, purposely included more than 20 acres. His act in drawing in one of his lines when his actual survey disclosed the fact that there was a slight excess within his boundaries, certainly tends to show a bona fide desire on his part to conform to the statutory requirement in that regard. That a location made in good faith and otherwise conformable to law is not rendered wholly void by reason of such excess, but that the excessive area only is void, is well settled. Zimmerman et al. v. Funchion et al. (C. C. A.) 161 Fed. 859, and cases there cited. And that such locator is at liberty to select the portion of the claim that he will reject as such excess is also established law. McIntosh v. Price, 121 Fed. 716, 58 C. C. A. 136, where we said:

"We are very clearly of the opinion that, if any portion of the ground located by the Kjelsbergs was subject to relocation as being in excess of the permitted width, the owners thereof in possession, under the circumstances found by the trial court, could not be deprived of the right to select the portion thereof which they would elect to hold, and that another locator had no right to enter upon that portion of the claim in which they were working and which was a valuable portion thereof, and oust them from possession by making a location thereof. The defendants in error were given no notice that the width of their claim was excessive, or that any part of their location was void, and they were given no opportunity to draw in their lines so as to comply with the local mining regulations. The policy of the mining laws of the United States does not permit a locator to thrust out of the possession of his discovery and the pay streak of his claim one who has located a placer claim in attempted compliance with the mining rules and laws, and who is actually engaged in mining upon that portion of his claim."
Does the fact that, when Whittren drew in his line so as to exclude the excess, he left out of the boundaries the hole in which he made his discovery, vitiate the entire claim? It has been many times decided that, in the absence of any intervening right, it is unimportant whether the discovery of mineral in the ground claimed is made before or after the marking of its boundaries. In such a case, the performance of those two acts (where the recording of the notice of location is not required) perfects the location; but both of them are essential to the validity of a mining location under the United States statutes. As said by the Supreme Court in Gwillim v. Donnellan, 115 U. S. 45, 50, 5 Sup. Ct. 1110, 1112, 29 L. Ed. 348:

The discovery "must lie within the limits of the location which is made by reason of it. If the title to the discovery fails, so must the location which rests upon it."

When, therefore, Whittren in November, 1903, left out of his boundaries the only place upon which he had then made a discovery of mineral, he abandoned one of the essential elements of his location. It is true that the evidence tended to show that he still maintained his claim to the ground included within his readjusted boundaries, which were marked as required by the statute and embraced only the statutory area, but within those boundaries he had not then made a discovery of mineral.

Passing, for the moment, the question of his then disqualification because of his then official position, the discovery of mineral within his readjusted boundaries, prior to the acquiring of any right in the premises by any one else, would have perfected his right to the ground. Such is the purport of the decisions in the cases of Tonopah & Salt Lake Mining Company v. Tonopah Mining Company (C. C.) 125 Fed. 408; Silver City Gold & Silver Mining Company v. Lowry et al., 19 Utah, 334, 57 Pac. 11, and the numerous cases there referred to. As, therefore, the location upon which the right of the defendants in error rests was not made until January, 1904, it results that if Whittren was a competent locator at the time he testified that he made a discovery of gold within his readjusted lines in December, 1903, the judgment below should be reversed.

Was he then disqualified by reason of his official position, is therefore the turning point in the case.

Section 452 of the Revised Statutes (U. S. Comp. St. 1901, p. 257), is as follows:

"The officers, clerks and employés in the General Land Office are prohibited from directly or indirectly purchasing or becoming interested in the purchase of any of the public lands, and any person who violates this section shall forthwith be removed from his office."

The later rulings of the Land Department are to the effect that this statute is applicable to a deputy surveyor, and therefore that such an officer is prohibited from acquiring or becoming interested in the purchase of any of the public lands. Muller v. Coleman, 18 Land Dec. Dep. Int. 394; In re Neill, 24 Land Dec. Dep. Int. 393; Floyd v. Montgomery, 26 Land Dec. Dep. Int. 122. See, also, In re McMicken, 10 Land Dec. Dep. Int. 97; Id., 11 Land Dec. Dep. Int. 96.
In the case of Hand v. Cook, 29 Nev. 518, 92 Pac. 3, a majority of the Supreme Court of Nevada held that the statute in question did not apply to a deputy mineral surveyor; but the reverse was held by the Supreme Court of Utah in the case of Lavagnino v. Uhlig, 26 Utah, 1, 71 Pac. 1046, 99 Am. St. Rep. 808. It will not do for a court to take a strained and narrow view of the language employed by Congress in its enactments, but rather give such a construction as will carry into effect its obvious intent. We entertain no doubt that a deputy mineral surveyor is an employee "in the General Land Office" within the meaning of the statute. That is the office in which the land laws of the United States are administered and executed, by and through the thousand and one officers and employees in and out of the particular building or buildings in which that department of the government is conducted. Nor do we see that there is any much clearer way to prohibit an act than to say expressly that it is prohibited. That Congress did in the section in question.

In the case of Prosser v. Finn, 208 U. S. 67, 28 Sup. Ct. 225, 52 L. Ed. 392, the Supreme Court held that section 452 applied to a special agent of the Land Department who had made an entry under the Timber Culture Act (Act March 3, 1873, c. 277, 17 Stat. 605, as amended by Act March 13, 1874, c. 55, 18 Stat. 21). The court said:

"The difficulty in the way of any relief being granted to the plaintiff arises from the statute prohibiting any officer, clerk, or employee in the General Land Office, directly or indirectly, from purchasing or becoming interested in the purchase of any of the public land. That a special agent of the General Land Office is an employee in that office is, we think, too clear to admit of serious doubt. Referring to the timber-culture statute, Secretary Smith well said: 'When the object of the act is considered, it will be seen that it applied with special force to such parties as the defendant in the cause at issue. As a special agent of the Commissioner of the General Land Office, he was in a position peculiarly adapted to secure such knowledge, the use of which it was the intention of the act to prevent. It follows from what has herein been set out that the decision of this department of date July 7, 1893, was in error, and the same is hereby set aside, and the decision of your office is affirmed.'"

"It is not clear, from any document or decision to which our attention has been called, what is the scope of the duties of a special agent of the land office, but the existence of that office or position has long been recognized. Suffice it to say that they have official connection with the General Land Office, and are under its supervision and control with respect to the administration of the public lands. Wells v. Nickles, 104 U. S. 444, 26 L. Ed. 825; 1 Land Dec. Dep. Int. 608, 620; Instructions to Special Timber Agents, 2 Land Dec. Dep. Int. 814, 819-822, 827, 828, 832; Circular of Instructions, 12 Land Dec. Dep. Int. 499. They are in every substantial sense employees in the General Land Office. They are none the less so, even if it be true, as suggested by the learned counsel for the plaintiff, that they have nothing to do with the survey and sale of the public lands, or with the investigation of applications for patents, or with hearings before registers and receivers. Being employees in the General Land Office, it is not for the court, in defiance of the explicit words of the statute, to exempt them from its prohibition. Congress has said, without qualification, that employees in the General Land Office shall not, while in the service of that office, purchase or become interested in the purchase, directly or indirectly, of public lands. The provision in question had its origin in the acts of April 25, 1812, c. 68, 2 Stat. 716, and of July 4, 1836, c. 352, 5 Stat. 107. The first of those acts established a General Land Office, while the last one reorganized that office. Each of those acts made provision for the appointment of certain officers, and each limited
the prohibition against the purchasing or becoming interested in the purchasing of public lands to the officers or employees named in them, respectively. But the prohibition in the existing statute is not restricted to any particular officers or particular employees of the land office, but embraces 'employees in the General Land Office,' without excepting any of them.

"In the eye of the law his case is not advanced by the fact that he acted in conformity with the opinion of the Commissioner of the General Land Office, who stated, in a letter, that section 452, Rev. St., did not apply to special agents. That view, so far from being approved, was reversed, upon formal hearing, by the Secretary of the Interior. Besides, an erroneous interpretation of the statute by the Commissioner would not change the statute or confer any legal right upon Prosser in opposition to the express prohibition against his purchasing or becoming interested in the purchasing of public lands while he was an employé in the General Land Office. The law, as we now recognize it to be, was the law when the plaintiff entered the lands in question, and, being at the time an employé in the land office, he could not acquire an interest in the lands that would prevent the government, by its proper officer or department, from canceling his entry and treating the lands as public lands which could be patented to others. It may be well to add that the plaintiff's continuing in possession after he ceased to be special agent was not equivalent to a new entry. His rights must be determined by the validity of the original entry at the time it was made."

The principle of this case is, in our opinion, applicable to the one now before us.

The judgment is affirmed.

WALKER et al. v. HAHER.

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

No. 1,895.

1. COURTS (§ 366*)—FEDERAL COURTS—AUTHORITY OF DECISIONS OF STATE COURTS—CONSTRUCTION OF STATUTES.

The construction which the courts of a state have placed upon its statute of frauds is binding upon the federal courts.

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


2. FRAUDS, STATUTE OF (§ 116*)—SUFFICIENCY OF WRITING—SIGNATURE BY AGENT.

Under the statute of frauds, Rev. St. Ohio, 1906, § 4199, which provides that no action shall be maintained on any contract for the sale of lands "unless the agreement upon which such action is brought or some memorandum or note thereof is in writing and signed by the party to be charged therewith, or some other person thereof by him or her lawfully authorized," an undisclosed principal can be charged on a contract for the purchase of real estate when the memorandum, otherwise sufficient, is signed by his agent in his own name and the agency is not disclosed by the writing, and such agency may be proved by parol evidence.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 252; Dec. Dig. § 116.*]

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

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep't Indexes.
S. D. Rouse and J. W. Warrington, for appellants.
Chas. B. Wilby, for appellee.

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

TAYLER, District Judge. The appellants filed a bill in the court below praying for the specific performance of a contract to purchase real estate in the city of Cincinnati.

The bill alleged that they had made a contract of sale of the property described in the bill with the defendant, George Hafer, by and through his agent, George B. Poole, under the terms of which the appellants agreed to convey, at the order of Poole, the property in the bill described; that Poole, while acting for the defendant and under his orders and instructions, signed the agreement and paid on account of the purchase for and on behalf of Hafer the sum of $100. The contract, which was attached to the bill and made a part thereof, is as follows:

"Mr. C. B. Poole, Cincinnati, Ohio.

"Dear Sir: We, the heirs of J. N. Walker, deceased, hereby agree to convey to your order the property situate at the southeast corner of Second and Race streets, Cincinnati, being leasehold, lot being 99 feet, 6 inches more or less, on Second street, by a depth of 71 feet, 6 inches more or less, on Race street, with improvements thereon, subject to a perpetual ground rent of $1,700.00 per annum, payable in equal installments of $556.66 2-3 every fourth month. Also will convey by general warranty deed clear and free of incumbrances the fee to the property next south of above with lot 14 feet, 3 inches, more or less, by 99 feet, 6 inches more or less.

"I will pay ground rent to date of conveyance, will pay taxes for year 1905, due and payable in June, 1906, grantee to pay all taxes thereafter. Consideration to be the sum of $10,000.00, (ten thousand dollars), cash; title to both properties to be good.

Mary E. Walker.
"G. C. Walker.
"W. G. Walker.
"I. L. Walker.
"T. T. Walker.
"H. E. Walker.
"By I. L. Walker.
"J. C. Walker.
"By I. L. Walker.
"Cincinnati, May —, 1906.

Geo. B. Poole.

"I hereby accept the above proposition.

"Received on account of above contract of sale and purchase the sum of one hundred dollars.

I. L. Walker, Agent."

The court below sustained a demurrer to the bill, and, the complainants waiving the right to amend, judgment was entered dismissing the bill. From this decree appeal is prosecuted.

The question squarely made by the bill and the contract is whether or not such facts are pleaded as serve to take the case out of the statute of frauds.

The question of want of equity was not referred to by counsel, either in the brief or argument, or considered by the court.

Section 4199, Bates' Ann. St. Ohio, as now and for many years in force, provides that:

"No action shall be brought whereby to charge the defendant • * * upon any contract of sale of lands, tenements or hereditaments or any interest
In or concerning of them * * * unless the agreement upon which such action is brought or some memorandum or note thereof is in writing and signed by the party to be charged therewith or some other person thereunto by him or her lawfully authorized.

George Hafer, the person sought to be charged, does not appear by any of the allegations of the bill or by the written instrument itself to have signed any memorandum or note respecting the purchase of this property. There is, in effect, the simple allegation that George B. Poole signed the instrument, and that he was the agent therefor of George Hafer. The court below held that the memorandum did not show that the defendant, the appellee, had signed it, or that it was signed by another person "thereunto by him lawfully authorized." The specific question which we have to answer is whether or not an undisclosed principal can be charged on a contract for the sale of real estate under the statute of frauds in Ohio, when the memorandum is signed by an agent in his own name and the agency is not disclosed by the writing, and where also it is not specifically alleged that the agent was authorized in writing by the principal to sign the memorandum.

The answer to this question is to be found in the judicial interpretation of the statute of frauds in Ohio, for it is settled that the construction which the courts of a state put upon the statute of frauds must be received in the courts of the United States. Brashear v. West, 7 Pet. 615, 8 L. Ed. 801; Grafton v. Cummings, 99 U. S. 100, 25 L. Ed. 366; Moses v. Bank, 149 U. S. 298, 13 Sup. Ct. 900, 37 L. Ed. 743, and a long line of authorities laying down the general rule.

In Thayer v. Luce, 22 Ohio St. 62, the following statement of the law as in force in Ohio is made in the syllabus:

"On the trial of an issue under the statute of frauds, the assent of the plaintiff to the terms of the contract may be shown by parol testimony. If the contract was made by the agent of the plaintiff, in such a case, the agency may be established by parol testimony, notwithstanding the agent may have contracted in his own name, without disclosing his agency or the name of his principal in the transaction."

On page 78 of 22 Ohio St., Judge McIlvaine, expressing the unanimous opinion of the court, says:

"The statute of frauds does not change the law as to the rights and liabilities of principals and agents, either as between themselves, or as to third persons. The provisions of the statute are complied with if the names of competent contracting parties appear in the writing, and, if the party be an agent, it is not necessary that the name of his principal should be disclosed in the writing. Indeed, if a contract within the purview of the statute be made by an agent, whether the agency be disclosed or not, the principal may sue or be sued as in other cases. In objecting to this feature of the statute, it is further urged that the liability of the plaintiff in error to Luce has been decreed, although Luce was never liable to him. And this result is claimed to be contrary to the law, which regards reciprocity of right to enforce by action, as well as mutuality of obligation to perform, as an essential element in a contract. In answer to this objection, we say that mutuality of obligation (at least of moral obligation) did exist between the plaintiff in error and Luce, and, if the right of action to enforce that obligation does not exist in favor of the former against the latter, it is solely because the statute requires the written agreement to be signed by the party to be charged therewith. The remedial laws of the state are under legislative control, and, as we understand it, the reciprocal right of parties to enforce certain contracts by action is taken away by force of this statute. If the written agreement in such case
be signed by one of the contracting parties and not by the other, the latter may enforce it by action, although the former may be remediless if the agreement be broken against him."

In the case just referred to, one Fuller was named in the contract as purchaser, but he was in fact acting for himself and Luce. When the owner of the property refused to convey, Fuller and Luce brought their action to compel Thayer, the owner of the property, to make a conveyance. The court held that the principal might, by parol proof, be shown to be acting through an agent.

To the same effect is the case of Walsh v. Barton et al., 24 Ohio St. 28. The first syllabus of that case reads as follows:

"Where the name of the agent, with whom a contract for the purchase of real estate was made, appears in the written memorandum of the agreement signed by the purchaser, who is the party to be charged, the statute of frauds is satisfied, although the names of the principals are not disclosed therein."

The opinion in this case, as in the last, was by Judge McIlvaine. Walsh, the original defendant, had signed a memorandum, declaring that he had purchased certain premises through auctioneers. The name of the owner was not in the instrument. Walsh refused to complete the contract, and the owners, as vendors, sought to enforce specific performance. In the opinion, page 39 of 24 Ohio St., the court says:

"The only question, therefore, is whether it be necessary, in order to satisfy the statute of frauds, that the names of the principals should appear in the memorandum, in a case where the contract was, in fact, made by their agents, and the names of the agents are set out in the writing. We think the statute is satisfied in this respect, when the names of the agents are set out in the writing, though the names of their principals be not disclosed. The case being thus taken out of the statute, the right or liability of the principals may be enforced, and their identity established, according to the rules of law governing in other cases, where contracts are made by agents without disclosing their principals."

In Furnace Co. v. Railroad Co., 22 Ohio St. 451, touching the question as to what is necessary to prove the assent of a principal in a case under the statute of frauds, the court says, on page 459:

"A written proposal, containing the names of the contracting parties and all the terms of the proposed agreement, signed by the proponent or by some other person thereunto by him lawfully authorized, when accepted and assented to by the party to whom the same is made, is sufficient to take an action against the proponent, founded thereon, out of the operation of the statute of frauds. And the delivery of such instrument as a proposal, and the acceptance thereof, and assent thereto by the party to whom it is made, may be proved by parol testimony."

Another case to the same general effect as the case just cited is Egle v. Morrison, 27 Ohio Cir. Ct. R. 497. The first proposition of the syllabus in this case is as follows:

"A written contract for the sale of real estate made and signed by an agent in his own name, and without disclosing his agency or the name of his principal, is binding on and may be enforced by the principal. The agency and assent of the principal may be established by parol evidence. Such contract satisfies the requirements of the statute of frauds."
The second proposition laid down in this case is as follows:

"It is no defense to an action to compel the specific performance of a contract required by the statute of frauds to be in writing that it is not signed by both parties thereto; it is sufficient if it is signed by one of the parties to be charged, and is accepted by the other. Acceptance of the latter is shown by bringing suit upon it."

See, also, Renwick v. Bancroft, 56 Iowa, 527, 9 N. W. 367.

Egle v. Morrison was affirmed by the Supreme Court of Ohio without report. 73 Ohio St. 388, 78 N. E. 1133. As the Circuit Court afforded the plaintiff the relief which was sought, the Supreme Court could not have affirmed the case without affirming the proposition that the contract did not violate the statute of frauds.

In the case of Mertz v. Hubbard, 75 Kan. 1, 88 Pac. 529, 8 L. R. A. (N. S.) 733, 121 Am. St. Rep. 352, the court refused to follow Walsh v. Barton, supra, on the ground that in the contract which was under consideration there was an avowed agency with an undisclosed principal, and that, therefore, it appeared that the agent was not acting for himself but for another. For that reason the court refused to allow the principal to be identified by parol, and held that Grafton v. Cummings, 99 U. S. 100, 25 L. Ed. 366, and other cases to the same effect, were controlling. But the court in the Mertz Case did not question the soundness of the rule that, where a contract was signed by competent contracting parties who actually bind themselves, an undisclosed principal might be identified by parol.

While, as we have already stated, the interpretation by the Supreme Court of Ohio of the statute of frauds of that state is controlling upon us in a suit involving a contract for the sale of real estate, it will be profitable to consider and compare the case of Salmon Falls Manufacturing Co. v. Goddard, 14 How. 446, 14 L. Ed. 493, and Grafton v. Cummings, 99 U. S. 100, 25 L. Ed. 366.

In the Goddard Case, the contract related to a sale of goods, but was controlled by the statute of frauds, which, in the state of Massachusetts, where the contract was made, provided that a party should not be charged "unless some note or memorandum in writing of the bargain be made, and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized." The memorandum in this case did not, either in the body or the signature, contain the name of one of the parties, but was signed "R. M. M." and "W. G. G." R. M. M. was the agent of the manufacturing company. On page 454 of 14 How. (14 L. Ed. 493) appears the following in the opinion:

"Extraneous evidence is also admissible to show that a person whose name is affixed to the contract acted only as an agent, thereby enabling the principal either to sue or be sued in his own name; and this, though it purported on its face to have been made by the agent himself, and the principal not named. Higgins v. Senior, 8 Mees. & W. 834; Trueman v. Loder, 11 Ad. & Ell. 889. Lord Denman observed, in the latter case, 'that parol evidence is always necessary to show that the party sued is the party making the contract, and bound by it; whether he does so in his own name, or in that of another, or in a feigned name, and whether the contract be signed by his own hand (or that of an agent), are inquiries not different in their nature from the question, who is the person who has just ordered goods in a shop? If he is
sued for the price, and his identity made out, the contract is not varied by appearing to have been made by him in a name not his own."

On page 455 of 14 How. (14 L. Ed. 493) appears the following:

"Now, within the principles above stated, we are of opinion that the memorandum in question was a sufficient compliance with the statute. It was competent to show, by parol proof, that Mason signed for the firm of Mason & Lawrence, and that the house was acting as agents for the plaintiffs, a company engaged in manufacturing the goods which were the subject of the sale. * * * The memorandum, therefore, contains the names of the sellers and of the buyers."

Mr. Justice Daniel, while dissenting from the judgment in this case, specifically concurred in the exposition of the law, as announced by the court on the statute of frauds; while Mr. Justice Curtis and Mr. Justice Catron dissented from the opinion of the court in its construction of the statute of frauds in the respect just referred to.

Grafton v. Cummings, 99 U. S. 100, 25 L. Ed. 366, involved the construction of the statute of frauds of New Hampshire, which provided as follows:

"No action shall be maintained on a contract for the sale of land, unless the agreement upon which it is brought or some memorandum thereof is in writing, and signed by the party to be charged, or by some person by him thereto authorized by writing."

The syllabus in this case in full is as follows:

"In order to satisfy the requirements of the statute of frauds of New Hampshire, the memorandum in writing of an agreement for the sale of lands which is signed by the party to be charged must not only contain a sufficient description of them, together with a statement of the price to be paid therefor, but in that memorandum, or in some paper signed by that party, the other contracting party must be so designated that he can be identified without parol proof."

Certainly it would seem that this statement of the law was made necessary by the peculiar language of the New Hampshire statute. The instrument whereby one of the parties was charged, if signed by an agent only, would be insufficient to hold the principal unless accompanied by a writing whereby the principal authorized the agent to sign the memorandum for him. At page 111 of 99 U. S. (25 L. Ed. 366), the court, in referring to Salmon Falls Manufacturing Co. v. Goddard, supra, says:

"In that case Mr. Justice Curtis delivered an able dissenting opinion, in which Mr. Justice Catron and Mr. Justice Daniel concurred. It may be doubted whether the opinion of the majority in all it says in reference to the use of parol proof in aid of even mercantile sales of goods by brokers is sound law. It certainly furnishes no rule to govern us in the exposition of the statutes of New Hampshire concerning contracts of sale of real estate within its own borders, where it conflicts with the decisions of the courts of that state on the subject.

It cannot be said that the expression of the court in the opinion just quoted overrules the law as laid down in the Goddard Case. The questions in the two cases were different, and it was not necessary to overrule the earlier case in order to decide the later one. However that may be, the rule laid down in the Grafton Case has no application
to this case, in consequence of the different phraseology of the statute of frauds of the two states.

From a consideration of all these cases, the following deduction must be made: The statute of frauds of Ohio defines what is necessary as the basis of a suit in which may be decreed specific performance either to convey or to accept conveyance of land. Its scope is limited to that manifest purpose. If the contract is signed as the statute requires, it follows that either of the parties who signed it may be sued by the other. If one of the parties is in fact a mere agent of an undisclosed principal, the question of agency is to be determined by the rules of law applicable to such a situation. Proof must be made of the agency, and what the nature of that proof must be depends, not upon the statute of frauds, but upon the rules of law governing the sufficiency of the proof of such agency. The form of this contract satisfied the statute of frauds. It is complete in its terms, as required by that statute. It is the basis of an action for specific performance.

From this it follows that the judgment of the court below in sustaining the demurrer to the bill must be reversed, and the case remanded for further proceedings as the law may require.

UNITED STATES \ WARFIELD et al. (two cases).
(Circuit Court of Appeals, 6th Circuit. March 13, 1900.)
Nos. 792, 793.

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

A postmaster who, under instructions from the First Assistant Postmaster General, given him under authority conferred by Rev. St. § 396 (U. S. Comp. St. 1901, p. 224), on the Postmaster General, and by the rules and regulations of the department delegated to the first assistant, appointed a clerk and paid his salary from month to month from money of the government in his hands, receiving proper vouchers therefor, is not liable to the United States for the amounts so paid out on his bond, conditioned that he would "faithfully discharge all of the duties and trusts imposed upon him either by law or the rules and regulations of the Post Office Department of the United States," although such clerk was not employed in his office, where he followed the instructions of his superior officer in good faith, without any knowledge of the place or nature of the clerk's employment, and in the supposition that he was employed in the postal service, probably as a special or secret agent.

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

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

The defendant in error Solomon Davies Warfield was appointed Postmaster by President Cleveland on May 5, 1894, and reappointed by President McKinley on May 6, 1899. He gave two bonds. The first was dated May 10, 1894, with the Fidelity & Deposit Company of Maryland and Edwin Warfield as sureties. The second was dated March 10, 1899, with the Fidelity & Deposit Company of Maryland, Edwin Warfield, and Henry A. Parr, as sureties. The suit below was on the bonds thus executed. Two suits were instituted, one on each bond, but they were consolidated by agreement.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
The condition of each bond was as follows:

"Now, the condition of this obligation is such, that if the said S. Davies Warfield shall faithfully discharge all the duties and trusts imposed upon him, either by law or the rules and regulations of the Post Office Department of the United States, and shall perform all of the duties and obligations imposed upon and required of him by law or the rules and regulations of the said department, in connection with the money order business, then this obligation to be void; otherwise of force."

The condition of the bonds alleged to have been violated reads as follows:

"That if the said S. Davies Warfield shall faithfully discharge all of the duties and trusts imposed upon him, either by law or the rules and regulations of the Post Office Department of the United States * * * then the above obligation to be void; otherwise of force."

One of the duties imposed upon the defendant in error as postmaster was the proper disbursement of funds placed in his hands by the government. The substance of the allegation is that the defendant in error, as postmaster, paid a salary for a certain time to one John W. Pettit, to wit, a salary of $600 per annum to him as clerk from July 19, 1898, to September 22, 1899, and $1,500 to him as bookkeeper from September 22, 1899, to September 10, 1903, although no work was done by Pettit in the Baltimore Post Office for such salary.

It appears: That John W. Pettit was placed upon the eligible list by the defendant in error as postmaster under the direction of the Post Office Department, and afterwards was appointed to a clerkship under the civil service law also by the direction of the Post Office Department at Washington. That the appointee was assigned to duties outside of the post office at Baltimore, and the defendant in error was required by the department to pay out of the funds in his hands the salary of the appointee, which was regulated also by the Post Office Department. That the defendant in error used the blanks which were required by the Post Office Department and entered the certificate which was necessary in order to make the payments to the appointee regular, etc.


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

PRITCHARD, Circuit Judge (after stating the facts as above). This case comes before us on a writ of error to the court below. The plaintiff below instituted an action to recover a certain sum claimed to be due by the defendant below S. Davies Warfield on account of certain money placed in his hands as postmaster at Baltimore, and which it is alleged was paid to one John W. Pettit without warrant of law.

It appears that the vouchers taken by the defendant in error at the time the disbursements were made by him were signed by the clerk, and that in pursuance of the same the money was actually paid to the clerk in each instance. The said clerk had been appointed on the authority of the First Assistant Postmaster General, who also made an allowance to the defendant in error for the payment of such sums to said clerk out of the moneys appropriated by Congress for the support of the Post Office Department with which to pay said clerk. The defendant in error, as his bond required, was simply discharging his duty in the manner he was advised it was proper for him to do by his superior officer, and was obeying the regulations of the Post Office Department as his bond required him to do. There is no claim that the defendant in error fraudulently colluded with others to defraud the plaintiff, or that there was any conspiracy the object of which was
to secure the payment of said sums to the clerk mentioned. Every dollar of the amount sought to be recovered was paid out, not simply with the knowledge, but by the direction, of the Post Office Department.

Section 388 of the Revised Statutes (U. S. Comp. St. 1901, p. 218), among other things, provides that:

"There shall be at the seat of government an Executive Department to be known as the Post Office Department, and a Postmaster General, who shall be the head thereof. • • •"

Section 396 (U. S. Comp. St. 1901, p. 224) provides that:

"It shall be the duty of the Postmaster General: First. To establish and discontinue post offices. Second. To instruct all persons in the postal service with reference to their duties. • • • Seventh. To superintend the disposal of the moneys of the department. • • •"

While these duties are imposed upon the Postmaster General, he does not, as a matter of course, perform all such duties personally. He is authorized by law to appoint assistants, and these assistants are designated by him as chiefs of the several branches of the postal service subject only to the supervision and direction of the Postmaster General, and by them the duties assigned are performed. However, their acts are the acts of the Postmaster General when confined within the scope of the duties assigned to them by their chief. Parish v. U. S., 100 U. S. 504, 25 L. Ed. 763.

Among other things, the Postmaster General as the head of the Post Office Department promulgates certain rules known as "postal regulations." Postmasters are controlled by the Postmaster General in accordance with these regulations and are instructed with reference to their duties through the First Assistant Postmaster General. It is provided by the postal rules and regulations with respect to the duties of the First Assistant Postmaster General as follows:

"To this office is assigned the general care of post offices and postmasters and their instructions. The adjustment of salaries of presidential postmaster and the consideration of allowances for clerical hire, rent, fuel, light, furniture and miscellaneous expenditures."

It should be borne in mind that the bond declared upon by the United States in this case, among other things, contains a condition to the effect that the obligor shall faithfully perform all the duties imposed upon him by the rules and regulations to which we have just referred. Therefore the defendant in error, being a subordinate of the Post Office Department, was by the condition of the bond required to obey the instructions and directions issued by his superiors.

The learned judge who tried this case below, in discussing this phase of the question, said:

"But the numerous reported cases in which this law has been enforced as against parties receiving money illegally paid by a public officer do not cover a case in which innocently and in good faith a disbursing agent, upon an apparently lawful claim and by direction of his superior officer charged with the duty of instructing him, makes a payment in good faith, out of moneys in his hands which should properly and legally be applied to the payment of the claim if it had no concealed element of illegality. I have not found a reported case in which an innocent disbursing agent has been held liable under such cir-
cumstances. It hardly seems that the financial operations of the government could go on if at the peril of refunding the money every subordinate was required to exercise his own judgment as to whether an apparently legal claim which his superior directed him to pay was to be paid or not. That the person wrongfully obtaining the money should be liable to refund to the government, no matter by what innocent mistake of law or fact he obtained it, is well settled as one of the risks of dealing with the government. * * * But it would seem that the position of an innocent agent who by direction disburse the government's money should be different, and the responsibility, so far as liability for the disbursement is concerned, should rest where the responsibility to decide is placed by the rules and regulations established by law."

This is an admirable statement of the law pertaining to this controversy, and is supported by numerous authorities, among others being the case of United States v. Sinnott (C. C.) 26 Fed. 86, in which the court said:

"And even if the disposition of the money received from the sale of lumber was a technical violation of section 3617 or 3618 of the Revised Statutes (U. S. Comp. St. 1901, pp. 2413, 2414), there is no pretense but that the defendant acted in good faith, and the Indians to whom the money really belonged had the benefit of it, and therefore, upon any equitable view of the transaction, he is entitled to be credited with the amount."

In the case at bar, although the appointee did not work in the post office at Baltimore, yet the whole transaction having been under the authority of the Post Office Department and by its direction, and the money having been paid out and honestly accounted for by the defendant in error, he should not be held liable to the government, although it should appear that appointee was not so engaged in the office at Baltimore, or if, indeed, it be a fact, as alleged, that he was not engaged in government work at all.

Among other things, an issue was submitted to the jury as to whether the defendant in error acted innocently and in good faith and in reliance upon the instructions received from the Post Office Department in the payment of the sums to which reference has heretofore been made. In response to this issue the jury found that the defendant in error innocently and in good faith, and in reliance upon the letters of July 14, 1899, and of September 20, 1899, really believed that Pettit was performing postal services in some capacity not in the Baltimore office. Thus it will be seen that the defendant in error at all times acted strictly in accordance with the instructions received from his superior officer. It was as much his duty to obey those instructions coming from the Post Office Department as it was to obey any other instructions or regulations emanating from that branch of the government service.

It is insisted by counsel for the plaintiff in error that the conduct of the post office officials was improper. This may be true, but nevertheless, under the law, the Postmaster General, and the first assistant, acting under his directions, were charged with the administration of the laws pertaining to that department, and it was in obedience to the mandate of the First Assistant Postmaster General that the defendant in error, acting as the disbursing officer of the government for the Post Office Department, disbursed the funds in his hands strictly in accordance with the directions of his superior officer. Therefore
the alleged misconduct of the officials in the Post Office Department can have no bearing on the questions involved in this controversy.

It is insisted that the defendant in error should have disobeyed the orders of the officials of the Post Office Department. Such conduct on the part of a subordinate would result in demoralization in the management of the affairs of the department, and, in this instance, would have subjected such official to removal from office for insubordination.

Since the argument of this case our attention has been called to the case of the United States v. Arthur R. Moore (decided by the Circuit Court of Appeals for the Second Circuit) 168 Fed. 36. We have carefully considered the facts of that case and are of opinion that the ruling announced therein does not apply to the case at bar. There it appears that the party carried on the pay roll of the postmaster was assigned duty in one of the departments at Washington, and this was expressly prohibited by Act Cong. March 15, 1898, c. 68, § 9, 30 Stat. 317 (U. S. Comp. St. 1901, p. 2630), which reads as follows:

"Sec. 9. Hereafter it shall not be lawful to detail clerks or other employés, paid from general appropriations for the postal service, from any branch of said postal service, whether located at the seat of Government or elsewhere, to any of the offices or bureaus of the Post Office Department at Washington."

It appears from the record that at the time Pettit was appointed the defendant in error had no definite knowledge that he was to be required to perform duties as a clerk in the department at Washington. We infer from the evidence that the chief of the salary and allowance division had agreed to arrange for the employment of Pettit, but nothing was said as to where or in what place in the postal service he was to be assigned to duty. It is true that the defendant in error afterwards said that he assumed that Pettit was engaged in the performance of duties at the department at Washington, yet a careful examination of the testimony of the defendant in error shows that he had no knowledge as to where Pettit was performing service. The defendant in error in his testimony in relation to this point, among other things, testified that:

"At the time of the original appointment of Pettit or the original pressure Hamlet was the chief inspector. The system is under surveillance at all times. You have the chief post office inspector who has charge of all the post offices in the field. He was the personal representative of the Postmaster General, and he either examined my office himself or had inspectors here. From the top they had places where they would look down on the clerks to see if they were performing their duties. The carriers had spotters out to look after the free delivery service, and witness did not know anything about it. This man might have been there on some secret work, and he was told he was not to come to the office. The chief inspector was present, and he urged witness to save Pettit's eligibility and to put Pettit on the rolls."

To require the defendant in error to refund the amounts paid out under the circumstances would be unconscionable. We are therefore of the opinion that the ruling of the lower court in this respect was proper.

We have carefully considered the questions of law raised by the declaration, pleas, demurrers, replications, and rejoinders; the result
being that we are in full accord with the rulings and instructions of the court below and do not deem it necessary to discuss them in detail. For the reasons hereinbefore stated, the judgment of the lower court is affirmed.
Affirmed.

THE THREE BROTHERS.

THE CLARE.

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

No. 221.

1. COLLISION ($§$ 90* )—NAVIGATION RULES—NARROW CHANNEL RULE.

Article 23 of the inland navigation rules (Act June 7, 1897, c. 4, 30 Stat. 101 [U. S. Comp. St. 1901, p. 2863]), which provides that "in narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel," is not an inflexible rule, but only to be followed "when safe and practicable"; and, where it is manifest that an adherence to it will produce disaster, it is not only the right, but the duty, of the navigator to disregard it.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 183; Dec. Dig. § 90.*]

2. COLLISION ($§$ 90* )—NAVIGATION RULES—NARROW CHANNEL RULE.

Such rule applies to Harlem river; but when there is an ebb tide setting strongly against the Bronx shore at the bend below Kingsbridge, which makes it dangerous for a hawser tow going up to pass the bridge on that side, it is justifiable for such a tow, as is customary, to keep to the left-hand side of the river. Nor is a tug required to employ a helper, or divide her tow in order to avoid doing so, which would obstruct and delay navigation and increase the danger of accidents.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 183; Dec. Dig. § 90.*]

3. TOWAGE ($§$ 11* )—COLLISION BETWEEN TOW AND BRIDGE ABUTMENT—LIABILITY OF TUG.

A tug was proceeding up the Harlem river with two tows on hawsers, and was keeping on the Manhattan side in order to pass under Kingsbridge on that side, on account of the strong ebb tide, which made it dangerous to take her tows through the other side. Before reaching the bend below the bridge, she blew two bend signals, to which she received no answer, and in rounding the bend, when for the first time she could see the channel under the bridge, a scow which had been lying at the bulkhead was shifting her position and lay directly across the channel on that side, wholly obstructing it. The tug stopped her engines and maneuvered skillfully, succeeding in passing the scow; but one of her hawsers parted, and the forward tow struck an abutment of the bridge and was injured. Held, that the tug was not in fault for being on that side of the channel, but that the fault was that of the scow, which was needlessly permitted to obstruct the channel in shifting, and which should in any event have heeded the tug's signals and waited until she had passed.

[Ed. Note.—For other cases, see Towage, Cent. Dig. §§ 17–20; Dec. Dig. § 11.*]

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

The claimants of the tug Three Brothers appeal from a decree of the District Court for the Southern District of New York holding the tug solely in

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes.
fault for causing the scow Atlas, which was being towed by the tug, to collide with an abutment of Kingsbridge in the Harlem river. The damages to the Atlas were assessed at $1,184.15 and a decree was entered in her favor for $1,263.81. The petition against the Clare was dismissed with costs. The facts are sufficiently stated in the opinion of the District Judge, reported in 162 Fed. 388.

Alexander & Ash, for the Three Brothers.
Wing, Putnam & Burlingham (Charles C. Burlingham, of counsel), for the Clare.
Foley & Martin (William J. Martin and James A. Nelson, on the brief), for the Atlas.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

COXE, Circuit Judge. At the point where the collision occurred there is a sharp bend in the Harlem river, the channel at 218th street being at right angles to the channel above Kingsbridge. At the time of the collision a strong ebb tide, running three miles an hour, was setting on the Bronx shore. The navigable channel at this point is about 300 feet wide and on the Bronx side the Hudson River Railroad Company has built a sloping wall with large rough rocks under water for some distance out from the bulkhead line. In the center of the channel is an abutment upon which the double swing drawbridge rests.

The testimony is practically uncontradicted that it is unsafe to take a west bound hawser tow on the northerly side of the center abutment when the ebb tide is setting strongly on the Bronx shore. The danger of the tow striking the jagged rocks is so great that all tows bound for the Hudson river navigate at this point when the tide is ebb on the Manhattan side. The District Judge who saw the witnesses so finds. He says:

"Owing to the bend in the river from about north northeast to northwest, the ebb current sets strongly on the Bronx side of the river up to and beyond Kingsbridge. It was, therefore, unsafe for a hawser tow to be taken through the opening on the Bronx side during the ebb tide, as such an attempt would probably result in the tow striking the shore of the bridge abutment on that side. It was usual for tows of such character to pass through the Manhattan draw and the proper course for that purpose was to keep on the Manhattan side of mid-channel and to pass the bulkhead about 100 feet away."

The Three Brothers made up her tow at the power house, the scow Atlas heavily loaded being placed next the tug and the scow Driscoll, being light, was placed close astern of the Atlas. The tug then rounded to and proceeded up the river about 100 feet from the Manhattan bulkhead intending to pass the center abutment of the drawbridge on that side of the river. As soon as he got straightened out on his course, the master of the tug blew a long bend signal and soon after another signal of the same character. Neither was answered. Owing to the sharp curve in the channel and obstructions along the bulkhead it was impossible for the master to see the channel under the bridge or the scows moored at the Manhattan bulkhead until he was approximately opposite of 219th street. This proposition can be easily demonstrated by placing a straight edge on the chart, Exhibit A.

When the master of the tug first saw the Clare she had swung out from her dock directly across the channel he was intending to take.

170 F.—4
It was then too late to maneuver so as to avoid disaster. Had he attempted to pass on the Bronx side, assuming he could have cleared the Clare, he would inevitably have swung the tow upon the rocks, if he had kept on he would have collided with the Clare. That his seamanship in this extremity was skilful is demonstrated by the result, as he succeeded in clearing the Clare and would probably have cleared the abutment had not his hawsers parted, permitting the Atlas to drift. The District Judge after examining the maneuvers of the tug in detail exonerates her from every charge of fault save one—that she was navigating on the wrong side of the river in violation of article 25 of the inland rules. 30 Stat. 101 (U. S. Comp. St. 1901, p. 2883). This rule is as follows:

"In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fair way of mid-channel which lies on the starboard side of such vessel."

Undoubtedly the Harlem river is a narrow channel and the rule, generally speaking, is applicable thereto but the rule must be construed in the light of common sense. Its purpose is to prevent collisions not to produce them. It is not an inflexible rule to be followed in all cases, and, where it is manifest that a blind adherence will produce disaster, it is not only the right but the duty of the navigator to disregard it. The rule so states explicitly. It must be followed only "when it is safe and practicable."

In the present instance we think it would have been both unsafe and impracticable to have followed it. It will probably be conceded that if a wreck, sand bar or sunken rock obstructs the starboard side of a channel, the navigator may take the port side. The situation disclosed by the proof differs only in degree from the one supposed. When the tide is running strong ebb the rocky shore at the convex of the bend is as much to be dreaded as a lee shore by a disabled ship. The danger was generally recognized and there was an understanding among rivermen that westward bound tugs should take the port side at this particular bend when the set of the tide required it.

The suggestion that the tug should have employed a helper or taken the boats through, one at a time, alongside imposes too heavy a burden upon navigation. Besides, it may well be doubted whether such a rule if established will not result in more accidents than the custom which now prevails. It will increase threefold the trips of the tugs around the bend, it will compel the tug to stop, dismember the tow, find dockage for one of the barges, lash the other barge alongside, leave her at some dock west of the bend, return for the other barge and reassemble the tow. It were strange if all this did not result in many disasters besides the delay, annoyance and expense sure to follow.

The narrow channel rule was intended to apply to tugs made up in the ordinary way; a construction which disorganizes the towing system of a given locality and makes compliance with the rule so onerous as to be prohibitory should be avoided if possible. We think it much safer to regard this dangerous bend, when the ebb tide is running, as an exception to the rule. Steam vessels approaching the bend should
sound the usual signal and vessels obstructing the channel should give
timely warning of their presence.

That the Clare was responsible for the collision we cannot doubt. She was lying at the bulkhead near the bridge. Outside of her was a loaded scow and in order to get the latter to the dock it was necessary to shift the Clare but this could have been done without permitting her to project more than 60 feet into the channel. She was 100 feet long and when seen by the approaching tug her bow was 25 feet from the loaded scow and her stern out beyond the center of the river, at least 150 feet from the bulkhead. The Manhattan draw was thus completely blocked while she remained in this position.

As we have said the mere shifting of her berth did not require her to swing across the channel but, assuming that it did, it was clearly her duty to give notice of such a dangerous maneuver. The place where she lay could not be seen by vessels approaching from either direction. Tugs and tows from the Hudson concededly were required to pass through the Manhattan draw and yet, without a word of warning, this unwieldy scow was permitted to drift out on a fast running tide directly across the course of vessels navigating the river.

The master of the Clare knew or should have known the conditions prevailing at this point and if he had not men enough to shift the Clare without permitting her to become a menace to navigation he should have given warning to approaching vessels or taken measures to ascertain that the river was clear before undertaking a maneuver so hazardous. Those on the Clare should have heard the two bend signals which the District Judge finds were given and suspended operations until the tug and tow had passed.

Having received no warning the master of the tug was justified in proceeding; he had no reason to expect that a helpless scow would be permitted to drift across his course. The moment he perceived the danger he acted promptly and efficiently and we agree with the District Judge in thinking that the navigation of the tug was free from fault. We cannot avoid the conclusion that the action of the Clare in obstructing the channel was the proximate cause of the collision.

The decree of the District Court is reversed with costs to the Three Brothers against the Clare and the cause is remanded to the District Court with instructions to enter a decree dismissing the libel as against the Three Brothers with costs and for damages and the costs of the District Court in favor of the libelant and against the Clare.
SIMPSON COUNTY v. WISNER-COX LUMBER & MFG. CO.

(Circuit Court of Appeals, Fifth Circuit. May 10, 1909.)

No. 1,812.


Whether leases of school lands in Mississippi for 99 years create a leasehold estate, or a determinable fee, or some estate greater than a leasehold, must be determined by the law of Mississippi, as enunciated by her highest judicial tribunal.

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


Under the law of Mississippi, a lease of school lands for 99 years creates in the lessee but a leasehold estate, conferring on him only the right to cut timber for estovers or to clear the estate for cultivation, and not merely for the sale thereof.

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

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

This is a suit in equity, brought in the chancery court of Simpson county, Miss., by Simpson county against the Wisner-Cox Lumber & Manufacturing Company, a corporation under the laws of Iowa.

The material averments and the prayer of the bill are as follows:

"That defendant was organized and incorporated for the purpose of buying large tracts of timber lands, and for the purpose of operating saw and planing mills, with which to manufacture into lumber all timber that might be purchased by it. That in pursuance to the avowed purpose of its organization, as aforesaid, the defendant has purchased large tracts of timber and timber lands in various counties in South Mississippi. That the said defendant is possessed of an unexpired lease for 99 years in and to the following described land, situated in the county of Simpson and state of Mississippi, to wit: [Here follows a description of parts of section 16, township 1, range 1 E.]

"Said lands are what are known as 'school lands,' and the fee-simple title to said lands is in the state of Mississippi, in trust for the inhabitants of the townships of said county of Simpson. That a number of years ago the county of Simpson leased said lands to sundry and divers persons for a term of 99 years, and said leases were duly executed in favor of said parties to run for periods of 99 years; said leases being of various dates and expiring at various times in the future, the date of expiration in every case being 99 years from the date of the lease. That the parties who leased said lands conveyed their unexpired leases to sundry and divers parties, and by mesne conveyances the title to the unexpired terms of said leases was conveyed to the said defendant, and said defendant is now the assignee of said leases. Defendant claims to own said lands in fee simple and upon other terms than that of a lease to expire at a fixed date, with absolute reversion to the state of Mississippi, in trust, and it claims all the rights of an owner in fee simple in said lands.

"Complainant further states that said lands are now covered with a very fine growth of yellow pine timber of great value, and defendant claims that by virtue of the assignment to it of the unexpired leasehold interests in said lands for a term of 99 years it has the right to cut all of the timber standing on said lands for the purpose of manufacturing the same into lumber; and complainant states and charges that defendant threatens at an early date to cut all the timber standing on all of the lands aforesaid, and manufacture the same into lumber, and complainant says that, unless restrained by this honorable court, the defendant will carry its threat into execution, and will cut

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
the timber standing on said lands, and will convert the same to its own use and for its own more profit.

"Complainant further states and charges that defendant claims the right to cut all the timber from said lands and manufacture the same into lumber, not for the purpose of clearing the same for cultivation, or for the purpose of obtaining reasonable estovers therefrom, but for his own more profit, the defendant claiming that it has all the rights in said timber of an owner in fee simple; and it is the avowed purpose of the defendant to cut and manufacture into lumber all the pine timber now standing on said lands, and unless restrained by this honorable court, defendant will carry its avowed purpose into execution, and will in the near future denude said land of all its standing timber, in wanton disregard of the rights of the complainant, and thus work a lasting injury to the freehold and irreparable damage to the complainant, the inhabitants of said townships, and the state of Mississippi.

"Complainant states and charges that the pretended claim of the defendant to own the timber standing on said lands in fee simple, and the pretended claim of defendant that it has a right to cut all of the timber standing on said lands, the same as an owner in fee simple, casts a doubt, cloud, and suspicion upon the title of the complainant and the state of Mississippi to said lands and the timber standing thereon.

"Complainant says that, if the defendant acquired any title to the timber standing on said lands by virtue of the transfer to it of the leases aforesaid, it acquired no right to cut the timber from said lands, except for reasonable purposes of cultivation and for reasonable estovers; and the claim of defendant that it has a right to cut more timber than is necessary for reasonable purposes of cultivation and for reasonable estovers is unfounded, and to that extent casts a doubt, cloud, and suspicion upon the title of complainant and the state of Mississippi in said lands and the timber standing thereon.

"Complainant derails its title to said lands and the timber standing thereon as follows:

"By the fifth clause of the articles of agreement and cession between the United States and Georgia, the lands ceded by that state to the United States, including the present state of Mississippi, were to form states, and to be admitted to the Union upon the same conditions and restrictions, and with the same privileges and in the same manner, as provided by the Ordinance of July 13, 1787, for the government of the Northwest Territory. Under said ordinance, and pursuant to uniform public policy, the sixteenth section lands in every township in all the new states admitted to the Union were appropriated for school purposes. By the twelfth section of the act of Congress of March 3, 1863 [2 Stat. 234, c. 27], providing for a survey and sale of the public lands in the state of Mississippi territory, all sixteenth sections were reserved in each township for the support of schools within the same; and complainant says that upon the admission of the state of Mississippi to the Union the title to said lands aforesaid vested in the state of Mississippi, in trust for the inhabitants of said townships, in accordance with the provisions of said acts of Congress.

"Complainant further states that under the provisions of chapter 123 of the Annotated Code of Mississippi of 1892, the jurisdiction and control of all sixteenth section lands in the state of Mississippi were vested in the several counties of the state, and that by virtue of the provisions of said chapter the jurisdiction and control of the aforesaid described lands in Simpson County were vested in the complainant, and the provisions of the Code of 1892 on the subject of sixteenth section lands have been re-enacted in the Code of 1906.

"The premises considered, complainant prays that the defendant may be summoned by proper process to plead, answer, or demur to this bill, but not under oath, and answer under oath being hereby waived, and that upon final hearing the legality of the claim of defendant to own said lands and the timber standing thereon in fee simple may be tested, and that the pretended claim of defendant that it has all the rights of an owner in fee simple to said lands and the timber standing thereon may be canceled as casting a doubt, cloud, and suspicion upon the title of complainant and the state of Mississippi to said lands and the timber standing thereon, and that the pretended claim of the defendant to the right to cut any more timber from said lands than may
be necessary for the purposes of reasonable cultivation and for reasonable estovers may be canceled, as casting a doubt, cloud, or suspicion upon the title of complainant and the state of Mississippi to said lands and the timber standing thereon, and that defendant may be perpetually enjoined from cutting the timber from said lands, except for bona fide purposes of cultivation and for reasonable estovers; and, if mistaken in the relief prayed for, then complainant prays for such other, further, and general relief as it may be entitled to in the premises, and as to the court may seem meet and proper. And as in duty bound your complainant will ever pray," etc.

On petition of the defendant the cause was duly removed to the United States Circuit Court. The defendant filed a disclaimer and demurrer. It disclaimed to hold the lands otherwise than under the grants described in the bill. It demurred, alleging many grounds of demurrer, among them: (1) That there was no cause of action in the complainant; (2) that the bill does not show there was no right in the respondent to cut the timber; and (3) that under the lease and the statutes of Mississippi the lessee acquired the whole estate in the land during the period of 99 years.

The Circuit Court sustained the demurrer and dismissed the bill. The complainant appealed, and assigns that the court erred in dismissing the bill.

Garner Wynn Green and Marcellus Green, for appellee.

Before PARDEE, MCCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge (after stating the facts as above). This is a bill to enjoin the defendant from cutting and removing for commercial purposes all the timber from parts of a sixteenth section. The bill shows that the defendant holds the land as assignee of a lease for 99 years. The lease was made by authority of a statute of the state of Mississippi. It is alleged that the defendant claims to have the right to denude the land of all its growing timber; that, in fact, it claims to be, by virtue of the lease, the owner of the land in fee. The demurrer is on the ground that under the lease the lessee acquired the whole estate in the land during the period of 99 years. The position of the defendant by the demurrer is that, admitting the allegations of the bill to be true, it has the right to cut and sell all the timber growing on the land, although such action would work a lasting injury to the freehold and irreparable damage to the complainant.

The controlling question in the case is whether the defendant's estate in the land is a leasehold estate, or a determinable fee, or some estate greater than a leasehold estate. If it is decided to be a leasehold estate, then the next and only other question is: Does the doctrine of waste, as between lessor and lessee, prevail in Mississippi?

This brief statement of the case, without referring to the more elaborate averments of the bill, shows that the questions raised involve the construction of a contract made by authority of a Mississippi statute in relation to real estate situated in the state of Mississippi.

It is a principle firmly established that the federal courts will follow the construction given to the statutes of a state by the highest judicial tribunal of such state (Leffingwell v. Warren, 2 Black, 599, 603, 17 L. Ed. 361; Joseph Dixon Crucible Company v. Paul [C. C. A.] 107 Fed. 784, 788); and it is equally well settled that to the law of
the state in which the land is situated we must look for the rules which govern its descent, alienation, and transfer, and for the effect and construction of wills and other conveyances (Clarke v. Clarke, 178 U. S. 186, 191, 20 Sup. Ct. 873, 44 L. Ed. 1028). The mere statement of the case shows that it must be governed by the laws of Mississippi. It would be intolerable to have one rule prevailing in the state courts and another in the federal courts as to the construction of state statutes and leases of real estate situated in the state. It is fundamental that the construction placed on a state statute by the state’s highest court is looked on by a federal court as a part of the statute itself, and that the laws of the state, as expounded by its court of last resort, constitute the law of the land as to the conveyance, lease, and titles of real estate situated within the state. We have, therefore, only to look to the laws of Mississippi to see if the two questions involved in this case have been settled by them.

In 1901 the Supreme Court of Mississippi decided a case which involved a lease like those in question here. It was an action of replevin for logs cut from section 16, township 15, range 3 E., in Warren county. The lessees held the land under a lease for 99 years, dated in January, 1834. The case involved the right of the lessees to cut and sell the timber growing on the land. The doctrine settled by the decision was that the tenant of a particular estate may cut timber for estovers and for clearing the estate for cultivation, so long as he leaves sufficient timber for permanent use and enjoyment of the inheritance, “but cannot cut the timber merely for the sale thereof.” Warren County v. Gans, 80 Miss. 76, 31 South. 539. This case stood unquestioned till May 7, 1906, when an opinion was handed down by the same court expressly overruling it, and holding that waste could not be predicated upon the fact that a lessee for 99 years denuded a sixteenth section of all of its timber. The opinion was written by Calhoun, J., and the conclusion was concurred in by Truly, J., on the ground that the lessee for 99 years held an estate which was “intended to operate as a fee determinable at the end of 99 years.” Whitfield, C. J., dissented. This decision never became the law of the state, and, in fact, never became the law of the case in which it was announced. Rule 10 of the Supreme Court of Mississippi provides that:

“The court will, at any time during the term at which a judgment is rendered, consider a written suggestion of error of law or fact therein, and will take such action as may seem proper.” 70 Miss. xxii (preface), 13 South. vi.

A written “suggestion of error” was made under this rule, and, on a rehearing, the final decision of the court was announced on November 26, 1906. The opinion of the court was delivered by Mayes, J. (who succeeded Truly, J., whose term had expired), and concurred in by a separate opinion by Whitfield, C. J. The effect was to reinstate the doctrine announced in Warren County v. Gans, supra. It was held that a lease, like those described in the bill in the instant case, is governed by the principles governing estates for years, and gives no right in the fee, and that, in the absence of a stipulation in the lease to the contrary, the lessee of sixteenth section lands for 99
years has no right to cut the timber for sale beyond his right as a tenant for years, and that if such lessee cut the timber, and carried it away to be manufactured into lumber and sold, and not for the purpose of clearing the land for cultivation, such lessee would be liable for waste. We content ourselves with referring to the very able and elaborate opinions of Whitfield, C. J., and Mayes, J., as stating the laws of Mississippi on the questions involved. Moss Point Lumber Company v. Harrison County, 89 Miss. 448, 42 South. 290, 296, 302, 873.

We find nothing in the previous decisions of the Supreme Court of Mississippi that cannot be reconciled with the final decision of the court in Moss Point Lumber Company v. Harrison County, supra. Our attention is called to several cases claimed to be in conflict with this conclusion; but they are all referred to and explained to our entire satisfaction in the two opinions which we have cited as controlling.

There is nothing in the averments of the bill or in the record as now presented to take the case out of the general rule requiring this court to be governed by the decisions of the state court of last resort.

The decree of the Circuit Court is reversed, and the cause remanded, with instructions to overrule the demurrers, and for further proceedings in conformity to the opinion of this court.

SIMPSON COUNTY v. COX et al.

(Circuit Court of Appeals, Fifth Circuit. May 10, 1909.)

NOS. 1,813-1,816.

Appeals from the Circuit Court of the United States for the Southern District of Mississippi.

Action by Simpson County against Arthur J. Cox and another. With this action have been consolidated in this court actions brought by Simpson County against the Forest Products & Manufacturing Company, against the Green Bay Lumber Company, and against Eastman, Gardiner & Co.


Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. These cases involve the same questions decided in Simpson County v. Wismer-Cox Lumber & Manufacturing Co. (which has just been decided) 170 Fed. 52. For the reasons there stated, the decree of the Circuit Court in each of these cases is reversed, and each cause is remanded, with instructions to overrule the demurrers and to proceed further in conformity to the opinion of this court; and in each case it is so ordered.
SHACKLETON V. BAGGALEY.

SHACKLETON et al. v. BAGGALEY et al.

(Circuit Court of Appeals, Ninth Circuit. May 10, 1909.)

No. 1,674.

1. EQUITY (§ 145*).—BILL—DOUBLE ASPECT.
   A bill may be originally framed with a double aspect, so as to be of that
   character if the alternative case stated is the foundation for the same
   relief.
   [Ed. Note.—For other cases, see Equity, Cent. Dig. § 339; Dec. Dig. §
   145.*]

2. EQUITY (§ 152*).—PLEADING—EXHIBITS—EFFECT.
   Complainants alleged that they were employed to provide materials
   and labor to construct a smelter, the reasonable value of the work
   performed and materials furnished, but referred to a notice of a mechanic's
   lien and a written contract under which the work was done, which were
   attached to the bill as exhibits, which contract contained an express
   waiver of a right to a lien. Held, that the written contract so made a
   part of the bill controlled the allegations thereof, and hence the cause
   of suit stated was not a quantum meruit but an express contract.
   [Ed. Note.—For other cases, see Equity, Cent. Dig. § 355; Dec. Dig. §
   152.*]

3. ESTOPPEL (§ 92*).—EQUITABLE ESTOPPEL—ACCEPTANCE OF BENEFITS—CON-
   TRACTS.
   Where complainants, who had agreed to construct a smelter under an
   express contract by which they had waived their right to a lien, claimed
   that the contract had been rendered void by defendant's fraud, but there
   was nothing to show when the fraud was discovered and that it had not
   been waived by the notice of lien, which was an express affirmation of
   the contract, claimants could not claim that they were absolved from the
   contract waiver of lien and at the same time sue in equity on the contract
   and notice of lien to foreclose the same.
   [Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 261; Dec. Dig. §
   92.*]

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

R. L. Clinton, for appellants.
J. Bruce Kremer, L. P. Sanders, and Alf. C. Kremer, for appellees.
Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. The appellants filed a bill in the court
below to foreclose a mechanic's lien. The bill in form states two
causes of suit, both, however, arising out of one transaction, and there
is but one prayer for relief. In the first cause of suit, it is alleged that
on April 9, 1903, the appellants, as original contractors, entered into
a contract with the appellees for the construction of a smelting plant,
a water tank, and boiler stacks; that the contract was performed; that
the contract price was $95,500; that the appellants furnished extras
at the instance of the appellees in constructing said smelting plant,
which were necessarily used therein, to the total amount of $12,818.17;
that there has been paid on account of said contract and extras $91,-
102.87, leaving a balance due of $17,215.31; that on January 14, 1904,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
the appellants recorded their notice and claim of lien against said property, a copy of which is made an exhibit to the bill, as is also a copy of the contract. The bill proceeds to allege that, while appellants were performing the contract, the appellee Baggaley fraudulently caused certain material alterations in the plans and specifications to be made clandestinely, which plans and specifications he retained in his possession, whereby there was added to the structure a dormer extension at a cost to the appellants of $250, and an additional height of eight inches to the concrete foundation of the building at a cost of $1,000; that Baggaley refused to permit the appellants to inspect or to have the possession of the plans and specifications; and that by reason of said fraudulent alterations of the plans and specifications so made without the knowledge or consent of the appellants, the contract was rendered wholly void, and the appellants were wholly discharged from all obligations arising therefrom. For the second cause of suit it is alleged that about April 9, 1903, the appellants were employed by the appellees to provide material and perform the work of construction of a smelter, etc.; that they did furnish said material and perform said work, according to plans and specifications furnished by the appellees, and furnished extra material and work which went into the construction thereof; that the reasonable value of said work and material is $108,318.97, on which there has been paid $91,102.87, leaving a balance of $17,215.31 still due the appellants; that within 90 days after the completion of said buildings, to wit, on January 14, 1904, the appellants duly recorded a notice of lien for their said material so furnished and work so performed, a copy of which notice is made an exhibit to the bill. The bill also makes an exhibit of the contract of April 9, 1903, and sets forth the same allegations of alterations of the plans and specifications as are set forth in the first cause of suit, and alleges that thereby the contract was rendered void. A demurrer was interposed to the bill: First, for want of jurisdiction of the cause of suit; second, because it appears upon the face of the bill and the contract that the appellees were not entitled to institute the suit; and, third, for want of equity. The demurrer was sustained on the ground that by the terms of the contract, the appellants had expressly stipulated to waive a lien on the property. The appellants declining to amend, the bill was dismissed.

It is the contention of the appellants that the bill is framed with a double aspect, upon one of which, at least, they are entitled to the relief which is prayed for. In Shields v. Barrow, 17 How. 144, 15 L. Ed. 158, it is said:

"A bill may be originally framed with a double aspect, or may be so amended as to be of that character, but the alternative case stated therein must be the foundation for precisely the same relief."

But, although the bill in this case is in form ostensibly framed with a double aspect, it in fact presents but one cause of suit, a suit in equity to foreclose a mechanic's lien based upon a written contract. The appellants contend that, while in one cause of suit they seek to foreclose a lien based upon an express contract, in the other they seek to foreclose a lien based upon a quantum meruit; but upon an ex-
amination of the bill it will be seen that this is not so, and that no
cause of suit is stated upon a quantum meruit. It is true that in the
second cause of suit the appellants attempt to say that they were em-
ployed to provide the materials and to do the work for the construc-
tion of a smelter, and that they allege the reasonable value of the work
which they performed; but they make exhibits of the notice of lien,
and the written contract under which the work was done. The writ-
ten contract so made a part of the pleading controls and interprets
the allegations of the complaint, and it shows that the cause of suit
was not upon a quantum meruit, but upon an express agreement, so
that in substance both causes of suit are the same. They are both
brought upon the contract, and yet in both it is alleged that the con-
tract was rendered void by the fraud of the appellees. It is not shown
when this alleged fraud was discovered. For all that appears to the
contrary, it may have been known before the work so alleged to be
fraudulently interpolated was done. If so, the alterations were as-
sented to by the notice of lien, for the notice is an express affirmation
of the contract. How can the appellants enforce a mechanic's lien for
work and services performed under a contract and under a notice of
lien which was filed under the contract, and at the same time allege
that the contract was void? They deny that it is the purpose of the
suit to rescind the contract. They admit that they entered into an
agreement to waive a mechanic's lien. The evident purpose of alleg-
ing that the contract is void is to obviate the effect of that agreement.
The argument is that the fraud practiced by the appellees, no matter
when it was discovered, absolves the appellants from their obligation
to file no lien, but leaves the contract intact in other respects. The
proposition cannot be sustained. If the allegations of fraud are true,
the appellants were thereby defrauded in the sum of $1,250. For this
they had their remedy by an action for damages. They cannot, in a
suit brought in equity to foreclose a mechanic's lien under a contract
and a notice of lien affirming the contract, allege that, by reason of
fraud discovered, we know not when, the contract or any part of it
was rendered null and void. Long v. Caffrey, 93 Pa. 526; Brezenski
v. Neeves, 93 Wis. 567, 67 N. W. 1125; Pressed Brick Co. v. Barr,
76 Mo. App. 380; Pinning v. Skipper, 71 Md. 347, 18 Atl. 659. In
the case last cited, the court said:

"If a party expressly contracts that he will not do a certain thing, or will
not set up a certain claim against the other contracting party or his property,
by resort to a certain process, it seems to us a legal anomaly to say that he
can go on and do the thing, or avail himself of the forbidden process because he
has a grievance against such other party on some other ground, or a claim
which he can enforce against him by a different suit or process."

The decree is affirmed.
WALSH et al. v. TWEEDIE TRADING CO.

THE HERM.

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

Nos. 234, 235.

SHIPPING (§ 46)—CHARTER PARTY—CONSTRUCTION—OPTIONAL EMPLOYMENT OF VESSEL.

A charter of a steamship "for one round trip to west coast of South America. Charterers have the option of employing the steamer in general trade for the period of about three months up to five months, but in any event not to exceed five months"—gave the charterers the option of a round trip to the west coast without limitation of time, or of using the vessel in general trade not to exceed five months, and their use of her in such trade for some three months was an election, and they were not then entitled to send her to the west coast, which would require a longer time than five months in all.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 171-176; Dec. Dig. § 46.*]

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

For opinion below, see 152 Fed. 276.

The decree in the first suit awarded to the agents of owners of the steamship Herm balance claimed to be due for hire of the steamer. The decree in the second suit dismissed the libel of the charterer, Tweedie Trading Company, brought to recover damages for alleged breach of charter party. The appellant does not dispute the amount of hire decreed, but denies its liability therefor. The opinion of the District Judge is found in 152 Fed. 276.

R. J. M. Bullowa, for appellant.
J. Parker Kirlin and Russell T. Mount, for appellees.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts as above). The questions raised by these appeals deal with the construction of a charter party and its application, as construed, to the facts of the case. The charter party is, as usual, a printed form, with blanks which have been filled in to express the intentions of the parties. After a recital of the names of the parties and a description of the vessel, the charter party—

"witnesseth, that the said owners agree to let and the said charterers agree to hire the said steamship from the time of delivery for one round trip to west coast of South America. Steamer to be placed at the disposal of the charterers at a port in U. S. north of Hatteras or Savannah or Fernandina at charterers' option, in such dock or at such wharf * * * as the charterers may direct [here follow the usual provisions as to readiness to receive cargo, seaworthiness, complement of officers and crew], to be employed in carrying lawful merchandise * * * between safe port and/or ports in British North America, and/or United States of America, and/or West Indies, and/or Central America, and/or Caribbean and/or Gulf of Mexico, and/or South America, and/or Europe, and/or Africa, and/or Asia, and/or Australia, excluding River St. Lawrence from Oct. 1st to May 1st * * * and all unsafe ports, as charterers or their agents shall direct."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
The words italicized above are typewritten in a blank space. There is also at the foot of the document, just before signatures, another typewritten clause dealing with the employment of the vessel. Counsel for owners suggests that it was placed there because there was no room for it in the earlier blank, and that it should be transposed to the place where it properly belongs. This seems reasonable, and will bring the provisions as to employment of the vessel into juxtaposition in the same paragraph. When this is done the paragraph after the words “from time of delivery” reads:

“For one round trip to west coast of South America. Charterers have the option of employing the steamer in general trade for the period of about three, (3) months, up to five (5) months, but in any event time not to exceed 5 months, subject, of course, to stranding, sinking, stress of weather or other accidents. Steamer to be placed at the disposal of the charterers, etc. [as above quoted].”

Counsel for owners contends that the “but in any event time not to exceed 5 months” qualifies both the optional employments—the round trip to west coast, as well as the general trading. We are of the opinion, however, that this time limit refers only to the employment in general trade. The vessel was delivered to charterer at New York July 13, 1905. Some cargo was there taken aboard, and she proceeded to Fernandina, where loading was completed. She sailed July 30th for Pernambuco, where she discharged part of her cargo, proceeded to Rio, where other cargo was discharged, and thence to Santos, where discharge was completed on September 20th. She lay idle there for about 12 days until, on October 3d and 4th, certain telegrams, which will be hereinafter referred to, were exchanged between the parties. Thereupon she left Santos October 5th for Pernambuco for orders, and under them proceeded to Barbadoes. Her subsequent movements need not be recited. They were subsequently adjusted.

The clause of the charter quoted supra provides for two different employments of the ship and gives the charterers the option which they will select. She may be sent on one round trip to the west coast of South America, or she may be employed in general trade (between the ports specified in a long enumeration) for a time not to exceed five months. There is no special requirement as to the manner in which such option shall be exercised and the owners notified of the choice made. No written notice is called for, nor must notice necessarily be given before sailing. When, therefore, the question is presented, Which of these two different employments did the charterers select? the answer must be found in what was done under the charter. The vessel loaded with no cargo for the west coast. She carried cargo only for several ports on the east coast, and her movements down to the time controversy arose had been confined to trade between ports in the United States and ports on that coast. At the very moment when controversy did arise, as the president of the charterer testified, he had in contemplation to send her to Africa, and thence to India, and thence home with oil.

Some evidence was put in by the charterer to the effect that under a charter for “one round trip to west coast of South America” there is a custom which gives the charterer the right to call at intermediate ports to load or discharge cargo. Cross-examination, however, left
this evidence quite unpersuasive. The vessel finding, at Santos, no cargo offering which she could have taken and carried under the general trading option within the time limit specified in the charter—nearly three months had then expired—the charterer cabled on October 3d to owners’ agents:

"Will you allow two months continuation of present charter £100 extra per month falling this Tweedle considering west coast South America voyage."

To which they replied October 4th:

"Owners agree to not exceeding two months continuation £200 extra per month whole period present charter and continuation difference falling this they protest keeping Herm over five months as per charter party therefore west coast South America voyage impossible."

The owners apparently construed the charter party as applying the five-months limit to the west coast voyage. In that they were in error. But it was with them to say whether or not they would give any extension for general trading, and, if so, on what terms. Upon the evidence we are satisfied that, long before the cable of October 3d was sent, the charterer had elected to employ the vessel in general trading, had actually so employed her, and was contemplating a continuance of such employment. The cablegram of October 3d indicates this clearly. It shows that the charterer did not construe the time limit as applying to the west coast voyage, for it says, "Failing this"—i.e. an extension—it was contemplated to send her to the west coast. Nevertheless an extension of time is asked for, which would be needed only in case the vessel were being employed in general trading. Having once exercised its option, and employed the vessel in general trading, the charterer could not, when conditions at Santos rendered that employment unprofitable, except upon an extension for a considerably longer period, adopt the other alternative and insist that the vessel should then be sent to the west coast.

The decrees are affirmed, with interest in the first cause and a single bill of costs of appeal for both causes.

HANSON et al. v. CRAIG et al.

(Circuit Court of Appeals, Ninth Circuit. May 3, 1909.)

No. 1,456.

MINES AND MINERALS (§ 27)—LOCATION OF MINING CLAIMS—CONFLICTING LOCATIONS.

Under Rev. St. §§ 2320, 2322, 2329 (U. S. Comp. St. 1901, pp. 1424, 1425, 1432), possessory title to a mining claim can only be acquired by a valid location, an essential of which is the discovery of mineral thereon; and where the locators of two association claims, which overlap, are sinking shafts at the same time, the first to discover mineral has priority of right, although the location was staked after the other, if it was made openly and peaceably.

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

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
ROSS, Circuit Judge. Not being satisfied with our decision here-
tofore rendered in this case (161 Fed. 861, 89 C. C. A. 55), the peti-
tion for a rehearing of the cause was granted, and after a further con-
sideration of the record we are convinced that the decision then made
was erroneous. The theory upon which we then proceeded was that
the evidence was sufficient to justify a finding of such a possession of
the mining ground in question by the defendants in error, who were
the plaintiffs below, as precluded the plaintiffs in error, who were
defendants below, from entering upon it for the purpose of prospect-
ing and making a valid mining location thereon. Some of the facts
are stated in the opinion then delivered, but there are other facts
shown by the record which were overlooked.

The plaintiffs in error, as well as the defendants in error, are eight
in number, and made the location under which they respectively claim
as an association claim of 160 acres of placer ground. The location
of the defendants in error was prior in point of time, having been made
on the 5th day of January, 1906; the ground then staked by them be-
ing 1,320 feet wide by a mile long, on Wildcat Creek, a tributary of
Treasure Creek, in the Fairbanks mining district of Alaska. That
claim was called the "Red Dog Association Claim." On the 18th of
the next month the defendants in error changed the boundaries of the
claim, so as to lessen the width one-half and to double the length,
and marked the boundaries thereof so that they could be readily traced
upon the ground, and thereafter recorded the notice of such location.
The record shows that the defendants in error had various other as-
sociation claims of 160 acres each in the near vicinity and had a
camp not far away. The evidence tended to show that on the 12th of
March, 1906, the defendants in error made arrangements to commence
sinking a shaft upon the ground thus claimed in search of gold, and
with that end in view it was arranged that the defendant in error
Cale should go to Fairbanks, which was about 18 miles distant, to
procure the necessary tools, blankets, and other supplies, and to re-
turn to the claim and commence work thereon on the 16th of March,
1906, and that in the meantime the defendant in error Carroll and
one Hugh Dougherty as the representative of the defendant in error
Alice Dougherty, should begin the sinking of a shaft on the claim,
which they did on the 14th of March, 1906, continuing such work dur-
ing the 14th and a part of the 15th of that month, during which time
they sunk the hole to a depth of about six feet. It appears that in the
evening of March 15th Carroll and Dougherty left the claim, taking
with them their tools and other belongings, for the reason that Cale
was expected to return from Fairbanks, under the arrangement, and
proceed with the work thereon the next morning, and also assigned as
a reason that until the shaft had been sunk a sufficient distance but
one man could work therein. It appears from the testimony that
Cale selected the place on the 12th of March for the sinking of this shaft; that witness testifying:

"I told Mr. Carroll and Mr. Dougherty on the evening of the 12th that they could go to work and commence sinking a shaft immediately, and that I would leave in the morning and go to Fairbanks Creek, and that it would not take me to exceed three days to get back; that I would be back on the third day if nothing intervened—nothing interfered with me—which they agreed to do. I had a similar conversation with them on the morning of the 13th, when leaving. That was the understanding, that they would go up in the morning and commence work on this shaft on this ground; and I left on that morning."

There was also testimony going to show that Cale returned to within one mile of the Red Dog association claim on the 18th of March, with his tools and supplies, but, instead of going onto the ground and commencing work, stopped at the camp of the defendant in error Carroll, and from there went back to Fairbanks Creek, and did not return to the ground in dispute until the afternoon of the 21st of March, when he went to work in the shaft or hole that had been commenced on the 14th of the month by Carroll and Dougherty; Cale testifying:

"I immediately went to work, and remained working until the shaft was sunk to bedrock. I worked alone for a while, until I got the shaft down as far as I could get it and throw the dirt out. Then I went to work and timbered the shaft, and made a windlass and a few other things that were necessary to continue the work, and I then got Mr. Warren [being one of the defendants in error] to help along in finishing the shaft, sinking it to bed rock [and that in sinking the shaft he made a discovery of gold]."

This discovery of gold, however, was subsequent to the location which was made by the plaintiffs in error on the 16th day of March, 1906, of a claim called "Try Again Association Claim," which location included a part of the ground covered by the Red Dog association claim. The plaintiffs in error so marked the boundaries of the Try Again association claim as that they could be readily traced upon the ground, and commenced sinking a shaft upon that portion of it which overlapped the Red Dog association claim of the defendants in error, and continuously prosecuted their work until they made a discovery of gold thereon on the 15th day of April, 1906, up to which time the defendants in error had not made any discovery of mineral within the boundaries of the Red Dog association claim.

Since the statute of the United States requires, as one of the essential conditions to the making of a valid location of unappropriated public land of the United States under the mining laws, a discovery of mineral within the limits of the claim (Rev. St. §§ 2320, 2329 [U. S. Comp. St. 1901, pp. 1424, 1432]), the real question for decision in this case is whether the defendants in error had such possession of the Red Dog association claim as precluded the plaintiffs in error from entering upon the ground and making their location of March 16, 1906, under which they proceeded to make a discovery of gold within the boundaries marked out by them, prior to any discovery by the defendants in error. The exclusive right of possession is by section 2322 of the Revised Statutes (U. S. Comp. St. 1901, p. 1425) conferred only on one who has made a valid location, one of the es-
sentials of which is, as has been said, a discovery of mineral. Prior to that time all such mineral land is in law vacant and open to exploration and location, subject to the well-established rule that no prospector is authorized by any form of forcible, fraudulent, surreptitious, or clandestine conduct to enter or intrude upon the actual possession of another prospector; for every miner upon the public domain is entitled to hold the place in which he may be working against all others having no better right. Zollars v. Evans (C. C.) 5 Fed. 172. The matter is, we think, well and tersely put by Costigan on Mining Law, p. 156, where he says:

"'Pedis possesso' means actual possession, and pending a discovery by anybody the actual possession of the prior arrival will be protected to the extent needed to give him room for work and to prevent probable breaches of the peace. But, while the pedis possessio is thus protected, it must yield to an actual location on a valid discovery made by one who has located peaceably, and neither clandestinely nor with fraudulent purposes."

These views are, we think, well sustained by numerous decisions of the Supreme Court, of this court, and various other courts, some of which we cite. Del Monte Mining & Milling Company v. Last Chance Mining & Milling Company, 171 U. S. 55, 18 Sup. Ct. 895, 43 L. Ed. 72; Jennison v. Kirk, 98 U. S. 453, 25 L. Ed. 240; Belk v. Meagher, 104 U. S. 279, 26 L. Ed. 735; King v. Amy & Silversmith M. Co., 152 U. S. 222, 14 Sup. Ct. 510, 38 L. Ed. 419; Creede v. Uintah M. Co., 196 U. S. 337, 25 Sup. Ct. 266, 49 L. Ed. 501; Cook v. Klonos (C. C. A.) 164 Fed. 529; Johanson v. White, 160 Fed. 901, 88 C. C. A. 83; Malone v. Jackson, 137 Fed. 878, 70 C. C. A. 216; Nevada Sierra Oil Co. v. Home Oil Co. (C. C.) 98 Fed. 673; Olive Land & Development Co. v. Oimsted (C. C.) 103 Fed. 568; Gemmel v. Swain, 88 Mont. 331, 72 Pac. 662, 98 Am. St. Rep. 570; Du Prat v. James, 65 Cal. 555, 4 Pac. 562; Horswell v. Ruiz, 67 Cal. 111, 7 Pac. 197. Applying the foregoing decisions to the present case, it is impossible to hold upon the record here that the defendants in error had such a possession of the strip of public land 660 feet wide and 2 miles long as precluded any other good-faith prospector from peaceably going within those boundaries and himself making a discovery and location.

It is pertinent to add that the Land Department of the government has recently decided that it would not recognize any such shoestring location as conforming to the provisions of the United States statutes upon the subject. See Snow Flake Fraction Placer, 37 Land Dec. Dep. Int. 250 (decided November, 1908), where it was said:

"It is the policy of the government to have entries, whether they be of agricultural or mineral lands, in compact form. Congress has repeatedly announced this principle, and the department has always and does now insist upon it. The public domain must not be cut into long and narrow strips. No 'shoestring' claims should ever receive the sanction of this department."

It results that the judgment must be, and hereby is, reversed, and the cause remanded to the court below.

170 F.—5
CAHILL v. MICHAELIS.

(Circuit Court of Appeals, Second Circuit. April 13, 1900.)

No. 220.

FALSE IMPRISONMENT (§ 11*)—ACTION FOR DAMAGES—JUSTIFICATION.

The action of a defendant in causing the arrest of plaintiff and his commitment for examination as to his sanity under the New York statute (Laws 1896, p. 471, c. 545) held fully justified by plaintiff's conduct and not to constitute false imprisonment.

[Ed. Note.—For other cases, see False Imprisonment, Dec. Dig. § 11.*]

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

John M. and Joseph P. Nolan, for plaintiff in error.

Francis Raymond Stark, for defendant in error.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. The action was brought to recover damages for an alleged false imprisonment of the plaintiff as an insane person. The defense, in brief, was that the plaintiff's conduct was so eccentric that the defendant believed it was his duty to inform the police authorities, in order that the plaintiff's mental condition might be examined by the properly constituted authorities. We do not deem it necessary to discuss the numerous assignments of error argued by the plaintiff, or to review the authorities cited in the briefs, for the reason that we are satisfied that, upon the testimony properly admitted, no cause of action is established. The salient facts are as follows:

The plaintiff had worked for the defendant as a shirt cutter for about three years. He had shown himself to be a man of violent temper, eccentric, nervous, and at times incoherent. His fellow workmen became alarmed, and complaints were made to the defendant that they were afraid to work with him. Finally, on November 3d, he was told that his services would not be required after November 17th, which was Saturday. He then told the defendant that he would not take his tools away, and intended to return to work on the following Monday. He became violent, asserted that he was being persecuted, and that he would return and work for nothing. That evening the defendant consulted a well-known alienist and neurologist regarding the plaintiff's mental condition. On Monday morning the plaintiff returned to work, and shortly before 9 o'clock he was, at the instigation of the defendant, taken by two uniformed policemen to the Jefferson Market police court where the defendant made a complaint stating that the plaintiff had acted in an irrational manner and asked that he be committed to the care of the commissioner of public charities for examination as to his sanity. After a hearing the magistrate committed the plaintiff to Bellevue for five days for observation and examination. The alienists at the hospital found signs of paranoia; but, as he was a resident of New Jersey, it was deemed safe, after four days, to discharge him in the custody of his father, with the un-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
derstanding that he should be treated by the family physician and placed in a sanitarium if necessary.

Section 68 of the state insanity law (Laws 1896, p. 498, c. 545) provides that:

"Any person apparently insane, and conducting himself in a manner which in a sane person would be disorderly, may be arrested by any peace officer and confined in some safe and comfortable place until the question of his sanity be determined as prescribed by this chapter."

The statute must be given a reasonable construction, and was undoubtedly intended to cover cases like the present, where a homicide might be committed by a paranoiac before a warrant could be obtained. Of course, the commitment must be made by a judicial officer, and this power has for years been exercised by the magistrates' courts of the city of New York, apparently without serious question. The plaintiff's intrusion on the morning of the 19th, with the apparent intention of continuing to work for his former employers after being discharged, was "conduct which in a sane person would have been disorderly," and, under the statute, warranted the officers in making the arrest.

We are satisfied that the facts amply justified the defendant's action. There is no proof of malice or improper motive on his part. Indeed, the conduct of the plaintiff was so irrational and threatening on the morning of the arrest that we incline to the opinion that it was the duty of the defendant, in order to save himself and his employés from injury, to have an investigation made as to the mental condition of the plaintiff.

Judgment affirmed.

BOWKER et al. v. HIGHT & FRESE CO.

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

No. 180.

CORPORATIONS (§ 548*)—INSOLVENCY AND RECEIVERS—ALLOWANCE OF ATTORNEY'S FEES.

Counsel for a creditor, who procures an adjudication of insolvency against a corporation, is entitled to compensation for services rendered in the protection of the fund, even after the appointment of receivers.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 548.]

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

For opinion below, see 161 Fed. 655.

William P. Maloney, for appellants.

John A. Boardman & Co. and Franklin Bien, for appellee.

James J. Henderson, for receivers.

Before COXE, WARD, and NOYES, Circuit Judges.

PER CURIAM. The special master, after a full hearing, allowed to William P. Maloney, in full for his services and disbursements as

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.
solicitor for the complainant, the sum of $5,000. Upon exceptions to
the report, the Circuit Court reduced this allowance to $3,000, upon
the ground that the master had erred in two particulars: (1) In con-
sidering services rendered by Maloney to the receivers after their ap-
pointment. (2) In considering services rendered in other jurisdictions.

We think that the Circuit Court erred in these rulings. From an
examination of the record we are satisfied that Maloney rendered no
services to the receivers, and was allowed nothing by the master for
services of that nature. He was, however, entitled to compensation
for services in the protection of the fund after the appointment of the
receivers, and such compensation was embraced in the allowance made
by the master. We also think that such allowance was intended to
cover only services rendered in this jurisdiction, and was reasonable
compensation for such services. In our opinion, the allowance made
to Maloney in the master's report should have been confirmed, and not
reduced.

The special master allowed $1,500 to Franklin Bien, as counsel for
certain creditors. As this attorney also represented the defendant,
and as his services to the estate were primarily for the benefit of his
own clients, this allowance was of doubtful validity. However, as
the services seem to have been of value, we have reached the conclu-
sion that the allowance made by the master was not improper; but we
see no reason why it should have been increased by the Circuit Court.

The other increases made by the Circuit Court were in the exercise
of its discretion, and we see nothing in the record calling for the re-
vision of its action.

The order is modified, by increasing the allowance to the claimant
Maloney to $5,000, and by reducing the allowance to the claimant Bien
to $1,500, and, as so modified, is affirmed, with costs of this court to
the appellants.

In re FAULHABER STABLE CO.
(Circuit Court of Appeals, Second Circuit. April 14, 1909.)
No. 248.

BANKRUPTCY (§ 188*)—LIENS—EQUITABLE ASSIGNMENT.
An auctioneer, employed by a stable company to sell its property, who
made an advance to the company, taking a receipt which authorized him
to deduct the amount from the proceeds of the property when sold, ac-
quired thereby no lien which entitled him to priority over other credit-
ors, on the bankruptcy of the company before the time for sale arrived;
the bankrupt having retained possession of the property.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 188.*]

Petition for Revision of Proceedings of the District Court of the
United States for the Southern District of New York, in Bankruptcy.

Thomas & Oppenheimer (Leo Oppenheimer, of counsel), for peti-
tioner.
A. H. Skillin, for respondent.

Before LACOMBE, COXE, and WARD, Circuit Judges.

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
WARD, Circuit Judge. This is a petition to review an order of the District Judge confirming the report of a referee to the effect that the petitioner was not entitled to priority over general creditors in respect to an advance of $2,376.70 made to the bankrupt. The petitioner is, inter alia, an auctioneer of horses, carriages, etc. The Faulhaber Stable Company, being the owner of the contents of a stable, arranged March 18, 1907, with the petitioner to sell the same at public auction in the first week of April. On the same day the petitioner advanced to the stable company the sum of $2,000 in accordance with the custom of auctioneers of this character and received the following receipt:

"New York, March 18, 1907.

"Received from Fiss, Doerr & Carroll Horse Company the sum of $2,000, advanced by it on account of the above sale, and the Fiss, Doerr & Carroll Horse Company is herewith authorized to deduct said sum from the proceeds of the above sale."

The petitioner also spent $276.70 in advertising the sale. There was no change of possession whatever of the chattels; the stable company continuing to use them as before in its business and not intending to deliver them to the petitioner until the day before the sale. March 30th a petition in bankruptcy was filed against the stable company and a receiver appointed, who took possession April 1st. The stable company was adjudicated a bankrupt April 6th and the receiver and trustee continued the business until November 12th, when he sold the contents of the stable through another auctioneer.

It is quite plain that the petitioner had no right in the chattels as pledgee, because there was no change of possession, nor as mortgagee, because no mortgage was filed, as is required by section 90 of the lien law (chapter 418, p. 536, Laws N. Y. 1897), regulating chattel mortgages. Nor had it any equitable lien on the actual proceeds of sale. If the authority given in the receipt to the petitioner to deduct the advances from the proceeds of sale could be construed as an assignment cognizable in equity, rather than as a promise to pay to be enforced at law, still no such fund ever came into existence. The actual sale was made six months later by order of a different person, viz., the trustee, through another auctioneer. If it were within the power of a court of equity to impress the proceeds of sale inter partes with an equitable lien, such a power would not be exercised to the prejudice of creditors. In bankruptcy, equality is equity.

These objections are fundamental, and dispose of the petitioner's claim to priority, so that there is no need to consider the other reasons given by the referee and the District Judge for arriving at the same conclusion.

The order of the District Court is affirmed.
DAIMLER MFG. CO. et al. v. CONKLIN.

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

No. 196.

PATENTS (§ 258*)—INFRINGEMENT—USE OF ARTICLE BROUGHT FROM FOREIGN COUNTRY.

The use of an article covered by a United States patent in the United States can no more be controlled by foreign law than its sale can, and a purchaser of such an article in a foreign country, although from one there authorized to sell it, is chargeable with infringement if he brings it into the United States and there uses it.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 398; Dec. Dig. § 258.*]

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

For opinion below, see 160 Fed. 679.

Howard Taylor and Francis H. Kinnicutt, for appellants.

H. M. Earle (John Ingle, Jr., of counsel), for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. This is an appeal from a decree dismissing a bill to restrain the infringement of United States patents for mechanical devices in automobiles. The defendant purchased the automobile abroad from a person authorized to sell the patented improvements there. The complainants sought to enjoin the use of the machine in the United States on the ground that the defendant had no license of any kind from the United States patentee to use the devices in question.

After the expiration of a patent the subject of the patent obviously becomes a public property. An extension of the original patent was formerly regulated in this country by statute. Section 18 of the act of July 4, 1836 (5 Stat. 124, c. 357), provides that patents may be extended seven years by a board composed of the Secretary of State, the Commissioner of the Patent Office, and the Solicitor of the Treasury, if they shall be satisfied that, having due regard to public interest, it is just and proper that the patent should be extended. This application may be made by the executor or administrator of the patentee. Wilson v. Rousseau, infra. This eighteenth section concludes with the following words:

"And thereupon the said patent shall have the same effect in law as though it had been originally granted for the term of twenty-one years. And the benefit of such renewal shall extend to assignees and grantees of the right to use the thing so patented, to the extent of their respective interests therein: Provided, however, that no extension of a patent shall be granted after the expiration of the term for which it was originally issued."

At present patents in this country are issued for a fixed term, without any provision for an extension.

"Every patent shall contain a short title or description of the invention or discovery, correctly indicating its nature and design, and a grant to the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
patentee, his heirs or assigns, for the term of seventeen years, of the exclusive right to make, use, and vend the invention or discovery throughout the United States, and the territories thereof, referring to the specification for the particulars thereof. A copy of the specification and drawings shall be annexed to the patent and be a part thereof." Rev. St. U. S. § 4894 (U. S. Comp. St. 1901, p. 3381).

The United States thus gives to patentees three distinct and independent rights within its own territory, viz., the right to make, the right to use, and the right to sell. Under the act of 1836 the only right conferred by grant or assignment to third parties under the original patent which continued in them under the extension was the right to use the patented article, and this was secured by the clause above quoted. The monopoly of the patent generally was continued for the extended term in the patentee or his executors or administrators, not in his assignees or grantees. The Supreme Court so decided in Wilson v. Rousseau, 4 How. 646, 11 L. Ed. 1141, in the case of the Woodworth planing machine. Justices McLean, Wayne, and Woodbury dissented, on the ground that the clause was applicable not to the original patent at all, but only to the extension. The court pointed out the difference between grants of the right to make and sell under the original patent and the right of a purchaser of a patented article to use it. The former, being a part of the franchise conferred by the patent, terminates with it, while a patented article which has been sold has passed beyond the monopoly of the patent for all time, and is saved in the purchaser or his vendee from the operation of the renewed monopoly. In the opinion of the court nothing was thus saved to grantees by the act of 1836 but the right to use the patented articles by persons who bought them during the term of the original patent, but this seems to include the right to sell the specific articles. Paper Bag Cases, 105 U. S. 766, 771, 26 L. Ed. 959.

February 26, 1845, Congress passed a special act further extending the term of the patent to Woodbury for his planing machine for seven years. 6 Stat. 936, c. 27. The question arose as to the effect of this act upon users of machines purchased under the original or extended patent. The Supreme Court held that the special act was to be treated as ingrafted on the general law, and, nothing being said in it as to the rights of users, they were to be deemed protected as before. Bloomer v. McQuewan, 14 How. 539, 14 L. Ed. 532. Justice McLean dissented, on the ground that these rights were not protected by section 18 of the act of 1836; and Justice Nelson, who wrote the opinion of the court in Wilson v. Rousseau, dissented without giving any reasons.

The discussion in both the foregoing cases turned upon the construction of the clause in the eighteenth section of the act of 1836 above mentioned. All that was said by the court about the inherent difference between the right to use and the right to make and sell patented articles was said in support of the construction put upon that clause, and not as a substantive and independent reason why the right to use continued, irrespective of the clause. That such rights exist only by statutory provision is to be inferred from Rev. St. U. S. § 4899 (U. S. Comp. St. 1901, p. 3387):
“Every person who purchases of the inventor, or discoverer, or with his knowledge and consent constructs any newly invented or discovered machine, or other patentable article, prior to the application by the inventor or discoverer for a patent, or who sells or uses one so constructed, shall have the right to use, and vend to others to be used, the specific thing so made or purchased, without liability therefor.”

Another line of authorities begins with Adams v. Burks, 17 Wall. 453, 21 L. Ed. 700, holding (Justices Bradley, Swayne, and Strong dissenting) that whoever purchases an article covered by letters patent of the United States from one having the right to make and sell the same within a defined territory may use it anywhere throughout the United States. Mr. Justice Miller referred to Wilson v. Rousseau and Bloomer v. McQuewan, not as deciding the question under consideration, but as analogous cases. In construing Rev. St. U. S. § 4884 he cited the reasoning used in them to construe section 18 of the act of 1836, viz., that the sale of a patented article takes it out of the limit of the monopoly. In Hobbie v. Jennison (C. C.) 40 Fed. 887, Judge (afterwards Mr. Justice) Brown held that the principle of this decision was as applicable to the sale as to the use of the article, which view was adopted by the Supreme Court in the same case on appeal. 149 U. S. 355, 361, 13 Sup. Ct. 879, 37 L. Ed. 766. The language of the court in these cases, as well as in Wade v. Metcalf, 129 U. S. 202, 9 Sup. Ct. 271, 32 L. Ed. 661, Boesch v. Graff, 133 U. S. 697, 10 Sup. Ct. 378, 33 L. Ed. 787, and Keeler v. Standard Folding Bed Co., 157 U. S. 659, 15 Sup. Ct. 738, 39 L. Ed. 848, as to the right to use or sell, must be understood to mean to use or sell within the United States, the territory which the letters patent cover. It cannot be supposed that the court was speaking of a right to use or sell in other countries, where our laws have no force. In the case of Boesch v. Graff the defendant purchased patented burners in Germany from a person authorized to sell them, which he imported into the United States for sale. The court held that such a sale was an infringement of the rights of the owner of the United States patent covering the same articles. The right to use in such cases was not under consideration, and as far as we can discover has never been considered by the courts. Because the court declared the right to sell an infringement and quoted largely from the earlier cases discussing the difference between the right to use and the right to make and sell a patented article, the court below inferred that the use of such an article would not be an infringement. We think this does not follow. The use of articles covered by a United States patent within the United States can no more be controlled by foreign law than the sale can. The sale by a German patentee of a patented article may take it out of the monopoly of the German patent, but how can it take it out of the monopoly of the American patentee who has not sold?

As the late Judge Townsend said in Fetherstone v. Ormonde Cycle Co. (C. C.) 53 Fed. 110, the purchaser abroad cannot get any greater right than the patentee has from whom he buys. It is true he was speaking of a sale; but we perceive no more reason for thinking that the foreign patentee can use the patented article in the United States
HILLARD v. REMINGTON TYPEWRITER CO.

in violation of the right granted by the United States patent to use and
grant to others the right to use the patented article within the United
States.

The decree is reversed, with costs.

HILLARD v. REMINGTON TYPEWRITER CO.

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


1. Patents (§ 72*)—Anticipation—Scope of Machine.

The scope of a machine, alleged to be an anticipation of a later pat-
tenated machine, is coextensive with the range of adjustment of parts
which its construction intelligently provides for.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 86, 87; Dec. Dig.
§ 72.*]

2. Patents (§ 328*)—Anticipation—Typewriter Escapements.

The Hillard patents, No. 554,874 and No. 580,281, for related improve-
ments in typewriter escapements, are void for anticipation by a machine
made by one Diss in 1890, which embodied the essential features of the
patented devices.

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

Appeal from the Circuit Court of the United States for the Sou-
thern District of New York.

This cause comes here upon appeal from a decree of the Circuit
Court, Southern District of New York, dismissing a bill in equity
charging infringement of two patents granted to complainant, viz.,
No. 554,874 (February 18, 1896) and No. 580,281 (April 6, 1897),
both for improvement in typewriting machines. The second of these
patents was by Judge Ray held valid and infringed in Hillard v.
Fisher Book Typewriter Co. (C. C.) 151 Fed. 34. That decision was
affirmed by this court. 159 Fed. 439, 86 C. C. A. 469. The earlier
patent was first adjudicated by Judge Hough in the decree now ap-
pealed from. His opinion is reported in 163 Fed. 281.

Thomas B. Kerr, for appellant.
H. D. Donnelly and W. A. Redding, for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. The details of the complicated device
covered by these patents, which are voluminous, covering 22 pages
of printed matter and 38 figures, will be found set forth with suffi-
cient fullness in the opinions above cited. It would serve no useful
purpose to rehearse them nor to endeavor to epitomize them here.
They deal with means for securing two functions, “camming back”
and “repulser action,” of which the first is claimed in the earlier pat-
ent, and the second in the later one. On the former appeal we held
that it was proper to carve out of the earlier application the “rep-
ulser” idea and make it the subject of the later application. Follow-

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
repulsor patent "covers and includes any typewriter construction wherein carriage propelling power acts to return the members of the escapement and the parts connected therewith, including the finger keys and type bars to their normal position," and also that "the camming back patent covers and includes any typewriter construction whereby the rack and attached paper carriage can be spaced forward step by step with respect to and under the control of a dog and spaced backward by the impact of said dog." The opinion sets forth in detail the parts of the combination, their relations to each other, and the operation by which the results sought to be obtained are accomplished. We fully concur in this opinion. The record—except as to a device hereinafter referred to—is substantially the same as that which was presented on the former appeal, and would entitle complainant to a decree on both patents, were it not for a prior use, which the Circuit Court found to be an anticipation. The suit narrows, therefore, to this issue, which is the only one we find it necessary to consider. It is unfortunate that the particular prior use relied upon was not testified to in the earlier suit, so that the whole case might have been there determined. That use, however, was by the defendant here, and not within the knowledge of the other corporation, which was defendant in the earlier suit.

The particular anticipating structure, which is relied upon and which is before this court for the first time, is known as the "Diss Machine," or "Defendant's Exhibit No. 9," and a large part of the record is taken up with testimony in regard to it. It is a "No. 5 Remington," one of the forms defendant was manufacturing in 1890, having stationary dogs and a swinging rack; the rack being swung by the blow on the keys through the operation of the universal bar and connections. Diss, who was assistant superintendent in defendant's factory, modified this machine by substituting a beveled rigid dog for the ordinary straight-faced one and adding a rack-stop beyond the rigid dog to prevent the swinging rack from being carried too far by its momentum. The date when this modified machine was assembled is given as December, 1890, and several witnesses testified to its construction at that time, to its immediate transmission to the office in New York, and to its continued use there for several months by one of the stenographers employed in that office. Testimony which undertakes as a matter of mere memory to give the precise date of transactions which took place years before the witness testifies, or to identify one particular machine out of many, is usually of doubtful value; but in this case there are circumstances which make it quite convincing. In the first place the particular machine is identified, not by a number, as to which recollections might be confused, but by a detail of construction which challenged the attention of every one who looked at it. It had four front guide rolls for the paper carriage, and was the only Remington typewriter fitted with a paper carriage having four front rolls. This earmark distinguished it in the recollection of every witness who saw it from its construction until to-day. Dated drawings, old letters, shipping slips, and book entries identify this "No. 5 without number sample machine with new carriage" as being the very machine which Diss undertook to improve upon, and which,
with his modifications embodied in it, was shipped to New York from Ilion on December 20, 1890, and immediately thereafter put to use in the office of Wyckoff, Seamans & Benedict, defendant's representa-
tives in that city. That a No. 5 machine with a beveled rigid dog and a rack stop was produced by Diss in December, 1890, and was suc-
cessfully operated, cannot be doubted upon these proofs.

We need not follow the Circuit Court in its review of the details of this Diss machine, nor pass in review the highly technical discussion of the opposing experts as to what that machine does or does not show. Upon the argument Exhibit No. 9 was operated before us in such a way as to make visible the slight camming back action of which so much has been said. Unskilled manipulation in the consultation room has so misadjusted it that it now fails to disclose anything in par-
ticular; but that is not material. Complainant on the argument, in response to inquiries by the court, conceded more than once that in the form and condition in which Exhibit No. 9 was then it would be an infringement of both patents, and if earlier in date would con-
stitute an anticipation. Complainant's position with regard to this exhibit is that its condition has been changed subsequently to the date when it was introduced in evidence (June 7, 1906). We have most carefully examined all the testimony bearing on this serious charge of tampering with exhibits, and fail to find in it any support for the charge. Certain parts of the machine are made adjustable. The universal bar may be raised or lowered by nuts on the screw-threaded ends of the rods that hold it. Apparently such adjustment would modify the amount of "drop" or forward feeding movement of the carriage during the down stroke of the key.

Concededly there have been changes made in the adjustment of ad-
justable parts since the machine was produced; but we concur in the conclusion of the Circuit Court that such adjustment did not change its character. The scope of any machine is co-extensive with the range of adjustment of parts which its construction intelli-

gently provides for. We concur with Judge Hough in his conclusion as to Ex-
hbit No. 9, viz.:

"The final question seems to be whether the machine made by Diss in 1890, as he made and designed it, used and exhibited it, did produce the same re-

sults in the same way as does the Remington No. 6 (the alleged infringing
device). I think it did, and that the reasons why it did so were completely

understood by several persons, who saw and examined it and would have been capable of reproducing it had occasion arisen."

We are not satisfied on the proofs that the so-called "beveled rack" made by Hillard, as he contends in 1890, carries him back of this Diss machine. Anticipation is therefore established, and the decree of the Circuit Court is affirmed, with costs.
NEW JERSEY SHOE TREE & LAST CO. v. BAKER SHOE TREE MFG. CO.

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

No. 237.

PATENTS (§ 328*)—INFRINGEMENT—SHOE TREES.

The Leadam patents, No. 621,423 and No. 621,424, for shoe trees, 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 166 Fed. 322.

Henry D. Williams, for appellant.
H. Albertus West, and Frederick H. Patterson, for appellee.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

NOYES, Circuit Judge. This is a suit in equity to restrain the alleged infringement of two patents for shoe trees granted to Lionel H. Leadam and numbered, respectively, 621,423 and 621,424. The particular claims alleged to be infringed by the defendant are claim 1 of patent No. 621,423 and claims 1 and 2 of patent No. 621,424. The defenses are:

(1) Invalidity.
(2) Noninfringement.

Claim 1 of the first patent reads as follows:

"The herein-described tree for boots and shoes comprising the toe or forward member, a heel or rear member bifurcated at its forward end and having a pin extending across the bifurcation, and a bar pivotally connected with the toe member and adapted to rest in the bifurcation of the heel member and having a longitudinal slot receiving the pin of the heel member and also having a device adjustable in the direction of its length for engaging the pin of the heel member, substantially as specified."

This claim was adjudged valid in Leadam v. Ringgold (C. C.) 140 Fed. 611, and, for the purpose of considering the question of infringement, we shall assume its validity. Only in case infringement appears will it be necessary to test the correctness of that assumption.

In approaching the question of infringement it is, of course, to be borne in mind that a structure, to infringe, must possess all the elements of the respective claims or their equivalents; and, in view of the prior art as disclosed in the record, it is also obvious that the range of equivalents to which the patentee is entitled is not a broad one. The patent is not for a primary invention.

The defendant claims that its device possesses neither of the following elements of the claim:

(1) "A heel or rear member bifurcated at its forward end."
(2) "A device adjustable in the direction of its length for engaging the pin of the heel member."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
The Circuit Court held that the heel member of the defendant's structure was not bifurcated, and, in our opinion, its conclusion was correct. Obviously the defendant's heel member, as a distinct structure, is not bifurcated at all. It is made of a single thickness of steel, with an eye at the forward end. A clip slides upon the intermediate member, and a cross-pin, passing through the clip, the eye of the heel member, and holes in the intermediate member, holds the sections together and in position. It is only by treating the clip or sliding piece as a part of the heel member that any sort of bifurcation can be said to appear. But, while it is a part of the connection between the heel and intermediate member, it belongs no more to the one than to the other. And, moreover, if it be treated as forming a part of the heel member, a bar pivoted to a double-pronged sliding piece can hardly be said to be "bifurcated at its forward end." We are of the opinion that the defendant's device possesses no bifurcated heel member, nor any equivalent to which the patentee is entitled.

We also think that the defendant's device does not have the second element of the claim to which reference has been made—"a device adjustable in the direction of its length for engaging the pin of the heel member." In the structure illustrated and described in the patent, the device which engages the pin of the heel member is the pin, g. This is the abutment which takes the pressure of the pin, c, and which is adjustable through the holes in the intermediate member to lengthen or shorten the shoe tree. It is true that the claim is not confined to this specific structure, but the language is applicable only to some abutting device having a multiplicity of adjustments. It must be "a device adjustable * * * for engaging the pin of the heel member." But the pin in the defendant's structure, uniting the heel and intermediate pieces, engages no adjustable abutment. The device which takes its pressure—the rim of the hole in which it may rest—is not adjustable. Instead of there being a single abutment capable of a multiplicity of adjustments, there is, in the language of the complaint's brief in speaking of the second patent, "a plurality of stationary abutments against any one of which the pin of the heel member may be held." The pin engages the rims of the different holes, but the rims are in no sense adjustable. Of course, the defendant's shoe tree, like the complaint's, is capable of being lengthened and shortened; but the result—as in the case of the complaint's cotter pin structure—is not accomplished by the employment of the adjustable abutment of the claim.

The complaint in its brief contends that the spring in the defendant's device which actuates the pin corresponds to the adjustable device of the claim. But, while this spring does operate upon the pin and hold it in an adjusted position, it does not, in our opinion, "engage" the pin within the meaning of the claim. A device which "engages" the pin of the heel member is one which operates as an abutment for it and takes its pressure. While the patentee is not limited to the drawings and specifications of the patent, they well illustrate such a device as the claim calls for.

For these reasons we hold that the defendant has not infringed claim 1 of patent No. 621,423.
Claims 1 and 2 of patent No. 621,424 read as follows:

"1. The herein-described tree for boots and shoes comprising a toe or forward member, an intermediate member pivotally connected to the toe member and having notches at intervals in its length, and a heel member adjustably connected to the intermediate member and having a pin arranged to seat in the notches thereof, substantially as specified.

"2. The herein-described tree for boots and shoes comprising a toe or forward member, an intermediate member pivotally connected to the toe member and having a longitudinal slot closed at its ends and lateral notches opening from said slot, and a heel member having a pin connecting it to the intermediate member; the said pin being adapted to be moved in the slot and seated in the notches of the said intermediate member, substantially as specified."

With respect to these claims the complainant states in its brief:

"The fundamental advantage of the provision for notches in the intermediate bar, or a notched slot in the intermediate bar, is that it provides in the intermediate bar a plurality of stationary abutments against any one of which the pin of the heel member may be held so as to prevent its shifting from its adjusted position."

The fourth claim of this patent—INFRINGEMENT of which is not claimed—calls for an "intermediate member * * * having notches at intervals in its length pitched upwardly toward its forward end." The defendant contends that, unless this provision for forwardly inclined notches be read into the claims in question, they describe an inoperative device—that without such inclination the notches and pin will disengage upon the slightest pressure, and will not operate to thrust the toe piece forward as required. It seems to us that this contention of the defendant is well founded. And, of course, if the provision of the forwardly inclined notches be a necessary part of the claims, the defendant does not infringe.

But it is not necessary for us to take this view to dispose of the question of infringement, because we think that the defendant's structure does not possess the notches of the claims at all. The obvious purpose of the notches is to act as abutments for the heel member and hold it so as to "prevent its shifting from its adjusted position." The defendant's device has no such notches. A series of holes are drilled or punched so close that they run together. The pin is held in position just as much by the lower part of the rim of the hole in which it may rest as by the top. If these rims were removed from the lower side of the slot in the defendant's intermediate piece, it is manifest that there would be nothing to hold the pin. In reality the defendant's device no more has notches than the complainant's cotter pin structure. In the latter there is a plurality of separate holes for receiving the heel pin which is removed and reinserted when a new adjustment is desired. In the former there is a plurality of holes run together which likewise receive the heel piece. And the heel pin must likewise be withdrawn and reinserted to make a new adjustment, although the connection between the holes and the operation of a push pin and spring facilitate such readjustment.

For these reasons we hold that claims 1 and 2 of patent No. 621,424 are not infringed, and in view of this determination find it unnecessary to inquire into their validity.

The decree of the Circuit Court is affirmed, with costs.
LORAIN STEEL CO. v. BARBOUR-STOCKWELL CO.

(Circuit Court of Appeals, First Circuit. January 19, 1909.)

No. 749.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—RAILWAY SWITCH.

The Moxham patent, No. 539,878, for railway switch work, embodying a single center piece with hardened surfaces to be connected with the rails by a separate body of cast metal, discloses patentable invention of some degree of merit, but must be limited to the particular construction described. As so construed, 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 Massachusetts.

Thomas W. Bakewell (Charles MacVeagh and George H. Parmelee, on the brief), for appellant.

Richard P. Elliott and Benjamin Phillips, for appellee.

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

ALDRICH, District Judge. This case, as presented to us, involves two questions, that of the validity of the Moxham patent, No. 539,878, and that of its infringement by the defendant. The result reached by the Circuit Court was against the defendant upon both points; but the conclusion upon the first point, that in respect to invention, seems to have been reached upon hesitation and with doubt, because it said in respect to it that, if there be some invention in the patent, it should be limited closely to the structure shown. Our conclusion involves a disagreement with the court below only upon the single point of invention. We think the idea of a switch structure embodying a single center piece with hardened surfaces calculated to resist at all points the frictional contact of car wheels crossing from one track to another, to be connected with the rails by a separate body of cast metal, thus presenting a solid one-piece structure, involves a new idea of some considerable value, and that the particular arrangement described for unifying and securing the structural connection between the hardened center piece and the rails through a scheme for a shrinkage grip under the cooling process of a separate body of molten metal poured into the mould which surrounds the center plate and rail ends, thus firmly uniting the whole together without the external fastenings of bolts and plates, taken in connection with the idea of presenting a solid center piece with a hardened surface, involved invention of some degree of merit, and as such entitled to protection commensurate with the degree of the actual invention involved.

Perhaps the case is not especially strong upon the proposition of commercial success, but the idea of the center piece was an original one, in the sense of its setting in such a place and for such a purpose and under such an arrangement; and the construction as a whole was

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
sufficiently described in the claims and specification to entitle the patentee, we think, to have it stand as a valid invention.

Speaking generally, we do not find the particular idea or the particular arrangement of patent No. 539,879 in the prior art, nor do we find it present in the earlier Moxham patent, No. 536,734, which was passed upon by the Circuit Court of Appeals for the Sixth Circuit in Johnson v. Toledo Traction Co., 119 Fed. 885, 56 C. C. A. 415. Still, in view of the general state of the art and that hardened center pieces had been used under various conditions of attachment and security, the invention should be limited, as is usual under such circumstances in patents for improvements, to the particular construction and adaptation described, and as such is only entitled to protection in respect to the uses of which the particular arrangement is capable. But as a device and to such extent we think it is entitled to that status in the field of invention.

Aside from this view, and notwithstanding it, we agree with the result reached below that the bill should be dismissed. The defendant's arrangement for securing the center piece was quite different from that of the patent in question, at least so different that it cannot reasonably be said to be within the rule of equivalents which should be applied to a situation involving a narrow invention of somewhat limited merit. The defendant's alleged infringing device is a construction which employs a scheme for solidly uniting or connecting through casting the body part around the rail sections under mechanical conditions which form a pocket in the top of the body part into which, after the casting or body is expanded through moderate heating, and, after the hardened center plate is in its place, shims are inserted between it and the ends of the rails, under such conditions that in cooling the plate is securely gripped and held, under conditions, however, which permit its removal without breaking up the general structural arrangement, while the later Moxham scheme of the patent in suit contemplates a single solid integral structure involving, of course, the rails and the center piece.

The later Moxham patent, the one in question, has for its leading idea a unitary structure, which comprises a cast-iron body and a hardened center piece permanently united and imbedded under the hold of cooling molten metal, the center piece, under such conditions of permanency, to have a hardened surface sufficient to adequately resist frictional wear, all to the end that the frog or track at the point of crossing shall have a duration of life equal to that of the rail.

We are not concerned, in this connection, with the question whether it was an entirely practical or successful device; but it is the idea and the method of accomplishing it which distinguishes the patent in suit, we think, from the prior art and that of the earlier Moxham patent, and which, at the same time and for the same reasons, distinguishes the structure and the method used by the defendant from the patent against which infringement is claimed.

There are various differences in the structural details of railway frogs, including those in respect to size and shape, and, in particular, there are differences in respect to size and shape of center pieces; but
in view of the discussion of the elements of the various structures in the older art and those of the different Moxham patents, as set forth in Johnson Co. v. Toledo Co., 119 Fed. 885, 56 C. C. A. 415, and in Steel Co. v. New York Switch & Crossing Co. (C. C.) 124 Fed. 548, and the differences of the structural details of the patent in suit and of the alleged infringing structure, as explained by Judge Lowell in that part of his opinion which deals with the question of infringement, we have no occasion, we think, to go further than to say that we agree with the reasoning and conclusions of Judge Lowell upon this part of the case, and that the structure and methods used by the defendant are so materially different from those described in the complainant's patent in question as to put them wholly outside of the range of equivalents properly applicable to a situation like this. Consequently, the general result reached here, that the bill should be dismissed, is the same as that reached in the court below.

The decree of the Circuit Court is affirmed, with costs.

BABCOCK & WILCOX CO. v. TOLEDO BOILER WORKS CO. (two cases).

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

Nos. 1,902 and 1,903.

1. PATENTS (§ 129*)—SUIT FOR INFRINGEMENT—ESTOPPEL.
   A corporation charged with infringement of a patent is not estopped to deny its validity merely because the patentee who sold and assigned it is a subordinate in its employment.
   [Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 182½—186; Dec. Dig. § 129.*]

2. PATENTS (§ 328*)—INVENTION—IMPROVEMENTS IN WATER-TUBE BOILERS.
   The Park patents, No. 747,329, for a baffle wall brick used in the construction of baffle walls of water-tube boilers, and No. 744,015, for a hand-hole cover for closing the hand-holes in the headers of water-tube boilers, are both void for lack of patentable invention over the prior art.
   [Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

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

C. P. Byrnes, for appellant.
Wilbur A. Owen and R. H. Parkinson, for appellee.

Before LURTON, SEVERENS, and WARRINGTON, Circuit Judges.

LURTON, Circuit Judge. These two cases, involving alleged infringements of two different patents, were heard together. This was feasible because the parties were the same in each case, and, though two distinct patents are involved, they pertain to appliances in connection with water-tube boilers, and each is alleged to have been used in the same structure. The defense was anticipation, nonpatentability, and the assertion that the equitable title to the patent, if valid, is in the defendants.

*For other cases see same topic & § NUMBERS in Dec. & Am. Digs. 1907 to date, & Rep't Indexes 170 P.—9
1. The patent involved in case No. 1,902 is a patent dated December 15, 1903, issued to the Aultman & Taylor Machinery Company, assignee of the inventor, Kennedy Park. The patent is for an improved baffle wall brick, used in the construction of baffle walls of water-tube boilers. The inventor, in his patent, states:

"The object of the invention is to prevent the leakage of gases through the baffle wall, to reduce the number of joints, and to protect the brick by a metal casing during handling or transportation, while protecting the metal casing from the gases when in place."

The patent involved in case No. 1,903 is another invention of the same Kennedy Park, the patent issuing to the same Aultman & Taylor Machinery Company, Park being assignor. It issued November 10, 1903, and is numbered 744,015, and is for "a new and useful hand-hole cover." The inventor, in his specifications, says:

"My invention relates to the hand-hole covers employed in connection with the headers of water-tube boilers; and the object of the invention is to provide a hand-hole cover or cap which will conform to the sinuous curves of the headers ordinarily used, give access to a group of tubes without necessitating the use of a special form of header, and can be inserted or removed through the hand-hole it is to cover."

Both patents were held invalid by Judge Tayler as not involving patentable inventions in view of the state of the art, and both bills were dismissed.

2. Before determining the validity of the patents, there is a question of estoppel, which, if found for the appellants, is determinative of the case, without regard to the defense of invalidity. These patents were for subordinate parts or attachments to water-tube boilers. Prior to both inventions, Park had secured a patent for a new type of water-tube boiler, and later secured a reissue, being reissue No. 11,870. When he made the water-tube boiler invention he was an employee of the Aultman & Taylor Machinery Company. Having completed his invention, he entered into a contract with that company, by which they were to have the exclusive right to make and sell such boilers in consideration of a salary and a royalty upon the sale of boilers so made and sold by that company. Under this arrangement the Aultman & Taylor Company undertook to at once construct and test a trial boiler under the patent, the construction to be at their expense, and under Park's supervision. After many delays, a boiler was constructed according to Park's reissue patent and subjected to satisfactory tests. During the construction of this trial boiler Park devised and applied to that boiler the baffle brick and hand-hole cover of the two patents now in suit. The Aultman & Taylor Company were of opinion that if these parts were patented it would tend to the better protection of the boiler itself when put upon the market. Park says that he did not regard the parts as properly patentable, but at the instance of the Aultman & Taylor Company agreed to apply for patents and to assign his inventions to that company, they paying all expenses of same. The patents in suit were accordingly applied for by Park, and, when granted, issued to the Aultman & Taylor Company, as his assignee. Two years elapsed after the completion and testing of the trial boiler, but no sale was made of the patented boiler. At
that stage, the Aultman & Taylor Company sold out their entire general boiler business to the Stirling Boiler Company, the predecessor of the Babcock & Wilcox Company, appellants herein. This sale included all of the patents owned by the Aultman & Taylor Company which related to boilers or attachments, or parts of boilers, though no mention was made of the two patents in suit. And it is doubtful whether at the time either party knew or cared about these patents. The royalty contract with Park, under which the Aultman & Taylor Company were to make and sell his water-tube boilers, was expressly excepted out of this sale; neither did the test boiler which had been made by that company pass to the Stirling Company, the predecessor of the Babcock & Wilcox Company, circumstances indicating that both Park and the Aultman & Taylor Company at that time regarded the baffle trick and hand-hole covers as appliances or appurtenances pertaining to that contract and to boilers made thereunder. As this sale divorced the Aultman & Taylor Company from the boiler business, it operated by common consent as a termination of Park's royalty contract, as well as of all relations to that company as a salaried employé.

In view of the circumstances under which the patents in suit were taken out, and of the fact that the new devices therein covered were principally valuable as parts of the Park water-tube boiler, the contention has been advanced that Park is the equitable owner of the patents in suit, notwithstanding they issued by his directions to the Aultman & Taylor Company, as his assignees. This contention we shall pass by, and for the purposes of this case assume that these patents passed to the Stirling Company under the sale by the Aultman & Taylor Company of all their patents relating to boilers.

This sale left Park free to make other arrangements for the manufacture and sale of his water-tube boilers under his reissue patent, No. 11,870. He accordingly left the employment of that company, and after some negotiations assigned that patent to the appellee company, and entered their employment under a contract by which he was to receive a salary and a commission or percentage upon the sale of all his water-tube boilers made and sold by them. Thereupon defendants began to make and sell the Park water-tube boilers, and in connection therewith employed the baffle wall brick and hand-hole cover of the later inventions of the same inventor. The evidence convinces us that both Park and his new employer, the Toledo Boiler Works Company, were not intentionally guilty of infringing the patents in suit. We are persuaded that Park had forgotten that patents had ever issued, and that the appellee company had no actual knowledge of that fact until they were given notice by the attorneys for the appellant that they were infringing after they had commenced to make and sell water-tube boilers with their appurtenances. Constructive knowledge only may be charged to appellee from the records of the Patent Office. We allude to actual innocence, not because ignorance is an excuse for infringement, but for its bearing upon the question of estoppel by reason of their connection with the inventor, Park.

Assuming, as we shall, for the purpose of this case, that Park him-
self would be estopped, by his sale of the patents in suit to the prede-
cessor of the appellants, from relying upon their invalidity when sued
for infringement, we come back to the question of whether there is
any such relation or privity between the defendant company and Park
as to affect them with his estoppel. But it is to be observed at the
outset that Park is not sued. Neither is he a stockholder nor an of-
cifer of the Toledo Boiler Works Company. Neither did that company
make any sale of either of the patents in question to the complainant
or its predecessor in title. The only relation of Park is that he sold
his water-tube boiler patent, to which the complainant has no shadow
of claim, to the Toledo Company, and entered into their employment
under a contract by which he is to receive a salary and a percentage
upon all sales of his water-tube boiler made and sold by them. This
gives him no financial interest in the profits or losses of that com-
pany. If they sell none of the boilers made under his patents, he gets
nothing but his salary. Whether sales of the water-tube boilers are
profitable or otherwise, his percentage is the same.

The Toledo Boiler Works is alone accountable to the Babcock &
Wilcox Company for their infringement by using the parts covered
by the patents in water-tube boilers made or sold by them under the
Park water-tube boiler patent. Why shall they be estopped from de-
defending their alleged infringement upon the ground of the invalidity
of those patents? The ground upon which the assignor of a patent
is estopped, when sued for infringement, to deny the validity of the
patent he has sold, is that, having received a valuable consideration,
he may not derogate from his grant by denying that it had any value.
Thus in Babcock v. Clarkson, 63 Fed. 607, 11 C. C. A. 351, the Circuit
Court of Appeals for the First Circuit, speaking by Judge Putnam,
said:

"The precise nature of this estoppel does not seem to have been always
clearly apprehended. It is, in effect, that when one has parted with a thing
for a valuable consideration he shall not, so long as he retains the considera-
tion, set up his own fraud, falsehood, error, or mistake to impair the value
of what he has thus parted with. * * * This is as much in harmony with
sound morals as with the fundamental rules of equity law; nor is it the usual
estoppel in pais, arising from the representations or silence of the party
against whom the estoppel is charged. Consequently, the estoppel which we
apply to this case does not run against a patentee whose patent has been
sold by his assignee in bankruptcy." Cropper v. Smith, 26 Ch. Div. 700;
Smith v. Cropper, 10 App. Cas. 249, affirming the former case upon that point.

In Hall v. Conder, 2 C. B. (N. S.) 22, it was said by Lord Romilly,
then Master of the Rolls:

"I do not intend to express my opinion as to the validity of Wright's patent.
I will assume, for the purpose of my judgment, that it is worth nothing at
all. But this is certain: that the defendant sold and assigned that patent
to the plaintiffs as a valid one, and, having done so, he cannot derogate from
his own grant. It does not lie in his mouth to say that the patent is not
good."

The estoppel is one limited in character, and such an assignor, when
subsequently sued for infringing the assigned patent, may show the
state of the art for the purpose of limiting its scope.
This court, in Noonan v. Chester Park Club, 99 Fed. 90, 39 C. C. A. 426, said:

"It seems to be well settled that the assignor of a patent is estopped from saying his patent is void for want of novelty or utility, or because anticipated by prior inventions. But this estoppel, for manifest reasons, does not prevent him from denying infringement. To determine such an issue, it is admissible to show the state of art involved, that the court may see what the thing was which was assigned, and thus determine the primary or secondary character of the patent assigned, and the extent to which the doctrine of equivalents may be invoked against an infringer. The court will not assume against an assignor and in favor of his assignee anything more than that the invention presented a sufficient degree of utility and novelty to justify the issuance of the patent assigned, and will apply to the patent the same rule of construction with this limitation which would be applicable between the patentee and a stranger."

Such an estoppel extends only to the assignor patentee and those in privity of title or interest with him. It does not, therefore, extend to a patentee whose patent was sold by his assignee in bankruptcy. Cropper v. Smith, cited above.

A corporation is a legal entity. It may be estopped only by some corporate act or relation of privity of estate or interest under or with one who is estopped. Neither reason nor authority exist for holding that an infringing corporation is estopped from denying the validity of the patent sued upon merely because the assignor patentee is a subordinate in its employment. The cases of Boston Lasting Co. v. Woodward, 82 Fed. 97, 27 C. C. A. 69, and American Coat Pad Co. v. Phoenix Pad Co., 113 Fed. 629, 51 C. C. A. 329, are in point.

The counsel for appellants have cited as opposed to this view: Daniel v. Miller (C. C.) 81 Fed. 1000; Time Telegraph Co. v. Himmer et al. (C. C.) 19 Fed. 382. They are not in conflict.

Daniel v. Miller was an application for a preliminary injunction. Miller, the inventor and assignor, was a party defendant, and the only averment in the case, as reported, was that "the other defendants were acting in privity with him." In the course of the opinion, Judge Dallas said:

"There is more room for dispute as to whether the other defendants are also estopped, but I am clearly of opinion, upon the proof of privity and the cooperative infringement, that they are."

What the proof of privity was, does not appear.

Time Telegraph Co. v. Himmer was a bill against Himmer, who was the inventor and assignor to the complainant of the patent in question. The other defendant, Carey, supplied Himmer with the various parts necessary to make a number of complete infringing devices. Touching Carey, the court said:

"He occupies no better position than Himmer does. He is Himmer's alter ego in the scheme of pirating the complainant's rights. His general denial of interest with Himmer goes for nothing, in view of the facts and circumstances which are set forth in the complainant's affidavits, and which are sufficient to call upon him for a full and explicit disclosure of his relations with Himmer in order to exonerate himself."

The case seems to have been one in which Carey was a contributing infringer and liable on that ground, but what the facts were which
constituted him "the alter ego of Himmer" do not appear in the record of the case.

They have also cited Continental Wire Fence Co. v. Pendergast (C. C.) 126 Fed. 381. That is an opinion upon an application for interlocutory injunction by Judge Lochren. The opinion distinctly concedes that such an estoppel will not apply to mere employers of such an assignor, though Judge Lochren did find upon the facts of that case such evidence of "secret interest" as to justify the order asked, the assignor being a defendant along with others associated with him in the infringement.

Same counsel have also cited Woodward v. Boston Lasting Machine Co., 60 Fed. 283, 8 C. C. A. 622, and same case, 63 Fed. 609, 11 C. C. A. 353. Neither case supports the contention. They are commented upon and explained in the later case heretofore cited from 82 Fed. 97 (27 C. C. A. 69), where Judge Putnam, speaking for the Court of Appeals, said:

"We are again pressed with the proposition that the respondents below are estopped from denying the validity of the claims of the patent now in issue. The situation in this respect is, however, essentially different from that existing when the patent was previously under consideration. Then the respondents were nominally the same as now, namely, Woodward, who was the patentee and assignor of the patent, and James Barrett and Thomas Barrett; and in both cases all these respondents were and are, in a general sense, cooperating. The essential difference, however, is that in the prior suit Woodward, who was the only person directly subject to the rule of estoppel, was the principal, and the other respondents, so far as the evidence showed, were acting at his suggestion and in subordination to him. Now, so far as the evidence shows, the other respondents are the principals, and Woodward is their employee, and no estoppel applies to them by reason of their engaging Woodward in a subordinate position."

In Noonan v. Chester Park Club, cited heretofore, we assumed, without deciding, that where such an assignor afterward organized a corporation and became a shareholder and its president, which engaged in infringing the assigned patent, the corporation was affected by the estoppel. The later case of Lamb Knit Goods Co. v. Lamb Glove & Mitten Co., 120 Fed. 267, 56 C. C. A. 547, does not distinctly present any question of estoppel relevant here.

Under all the facts of this case, we are unwilling to hold the appellee company affected by any estoppel which affects Kennedy Park.

The defense of invalidity being open to the appellee, we quite agree with the conclusion of Judge Tayler that both patents are invalid as not involving patentable invention over the old art. The patent for baffle brick, No. 747,329, covers a metal casting cast around a previously formed fire brick, and the claims cover certain details. The state of the art pertaining to fire brick structures, subjected to great heat, was such as to enable any one familiar with that art to make such changes of the unimportant character shown in this patent, and supports the conclusion of the court below that the device does not exhibit patentable invention. It is enough to refer to the patent to Bradford, No. 62,927, and to Watson, No. 71,433, and to Bradbury, No. 218,616, and to Wellhouse, No. 350,331, and to Johnson No. 82,721. The other patent in suit, being the patent involved in case
No. 1903, is No. 744,015, for a hand-hole cover for closing the hand-holes in the headers of water-tube boilers. These hand-holes are the means of access through the headers to the expanded tube ends, for the purpose of removing or repairing them. The invention relates only to the covers for such hand-holes. "The object of the invention," says the patentee in his specifications, "is to provide a hand-hole cover or cap which will conform to the sinuous curves of the headers ordinarily used, give access to a group of tubes without necessitating the use of a special form of header, and can be inserted as desired through the hand-hole it is to cover." Mr. Albert W. Smith, the expert called by complainant, distinctly states the invention of the patent "to be an inner hand-hole cover to fit the ordinary sinuous headers of a water-tube boiler of such shape that the hole which it covers will give a maximum sized opening for access to the header interior, at the same time permitting the cap to be inserted and removed through the hole it is designed to cover." He concedes that the patent claims no novelty for the inside cap feature. The file wrapper and contents show that claims were made and rejected covering the form of hand-hole so shaped as to permit the cover to be inserted or withdrawn through the opening, and a cover with a groove into which a gasket fits to form a steam-tight joint, as well as a hand-hole cover or cap having inwardly curved sides arranged to conform to an ordinary sinuous header. Of these three features only the third, the shape of the sides of the cap and opening, is covered by the claims allowed. Referring to this feature, the specifications say:

"The advantages of my invention result from the peculiarly inwardly curved sides of the cap, which allow the ordinary sinuous header to be used."

The first claim reads:

"(1) A hand-hole cap having inwardly curved sides arranged to conform to an ordinary sinuous header, substantially as described."

The second claim reads:

"(2) A sinuous header or manifold having a hole to give access to a group of tubes, and an inside cap for the hole having inwardly curved sides to conform to the header, substantially as described."

The only noticeable difference between the claims seems to be that claim 2 requires that a single hole shall give access to a group of tubes, and that an inside cap shall be used, while claim 1 makes no such requirement. The claims of the patent must be sustained, if at all, in view of the proceedings in the Patent Office and the verbiage of the claims themselves, upon the inwardly curving sides of the hand-hole and cover so as to conform to an ordinary sinuous header. Hand-hole openings giving access to one or two or more tubes for the purpose of removing, cleaning, or repairing were old. It was old to cover such openings either with inside or outside caps, and, when by an inside cap, the hole and cap were made of such shape as to enable the cap to be inserted through the opening it was intended to cover. Neither was it new to give the hole and cover a shape to correspond with the shape of the header in which it was to be used. Reference may be made to the patents to Higgins, No. 358,301; Zell, No. 321,330;
Kelly, No. 350,201; and Hartley, No. 350,361. These patents, as well as others, are reviewed and explained by the experts for the defendants below in a most convincing way. It would not serve any valuable purpose to here insert the details of the patents to which we have referred. To give a hand-hole and cover such shape as to conform to the shape of a sinuous header and give access to a group of tubes would not seem to require anything more than the ordinary skill of one acquainted with the art and its history as seen in the patents referred to, as well as in others shown in the record.

The decrees must be affirmed.

MEINECKE & CO. v. STRANSKY & CO.

(Circuit Court, S. D. New York. April 16, 1909.)

PATENTS ($§ 328*)—VALIDITY OF INFRINGEMENT—BED PAN.

The Hogan patent, No. 651,310, for a bed and douche pan, was not anticipated and discloses invention; also held infringed.

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

In Equity. On final hearing.


Fred H. Bowersock, for defendant.

PLATT, District Judge. This is an equity suit on letters patent to Meinecke & Company, assignee of Daniel Hogan, No. 651,310, for new and useful improvements in bed or douche pans. There is only one claim, and that described the invention, and is therefore set forth in full:

"A bed and douche pan having elevated side edges extended the length of the pan, thigh-supports, 4", at the height of said edges, terminating near the rear of the pan, and leaving an opening between the end of the pan and the termination of said supports, and formed integral with the side edges of the pan, concave depressed buttock-supporting portion, 4', near the front of the pan, and a depressed concave overhanging rim near the front of the pan; said pan being wider at the front than at the rear, so as to give increased capacity at the front or overhanging rim, and said opening or spout, 2, being open on top and located below the level of the thigh-supports, substantially as described."

When Hogan applied for the patent, there were bed pans and douches in the art; but none of them seem to have hit the mark. Hogan himself had made a valiant, but futile, attempt in his former patent; and in his present effort he was put to much trouble before he could convince the examiners that he was entitled to what he asked for. At last he convinced them, almost against their will, and the device made under his patent caught the market. It met with great success, and it met with that success, because it actually does the things which are claimed for it. Doctors and nurses praise it in unmeasured terms, and its popularity is a real, substantial thing, not a creature of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
freak or fancy. To have given so much comfort to the sick is certainly a deed which is entitled to careful thought before one presumes to divest the patent of the material benefits which the complainant urges upon us as a right.

The results which have followed upon the marketing of this device strengthen the prima facie faith in patentability which was forced upon the examiners. The argument was pretty well set forth in the letter of the attorney for the patentee under date of April 18, 1900. Many a device less worthy than this has been protected by the courts. The utility of the device is obvious. The novelty is not seriously affected by the devices urged in anticipation. The only possible question is as to whether he discovered or invented anything. We can find the best references which he had to work upon in Haertel, 371,193; Dugot, 443,593; Vaughn, 543,516; and his own earlier patents, 581,588 and 633,004. There will be found scattered among the devices to which these patents relate overhanging rims extending the length of the pan, integral with the side edges, and an opening at the end of the pan which gives natural and easy access to the patient. We also find at least one which is wider at the portion where the buttocks could rest with more or less comfort, and the gradual rise of the overhanging rim from the buttocks portion could have been utilized to a limited extent for the support of the thighs.

We do not find, however, in any patent of the prior art, “thigh supports, 4”, at the height of said edges, terminating near the rear of pan, and leaving an opening” to facilitate access to the patient. Right around this point is the crux of the case. Dugot and Vaughn are the only ones who, prior to this patent, had overhanging rims which could be used for thigh supports, in any sense of those words. Hogan’s “cushions, 10,” were not thigh supports in the sense of the “thigh supports, 4”. Hogan's cushions were calculated to relieve the limbs from the roughness of the ordinary bed pan. Dugot had no idea of using his overhanging rim for thigh supports. It may have been floating in the haze of Vaughn’s mind, but was not crystallized into certainty. To discover that by important changes the rim of either patent could be put to the complete use which it has in the patent in suit required, in my opinion, a touch of that divine fire called “inventive genius.”

Another way of putting it: The central and valuable thought is to utilize the integral overhanging rim, so that at its highest point it furnishes support for the thighs and brings them to the position they should be in for practical purposes, and at its lowest point takes care of the buttocks and the spine, and all this with an easily adjustable, sanitary, comfortable, and fairly secure pan, so constructed as to give the doctor and nurse instant and easy access to those parts of the patient which from the necessities of the case require attention. Some of its advantages can be found in other constructions; but the bringing of them all together in one device, with the added advantages above mentioned, was, as I see it, the discovery of a new and useful thing.

The comfort of a sick person is not a matter which can be compassed by tricks of trade. The principles of suggestion can hardly be enforced upon a person who lies in extremis. It is easy now to assume
a flippant manner, and to tell us that no advance upon the art has been made, except, possibly, to make the pan of such a shape that it fits the average human frame somewhat better than of yore; but the cold fact remains, staring us in the face, that for years persons of experience had seen the necessity for advances in this doleful art, and every attempt had been barren and futile until Hogan came, who, after two valiant efforts, both of which missed the mark, managed at last, after a painful struggle with the examiner, to reach the monopoly which defendant so lightly invades.

The defendant is probably within his rights in attacking the patent; but it comes with ill grace from one who entered upon such business relations with the complainant as to make him almost a licensee. He certainly is unfortunate, in that he marked complainant's patented stamp upon a construction which he now insists has no patented protection. The legal right to change his mind may be admitted; but the morality of the act is another matter. Infringement is plain, unless one sticks in the bark as to the meaning of the claim.

The patentee had a rough journey through the Patent Office, and it was a long time before he had rearranged his earlier claims and condensed the subject-matter into a form which met the views of the examiner. In one of his earlier arguments he protested that his was a "one-piece device," and changed his claim so that the thigh supports are formed "integral with the side edges of the pan." Every metal pan with its side edges extended into an overhanging metal rim was necessarily made in two pieces. So was the porcelain pan, for that matter. There could be only two reasons for using the word "integral." Since the rim itself was to be a thigh support, it must be made integral with the side edge in such a way as to avoid any sharpness which would disturb the patient where the rim joins the edge, and more particularly the "cushions, 10," which acted in the earlier patents to ease the patient's body, were to be eliminated. These had been separate pieces. Now no separate piece would be needed. The overhanging rim would now perform the function of the cushions, as well as its own other functions.

It is unbecoming in the defendant to be so nice about definitions after his admitted relations with the complainant; but, in any event, the pan of the patent is essentially, and for every purpose, and from every view, a one-piece device, and the overhanging rim is integral with the side edges.

Defendant criticises the proofs of infringing sale; but here, again, he is unwarrantedly technical. The proofs about the sale, taken in connection with defendant's catalogue, make out, to my mind, a clear case of actual sale within the district, and an avowed purpose to make as many more as possible.

Let the usual injunction issue.
1. PATENTS (§ 13*)—SUBJECTS OF PATENTS—ADVERTISING CARD.

An advertising device made of cardboard is a manufacture, and patentable as such, if novel and involving invention.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 11, 12; Dec. Dig. § 13.*]

2. PATENTS (§ 328*)—INVENTION—ADVERTISING DEVICE.

The Mitchell patent, No. 861,747, for an advertising device, held not void on its face for lack of novelty or invention.

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

In Equity. On demurrer to bill.
See, also, 169 Fed. 145.

Philipp, Sawyer, Rice & Kennedy, for complainant.
Kenyon & Kenyon, for defendant.

WARD, Circuit Judge. Demurrer to bill for infringement of claim 1 of letters patent 861,747, on the ground that they are invalid and void on their face for want of novelty, and as for nonpatentable subject-matter, in view of common knowledge and information. The object of the patentee was to devise an advertising scheme which would encourage receivers to keep the name and address of the sender, instead of throwing the communication into the waste paper basket, as generally happens in the case of circulars. The method devised was to print the name and address of the sender on a gift, generally a picture, which is a part of the device, and which the receiver will be likely to keep. The thing patented, however, was not the method, but the physical device used. Claim 1 reads:

"1. The herein described advertising device comprising a cardboard sheet of substantially commercial letter paper form and size, scored transversely to form upper and lower flaps to fold upon the intermediate portion, the entire inner side of said sheet being adapted to bear a printed letter with proper letter head upon the upper flap portion and a signature at the bottom, one of said flap portions comprising a gift to be detached from the remainder, and means for sealing the free edges of the sheet, when folded for mailing, substantially as described."

The advertising device covered by the patent is a manufacture within the patent law, and therefore patentable, if novel and involving invention. The patent itself is prima facie evidence of validity; and, supplementing this, the demurrer admits the allegations of the bill which establish the utility of the device and the general acquiescence in the complainant's rights. The folded sheet seems to me to involve no invention; but the making of one of the folds a gift likely to preserve the name and address of the sender may do so. While the patent certainly seems very obvious, I cannot say, because of facts within common knowledge, that it is void on its face for lack of novelty or invention. Butler v. Bainbridge (C. C.) 29 Fed. 142.

The demurrer is overruled.

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
1. **Shipping (§ 172*)—Demurrage—Construction of Charter Party.**

   Where a charter party contains no express provision as to the time for loading, the parties are deemed to have contracted with reference to the custom of the port where the vessel is to be laden, which stands as a regulation; but, where the charter party has fixed the number of days and time of their commencement in unequivocal language, usage and custom cannot avail to change or modify its stipulations in that respect.

   [Ed. Note.—For other cases, see Shipping, Cent. Dig. § 569; Dec. Dig. § 172.*]

2. **Shipping (§ 181*)—Demurrage—Lay Days—Construction of Charter Party.**

   A charter party for a steamship to be loaded with wheat for export at the port of Portland, Or., provided that lay days for loading should not count during any time when the supply or bringing by rail to the port of loading of the intended cargo should be delayed by railway accidents or impediments or other hindrances beyond the charterers’ control. The grain had been purchased and was stored at interior railroad points. There was a delay of several days beyond the charter time in loading, which the charterers claimed was due to their inability to obtain the forwarding of the grain by the railroads as speedily as demanded. It appeared, however, that, although they did not obtain shipments in as large volume as usual, it was not due to any accidents, or unusual conditions, and that they did in fact during the time the vessel should have been loaded receive more than sufficient to load her, which they shipped in other vessels also under charter to them. Held, that the delay was proximately caused by the acts of the charterers themselves, and not to any hindrance beyond their control, within the exception in the charter.

   [Ed. Note.—For other cases, see Shipping, Cent. Dig. § 590; Dec. Dig. § 181.*]

3. **Shipping (§ 181*)—Demurrage—Construction of Charter Party—“Rainy Days.”**

   A provision of a charter party, excluding “rainy days” from the lay days for loading a cargo of wheat at Portland, Or., will be construed to exclude only days when by reason of rain and storm the work of loading such cargo with the facilities at that port cannot be safely and conveniently prosecuted; but it is the right of either party to insist on the exclusion of such days, and the charterer may do so even though the loading in fact proceeded.

   [Ed. Note.—For other cases, see Shipping, Cent. Dig. § 590; Dec. Dig. § 181.*

   For other definitions, see Words and Phrases, vol. 7, p. 5916.]

4. **Shipping (§ 181*)—Demurrage—Construction of Charter Party—“Holi-

   A charter party of a vessel to be loaded with grain at Portland, Or., excepted “holidays” from the lay days for loading, and also contained a provision that working days should not count when the shipment of the grain or the loading should be delayed by holidays ecclesiastical or civil, B. & C. Comp. Or. § 8918, makes certain days legal holidays, “and every day appointed by the President of the United States or by the Governor of this state as a day of public fasting, thanksgiving or holiday.” The statute, however, imposes no penalties for working on such days. Held, that the provision, construed with reference to the statute, included only such holidays as were customarily observed by a cessation of work, that

*For other cases see same topic & § Number in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
a day designated by the President for thanksgiving was within the exception, but that a series of days specially designated by the Governor as legal holidays on account of a financial panic were not within the exception.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 590; Dec. Dig. § 181.]

For other definitions, see Words and Phrases, vol. 4, p. 3321.


In Admiralty. Suit for demurrage.

Veazie & Veazie, for libelant.

Teal, Minor & Winfree, for respondents.

WOLVERTON, District Judge. By charter party of date October 3, 1907, Kerr, Gifford & Co. chartered of C. Andersen the ship Tiberius, to carry wheat in sacks from Portland to a port in the United Kingdom or on the Continent of Europe; the net register of said ship, according to the charter, being 2,703 tons. By the charter party it is provided (paragraph 8) that:

"Fourteen working lay days (Sundays, holidays, and rainy days, or days on which the Columbia or Willamette rivers are obstructed by ice, so as to prevent navigation by ordinary lighters, not to be counted as lay or working days), to commence twenty-four hours after the inward cargo and or ballast shall have been finally discharged, and the captain has given charterers written notice, accompanied by surveyor's certificate that his vessel is ready to receive cargo, are to be allowed charterers for loading at places as hereinbefore provided."

By section 14 it is agreed for that each and every day's detention or demurrage at the port of loading, by default of the charterers or their agents, four pence per net register ton, or its equivalent, per day, shall be paid day by day, by the said charterers or their agent; and, by paragraph 15, that:

"Lay or working days shall not count at ports of loading, during any time when the supply or loading of stiffening, or the supply or bringing by rail, craft, or otherwise, to port of loading or alongside the vessel, or the loading of the cargo, or intended cargo, or any part thereof, is delayed by the act of God, war, restraint of princes, rulers, or people, force majeure, blockade, quarantine, earthquake, inundations, storms, rain, snow, ice, fire, riots, strikes, lockouts, civil commotions, political disturbances or impediments, holidays (ecclesiastical or civil), cessations or stoppages of labor, epidemics, perils of the seas, railway accidents or impediments, or any other hindrance of whatsoever nature beyond the charterers' control."

The ship Tiberius arrived in port on the 7th day of November, and at 8 o'clock a.m. on the 11th the captain gave notice to the charterers, accompanied by the certificate of a competent surveyor selected by them, that the vessel was ready to take in cargo. Loading, however, was not begun until November 27th, and thence was continued from day to day until December 6th, when her cargo was completed, and she departed on her voyage.

On October 28th the Governor of the state of Oregon issued his proclamation declaring the 29th, 30th, and 31st days of October, and

*For other cases see same topic & l number in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
the 1st and 2d days of November legal holidays, and thereafter issued other proclamations from time to time declaring other days to be legal holidays, comprising all the time that the steamship Tiberius was in the harbor of Portland, excepting December 5th and 6th. The especial reason for the issuing of such proclamations was the peculiar financial condition of the country in banking circles.

This is a proceeding by libel to recover demurrage for the delay of the ship beyond 14 lay days subsequent to 24 hours after the notice was given that the ship was ready for loading.

It is stipulated by the charter party, bringing the material matter into juxtaposition, that lay or working days shall not count at ports of loading during any time when the supply or bringing by rail or craft or otherwise to port of loading, or alongside of the vessel, or the loading of the cargo or intended cargo, or any part thereof, is delayed, by railway accidents or impediments, or other hindrance, of whatsoever nature, beyond the charterers' control. The two members of a committee who were instrumental in having this form of clause introduced into the charter party have testified from the witness stand, in effect, that it was designed for the protection of the shipper and charterers to cover delays incident to shipping grain from the interior by rail, beyond the shipper's or charterers' control. Grain is purchased from first hands in the interior of the country, many miles from the port, where it is stored in warehouses along the lines of railways. Exporters sometimes, in anticipation of their export trade, and sometimes subsequent to their purchases inland, charter vessels for their use to carry such grain abroad from Portland. They expect, however, to assemble the grain at the Portland docks in time to meet the exigencies of their charters. Their calculations in this particular may, however, be frustrated on occasions by unusual and unlooked for occurrences, delaying deliveries by rail, and it is such unforeseen hindrances, beyond the control of the charterer, say the framers of this form of charter party, that the contract was intended to cover, and thereby to excuse the charterers from delays attributable to such causes.

While it might be pertinent for the draftsman of a contract to explain what was intended by specific provisions contained therein, nevertheless the instrument is subject to like rules of construction as those of similar kind, and the intentment must be gathered from the four corners of the paper itself, viewed in the light of the conditions and environment under which it was drawn, and the purposes which, from its reading, it was manifestly designed to subserv. Formerly the rule prevailed that, when a charterer agreed to furnish cargo for a vessel, his obligation imported that he must have it ready for loading when the vessel was ready to receive it; but the rule has been very materially modified, so that it now has adaptability to the custom of the port in which the vessel is to be laden. Of course, if the charter party, by explicit terms, fixes the time for loading, no custom can avail to change its effect; but, if no specific time is designated, then a reasonable time is allowed to be ascertained from the custom of the particular port. So it is as it respects getting the cargo to the ship's side in the absence of any express provision that it must be ready when the ship
is prepared to receive it. The established custom of the port stands as a regulation; the parties to a charter party being deemed to have contracted with reference to the custom.

In Randall v. Sprague, 74 Fed. 247, 21 C. C. A. 334, there being no stipulation respecting loading days, the court observes:

"It is evident that the vessel was chargeable with notice that, by the usage of the port, coal was not stored at Baltimore, but was to be loaded from the cars, so that the usual strict obligation to have the cargo on hand prior to commencing loading did not exist, in all its particulars. It is also plain that the master was chargeable with the understanding that he was to take his turn at the wharf where the vessel was to be loaded."

The doctrine is carried still further if it be agreed that the loading shall be done by a person or corporation engaged in a special industry. In such case, the rule subjects the ship, not only to the custom of the port in the manner of loading, but to the usage of the person or corporation in supplying the cargo or bringing the same to the ship's tackle. Donnell v. Amoskeag Mfg. Co., 118 Fed. 10, 55 C. C. A. 178.

This extension of the doctrine is well illustrated by an English case (Lyle Shipping Co. v. Corporation of Cardiff, 2 Q. B. 638), which was in relation to the unloading of the ship. By the custom of the port, the cargo was to be delivered in wagons of certain specified railroad corporations, and in no other way, and it was held that the cargo owners were reasonably relievable from the charge of negligence where they did their best to obtain the conveyances of a specified company customarily used, into which the cargo was discharged.

The rule is fully discussed, and authoritatively settled, in W. K. Niver Coal Co. v. Cheronea S. S. Co., 142 Fed. 402, 73 C. C. A. 502, 5 L. R. A. (N. S.) 126, which is perhaps the most recent expression of the courts upon the subject. On the other hand, however, the rule is inexorable that, where the charter party has fixed, by unequivocal language, the time when loading or the lay days shall commence, usage and custom cannot avail to change or modify the stipulation of the contract in that respect. In such case the parties must abide their agreement, and they cannot be excused unless through appropriate exceptions also provided for in the charter party. Davis v. Wallace, 7 Fed. Cas. No. 3,657; Carbon Slate Co. v. Ennis, 114 Fed. 260, 52 C. C. A. 146; New Ruperra S. S. Co. v. 2,000 Tons of Coal (D. C.) 124 Fed. 937; Schooner Mahukona Co. v. 180,000 Feet of Lumber (D. C.) 142 Fed. 578.

So it is if the shipper has engaged to furnish a cargo, at the ship's tackle, he is bound to the strict performance of his obligation, unless saved by an exception appropriate to his relief. 1,600 Tons of Nitrate of Soda v. McLeod, 61 Fed. 849, 10 C. C. A. 115.

It is strongly urged, as coming especially within the exception, that the charterers were hindered in getting their cargo alongside of the Tiberius by reason of the dilatoriness of the Oregon Railway & Navigation Company in making delivery to them from the interior warehouses, where their grain was on deposit; such grain having been previously purchased. The charterers show that they made repeated and urgent requests of the railroad company to forward their grain more speedily, but were unable to obtain the requisite shipments to
enable them to load the Tiberius within the time specified by the charter party. It appears, however, that the charterers did get considerable quantities of wheat forward; not so great a volume as was usual, but in large proportion thereto. This appears from the railroad company's returns. During the last three days of September and the month of October they received 610 cars, and during November and the first six days of December they received 489 cars, which latter shipments were almost sufficient to load three such vessels as the Tiberius. From November 11th, the time of the ship's arrival and notification of readiness for receiving cargo, to November 27th, inclusive, more than sufficient wheat arrived for her loading, and in the next two days following nearly sufficient arrived to half load her, so that, laying all other considerations aside, there was no hindrance arising from dilatoriness on the part of the railway lines in delivering cargo sufficient to load the Tiberius.

But it is further urged that the charterers had other vessels in port, which were required to be loaded, and that the particular kind of wheat destined to be shipped by the Tiberius did not come forward as was desired. The testimony shows that two other ships, namely, the British Monarch and the Borderer, each of about the same tonnage as the Tiberius, were loaded ahead of her; the charterers assigning as a reason for this that the ships arriving later were chartered to load with a superior quality of wheat to that intended for consignment by the Tiberius, and hence the apparent preference given them. On November 18th the charterers had 6 vessels in port awaiting wheat cargoes, with a capacity of 32,000 tons, and on December 5th they had 10 vessels in port, with a total capacity of 46,500 tons. The Tiberius and 3 others are enumerated in both lists of vessels, yet others loaded out during the month of November—one in particular that I mention, the British Monarch. Such were the conditions existing while the Tiberius was awaiting her cargo.

Now, if it be conceded that any hindrance, in its broadest sense beyond the control of the charterers, is within the intention of the charter party to prevent the running of lay days, it does not appear that the delay in the car service was the proximate cause of the ship not having its requisite cargo in due time. It cannot be that a cause of delay, springing from another cause which arose by reason of the charterers' own acts, will suffice to postpone the lay days. Such a cause of delay could not be said to be beyond the charterers' control, for they might have chartered fewer vessels, and thus lessened the demand for cargo, so that the cargo that was delivered would have fully met the demand for shipping abroad. The charterers surely could not complain if they had brought into the harbor of Portland twice the amount of shipping that they could supply cargo for from the interior, under the usual course of delivery by the railroad, for they themselves would be to blame for the condition. They ought to have foreseen the result.

While the condition in the present case is not in that extreme, yet the charterers had a great supply of vessels in port, which required as large an amount or even more grain for loading than the usual
deliveries by rail would bring to the dock, so that a slight falling off was bound to leave some vessel or vessels without cargo within time. There was an appreciable falling off, but with this the deliveries for November and the early part of December were not largely dispropor-
tionate to those of an equal length of time immediately preceding; the latter deliveries being a little over one-sixth less than those for the former period of time.

There are always some chances to take upon prompt delivery of freight by rail. I speak of this, barring accidents and unusual im-
pediments. Such delays are to be anticipated by the shipper, and for which he is remediless unless special provision is made for reparation. There were no railway accidents relied upon as contributing to the delay, and no impediments hindering the moving of freight, unless it be said that the nonpayment of freight money for a couple of days had that effect. Nor is the hindrance complained of attributable to car shortage. The evidence does not show that there was such a shortage, but that the railroad company failed to move the charterers' grain when and as rapidly as ordered. The difficulty was in getting it moved in sufficient quantities at the particular time it was wanted for exportation abroad, and this without the railway lines assigning any particular excuse or reason for the delay. It is not, in my opinion, the intendment of the charter party that the ship should take the chances of such a delay as this. It was not more than might have been anticipated to have occurred through the usual movement of commerce by rail, and the charterers must be held to have engaged an excessive tonnage for exportation, to their own peril. Where therefore the charterers' own act is the proximate cause of the delay, another cause, more remote, contributing thereto, will not avail to excuse them. Fundamentally, the law looks to the immediate cause conducing to a par-
ticular result, and does not concern itself with causes of causes, or those which are remote and not directly consequential. The prin-
ciple was applied in W. K. Niver Coal Co. v. Cheronea S. S. Co., supra, and this without particular reference to the point that the parties complaining bore in producing the proximate cause. With how much greater force, then, should the rule apply where the parties are themselves promoters of such impelling cause. In this connection should be mentioned the claim that shipment by rail was suspended for two days, namely, from October 29th to the 31st, by reason of freight charges not having been paid on the part of the shippers in the usual way, arising from a stringency in the money market. This special delay, however, was manifestly inconsequential in its effect upon the general situation.

Rainy days are to be excluded under the charter party from the time agreed upon for loading the ship, and it becomes a question as to the kind of days that are to be considered rainy days in Portland Har-
bor, where the loading was to be done. The question was determined by Judge Deady in the case of Balfour v. Wilkins, 5 Sawy. 429, 437, Fed. Cas. No. 807, in 1879, as comprising such days as, by reason of rain precipitation and storm, cargo cannot be safely and conveniently loaded aboard vessels. Rain falls many days which does not neces-

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sitate the suspension, or even retard in any appreciable measure the work of loading, and shippers and longshoremen do not regard it at all. Such days as these were manifestly not within the intendment of the charter party. Other days, again, may be attended with heavy rainfall and strong winds, which may at times materially inconvenience and even endanger the work, and yet, in the experience of shipping within the Portland Harbor, it is a rare exception when the workmen are laid off on account of storms. It is essential to keep the chutes dry in loading sacked grain, and also to protect the grain itself from getting damp; but awnings are provided, which serve in general as sufficient protection against dampness, as well as shelter for those engaged in the service. But when the rainfall is heavy, accompanied with high winds, the work is necessarily more or less retarded in keeping the awnings, being of a temporary character, in place, and the inconvenience is great in proportion to the violence of the storm. While it is evidently not the intendment to except all days upon which rain falls from the stipulated lay days, yet the phrase "rainy days" must be accorded a significance; otherwise it should not have been introduced in the charter party. Weather conditions have not changed perceptibly in this locality since Judge Deady rendered his decision. While the appliances for protection against storm are perhaps improved, yet, withal, his definition is as applicable now as then. All days when the violence of rain and storm materially and essentially retards the work of loading vessels in the harbor, because of the inconvenience and danger incurred, were no doubt within the purpose of the parties to be excepted from the lay days stipulated for. Being so within that purpose, it is the right of either party to insist upon the exclusion of such days, whether it was possible that loading could have been done or not. From a report of the Weather Bureau station at Portland, it is shown that the rainfall and average hourly velocity of the wind in 24 hours, for the stormiest days in November, were as follows:

November 13, 14/100 of an inch, 3 9/10 miles per hour.  
" 15, 10/100 "  " 3 8/10 " "  
" 19, 70/100 " " 10 5/10 " "  
" 20, 40/100 " " 10 " "  
" 22, 50/100 " " 12 " "  
" 23, 1.51 Inches, 18 8/10 " "  
" 25, 48/100 of an inch, 13 9/10 " "  
" 26, 12/100 " " 4 8/10 " "  
" 27, 27/100 " " 3 " "  

Out of all these days, there is one that must have caused more or less difficulty and inconvenience in loading; that being the 23d. The rain fell incessantly throughout the day, aggregating 1.51 inches within 24 hours. The greatest velocity of wind was 36 miles per hour. This occurred at 6:30 p.m. But the average hourly velocity was 18.8 miles. I do not think that it was within the intendment of the charter party that the charterers should be required to load the ship on such a day as that. It was one of the stormiest of the season, and should be excepted from the lay days specified for loading. None of the other days approximate this in severity of the weather, and work could evidently proceed without any material inconvenience. None of these should be excepted. It is true that the charterers continued
with the work of loading another ship on the 23d, notwithstanding the inclemency of the weather; but the intendment of the charter party must govern, and, if the day was such that the charterers were not required to load a cargo aboard ship, they could proceed with the loading or not, as they might feel disposed, and the ship cannot hold them accountable for the delay.

The next question arising is touching the signification of the word "holiday" as used by the parties in the charter party. The charter party, so far as it concerns the demurrage which forms the basis of this libel, was entered into to be executed in the Portland Harbor, and the term "holiday" must receive the meaning that should be attributed to it under the laws and customs regulating shipping on navigable waters within the state of Oregon, or within the jurisdiction of its laws. The statute of Oregon declares certain days enumerated therein to be legal holidays. Among them are Sunday, the 1st day of January, etc., "and every day appointed by the President of the United States or by the Governor of this state as a day of public fasting, thanksgiving, or holiday." It provides, further, that:

"Negotiable Instruments falling due on any legal holiday shall be due and payable on the next succeeding business day." Sections 3918, 3919, B. & C. Comp. Or.

By section 946 of the same compilation it is declared, in effect, that no court of justice can be opened, or can judicial business be transacted, on the days mentioned above, with certain enumerated exceptions.

By none of these sections, nor by any other provisions of the statute, so far as I am aware, are persons forbidden to labor or do any work, neither is there any penalty prescribed for any violation of the law; the purpose being manifestly to declare what days are legal holidays, and what business is affected by the fact that such days are so declared to be holidays. The business affected has relation to the coming due of negotiable instruments, the holding of courts of justice, and the transaction of business therein. It does not seem to have been the intendment of the Legislature to affect any other relations of the populace, either ecclesiastical or civil. Excepting the effect as it respects negotiable instruments, there was apparently but one purpose of the Legislature in the enactment of this legislation, which was to create what the words import, "legal holidays" as distinguished from holidays in the general sense; that is to say, the holiday of the statute is dies non juridicus, a day not judicial, not a court day. See Whitney v. Blackburn, 17 Or. 564, 21 Pac. 874, 11 Am. St. Rep. 857; Lampe v. Manning, 38 Wis. 673.

Further than this, there is no mandate that the day shall be observed by ceasing from labor, or by indulging in religious worship, public thanksgiving, or fasting, or adhering to any specific custom or practice. Speaking of the effect of the Governor's proclamation appointing a day of thanksgiving and declaring it a holiday, Mr. Justice Grier, in Richardson v. Goddard et al., 23 How. 28, 43, 16 L. Ed. 412, says:

"It is matter of history that the state of Massachusetts was colonized by men who fled from ecclesiastical oppression, that they might enjoy liberty of conscience, and that, while they enforced the most rigid observance of the
Lord's Day as a Sabbath, or day of ceremonial rest, they repudiated with abhorrence all saints' days and festivals observed by the churches of Rome or of England. They 'did not desire to be again brought in bondage, to observe days and months, and times and years.' And while they piously named a day in every year which they recommended that Christians should spend in fasting and prayer, they imposed it on no man's conscience to abstain from his worldly occupations on such day, much less did they anticipate that it would be perverted into an idle holiday. The proclamation of the Governor is but a recommendation. It has not the force of law, nor was it so intended. The duties of fasting and prayer are voluntary, and not of compulsion, and holiday is a privilege, not a duty. In almost every state in the Union a day of Thanksgiving is appointed in the fall of the year by the Governor, because there is no ecclesiastical authority which would be acknowledged by the various denominations. It is an excellent custom, but it binds no man's conscience or requires him to abstain from labor."

The observance of the day binds no man's conscience in this: That the act of nonobservance is not made malum prohibitum, an evil prohibited, with a penalty attached for the breach of the law. The occasion, however, is worthy of universal respect, and the moral obligation for the observance of the day of thanksgiving in pursuance of the proclamation of both the President and the Governor is cogent and strong. So it is that many people throughout the United States, and in every state, keep the day by ceasing from labor, and observing religious worship or indulging in pleasurable pursuits. In Tweedie Trading Co. v. Pitch Pine Lumber Co. (D. C.) 156 Fed. 88, 89, "A holiday is one," says Hough, District Judge, "created by general acceptance and observance, to which dignity it may arrive without the aid of statute law."

Under the charter party, holidays are not to be counted as lay or working days, and by the fifteenth paragraph it is stipulated that lay or working days shall not count when the supply or bringing by rail, craft, or otherwise to port of loading or alongside the vessel, or the loading is delayed by holidays, ecclesiastical or civil. The stipulation almost defines the term, namely, that the holiday must be considered such a day so given over to that purpose as delays the bringing of cargo alongside the vessel, or the loading of the same. Thus it would seem that the contracting parties intended the application of the term to be made in its general sense, not in its statutory sense, as legal holidays. There is but little or no evidence showing to what extent Thanksgiving Day is observed in the Portland Harbor, but I think the court may take judicial knowledge of the fact that the day is generally observed by a great many people within the state and about Portland, that while the custom does not prevail to such an extent as to absolutely prevent the procurement of labor for loading, yet that it impedes its procurement in a material way, and hence that the day was within the intendment of the charter party; but, further than this, other holidays declared by the Governor were not within such intendment.

Rejecting November 23d as a rainy day and the 28th as a holiday, the ship was detained seven days beyond her stipulated lay days, for which the libellant should recover the sum of $1,531.74, with interest from December 6, 1907, at 6 per cent. per annum, and such will be the order of the court.
THE BAILEY GATZERT.

(District Court, D. Oregon. March 29, 1909.)

No. 4,979.

1. Collision (§ 82*)—Precautions for Preventing Collision—Speed in Fog.

A steam vessel in a dense fog is bound to observe unusual caution and to maintain only such a rate of speed as would enable her to come to a standstill by reversing her engines at full speed before she could collide with a vessel which she could see through the fog.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 170-172; Dec. Dig. § 82.*

Collision rules, speed of steamers in fog, see note to The Niagara, 28 C. C.A. 582.]

2. Collision (§ 85*)—Steamer and Anchored Dredge—Excessive Speed in Fog.

A collision in the Willamette river in a dense fog between a steamer passing down the river at a speed of 10 to 12 miles an hour and a dredge working in the fairway held due to the fault of the steamer because of her excessive speed, which was such that, although she reversed as soon as the dredge could be seen, she could not be stopped in time to avoid the collision. The dredge held not in fault; it appearing that she was ringing her bell at intervals of not more than a minute.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 166; Dec. Dig. § 85.*]

In Admiralty. Suit for collision.

Williams, Wood & Linthicum and William C. Bristol, for libelant. Carey & Kerr and Harrison Allen, for respondent.

WOLVERTON, District Judge. On the morning of November 6, 1907, the libelant was engaged in deepening the channel of the Willamette river, at a point nearly opposite the head of what is known as “Willamette slough.” The work was being prosecuted by means of the dredge Portland. It was found necessary, for the convenient and successful doing of the work, to anchor the dredge directly in the fairway. This was done by means of a spud and anchors, attached to cables on board. The vessel in its operation swung forward and back; the spud acting as a pivot in a radius of 150 feet. While so anchored and in operation, and being in position at an angle with the channel of the river, she was run into and sunk by the steamer Bailey Gatzert, while descending the river on her usual trip plying between Portland and The Dalles. This libel was brought to recover damages for the injury thus sustained to the dredge. For cause of recovery it is alleged that:

“Notwithstanding the fact that said morning was foggy, the Bailey Gatzert, up to the instant of the collision, was being navigated by her master at a high rate of speed, namely, full speed, and although the bell of the Portland was being rung at regular intervals, as required by law, the master of the Bailey Gatzert failed and neglected to observe the bell of the Portland, and himself navigated the Bailey Gatzert at such a high and dangerous rate of speed in said fog that when the Portland came into the view of the Bailey Gatzert he failed to check the headway of the Bailey Gatzert and collided

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep’t Indexes.
with the dredge, causing said dredge to sink within a few minutes. Said collision was occasioned solely through the fault of the Bailey Gatzer and of her master in the particulars aforesaid, and the Portland and those in charge of said vessel in no respect contributed to the collision."

The owner of the respondent claims damages by cross-libel against the Port of Portland because of the collision. By this it is charged, in effect, that notwithstanding the dredge Portland was anchored in the fairway, and the morning was foggy, no fog bells were rung on board the dredge in accordance with the law or the regulations of the United States inspectors of steam vessels for inland waters of the Pacific Coast, nor was any other signal or warning given, nor did the Port of Portland keep or provide a proper lookout and watch on board the dredge, by reason whereof, the Bailey Gatzer not having been warned of the presence of the dredge in the fairway, the collision occurred, without fault or negligence of the cross-libelant.

These averments of the libel and cross-libel, with their denials, present the primary issues in the cause. The simple inquiry therefore is: Whose fault was it that brought on the collision?

F. H. Sherman, the commander of the Bailey Gatzer, made the following report of his trip on the occasion of the collision, under the head of "Remarks."

"Thick fog. Calm. Left Portland 7 a.m. Fog was very thick. Went very slow to St. Johns. Then it commenced to clear. Could see both shores. Left Limeston at 8:00 a.m. Not a sound was heard before then. The fog had shut in again. The lookout reported dredge ahead. I immediately stopped. Then I heard a bell ring. I saw the dredge and gave a backing bell. When I saw the dredge she was not over 200 feet ahead. We hit her with our stem almost head on and took about four feet of the corner off."

I interpret this to mean that the Bailey Gatzer was running in a thick fog at the time of the accident, and that immediately when the dredge was reported ahead the commander heard a bell ring. This is in accord with the commander's testimony, wherein he says:

"I did not hear anything until after the lookout reported the dredge ahead. Then the bell rang."

This, without more, establishes the fact that a bell was rung at least at that time on the dredge; but the testimony of other witnesses, who were in a position to hear for several minutes just prior to the collision, shows quite clearly that the bell on the dredge was being rung at intervals of about a minute, and in apparent answer to signals of approaching boats. The bell was a large ship's bell. The lookout on the Wauna, passing up stream at the time, heard it distinctly in answer to her signals, and also heard it while the Bailey Gatzer was approaching downstream and sounding her whistles. So of two of the officers—the pilot and captain—of the Wentworth, which passed down but little ahead of the Bailey Gatzer. They heard the bell distinctly at least three times before passing the dredge, in answer to the Wentworth's signals, and they heard it after passing. Two fishermen heard the bell immediately prior, and the officer on board the dredge testifies that he rang the bell after the fog settled in, in answer to all signals from approaching vessels, whether passing up or down stream, and that the frequency with which the bell was rung was about once a
minute, continuing for about five seconds at each time. While the
officers and passengers on the Gatzert may not have heard this bell
ring more than the one time, and that immediately after the dredge
was sighted, yet the positive evidence of many witnesses who did hear
it at reasonable and proper intervals is much more convincing and
satisfactory that the bell was rung than the negative testimony that
it was not. I think there can be no question that the bell on the dredge
was rung at proper intervals during the approach of the Bailey Gatz-
ertz, and for several minutes at least before the collision. That a
thick fog was prevailing is conceded. When the dredge was first
discovered from the Bailey Gatzert, it is probable that the Gatzert
was within 100 feet of her. The commander of the Gatzert says in
his report that she was not over 200 feet ahead. In his testimony he
says the dredge was from 100 to 150 feet ahead, but others on board
the Gatzert give the distance as about 100 feet or less.

Now, as it relates to the speed at which the Gatzert was running
when the dredge was sighted, her commander testifies that she was
running at half speed, and had been since passing St. Johns. She
was loaded, and in that condition made about 15 miles per hour. At
half speed her rate was nine miles or about. The current of the stream
was running out at the time. There is, however, a sharp conflict be-
tween the testimony of the commander and that of the engineer on
this vessel. The latter testifies that a minute and a half or two min-
utes before the collision he received a signal from the commander
to run full speed ahead, and that he had opened or was opening the
throttle of the engine, and the boat was gathering toward the full-
speed limit. The commander denies that he gave such a signal, but
I incline to the view that it was given. Whether the commander gave
it or not, however, the boat was at that time speeding up, and the
commander should have been apprised of it by the quiver or mo-
tion of the boat, and he allowed her to continue in that way. The
boat was therefore increasing her velocity from half speed to full
speed ahead, and was probably running at a rate of from 10 to
12 miles per hour, with the current of the stream in her favor.
When the dredge was sighted, the engine was reversed, and was so
reversed when the collision took place, so that it must be that the
speed of the vessel was checked somewhat. The speed, however, thus
checked, was sufficient by the impact with the dredge to drive her bow
into the dredge for a distance of from 8 to 14 feet, encountering on
the way a number of heavy timbers, ranging in size from 12×12 inches
to 14×14. These were broken and parted, causing a rent in the stern
of the dredge, from which she sank at once. There can be no doubt
therefore that the Gatzert was running at a considerable rate of speed,
and with great force, so that a collision with another craft would
be necessarily attended with great injury and damage.

It is a rule of navigation that:

"A vessel in a dense fog is bound to observe unusual caution, and to main-
tain only such a rate of speed as would enable her to come to a standstill by
reversing her engines at full speed before she could collide with a vessel
which she could see through the fog." The Belgian King, 125 Fed. 869, 870,
60 C. C. A. 451.
This case was decided by the Court of Appeals in this circuit, and is binding upon this court. Other adjudications, however, are to the same purpose: The State of Alabama (D. C.) 17 Fed. 847; The Bolivia, 49 Fed. 169, 1 C. C. A. 221; The Michigan (D. C.) 63 Fed. 285; The H. F. Dimock, 77 Fed. 226, 23 C. C. A. 128; The Kentucky (D. C.) 148 Fed. 500.

The rule is both reasonable and wholesome, and especially does it have application to navigation upon the waters of a narrow channel like that of the Willamette river from Portland to its mouth, where many vessels are plying constantly. The commander of the Gatzert is manifestly chargeable with grave negligence in permitting his boat to be navigated at the rate of speed she was running at the time. It was impossible for him to have brought his vessel to a stop in so short a distance as he was able to sight another vessel in the thick fog then prevailing. As it was, her engines were promptly reversed, but it seemed to check her but slightly before she collided with the dredge. Prudent navigation under the rule would have prevented the accident.

The next inquiry is: Was the dredge guilty of negligence in not ringing her bell as required by the government regulations?

Some question was made touching the position of the bell as not well calculated to give warning when rung. It was suspended near the front end of the boat, and in the clear above the hurricane deck by from 14 to 17 inches, so that there was nothing to obstruct the sound from any direction. It could not therefore have been more advantageously placed without suspending it at a much greater height, which is not usual. The proofs indicate that the bell was being rung at regular intervals, as vessels were approaching as indicated by their signals. Such was the case as it concerned the Gatzert. Whether the bell was rung at all times while fog prevailed or not could not affect the case. The negligence in that respect, if the dredge was so negligent, could not have in any way conducd to the collision in question, because the bell was ringing at appropriate intervals while the Gatzert was approaching.

Cross-libelant also complains that the libelant failed to keep a watch or lookout upon the dredge. It is in evidence that Cosgrove, who was charged with the duty of ringing the bell, was also required to keep a lookout for approaching vessels. He had supervision also of some men about the deck. All these duties he was endeavoring to perform. He testified that, during the approach of the Bailey Gatzert, he was ringing the bell at intervals of about one minute, and that when not so engaged he kept a lookout for other vessels. He could not see up the river when ringing the bell, because of his position behind the upper deck, but he went from side to side on the promenade deck, and by that means kept watch in every direction. Here again, however, if it be the case that the duties of the lookout were not so fully observed as the government regulations required, it is manifest that had such lookout been on the best possible position on the dredge he could not have discovered the Gatzert sooner than the Gatzert's watch discovered the dredge, and this was all too late to avoid the
collision, so that any supposed dereliction of the watch did not, and
could not, contribute to the accident, and therefore could not affect the
result of the controversy. It is said that a watch could have discov-
ered the approach of the Gatzert from her signals, and could, by a
direction, have required the bell to be rung more vigorously, so that
it would have served to warn the Gatzert of the dredge's presence in
the channel. The proof is satisfactory, however, that the bell was
rung at appropriate intervals and in answer to the signal of the Gat-
zert, which was heard by Cosgrove, and this was all that was required
by the regulations. Even a watch on the dredge could not anticipate
that an approaching vessel, made known by her signals, was going
to run into his vessel, and hence a more vigorous action could not be
required of him or the bellman than is usual in such cases.

From these considerations I conclude that the fault conducing to
the collision was entirely with the Bailey Gatzert.

This leaves but one further question to be considered, which is the
amount of damages sustained by the dredge because of the collision.

The testimony on the part of the libelant shows that the dredge sus-
tained injuries to the amount of $18,058.28. I file herewith an item-
ized statement thereof.

I have had some doubts as to whether the entire amount should
be allowed against the Gatzert, as the sum claimed seems to be very
large, yet there has been no evidence offered reasonably reliable in
character to counteract the testimony of the libelant upon the sub-
ject. The estimate of G. H. Thayer, marine engineer, has been of-
ffered, showing the cost of repair of main engine and pumps, boilers
and boiler settings, and auxiliary machinery, which differs significan-
tly from the cost of repair of these appliances as shown by libelant's tes-
timony. There is not included in this estimate, however, the damage
to the electric lighting plant and the machinery supplies, and it is
very difficult to make the proper comparison so as to arrive at the true
difference in the cost of repairs made by libelant and Mr. Thayer's
estimate. An estimate has also been introduced in evidence tending
to show that the carpenter work could have been done for much less,
but this estimate does not include all the items covered by the car-
penter work, nor all the work which was actually done by the libelant
in repairing the dredge, and necessary thereto for putting her in the
condition she was in prior to the collision.

Another witness was called, who testified that he would have been
willing to raise the dredge for the sum of $8,500; but his testimony
is not reliable, because of the fact that he supposed the vessel was
of about 400 tons weight, when in fact it is 700 tons or above.

On the whole therefore I conclude that the libelant is entitled to
recover the full amount of its claim, namely, $18,058.28.
Shipping (§ 60*) — Master — Wrongful Discharge — Rights under English Law.

Under the English admiralty law the master of a vessel wrongfully discharged abroad before the termination of the voyage has a lien for his wages earned and his action in rem therefor, but can have no relief against the ship for wages from the time of his discharge to the termination of the voyage, nor for the expenses necessary to carry him to his home port.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 305; Dec. Dig. § 69.*]

In Admiralty.

James Gleason, for libelant.

Williams, Wood & Linthicum, for claimant.

WOLVERTON, District Judge. The libelant was appointed master of the ship Ancaios under articles of date December 21, 1905, at a salary of $80 per month, Canadian currency, equal to £16. 10s. 8d. British Sterling; the time to count from the time of the libelant's leaving Liverpool for Cape Town to join the ship, and the service to continue until the ship's return to her home port, unless meantime sold or leased, in which event the usual provision for expenses home was to be made. In addition to the salary named, the libelant was entitled to "board, lodging, and keeping." The Ancaios is a British ship, flying the flag of Great Britain, and her home port is in England. Libelant left Liverpool for Cape Town December 23, 1905, and accordingly his wages began from that date. The ship proceeded from Cape Town to Newcastle, New South Wales; thence to Antofagasta, Chile; thence to Newcastle, N. S. W.; thence to Callao, Peru; from Callao to Sydney and Newcastle, N. S. W.; and thence to Portland, Oregon, at which latter port libelant was discharged; the date thereof being, according to the libel, April 25, 1908. Libelant avers that he was wrongfully dismissed, and claims a balance due him for wages to the date of the dismissal in the sum of $328.69; further, for wages from that date until the ship's arrival in her home port, being for the space of one year, amounting to $960, and transportation and expenses home in the sum of $200.

The legal question is presented, and may now be considered, whether the master of a British ship may, in an action in rem against the vessel, recover wages from the time of his discharge, if the same be wrongful, till the arrival of his ship in the home port. Along with this may be also determined whether the master is entitled to recover for his expenses home. The question is dependent solely upon the admiralty law as administered in the English courts of adjudication. As it relates to seamen, the law obtaining in England is as follows:

*For other cases see same topic & § Numbers in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
"If a seaman is wrongfully dismissed before the end of the voyage or of his term of employment, his wages are due for the whole of the voyage or until the period for which he was engaged terminates, if he has not before that time found new and equally lucrative employment. Any expenses which may be incurred by the seaman who is thus dismissed, in reaching his own country if he is discharged at a distance from it, and in maintaining himself until he is in a position to obtain fresh employment, are recoverable with the wages, subject to all questions of opposing claims such as the possessory lien of a shipwright." Roscoe's Admiralty Practice (3d Ed.) p. 256.

By a provision of the merchant shipping act of 1894 (being section 167 thereof):

"The master of a ship shall, so far as the case permits, have the same rights, liens, and remedies for the recovery of his wages as a seaman has under this act, or by any law or custom."

We are to resolve the question in hand by ascertaining the proper interpretation of the provisions of the shipping act, read in relation to the general provisions of law as it respects seamen's wages.

Dr. Lushington has, in two cases, namely, The Camilla, Swabey, 312, decided in 1858, and The Princess Helena, Lush. 190, decided in 1861, in view of the statute of 17 & 18 Victoria, being Merchant Shipping Act 1854, c. 104, § 191, which section is substantially section 167 of the merchant shipping act of 1894, being St. 57 & 58 Vict. c. 60, held in effect that a master engaged for a voyage out and home, if wrongfully dismissed abroad, is entitled to his wages until the termination of the entire voyage, or until he has obtained other employment. The holding is the result of that eminent jurist's interpretation of the statute of 17 & 18 Victoria, extending to the master the same rights, liens, and remedies for the recovery of his wages as the seamen possessed. His reasoning is cogent and persuasive, and, were it not for a later adjudication made in the Court of Appeals from the Probate, Divorce, and Admiralty Division of the High Court of Justice in England, I should have been content to follow him. The case referred to is that of The Arina, decided in 1887, and reported in the Law Reporter, Probate Division, vol. 12, p. 118. In this case the master claimed double pay, which seamen were entitled to recover under St. 17 & 18 Vict. c. 104, § 187, and also payment until the time of final settlement with him, as is allowed to seamen unless the delay is occasioned by their default, under St. 43 & 44 Vict. c. 16, § 4, and it was held that St. 17 & 18 Vict. c. 104, § 191, extended to the master the same remedies only as the law accorded to seamen for the enforcement of the payment of their wages, and that it did not entitle the master to the added wages provided for by law for the seamen in case of default in payment on the part of the ship. The court, after quoting from Dr. Lushington's reasoning against the right of the master to extra pay, and referring to the provisions of the statute, concludes as follows:

"We think, therefore, that the extra payment is not made part of the seamen's wages by section 187. Even were it otherwise—were the extra payment made part of the seamen's wages—it would by no means follow that section 191 makes a similar extra payment part of a master's wages. By the words of section 191 a master is to have, not the same right to wages as the seaman, but only the same rights, liens, and remedies for the recovery of his wages. It does not purport to give the master any additional wages, but only the same
rights, liens, and remedies for the recovery of his wages as the seaman has for the recovery of his. This distinction is emphasized by the fact that section 187 is one of the sections printed under the heading 'Legal Right to Wages,' whereas section 191 comes under a different heading, viz., 'Mode of Recovering Wages.'

"The extra payment not being by the act made part of the master's wages, can be nevertheless recover it as a 'remedy' for the enforcement of due payment of his wages? The plaintiff contends that, even if the extra payment be regarded as a penalty, it is one of the means of enforcing due payment of wages given to the seamen; is, in fact, a 'remedy' for the recovery of his wages, and therefore enforceable by the master under section 191.

"We do not think this argument maintainable. Before the enactment in question, the master had no lien on the ship for the enforcement of his claim to wages except under 7 & 8 Vict. c. 112, s. 16, in case of the bankruptcy or insolvency of the owner. We think full and ample effect may be given to section 191 of the act of 1854 by construing it as giving to masters in all cases a lien, and the consequent remedy in rem, without holding that it also confers upon him the right of recovering a penalty for nonpayment of his wages in due time."

The case is in complete analogy to the one at bar, although a statute is being considered as to its effect upon existing general law. It is therefore controlling here, as I am bound by the construction given by the courts of England to her own statutes, especially as I am deciding a cause governed by the English law. The master has no lien except by statute, and this now so far only as the seaman has a lien against the ship for his wages. He is entitled to the same remedies for the recovery of his wages as seamen are, but he is not entitled to any added wages, which are given to seamen as a sort of penalty for the wrongdoing of the ship's master in discharging them without cause. Under the remedy thus extended by statute, the master has a lien for his wages earned, and his action in rem, but further than that he can have no relief against the ship, whatever his remedy might otherwise be. For the same reason, it follows irresistibly that the master has no relief against the ship for his expenses sufficient to carry him to his home port when wrongfully discharged abroad.

In coming to this conclusion, the case of The Great Eastern, Law Reports, Admiralty & Ecclesiastic, vol. 1, p. 383, has not been overlooked. That, however, is the case of a seaman suing for his compensation in the nature of damages for a wrongful discharge under section 10 of the admiralty court act of 1861; the court holding that admiralty has jurisdiction to entertain the cause. The cause was decided in 1867, the judgment being rendered by Dr. Lushington, who was at the time, through illness, unable to appear in court. The case is not cited either by counsel or the court in The Arina, but it is altogether probable that, had it been brought to the attention of the court, its ruling would not have been affected. At all events, the latest expression of the English courts upon the subject in hand, so far as I am advised, is contained in The Arina, and, being the latest, impels me to a like conclusion.

It is with reluctance that I am thus persuaded, as I do not think, from a careful consideration of the entire testimony in the case at bar, that sufficient cause existed for the dismissal of Capt. Ritchie. A letter of date March 28, 1907, written by James & Alexander Brown, of Newcastle, N. S. W., who were the agents of Soley & Co., Ltd., with
full power to remove Ritchie for cause if any such existed, indicates very clearly that Ritchie was conducting himself in an exemplary way, and attending strictly to the ship’s business and interests. Hence he was not removed. There was probably no greater cause for his dismissal at Portland. It is true the ship had bad luck on occasions, but the testimony fails to show that it was attributable to her master. It has developed that the Ancenis’ experience was nearly as bad. This was another ship under the same management. It seems to me that Soley & Co. recognized this fact when, by its letter of March 18, 1908, directed to Ritchie, notifying him of its determination to dismiss him, it proposed, in case of Ritchie’s being without funds, to pay his passage East.

Now, as to the account of Capt. Ritchie with the ship. A statement of account was had between him and James & Alexander Brown, of Newcastle, N. S. W., who were the agents of the ship, on February 27, 1907, whereby a balance was found to be due Ritchie in the sum of £36. 10s. 11d. The statement of account is signed by Ritchie, thus showing his approval of the same. He was given credit in the account for his wages to the date thereof. Another accounting was had on March 28, 1907, showing a balance due the master of £18. 8s. 7d., which credits him with an additional month’s wages. On December 11, 1907, Ritchie received from James & Alexander Brown £120, and made some disbursements, leaving a balance in his hands of £99. 4s. On January 13, 1908, Ritchie received from the same agents £40, of which he disbursed £19. 5s., leaving in his hands £20. 15s. In consideration of these matters, a statement of Capt. Ritchie’s account with the ship is as follows:

J. E. Ritchie.
In Account with the Ship Ancelos.

Cr.

March 22, 1907. By bal. favor master, per st. of % .......... 18. 8. 7
" master’s wages from March 27, 1907, to April 25, 1908, 12 mo. 29 days, @ 16-10-8 per mo. ....................... 214. 7. 8

Total ........................................ 232. 16. 3

Dr.

July 14, 1907. To bal. cash captain’s private % .............. 25. 15. 4

“ Broughton’s % for tobacco paid by ship Mar. 26, 1907. ......................... 10. 3. 0
“ Broughton’s % for tobacco paid by ship June 12, 1907. ......................... 30. 1. 0
“ R. H. Menzies’ shop account paid by ship Sept. 12, 1907. ......................... 18. 14. 0
“ Pearce’s % repairs sextant, paid by ship Sept. 12, 1907. ......................... 5. 0

Total ........................................ 204. 17. 4
Leaving a balance due the master of ............... 27. 18. 11

This is equivalent to $135.22 Canadian money, for which, with interest at 6 per cent. from April 25, 1908, the libelant is entitled to judgment.
1. CONSPIRACY (§ 28*)—CONCEALMENT OF BANKRUPT'S ASSETS.
Bankr. Act July 1, 1898, c. 541, § 29b, 30 Stat. 554 (U. S. Comp. St. 1901, p. 3433), provides that a person shall be punished by imprisonment on conviction of having knowingly and fraudulently concealed while a bankrupt, or after his discharge, from his trustee, any of the property belonging to his estate in bankruptcy. Held, that an indictment for conspiracy to conceal assets of a corporation in contemplation of bankruptcy was not objectionable because there was no existing bankruptcy when the conspiracy was originated.

[Ed. Note.—For other cases, see Conspiracy, Dec. Dig. § 28.*]

2. CONSPIRACY (§ 40*)—CONCEALMENT OF BANKRUPT'S ASSETS—INDIVIDUAL CONSPIRATORS.
Indians may be guilty of conspiracy which included in its purpose a fraudulent concealment of the assets of a bankrupt corporation, even if the corporation may not be charged as a conspirator.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 75; Dec. Dig. § 40.*]

3. BANKRUPTCY (§ 492*)—CONCEALMENT OF ASSETS—OFFENSES—AIDERS AND ABETTERS.
Bankr. Act July 1, 1898, c. 541, § 29b, 30 Stat. 554 (U. S. Comp. St. 1901, p. 3433), provides that a person shall be punished by imprisonment on conviction of having knowingly and fraudulently concealed, while a bankrupt, or after his discharge, from his trustee, any of the property belonging to his estate in bankruptcy. Held, that though there can be no violation of such section unless the concealment is accomplished while there is a person in bankruptcy, or after his discharge, not only the bankrupt, but others aiding and abetting in the concealment, are punishable thereunder.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 492.*]

4. BANKRUPTCY (§ 492*)—“PARTICIPANTS IN FORBIDDEN ACTS”—“PERSONS.”
Bankr. Act July 1, 1898, c. 541, § 1, subd. 10, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3419), provides that “persons” when used with reference to the commission of acts which are forbidden, shall include persons who are participants in the forbidden acts, and the agents, officers, and members of the board of directors, or trustees, or other similar controlling bodies of corporations, etc. Held, that the term “participants in the forbidden acts” includes all persons who join with the bankrupt in the commission of the offenses created by chapter 4, § 29.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 492.*
For other definitions, see Words and Phrases, vol. 6, pp. 5322–5335; vol. 8, p. 7752.]

5. BANKRUPTCY (§ 492*)—CONCEALMENT OF ASSETS—OFFENSES—CORPORATIONS.
A corporation may be guilty of a concealment of assets while a bankrupt, in violation of Bankr. Act July 1, 1898, c. 541, § 29b, 30 Stat. 554 (U. S. Comp. St. 1901, p. 3433).

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 492.*]

On Demurrer to Indictment.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
BROWN, District Judge. This is an indictment under section 5440 for conspiracy to commit an offense against the United States, to wit, a violation of the provisions of section 29b, c. 4, of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 554 [U. S. Comp. St. 1901, p. 3433]).

Section 29b provides that:

"A person shall be punished, by imprisonment for a period not to exceed two years, upon conviction of the offense of having knowingly and fraudulently (1) concealed while a bankrupt or after his discharge from his trustee, any of the property belonging to his estate in bankruptcy," etc.

The Circuit Court of Appeals for this circuit held in Alkon v. United States, 163 Fed. 810, that the mere fact that there was no existing bankruptcy when the conspiracy originated does not make the statute inapplicable, if the conspiracy included an intent to continue the concealment after the bankruptcy. The court observed:

"It was like all conspiracies, in that it related to something in future."

The court approved and followed as to this point the decision of the Circuit Court of Appeals of the Second Circuit in Cohen v. United States, 157 Fed. 651, 85 C. C. A. 113. Cohen v. United States also decided:

"(1) The corporation, the bankrupt, could violate the provision against fraudulently concealing its assets. Its act would be criminal, notwithstanding its corporate character would prevent its punishment. See U. S. v. Van Schneck (C. C.) 134 Fed. 502.

"(2) Even if the corporation alone could violate the bankruptcy act, the defendants could conspire that the corporation should violate it and so be guilty of conspiracy."

The indictment is apparently framed in view of the decision in Cohen v. United States, 157 Fed. 651, 85 C. C. A. 113, except that it charges that the Young & Holland Company, a corporation, and the individual defendants conspired together—

"to commit an offense against the United States, in and by corruptly and fraudulently agreeing together, in anticipation of the involuntary bankruptcy of the said Young & Holland Company, to be brought about and accomplished by the said Carroll H. Chapman, with the knowledge and connivance of the said other conspirators, unlawfully, willfully, knowingly, and fraudulently, while the said Young & Holland Company was a bankrupt, to conceal from the trustee in bankruptcy of the said Young & Holland Company, to be thereafter appointed, certain merchandise, etc., belonging to the estate in bankruptcy of the said the Young & Holland Company," etc.

The Young & Holland Company is alleged to be a party to the conspiracy, and it is charged that all the defendants, including the Young & Holland Company, conspired to conceal from the trustee in bankruptcy merchandise belonging to the estate in bankruptcy.

The indictment thus states that the conspiracy included a proposed concealment of assets from the trustee by the Young & Holland Company itself.

The case of United States v. MacAndrews & Forbes Co. (C. C.) 149 Fed. 834, holds that a corporation may be guilty of conspiracy. Even should there be a doubt as to whether the corporation could properly be charged as a conspirator, this would not affect the indictment, for
the individual defendants can be guilty of a conspiracy which includes in its purpose a fraudulent concealment by a bankrupt corporation. Cohen v. United States, 157 Fed. 651–653, 85 C. C. A. 113.

The defendants also contend that section 29b of the bankruptcy act defines a crime that can be committed by no person other than a bankrupt. Field v. U. S., 137 Fed. 6, 69 C. C. A. 568, and U. S. v. Lake (D. C.) 129 Fed. 499, cited by the defendants in support of that proposition, were before the court in Cohen v. United States, 157 Fed. 653, 85 C. C. A. 113, and held inapplicable where the indictment charges a conspiracy that a bankrupt corporation should conceal its assets, as distinguished from a conspiracy that the officers of a bankrupt corporation should conceal its assets.

Assuming that there can be no violation of section 29b of the bankruptcy act unless the concealment is while there is a person in bankruptcy or after his discharge, does it follow that no person is punishable under section 29b except a bankrupt? In U. S. v. Gooding, 12 Wheat. 460–472, 6 L. Ed. 693, it was said:

"Even in the highest crimes, those who are present, aiding and commanding, or aiding and abetting, are deemed principals; and if absent, in treason and misdemeanors they are still deemed principals," etc.

Section 5132 of the Revised Statutes, a provision of the former bankruptcy act, provided for punishment for various acts done by—

"every person respecting whom proceedings in bankruptcy are commenced, either upon his own petition or upon that of a creditor."

Concerning this statute, Judge Dillon made the following observation in United States v. Bayer, 4 Dill. 407–410 (Fed. Cas. No. 14,547):

"It is not necessary to decide the main proposition relied on by the learned counsel for the defendants, which is that under section 5132 no person, except the one respecting whom proceedings in bankruptcy are commenced, can commit, or be punished for, the acts therein made criminal. Without intending to determine the soundness of this position, I must say that the result of the argument left my mind with a decided impression against it. It is true that the statute only mentions the debtor or bankrupt; but it is a statutory misdemeanor only that is created, and the general principle of the law is that all procurers and abettors of statutory offenses are punishable under the statute, although not expressly referred to in the statute. Bishop on Statutory Crimes, 136; Commonwealth v. Gannett, 1 Allen (Mass.) 7, 79 Am. Dec. 693; United States v. Harbison, 13 Int. Rev. Rec. 118, Fed. Cas. No. 15,300 (Judge Emmons); and cases cited infra. Moreover, it has been several times adjudged, upon full consideration, that it is immaterial that the aider and procurer is himself disqualified to be the principal actor in the offense by reason of not being of a particular age, sex, condition, or class. State v. Sprague, 4 R. I. 257; Boggus v. State, 34 Ga. 275; Rex v. Potts, Russ. & Ry. Crown Cases 332; 1 Bishop on Crim. Law, 627, 629."

In State v. Sprague, 4 R. I. 257, Chief Justice Ames observed concerning a statute providing for punishment of a woman for concealment of the birth of a child:

"There is nothing then at least, in the nature of an offense merely, because described as one which must be committed by one person, or by a person of a certain sex, or in a certain relation, which renders it at least, if a felony, impossible to be committed by one even as a principal in the second degree, or which renders conviction of it impossible, under an indictment charging that person 'as present, aiding,' etc., that is properly so charging him and upon proof supporting that charge."
See, also, 2 Am. & Eng. Encyc. of Law, 32.

There is no serious difficulty then in the conclusion that, although section 29b requires as a principal offender a bankrupt, it is applicable not only to a bankrupt, but also to all persons who unite with the bankrupt as participants in the act which is made an offense by the statute.

Other provisions of the bankruptcy act support this view.

In defining the jurisdiction of the courts of bankruptcy, it is provided that they may, under chapter 2, § 2, subd. 4 (U. S. Comp. St. 1901, p. 3421)—

"arrest, try and punish bankrupts, officers, and other persons, and the agents, officers, members of the board of directors or trustees, or other similar controlling bodies, of corporations for violations of this act, in accordance with the laws of procedure of the United States now in force, or such as may be hereafter enacted, regulating trials for the alleged violation of laws of the United States."

Chapter 1, § 1, subd. 19:

"Persons' shall include corporations, except where otherwise specified, and officers, partnerships, and women, and when used with reference to the commission of acts which are herein forbidden shall include persons who are participants in the forbidden acts, and the agents, officers, and members of the board of directors or trustees, or other similar controlling bodies of corporations."

The term "participants in the forbidden acts" seems an appropriate expression designed to cover persons who join with a bankrupt in the commission of the offenses created by chapter 4, § 29, and framed in view of the rule that those who are present aiding, commanding, or abetting are deemed principals. See U. S. v. Gooding, 12 Wheat. 472, 6 L. Ed. 693.

In an act to codify, revise, and amend the penal laws of the United States, approved March 4, 1909, c. 321, 35 Stat. 1088 and to go into effect January 1, 1910, it is provided:

"Sec. 322. Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces or procures its commission, is a principal."

This section apparently is declaratory of the existing rule. But we need not further consider the question of the commission of offenses under section 29b by persons other than the bankrupt. The principal argument is directed to the point that a corporation cannot be guilty of the offense created by section 29b. In Philadelphia, Wilmington & Baltimore Rd. Co. v. Quigley, 21 How. 202, 16 L. Ed. 73, arguments similar to those here advanced were considered in their civil aspect, and were rejected for reasons which seem applicable as rules of corporate responsibility, whether civil or criminal, and to be in accordance with the decisions in Cohen v. United States, 157 Fed. 651, 85 C. C. A. 113, and U. S. v. MacAndrews & Forbes Co. (C. C.) 149 Fed. 834. See New York Cent. R. R. v. U. S., 212 U. S. 481, 29 Sup. Ct. 304, 53 L. Ed. ——.

Other points argued do not seem of such importance as to require special consideration in this opinion.

Demurrers overruled.

170 F.—8
In re OTTO F. LANGE CO.
(District Court, N. D. Iowa, E. D. May 10, 1909.)

No. 591.

1. Bankruptcy (§ 311*)—Preferences—"Surrender."
The word "surrender," as used in Bankr. Act July 1, 1898, c. 541, § 57g, 30 Stat. 560 (U. S. Comp. St. 1901, p. 3443), providing for the surrender of preferences, includes a voidable preference of which a creditor is deprived by the judgment of a court at the suit of the trustee as well as a surrender by voluntary act.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 499; Dec. Dig. § 311.*]

For other definitions, see Words and Phrases, vol. 8, pp. 6819-6821.]

2. Bankruptcy (§ 328*)—Preferences—Proof of Claims—Time.
Where a preferred creditor is compelled at the suit of the trustee to surrender a voidable preference, it is entitled after judgment to have its claim proved and allowed against the estate before it is finally settled, though it is not filed or proved for such allowance within the year from the date of the adjudication prescribed by Bankr. Act July 1, 1898, c. 541, § 57n, 30 Stat. 561 (U. S. Comp. St. 1901, p. 3444), for the filing of general claims.

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

Where a bank took a mortgage to secure the indorsement of a corporation's note by its president and the corporation became bankrupt, the indorser being entitled to subrogation to the rights of the bank to the extent of so much of the debt as he or his property should discharge, as provided by Bankr. Act July 1, 1898, c. 541, § 57l, 30 Stat. 560 (U. S. Comp. St. 1901, p. 3443), and to prove the claim in the bank's name in the bankruptcy proceedings against the corporation, if the bank did not, the bank was entitled to prove the entire claim against the estate, though any dividend it might receive thereon would reduce to that extent its mortgage security.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 502; Dec. Dig. § 310.*]

In Bankruptcy. On petition of the First National Bank of Dubuque, Iowa, for review of the order of the referee denying its claim against said bankrupt estate.

See, also, 159 Fed. 586.

T. J. Fitzpatrick, for petitioner.

Lacy, Brown & Lacy, for trustee.

REED, District Judge. The Otto F. Lange Company, an Iowa corporation, was adjudged bankrupt by this court November 21, 1907, upon petition of certain of its creditors filed October 30th preceding, and a trustee of the estate was duly appointed December 4th following. October 23, 1907, the bankrupt was indebted to the First National Bank of Dubuque, Iowa, upon two promissory notes of $1,000 each, dated July 18, 1907, which notes were indorsed by Otto F. Lange, individually, who was then, and at the time of the bankruptcy, the president and general manager of the bankrupt corporation. As se-

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
curity for his indorsement of such notes, Lange and his wife had made to the bank a mortgage upon their homestead in Dubuque, and on October 23d Lange paid the notes in full to the bank, which, with interest to that date, amounted to $2,030, from the funds of the Otto F. Lange Company. March 10, 1908, the trustee in bankruptcy demanded of the bank that it return to him as trustee of the Otto F. Lange Company the said $2,030, upon the ground that it was a voidable preference, and that he elected to recover the same for the benefit of the estate. The bank refused to comply with this demand, and on March 13th the trustee brought suit against it in this court to recover such alleged preference. This suit was prosecuted to final determination, and on January 22, 1909, judgment or decree was rendered in favor of the trustee and against the bank for said $2,030, with interest from October 23, 1907, and costs. February 8, 1909, the bank paid into court the full amount of said judgment, with interest and costs, and on February 9th proved its claim against the bankrupt estate upon said notes for the amount so recovered from it, filed the same with the referee on that date, and asked that it be allowed as an unsecured claim against the estate. The trustee objected to its allowance upon the ground alone that the claim was not proven or filed with the referee within one year from the date of the adjudication of the Otto F. Lange Company as a bankrupt. The referee sustained this objection, and rejected the claim; and the bank petitions for a review of this order. The single question for determination is, Was the claim of the bank proved against the bankrupt estate within the time required by the bankruptcy act?

In Re Kemper (D. C.) 142 Fed. 210, this court held that such a claim must be proved within the time prescribed by section 57n of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 561 (U. S. Comp. St. 1901, p. 3444), or it would be barred by the express provisions of that section; but it is contended on behalf of the bank that in view of the decisions of the Court of Appeals, First Circuit, in Powell v. Leavitt, 150 Fed. 89, 80 C. C. A. 43, the question should be re-examined and the Kemper Case overruled. One of the objections to the allowance of the claim in the Kemper Case was that the claimant had acted in bad faith in accepting the preference and retaining it until it was deprived thereof by the judgment of the court, and there was testimony tending to support that contention. The decision, however, was not made to rest upon that ground. The question is of such importance that it will be re-examined, and if the Kemper Case was wrongly decided it should not be arbitrarily adhered to.

Counsel for the bank relies mainly upon Powell v. Leavitt, above, where it is held that the phrase "liquidated by liquidation," as used in section 57n, is sufficiently comprehensive to include the judgment or decree of a court depriving a creditor of a voidable preference at the suit of the trustee; that such judgment fixes the liability of the estate to the creditor for the amount so recovered from him, and that he may prove a claim therefor within the time prescribed by section 57n. Whether the phrase will bear that interpretation may admit of some doubt.
In Keppel v. Tiffin Savings Bank, 197 U. S. 356, 25 Sup. Ct. 443, 49 L. Ed. 790, the Supreme Court held that the word "surrender" as used in section 57g denotes an enforced as well as a voluntary act, and that a creditor who has received a merely voidable preference, and in good faith retains it until deprived thereof by the judgment of a court at the suit of the trustee, may thereafter prove his debt and have it allowed. The question of limitation under section 57n was not certified to the Supreme Court in that case, and whether or not any question under that section was involved or could have been raised does not appear from the statement of the case or the opinions of the court; and it was said in the Kemper Case that the question of limitation under section 57n was not there determined.

In the recent case of Page v. Rogers, Trustee, 211 U. S. 575, 29 Sup. Ct. 159, 53 L. Ed. —, the question of preference was again considered by the Supreme Court. In that case Rogers, as trustee of a bankrupt estate, brought suit to recover from one of its creditors a voidable preference received by him in June, 1903, a few days prior to the adjudication in bankruptcy. The trustee had judgment in the District Court, and that was affirmed by the Court of Appeals. Upon appeal to the Supreme Court it was held that the decree of the lower courts should be modified for a reason not urged, and upon a question not raised, by the parties to the suit. The court said:

"All that has been said would naturally lead to an affirmance of the decree. Nevertheless, we are of the opinion that it ought to be modified, for a reason not dwelt upon in argument. Now that this litigation has come to an end, and the defendant has been compelled to surrender the preference which he received, he is entitled to prove his claim and to receive a dividend on it upon an equality with other creditors. Keppel v. Tiffin Savings Bank, 197 U. S. 356, 25 Sup. Ct. 443, 49 L. Ed. 790. In view of the fact that this suit was brought in the bankruptcy court itself, and a final decree is to be entered by the judge of that court, it is entirely practicable to avoid the circuitous proceeding of compelling the defendant to pay into the bankruptcy court the full amount of the preference which he has received, and then to resort to the same court to obtain part of it back by way of dividend. The defendant may be permitted, if he shall be so advised, to prove his claim against the estate of the bankrupt, and the bankrupt court then may settle the amount of the dividend coming to him, and the final decree may direct him to pay over the full amount of his preference, with interest, less the amount of his dividend. Solely for the purpose of accomplishing this result, the final decree in the case is reversed, and the case remanded to the District Court to take proceedings in conformity with this opinion."

This decision was 5½ years after the bankruptcy, and before the creditor had attempted, otherwise than by his defense to the suit of the trustee, to make any assertion of his claim. No reference is made to section 57n, but it is obvious from this decision, in connection with that in Keppel v. Savings Bank, that the Supreme Court does not regard the claims of creditors who have been deprived of merely voidable preference as falling within the provisions of section 57n, but as claims accruing under section 57g at the time the preference is surrendered or the creditor is deprived thereof by the judgment of the court, and that they may be proved and allowed thereafter before the estate is finally settled. Page v. Rogers was not referred to upon the argument of this case, and the opinion had not been published at the
time the suit of the trustee against this bank was determined. If it had been, or had then been called to the attention of the court, the rights of the bank under its claim against the estate might have been adjusted in the same way that a similar claim was adjusted in Page v. Rogers. It follows, therefore, that if the question of bad faith in accepting and retaining the preference, suggested in the Kemper Case, was not to be considered, that case was wrongly decided and should not be followed.

It appears that the bank holds a mortgage upon the homestead of Otto F. Lange as security for his indorsement of the notes of the Otto F. Lange Company, and the question was suggested upon the argument whether its claim could be allowed except for the amount thereof above the value of such security, as provided by section 57e. This mortgage is not upon any property of the bankrupt, but is upon the property of the indorser, and if the bank should fail to prove the claim the indorser might do so in its name and be subrogated to the rights of the bank to the extent of so much of the debt that he or his property shall discharge. Section 57i. The bank may therefore prove its entire claim against the estate, though any dividend it may receive thereon will reduce to that extent its mortgage security upon the homestead of Lange and his wife.

The conclusion, therefore, is that the claim of the bank to the extent of $2,030 against the bankrupt estate, the payment of which was recovered from it by the trustee as a avoidable preference, should be allowed as an unsecured claim against the estate of the Otto F. Lange Company, and the matter will be referred back to the referee for such allowance. It is ordered accordingly.

AMERICAN TOBACCO CO. v. POLACSEK.

(Circuit Court, S. D. New York. May 5, 1909.)

1. TRADE-MARKS AND TRADE-NAMES (§ 93*)—NATURE OF ARTICLE—EVIDENCE.
Evidence held to justify a finding that complainant's tobacco to which the trade-mark in controversy was attached was suitable for smoking and might be so used in cigarettes.
[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Dec. Dig. § 93.*]

2. TRADE-MARKS AND TRADE-NAMES (§ 93*)—INFRINGEMENT—CUSTOM.
In a suit to restrain the infringement of a trade-mark attached to tobacco, the fact that manufacturers of tobacco had customarily allowed their trade-name for a smoking brand to be used by a manufacturer of cigarettes is irrelevant, unless the infringing use has been open, notorious, and acquiesced in by complainant.
[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Dec. Dig. § 93.*]

3. TRADE-MARKS AND TRADE-NAMES (§ 93*)—INFRINGEMENT—EVIDENCE.
In a suit to restrain the infringement of a trade-name used in the sale of tobacco, the introduction of two packages of tobacco having the same name and apparently manufactured by different individuals is irrelevant

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
when unaccompanied by proof of the circumstances surrounding the origin and use of the packages.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Dec. Dig. § 33.*]

4. TRADE-MARKS AND TRADE-NAMEs (§ 84*)—DESTRUCTION—CUSTOM.

A valid trade-mark cannot be destroyed by proof of a custom to disregard trade-marks generally.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Dec. Dig. § 84.*]

5. TRADE-MARKS AND TRADE-NAMEs (§ 8*)—"VIRGIN LEAF."

The trade-name attached to complainant's tobacco "Virgin Leaf" was not synonymous with "Virginia Leaf," nor was it descriptive of the tobacco used, but was an arbitrary, fanciful name intended to denote the purity of the tobacco, and was therefore a valid trade-name.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 12; Dec. Dig. § 8.*]

6. TRADE-MARKS AND TRADE-NAMEs (§ 61*)—APPLICATION OF NAME TO DIFFERENT GOODS.

A trade-name used by a manufacturer of smoking and chewing tobacco cannot be appropriated by a manufacturer of cigarettes.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 76; Dec. Dig. § 61.*]

7. TRADE-MARKS AND TRADE-NAMEs (§ 65*)—INFRINGEMENT—INTENT TO MISLEAD.

A competitor may not use a name, whether fictitious or real, a description, whether true or not, which is intended or calculated to represent to the world that his business is that of another, and by such fraudulent misstatements deplete the latter of business which would otherwise come to him.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 64; Dec. Dig. § 65.*

Misleading or false labels, see note to Raymond v. Royal Baking Powder Co., 29 C. C. A. 250.]

8. TRADE-MARKS AND TRADE-NAMEs (§ 61*)—INFRINGEMENT—INJUNCTION.

Where complainant and its predecessors for over 60 years had used the trade-name "Virginia Leaf," to designate a brand of fine-cut tobacco, and defendant used such a name in connection with his sale of cigarettes, repudiating any intent to deceive the public, but claiming his use of the word to be a substitute for "Virginia" and descriptive of the tobacco of which the cigarettes were made, complainant was entitled to a preliminary injunction, defendant being relegated to his right to use the word "Virginia" instead of "Virgin."

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 76; Dec. Dig. § 61.*]

On Motion for a Preliminary Injunction.

John Hall Jones, for complainant.

Charles Dushkind, for defendant.

COXE, Circuit Judge. The bill alleges, and the affidavits sustain the allegation, that for over 60 years the complainant and its predecessors, from whom it derives title, had used as a trade-mark the words "Virginia Leaf" to designate a brand of fine cut tobacco, suitable for smoking and chewing, manufactured by them.

In 1863 David H. McAlpin, who founded the copartnership of D. H. McAlpin & Co., bought the trade-mark of John Cornish who

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep'y Indexes
originated it and transferred it and the good will of the business to the said firm. During the same year the package in which the tobacco was sold was altered and a gold tobacco leaf was added, interposed between the words "Virgin" and "Leaf." In this form the trade-mark was used by McAlpin & Co. and by the complainant, to whom it was transferred in 1901, until the present day. Thus for 46 years the words "Virgin Leaf" with a pictorial representation of a tobacco leaf between the words, has been used to designate the tobacco manufactured by McAlpin and, since 1901, by the complainant. Large sums were spent in advertising "Virgin Leaf" until it became well known and popular and was bought and sold under this name alone by dealers and consumers. A person desiring this brand had only to ask the salesman for "Virgin Leaf" and he would be furnished the McAlpin brand. It is alleged that this tobacco is not only suitable for chewing and smoking but that it may be rolled into cigarettes. In short, the complainant and its predecessors have for over half a century enjoyed the uninterrupted, exclusive and undisturbed use of the trade-mark "Virgin Leaf" to designate the tobacco manufactured by them until it acquired a significance synonymous with the name of the maker. "Virgin Leaf" meant McAlpin's tobacco and nothing else.

The defenses are: First: That the complainant's trade-mark has always been used to designate chewing tobacco and has never been used in connection with cigarettes. Second: That it has long been the custom in the tobacco business to use the same name for tobacco in its various forms when made by different manufacturers. For instance, if A uses the name "Oriflamme" in connection with smoking tobacco B may with propriety use the same name to designate his chewing tobacco, C to designate his cigarettes and D to designate his cigars. Such is the alleged custom. Third: That "Virgin Leaf" means "Virginia Leaf" and the two names are used synonymously to indicate tobacco grown in the state of Virginia.

I think the weight of testimony is to the effect that though the complainant's tobacco is not used for cigarettes it is suitable for smoking purposes and is so used. It may be rolled into cigarettes, though the proof that this has been done, except in sporadic instances, is most unsatisfactory. As to the second defense—assuming that such testimony as is presented by the defendant would be sufficient, in any circumstances, to establish a custom, it is manifest that the mere fact that manufacturers of tobacco have allowed their trade-names for a smoking brand to be used by manufacturers of cigarettes is of no relevancy whatever unless it be shown that the infringing use was open, notorious and acquiesced in by the owner of the mark. If on the other hand he knew nothing of the infringement or had granted a license to use the mark in a restricted form the proof is equally ineffectual.

The introduction of two packages of tobacco having the same trade-name and apparently manufactured by different individuals, is absolutely of no relevancy whatever unaccompanied by proof of the circumstances surrounding the origin and use of the respective packages. For illustration take the trade-name "Recruit." Two packages
are submitted, one containing "Recruit granulated for pipe and cigarette," the other "Recruit, little cigars." There is no proof, save a declaration printed on one of the packages as to who was the manufacturer of either. Let us assume that John Doe manufactured the granulated smoking tobacco and that it was made prior to the appearance of the little cigars. Who first used the word "Recruit"? If it were John Doe, did he use it long enough to establish a trade-mark? Did he have a right to use it? Did he relinquish that right? Were the little cigars made with his knowledge and consent? All of these questions must be answered in favor of the defendant's contention before he would be even in a position to offer the exhibits in evidence as tending to establish a custom. But to my mind the contention that a valid trade-mark can be destroyed by proof of a custom to disregard trade-marks generally is wholly without merit. I suppose it will be conceded that the right of the owner of a valid patent to proceed against an admitted infringement cannot be defeated by proof that there is a well-known custom to infringe patents by those engaged in manufacturing devices covered thereby. It is probable that an offer to prove such a custom would not proceed far beyond its rudimentary stage. The short answer to such a supposed defense is that the patentee has never waived any of his rights, that his patent is valid and the infringement admitted. He cannot be deprived of his right to a decree because other inventors have permitted their patents to be infringed with impunity. The same principle should apply to trade-marks. The fact, if it were true, that others in the same business have allowed their marks to be infringed should not be permitted to destroy a trade-mark which for 60 years has designated the owner's business and has been uniformly respected by the trade.

The testimony fails to establish the third defense. "Virgin Leaf" is not synonymous with "Virginia Leaf" and is not descriptive of the tobacco used. It is an arbitrary fanciful name intended to denote the purity of the tobacco. If the defendant is not seeking to avail himself of the reputation which attaches to the complainant's tobacco, if, as he says, he only wishes the advantages which flow from the use of Virginia tobacco, he has only to substitute "Virginia" for "Virgin" and the complainant will have no cause for complaint.

It would seem therefore, that the only question worthy of debate is the one suggested by the first defense. Can the trade-mark of a manufacturer of smoking and chewing tobacco be appropriated by the manufacturer of cigarettes? I incline to the opinion that it cannot be. A trade-mark is a guaranty that the goods to which it is attached are made by its owner. If the owner has a high character for honesty, good workmanship and fair dealing his mark stands for all of these qualities. Those who have been accustomed to his goods see his mark and buy, knowing that they will not be defrauded. Whether a manufacturer confines himself to smoking tobacco, chewing tobacco or cigarettes, he is still in the tobacco business just as one is in the clothing business whether he makes coats, waistcoats or trousers, just as one is in the whisky business whether he makes Rye or Bourbon. A consumer who believes in McAlpin's tobacco, seeing "Virgin Leaf" cigarettes on the market, will naturally think that they are the product
of the McAlpin factory, precisely as if "D. H. McAlpin & Co." had been printed on the package.

The precise question was decided in the case of Carroll v. Ertheiler (C. C.) 1 Fed. 688. The complainant had adopted the word-symbol "Lone Jack" to sell smoking tobacco manufactured by him. The defendant was enjoined from selling "Lone Jack" cigarettes, the court observing:

"Cigarettes consist of smoking tobacco, similar in all respects to that used in pipes. The circumstance that a longer 'cut' than that commonly used in pipes is most convenient for cigarettes is not important, nor that the tobacco is smoked in paper instead of pipes. It may be used for either purpose, and is all embraced in the term 'smoking tobacco.' We do not believe the public or the trade draw such a distinction as the defendant sets up."

The right which every man possesses to have his business protected is well expressed in the case of Levy v. Walker, L. R. 10 Ch. D. 447, as follows:

"You must not use a name, whether fictitious or real—you must not use a description, whether true or not, which is intended to represent, or calculated to represent, to the world that your business is my business, and so, by fraudulent misstatement deprive me of the profits of the business which would otherwise come to me."


The logic of the situation may be briefly stated. Either the defendant is endeavoring to profit by the reputation of McAlpin's tobacco or he is not. If it be true that he is making this attempt he should be stopped in limine, if, on the other hand, he is only selling his goods on their merits he does not need the same trade-mark as the complainant.

To continue its use will only serve to increase the confusion which is injurious to both, assuming that both are desirous of disposing of their tobacco on its merits.

The motion is granted.

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3. POST OFFICE (§ 23*)—MAIL—DELIVERY—ADDRESSEE'S AGENT.

Delivery of a letter by the postal authorities to the agent of the addressee terminates the government's authority over it.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 42; Dec. Dig. § 23.*]

4. POST OFFICE (§ 43*)—MAIL—STATUTES—APPLICATION.

Rev. St. § 3892 (U. S. Comp. St. 1901, p. 2657), makes it an offense for any person to take any letter out of the post office of the United States, or which has been in any post office, before delivery to the addressee, with a design to obstruct the correspondence, or to pry into the business or secrets of another, or to secrete or embezzle the same. A postmaster, having written, stamped, and deposited a letter in the mail before it was transported, withdrew it and delivered it to defendant, who agreed to take it, with other mail, to the addressee; but defendant, instead, secreted or destroyed the letter. Held, that the postmaster's withdrawal of the letter terminated the government's authority over it, and that its subsequent destruction constituted no offense.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 59; Dec. Dig. § 43.*]

On Motion by Defendant for Peremptory Instructions for Verdict in His Favor.

O. D. Street, U. S. Atty.
Shelby S. Pleasants, for defendant.

HUNDLEY, District Judge. In this case the defendant is indicted for an alleged violation of section 3892 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 2657). This statute makes it criminal for any person to take any letter out of a post office of the United States—or which has been in any postoffice of the United States before it has been delivered to the person to whom it was directed—with a design to obstruct the correspondence or to pry into the business or secrets of another, or to secrete or embezzle the same. The language of this statute is very broad, and is sufficient to cover the secretion or embezzlement of a letter before it has reached the addressee, although it may have been rightfully delivered by the postal authorities.

The facts of this case are undisputed so far as the delivery of the letter is concerned. Mr. Elkins, according to the evidence, was postmaster at Mud Creek, Ala. The letter upon which the offense is predicated in the indictment was written by Elkins to one Hunter, who lived and received his mail at the Mud Creek post office, and said letter was addressed to Hunter at Mud Creek, Ala. The defendant, Bullington, called upon Elkins and told him that there was a letter for Hunter—which was a different one from the one upon which the offense is based—written by Bullington's firm at Huntsville, Ala., which was in the post office, and which contained some contracts which Hunter was to execute to and with the defendant. The defendant requested Elkins, the postmaster, to permit him to take said letter from his firm containing the contracts and carry it up to Hunter, to whose house he was going, in order to save the defendant time in transacting his business. The postmaster agreed to do this, and further stated to the defendant that there was other mail

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
in the office for Hunter, and asked the defendant to take this mail along and deliver it. The defendant agreed to do this, and before he left with the mail the postmaster, Elkins, then himself wrote a letter to Hunter, which he stamped with a postal stamp, and also placed a postage stamp upon it, which he canceled. He then took this letter, along with the letter which the defendant had requested, and also other letters for Hunter, and delivered them to the said defendant, who had promised to carry them and deliver them to Hunter. This letter from the postmaster, Elkins, to Hunter, the defendant failed to deliver, but secreted or destroyed the same. This act of the defendant is the basis of the prosecution in this case.

On these facts the question submitted is: Was there an offense committed under the laws of the United States? While the language of the statute is sufficiently broad to make the act, as shown by the undisputed evidence, an offense, yet this statute has always been given a reasonable construction, and has been construed in the light of the constitutional power which Congress has to enact laws upon this subject. The Constitution of the United States gives Congress the power to establish and maintain post offices, and to this provision we must look for the authority of Congress to enact this statute. Congress, of course, has ample power to protect the mails of the United States, and any letter which gets into them, from the time it is received by the postal authorities until its possession is surrendered voluntarily and rightfully to the party entitled to receive it; but then the authority and power over the letter of the United States ceases and determines. A letter must be surrendered by the postal authorities to the writer of it, if it is called for at any time before it is placed in transit. Any delivery to the writer before its conveyance by the mail ends the authority of the government over it; and the delivery of it to the rightful agent of the writer would be the same as a delivery to the writer himself. The same rule applies, and the principle is the same, when it is delivered to the addressee or his agent.

These principles were established by the earliest reported decisions construing this statute. U. S. v. Parsons, 2 Blatchf. 104, 106, Fed. Cas. No. 16,000; U. S. v. Driscoll, 1 Lowell, 303, Fed. Cas. No. 14,994; U. S. v. Thoma, 25 Int. Rev. Rec. 171, Fed. Cas. No. 16,471; U. S. v. Sander, 6 McLean, 598, Fed. Cas. No. 16,819. These cases appear to have been followed, with one exception, by practically all the federal courts which have passed upon the subject. The most thorough discussion of the question and the leading case apparently on the subject is one by the District Court for the Eastern District of Missouri, which is hereunder first cited. U. S. v. Safford (D. C.) 66 Fed. 942; U. S. v. Lee (C. C.) 90 Fed. 256; U. S. v. Huilsman (D. C.) 94 Fed. 486. The statute appears never to have been construed by the Supreme Court of the United States; and the only case reported in the Fifth circuit is the case of U. S. v. Lee, supra, decided by District Judge Newman of the Northern District of Georgia. The only case which conflicts with these authorities is the one of U. S. v. McCready (C. C.) 11 Fed. 228, which was decided in the Western district of Tennessee, and is not so late as the three last above cited authorities.
The postmaster, Elkins, being himself the writer of the letter, had a right to withdraw it from the mails, or request its withdrawal therefrom. Having withdrawn the letter, and having then given it to the defendant, Bullington, the latter became the agent of the postmaster, Elkins, individually and not officially, and the authority of the government over the letter ceased with its delivery to Bullington. I am of the opinion, therefore, from the authorities cited supra, as applied to the facts in this case, that no offense has been committed by the defendant against the federal statutes, and that the motion to direct the verdict should be granted.

I now direct you, gentlemen of the jury, to return your verdict for the defendant.

MISSOURI PAC. RY. CO. et al. v. JONES, Circuit Attorney, et al.

(Circuit Court, W. D. Missouri. May 10, 1909.)

No. 3,465.

COURTS (§ 508*)—FEDERAL AND STATE COURTS—PRIORITY OF JURISDICTION—INJUNCTION BY FEDERAL COURT AGAINST PROCEEDINGS IN STATE COURT.

A federal court, which has entered final decrees adjudging a statute fixing railroad passenger rates unconstitutional and void as confiscatory, which decrees have not been appealed from, and reserved jurisdiction over the subject-matter to permit application for modification if conditions should change, will on a supplemental bill enjoin a circuit attorney of the state from prosecuting a suit in a state court to restrain the railroad companies affected from charging more than the statutory rate, and the purpose of which is to relegate the question of the validity of the statute.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1418–1430; Dec. Dig. § 508.*

Enjoining proceedings in state courts, see notes to Garner v. Second Nat. Bank, 16 C. C. A. 90; Central Trust Co. v. Grantham, 27 C. C. A. 375; Copeland v. Bruning, 63 C. C. A. 437.]

In Equity. On supplemental bill for injunction.

Frank Hagerman, for complainants.
Martin L. Clardy, for complainant Missouri Pac. Ry. Co.
J. L. Minnis, for complainant Wabash R. Co.
S. H. West, for complainant St. Louis Southwestern Ry. Co.
W. C. Scarritt, for complainant Chicago & A. R. Co.
Gardiner Lathrop, for complainant Atchison, T. & S. F. Ry. Co.
S. W. Moore, for complainant Kansas City S. Ry. Co.

SMITH McPHERSON, District Judge. March 8, 1909, this court by an opinion read and filed in open court declared the two-cent pas-
senger fare state statute void, for the reason that such rate was not
remunerative. Shortly thereafter decrees were accordingly entered.
That term of court has expired, and those decrees have not been modi-
ified, nor appealed from as yet, although it is said that appeals will be
taken. April 8, 1909, the defendant Jones, as circuit attorney for St.
Louis county, instituted in the state court at that place an action in
equity against all said companies, except one, to enjoin them from
putting in force a rate schedule by agreement charging any rate in
excess of two cents per mile for state business. A supplemental bill
has been filed herein, praying that defendant Jones be enjoined from
prosecuting the action in the state court.

In the decrees in this court jurisdiction was retained over the sub-
ject-matter, namely, that of rates, with the right of either party to
have the decrees modified when a changed condition should arise.
Such practice has prevailed from time immemorial, and was expressly
authorized by the Supreme Court of the United States in the great
Nebraska railroad rate case. The question now is as to whether this
court by its decrees should enjoin defendant Jones from prosecuting
the action he has brought in the St. Louis state court, and that de-
pends upon whether the subject-matter of the case in the state court
is with reference to rates.

There are many allegations in the state court petition of and con-
cerning alleged agreements by the companies, but the vice of the al-
leged agreements is because of the price per mile; and the state court
so understood it when it issued two restraining orders. The orders
follow the petition and the amendment. The two orders recite that the
railway companies are enjoined from carrying out the agreement by
combination of exacting and receiving in excess of two cents per mile
by any form of ticket or mileage book. The orders enjoin the com-
panies from carrying out any agreement as to passenger rates and from
discriminating as between passengers using the various kinds of tick-
ets.

It is apparent that the price charged is the real, substantial com-
plaint. No one understands this better than does Circuit Attorney
Jones, a defendant herein, because on his motion he has since obtained
orders dismissing the case as to three railway companies, who now
agree to charge $1.5 cents per mile, and he has filed like motions to dis-
mIss as to three other companies because they have now agreed to
charge $1.5 cents per mile, and under oath, as a witness before me, he
testified that he will dismiss the case as to all the companies whenever
they will pledge themselves to make a like charge of $1.5 cents per
mile. He thereby shows that his action is of and concerning, and
that his concern is to get, a rate of $1.5 cents per mile—in my opinion
a commendable purpose as to the strong roads, if it can be brought
about; but, if ever brought about, it must be by what is called legis-
lative action, and cannot be brought about by decrees of a court. It
is apparent, and Mr. Jones conclusively makes it appear, that he is
attempting to relitigate the question of passenger rates unless the
matter can be adjusted by compromise. The subject-matter to that
extent is the same as has been covered by the decrees of this court,
and that question can only be relitigated by an appeal to the Supreme Court of the United States, where all mistakes, if any, of this court will be corrected.

About the time the passenger statute on its face took effect a full hearing on an application for a temporary injunction was had; both sides being represented by counsel. The writ of injunction was denied, and this court ordered the companies to put in the two-cent rate pending a hearing and investigation. The right to charge more than two cents, if such right existed, was thereby, by force of this court's orders, taken from the companies. When this court by final decree declared that the two-cent rate was void, the companies were thereby restored to such rights, and to such rights only, as they formerly had, and it was the duty of this court to reinstate such status as is readily understood by those familiar with the authorities presently to be cited. Some of the companies have applied to the state Supreme Court for a writ of prohibition against the St. Louis court. That is soon to be heard. I assume that the state Supreme Court has full power to command the St. Louis court to proceed or to desist, as the Supreme Court may be advised. This court cannot do that. This court is limited in its orders over the party who brings such case, and not over the court itself. So that the restraining orders already issued by the state court will soon be under review, and full justice done by the state Supreme Court. The parties should promptly and cheerfully present themselves to that court in the prohibition case, because no one need doubt but that such a hearing will be given by that eminent court as to satisfy all parties.


The Attorney General of the state has had nothing to do with the St. Louis court case, and says that he will not have anything to do with such case. He should not be enjoined. The same is true as to the State Railroad Commissioners.

THE SEVEN BROTHERS.

(District Court, D. Rhode Island. April 9, 1909.)

1. Shipping (§ 86*).—Liability of Vessel for Torts—PUNITIVE DAMAGES.

In a suit in rem to recover for an injury done by a vessel, punitive damages cannot be awarded, although the tort was willful and malicious, where the owner of the vessel had no knowledge of or part in the injury.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 86.*]
2. SHIPPING (§ 86*)—ACTION AGAINST VESSEL FOR TORT—DAMAGES.

In a suit to recover for the destruction of a fish trap by a vessel, damages may be awarded for loss of fish resulting from the breaking of the net and interruption of the business, where there is sufficient evidence of surrounding catches to afford a reasonable basis for computation of the loss.

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

In Admiralty.

Clark Burdick and Francis I. McCanna, for libelant.
Daniel A. Colton, for claimant.

BROWN, District Judge. This is a libel in rem against the steamboat Seven Brothers, for injuries to a certain fish trap of the libelants which was located about one mile southeast of Narragansett Pier.

At the conclusion of the oral hearing the court was of the opinion that the libelants had sustained the allegations of the libel, to the effect that the steamboat Seven Brothers was deliberately and willfully run into the trap for the purpose of injuring it. There was no justification or excuse for this act. Its cause seems to have been a dispute between trap fishermen as to the location of their respective traps.

The injuries were willful and malicious, and for this reason the libelants seek punitive damages, as well as compensatory damages. As the libel is in rem, and thus in effect against the owner of the vessel, who is not proved to have had any share in or knowledge of the malicious act, punitive damages cannot be awarded. The Amiable Nancy, 3 Wheat. 546, 4 L. Ed. 456. In the opinion by Mr. Justice Gray in Lake Shore R. R. Co. v. Prentice, 147 U. S. 101, 13 Sup. Ct. 261, 37 L. Ed. 97, this doctrine is reaffirmed, and it is said with reference to the opinion in Hagan v. Providence & Worcester R. R. Co., 3 R. I. 88-91, 62 Am. Dec. 377:

"The law applicable to this case has been found nowhere better stated than by Mr. Justice Brayton, afterwards Chief Justice of Rhode Island, in the earliest reported case of the kind, in which a passenger sued a railroad corporation for his wrongful expulsion from the train by the conductor, and recovered a verdict, but excepted to an instruction to the jury that 'punitive or vindictive damages, or smart money, were not to be allowed as against the principal, unless the principal participated in the wrongful act of the agent, expressly or impliedly, by his conduct authorizing it or approving it, either before or after it was committed.' This instruction was held to be right," etc.

The evidence as to actual damage is far from satisfactory, and the libelant's estimate is grossly exaggerated. I find evidence to show actual injuries to the trap to the extent of $155. The libelant claims large damages for the loss of fish actually in the net, and for the loss of a probable catch during the period which elapsed before the net could be replaced. The evidence of other fishermen in the vicinity, as well as the fact that some four barrels of butter fish were taken from the net after the injury, affords a basis which is more than conjectural for a finding that plaintiffs were deprived of a catch of fish.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
In form the evidence is sufficient to show average catches of a large number of barrels. The difficulty with this evidence is in its obvious exaggeration. The witnesses for the Seven Brothers put the average daily catch of similar traps in the vicinity as low as from two to four barrels. As fish were actually caught by others in a similar situation, I think the testimony arises to the dignity of proof that the libelants have lost a number of barrels of fish by the enforced suspension of their fishing. The fact that the plaintiffs are unable to prove with certainty the amount of their loss should not enable the wrongdoers to escape entirely. Upon the whole evidence I am of the opinion that the sum of $200 would no more than compensate the plaintiffs for the fish lost and for the interruption of their fishing. The libelants' claim for this item amounts to upwards of $1,500; but there is no credible testimony in the case to support so large a claim.

Judgment will be entered for the libelants for the sum of $355.

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VICTOR TALKING MACHINE CO. v. BERWALD.

(Circuit Court, S. D. New York. April 22, 1909.)

CONTEMPT (§ 20*)—DISOBEDIENCE OF ORDERS OF THE COURT.

A defendant adjudged guilty of contempt in disobeying the orders of the court.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 58–62; Dec. Dig. § 20.*]

On Motion to Punish for Contempt.

Horace Pettit, for complainant.
Lamar Hardy, for defendant.

LACOMBE, Circuit Judge. The defendant is found guilty of disobedience of the court's orders, and is fined $25 for his contempt; the same payable to the United States. This small amount is imposed because he frankly admitted his offense, and upon the understanding that he will not be guilty of any future acts of disobedience. Should he offend again, the consideration which has been shown him upon this motion will be an element to be considered in fixing the amount of his punishment for such new offense.

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep'y Indexes
THOMAS et al. v. SAN PEDRO, L. A. & S. L. RY. CO.†
(Circuit Court of Appeals, Ninth Circuit. May 3, 1909.)

No. 1,612.


Civ. Code Cal. § 483, requires carriers to furnish on the inside of passenger cars sufficient room and accommodations for all passengers to whom tickets are sold for any trip, and section 484 declares that every railroad corporation shall have printed and conspicuously posted on the inside of its passenger cars its rules and regulations regarding fare and conduct of its passengers, and in case any passenger is injured on or from the platform of a car, in violation of such printed rules, the carrier shall not be responsible for damages unless it has failed to comply with section 483. Held, that under such sections, as construed by the Supreme Court of California, a passenger who voluntarily goes on the platform of a car while the train is in motion, in violation of rules properly posted, etc., as required, is not necessarily negligent, as a matter of law, precluding a recovery for injuries sustained.

[Ed. Note.—For other cases, see Carriers, Cent. Dlg. §§ 1346–1397; Dec. Dlg. § 347.*]


In an action for death of a passenger resulting from the wreck of his train due to a misplaced switch, whether decedent was negligent in going to the front platform of the car in which he was riding, after his station had been announced, and the train had slackened speed, immediately before the accident, was for the jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dlg. §§ 1346–1397; Dec. Dlg. § 347.*]

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

Action at law by plaintiffs in error, Maggie Thomas and John Thomas, her husband, brought in the United States Circuit Court for the Southern District of California, Southern Division, against the defendant in error, the San Pedro, Los Angeles & Salt Lake Railroad Company, for damages in the sum of $25,000 for the loss of their son, John Thomas, who was injured and killed in the derailment and wreck of defendant's train while riding as a passenger near Los Angeles, Cal., on March 3, 1907.

In an agreed statement of facts it was stipulated and admitted, among other things, in substance, that the defendant in error was and is a corporation organized and chartered under the laws of the state of Utah, and is and was a common carrier of passengers and freight for hire in the state of California, having its principal place of business at Los Angeles, owning, operating, and controlling a line of railroad running from San Pedro by way of Los Angeles to Salt Lake City, and extending also to Pomona; that on March 3, 1907, John Thomas purchased of defendant railway company a ticket at Pomona to travel from Pomona to Los Angeles, and that he was accepted to be transported by said company to Los Angeles as a passenger on one of its trains and in one of its passenger coaches, to wit, in the car known as a "smoker"; that as the train approached the station at Los Angeles and at a point at or near Seventh street the train left the main track and ran into an open ditch, causing the engine, tender, baggage car, and smoker to jump the track; the engine, tender, and baggage car were wrecked, and the baggage car torn away from the smoker, leaving the front platform of the smoking car, in which Thomas was riding, open and exposed; that the front end of the smoker collided with and against the boiler attached to the engine,

*For other cases see same topic & § number in Dec. & Am. Digs. 1807 to date, & Rep'r Indexes
170 F.—9
† Rehearing denied July 29, 1909.
throwing Thomas about the platform, thereby bruising and wounding him, and that he was scalded by the escaping steam, and died a short time there- 
after from the effects of the injuries received. It appears from the statement
that as the train approached the station defendant's brakeman or conductor
announced that the next stop of the train would be at defendant's Fourth
street station, the train slackened its speed, the whistle was sounded, and the
train, which had been running from 35 to 40 miles an hour, began to slow
down and reduce its speed to about 25 miles an hour, after which Thomas
and a companion left their seats, stating in the hearing of other passengers
in the car that they were going to get off at that station, and went upon the
front platform of the car, and immediately thereafter the engine of said
train struck the open switch, the train was derailed, and the wreck occurred
in which Thomas was injured, wounded, and scalded, and from which injuries
death resulted.

The cause of the engine overturning and the derailment of the smoker and
other cars was stipulated to be as follows:

"That at the said point where the said engine overturned there is a side
track leading from the main track of defendant's railroad to its freightyards,
and shortly before the said train reached said point one of the members of a
switching crew in the employ of the defendant, and employed upon an engine
engaged in switching cars in the yard of said defendant, turned the switch
controlling said side track so said switching engine could pass from said
main track to said side track; that, after said switching engine had passed
from said main track to said side track, the said switch was closed so that
trains could pass along said main track, but thereafter the employes of the
defendant in charge of said switching engine, while switching cars in said
yard, negligently and carelessly backed the said switching engine upon said
side track so close to said switch that the points of said switch were forced
partly open, so that, when the engine of the train upon which plaintiffs' said
son was a passenger reached said switch, the front wheels continued along
and upon the main track while the rear wheels were caught in the point of
said switch, causing said wheels to turn out upon the rails of said side track,
and causing said engine to overturn and the steam in the boiler thereof to
escape. That said negligence of the defendant caused said wreck; * * * that
the smoking car upon which said plaintiffs' son had been riding left the
rails of said railroad track, but was not overturned nor wrecked nor injured
to any material extent."

It appears further from the statement that East Seventh street where
the derailment occurred was 2,500 feet from the Fourth street station, where it
was stated Thomas intended to leave the train; that the printed rules of the
company were conspicuously posted at both ends of the car, which forbade
passengers from riding on the platform or steps of the cars, and were re-
quired to remain in their seats while the train was in motion.

In addition to the agreed statement of facts, Maggie Thomas, the mother,
testified that she and her husband had not been living together for the past
seven years; that he did not contribute to her support during that time;
that immediately prior to the accident the family consisted of her son, John,
who was then 23 years of age, and her daughter, a girl 22 years of age; that
her son earned from $40 to $50 per month.

After the testimony of the mother and the reading of the agreed statement
of facts, plaintiff rested, and the defendant moved for a nonsuit, which was
allowed by the court, and it was ordered that judgment be entered in favor
of the defendant. The case is here upon writ of error.

Drew Pruitt and Morton, Pruitt & Goodrich, for plaintiffs in error.
A. S. Halsted and S. M. Johnstone, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). It is
assigned as error that the Circuit Court granted defendant's motion for
a nonsuit. This motion was based mainly upon the ground that it ap-
peared from the evidence that the deceased was guilty of contributory negligence in going upon the platform of the car while the train was in motion, in violation of the rules and regulations of the company.

Whether, under the circumstances of the particular case, the injured passenger is guilty of contributory negligence, is generally a question of fact for the jury, but as the negligence of the defendant in this case and the resulting death took place in California it is contended by the defendant that the plaintiffs' right of action rests on the law of that state, and under that law the question was one of law and not of fact.

Section 483 of the Civil Code of California provides:

"Every railroad corporation must furnish, on the inside of the passenger cars, sufficient room and accommodations for all passengers to whom tickets are sold, for any one trip, and for all persons presenting tickets entitling them to travel thereon; and when fare is taken for transporting passengers on any baggage, wood, gravel, or freight car, the same care must be taken and the same responsibility is assumed by the corporation as for passengers on passenger cars."

Section 484 of the same Code provides:

"Every railroad corporation must have printed and conspicuously posted on the inside of its passenger cars its rules and regulations regarding fare and conduct of its passengers; and in case any passenger is injured on or from the platform of a car, or on any baggage, wood, gravel, or freight car, in violation of such printed regulations, or in violation of positive verbal instructions or injunctions given to such passenger in person or by any officer of the train, the corporation is not responsible for damages for such injuries, unless the corporation failed to comply with the provisions of the preceding section."

It was admitted that the defendant company provided sufficient seats in the smoking car for all passengers using the same, and that its rules and regulations as required by section 484 of the Civil Code were properly posted.

In Mitchell v. Southern Pacific R. R. Co., 87 Cal. 62, 25 Pac. 245, 11 L. R. A. 130, the plaintiff was in the smoking car attached to a train running down a steep incline leading to the bed of a river on a new and curved track. The car was derailed and overturned, and the plaintiff was injured. He testified that he had gone out upon the platform immediately before the accident in consequence of the fear that some disaster would occur; that he had no sooner reached the platform than the car was overturned and he was thrown upon the ground. The evidence of the defendant tended to show that the plaintiff had been upon the platform some minutes before the accident occurred. There was a question as to the burden of proof resting upon the plaintiff to show defendant's negligence. The case was submitted to a jury under instructions from the court upon that question, and upon the law relating to the defense that the plaintiff had been guilty of contributory negligence in going upon the platform of the car while the train was in motion. The jury returned a verdict in favor of the plaintiff. In the Supreme Court it was contended by the defendant: First, that the burden of proof was upon the plaintiff to show negligence on the part of the defendant; and, second, that the plaintiff was guilty of contributory negligence. With respect to the first question the court held that the derailment and overturning of the car were undisputed facts, and with the other circumstances the showing was suffi-
cient to place upon the defendant the burden of proving that the injury was not caused by any want of care on its part. With respect to the second question, the court instructed the jury as follows:

"If you find, from the evidence, that at the time plaintiff left his seat in the smoking car there was no imminent peril of life or limb, and no apparent danger, but that such imminent peril of life or limb, or apparent danger, arose after plaintiff took his position on the platform of the smoking car, then plaintiff cannot recover, and your verdict must be for the defendant."

This instruction was approved by the Supreme Court, and it is upon this instruction that the defendant in this case contends that under the California statute, if a passenger on a railroad train voluntarily goes on the platform of a car while the train is in motion in violation of the rules and regulations of the company, he assumes the risk of the position and cannot recover damages for injuries received. If this were the only instruction upon this phase of the case, the contention of defendant might be accepted as a correct interpretation of the statute by the Supreme Court; but the trial court gave other instructions which were also approved by the Supreme Court; among others, the following:

"If you believe that the plaintiff went upon the platform under a reasonable apprehension of a derailment of the train, and for the purpose of jumping off in case of an accident, and while there for that purpose was injured by the overturning of the car, I instruct you that his being on the platform under these circumstances was not riding or standing on the platform within the meaning of the rule which prohibits such riding or standing."

The court further instructed the jury:

"If the danger of overturning was imminent, and the plaintiff, acting upon the instinct of self-preservation, placed himself in the position which appeared to him, as a reasonable man, to be most safe, and made such choice as a person of ordinary prudence and care placed in the same situation might have made, this does not constitute negligence on the part of the plaintiff. The peril of remaining in the car or going upon the platform is to be judged by the circumstances as they then appeared, and not by the result."

From these instructions to the jury it appears that the question whether the plaintiff was guilty of contributory negligence did not depend upon the admitted fact that he had gone upon the platform of the car in violation of the rules and regulations of the company, but whether in so doing he acted under all the circumstances with ordinary care and prudence; and the Supreme Court approved the instructions of the trial court under which this question was submitted to the jury for determination. Furthermore, the Supreme Court refers with approval to the case of Buel v. New York Central R. R. Co., 31 N. Y. 319, 88 Am. Dec. 271. In that case the plaintiff seeing an approaching train, left his seat in the car and rushed to the door to escape from the danger of an impending collision between the train he was on and the approaching train. The other passengers neither saw nor had notice of the impending danger, remained in their seats, and were uninjured. The question was whether the plaintiff was guilty of contributory negligence in going upon the platform. The court refers to the facts that justified his action, but says:
"At all events, it was for the jury and not the court to say whether plaintiff's conduct, in view of the circumstances, was rash or imprudent or amounted to negligence."

The court further says:

"The statute was intended to prevent the imprudent act of standing or riding on the platform, but not to absolve railroad companies from responsibility for every injury which might happen at that place when a passenger in passing over it, while justifiably entering or leaving the cars."

To the rule of the company that passengers are not allowed to ride on the platform, and are required to remain in their seats while the train is in motion, there are therefore necessarily certain exceptions which custom has sanctioned, and which have become admittedly reasonable and proper under certain circumstances. Passengers are permitted to pass from one part of a car to another while the train is in motion in going to and from the lavatory and closet, and they are invited to pass from one car to another while the train is in motion in going to and from the dining car. It is also usual for passengers to prepare to leave their car before the train reaches the station at the place of destination, and they are permitted to proceed towards and sometimes upon the platform of the car for that purpose while the train is still in motion. It is therefore manifest that this rule is subject to the qualification that a passenger may leave his seat in a car while the train is in motion and go upon the platform of the car if under all the circumstances such action is prudent and careful, and whether it is so or not is a question of fact for the jury.

In Railroad v. Pollard, 22 Wall. 341, 22 L. Ed. 877, the evidence for the plaintiff showed that the defendant's train, on which the plaintiff, Mrs. Pollard, was a passenger, was approaching the depot at Jersey City. Mrs. Pollard was standing up in the section which her traveling party had occupied, with her back to the seat in which she had been sitting, engaged in fixing her little girl's hair preparatory to leaving the car. The train was moving slowly and about to enter the depot, and passengers were getting out and off. There was then a jerk, or lurch, or concussion of the cars which threw Mrs. Pollard backward so that the lower part of her spine struck against the arm of the seat, causing her serious and permanent injury. The plaintiff having rested her case, the defendant moved for a nonsuit on the ground that there was such contributory negligence on the part of Mrs. Pollard, as shown by her standing in the car, her position and occupation at the time of the accident, as would prevent a recovery, and that there was no such negligence shown on the part of the defendant as would warrant the case to be submitted to the jury. The court refused a nonsuit, which was made the subject of an exception upon the conclusion of the case. A verdict was returned in favor of the plaintiff. In the Supreme Court the defendant assigned as errors the giving of certain instructions requested by the plaintiff and the refusal to give certain instructions requested by the defendant. The judgment of the trial court was affirmed. The syllabus of the reported case contains the following statement:
"Whether a passenger in a rail car, standing up in it when getting into the station house, at the close of a journey, but before the actual stoppage of the car, is guilty of negligence in the circumstances of the case, is a question of fact for the jury to decide under proper instructions."

In Wylde v. Northern R. R. Co., 53 N. Y. 156, the plaintiff was a passenger on a train arriving at Jersey City. On entering the depot the locomotive was detached from the train. The plaintiff arose from his seat to button his coat in preparation for leaving the car. The cars, after the locomotive was detached moved on through the depot and struck with great force the "bumper" at the end, throwing the plaintiff down and over the arm of a chair behind him, causing the injuries which were the subject of the action. The court said:

"There is no ground for imputing negligence to the plaintiff. It is probable that if he had retained his seat the injury would not have happened. He had no notice of danger, and had a right to assume that the train would be stopped in the usual manner. The train had reached its destination, and the plaintiff left his seat with a view of leaving the car as soon as the train stopped. He did as passengers usually do, and what the company must have known they were accustomed to do, and the plaintiff could not have supposed that the act was inconsistent with safety."

In Barden v. Boston, Clinton & Fitchburg R. R. Co., 121 Mass. 426, the plaintiff was a passenger in one of the defendant's cars. The name of the station to which the plaintiff was going having been announced, the plaintiff left his seat and stood in the aisle preparatory to leaving it when the car should stop, and, while so standing, the car came into collision with another car, and the passenger was thrown down and injured. The defendant contended that the plaintiff was guilty of contributory negligence, as a matter of law, which would preclude his recovery. The plaintiff contended that it was a question for the jury. If on these facts the plaintiff was guilty of such negligence as matter of law as to preclude a recovery, judgment was to be entered for the defendant, but if, on the other hand, the plaintiff as matter of law was not guilty of contributory negligence, or if that question was for the jury upon the foregoing facts, then judgment was to be entered for the plaintiff. Chief Justice Gray, speaking for the court, said:

"We can have no doubt that the contract between the parties, which required the corporation to furnish the plaintiff with a seat, did not, as matter of law, oblige him to keep it from the time he first took it until the train had come to a final stop at the place of his destination; and that the question whether he was wanting in reasonable care in leaving his seat and standing in the passageway inside the closed door, after the approach of the train to the station at which he was to alight had been announced and the car had actually entered the station, and for the purpose of hastening his departure from the car, was a question of fact for the jury."

In Romine v. Evansville, etc., R. R. Co., 24 Ind. App. 230, 56 N. E. 245, the plaintiff was a passenger on defendant's train standing inside of the car looking through the window of the rear door, his hand resting against the casing of the closet door. The conductor came into the car, opened and closed the closet door quickly; plaintiff's finger slipped into the crack when the door was opened, and was crushed by the door when it was closed. With respect to the question whether the plaintiff was guilty of contributory negligence, the court said:
"Taking into consideration the mode of construction of the commodious and convenient American passenger car, and the commonly known habits of the traveling public in our railway carriages, we are unable to regard it as negligence per se for the appellant to take the position and attitude in which the conductor saw him at the time of the injury. He had a reasonable motive for placing himself where he could take note of the appearance of the country more fully than at a side window. At least, the gratification of his inclination to view the country from the rear window, if it could be done without apparent danger, was not necessarily negligence on his part. Whether or not he exercised ordinary care, which he was bound to exercise, in so standing, and in placing his hand in such position that the finger which was injured was exposed to such injury, cannot be decided as a question of law. It was a question for the jury, under proper instructions from the court."

In Lane v. Spokane, Falls & Northern Ry. Co., 21 Wash. 119, 57 Pac. 367, 46 L. R. A. 153, 75 Am. St. Rep. 321, it appeared from the evidence that, the train upon which plaintiff was a passenger having arrived at a station, the engine was uncoupled and taken by the fireman up the track a short distance for the purpose of getting water. In backing the engine down to connect it with the train, it was permitted to collide with the cars with such force as to throw the plaintiff, who was standing in the aisle of one of the coaches, to the floor, causing the injuries of which she complained. It was assigned as error in the Supreme Court that the court refused to instruct the jury as a matter of law that the plaintiff was guilty of contributory negligence because she was standing in the aisle of the car at the time the accident occurred. The court was of the opinion that to have given these instructions would have been gross error.

In Schultze v. Mo. Pac. Ry. Co., 32 Mo. App. 438, the station was announced where plaintiff was to leave the train; the whistle was blown for the station, and the train slackened its speed. Plaintiff proceeded to get out, and went on the platform and stepped down onto the second step of the platform. He then saw that the train was still in motion, and turned around to go into the car, when by a sudden jerk of the car he was thrown from the train and injured. At the close of plaintiff's evidence the defendant asked an instruction in the nature of a demurrer to the evidence, which the court overruled, and defendant excepted. The Court of Appeals said:

"It is difficult to see what act or acts of plaintiff in this case could be imputed to him as negligence. He was a passenger to Lee's Summit, and expected to get off there; the whistle was blown for this station, the train began to check, and the porter passed through the car and announced the station. There certainly was nothing careless or unreasonable in the conduct of plaintiff, in preparing to get off of the train. While he might have remained in his seat until the train came to a standstill at the depot, his approaching the door and platform in the manner stated in his evidence certainly was not such contributory negligence as to disprove the cause of action stated in his petition."

At the time of this accident, section 800 of the Revised Statutes of Missouri of 1879 provided substantially as do the statutes of California, that, in case any passenger on any railroad train should be injured while on the platform of the car in violation to the printed regulations posted up at the time in a conspicuous place inside of the passenger car then in the train, such company should not be liable for the injury. Notices as required by this statute were posted inside
the car forbidding passengers to stand on the platform. It was con-
tended on the part of the defendant that under this statute it was neg-
ligence per se for the plaintiff to stand on the platform while the
train was in motion. In referring to this defense, the court said:

"In our opinion, the case at bar does not fall within the spirit and object of
section 500 of the Revised Statutes of 1879. It cannot be reasonably claimed
that the plaintiff was riding or remaining on the platform of the car in the
sense condemned in this statute. As before suggested, he was induced to go
there to alight from the train by the conduct of defendant's agents and serv-
ants. The whistle signaled the station, the train checked, the porter announ-
ced the station. What might have been reasonably expected of a passenger
expecting to leave the train at that point?"

In Bronson v. Oakes, 76 Fed. 734, 22 C. C. A. 520, the plaintiff
was in the rear coach of a vestibuled train. He left the coach at night
to go to the forward end of the train, and, to facilitate his return,
left open the door of the sleeping coach in which he was ricing. The
night was dark, the vestibule was not lighted, and the train was run-
ning rapidly. On his return, in passing through the vestibule which
led to the coach in which he was riding, he supposed a dim, reflected
light from the windows of the sleeper was a light shining through the
door of the coach which he had left open, and proceeding to enter,
as he supposed, the doorway of the coach, walked through an outside
vestibule door, which was left open, fell from the train, and was seri-
sously injured. A demurrer to the complaint setting out in substance
the foregoing facts was sustained in the lower court. The Circuit
Court of Appeals, in passing upon the sufficiency of this complaint,
said:

"It is well settled that what constitutes negligence is a question of fact for
the jury, and it does not cease to be such although the facts are undisputed,
for that would be to deprive a suitor of his constitutional right to have the
material facts in his case tried by a jury. Whether, upon the conceded facts
in this case, the act of the defendant was negligent, is the principal and
ultimate fact in the case, and the decision of this fact, like any other disputed
fact in a case, rests with the jury, and not with the court. The question of
contributory negligence is likewise one of fact for the jury. There is no
statute or law which defines the quality of every human action, and stamps
it in advance as either negligent or prudent. The law cannot anticipate the
conduct and actions of men in all the varying and multiplied relations they
sustain to each other, and declare in advance what shall be esteemed prudent
and what negligent. The facts and circumstances of this case as they are
disclosed by the complaint differ from the facts and circumstances of any
case that ever occurred before, or any case that is likely to occur in the
future. It is manifest, therefore, that, if the court should decide as a matter
of law that these facts and circumstances do or do not constitute negligence
in law, it would be a case where the decision made the law, and not the law
the decision. And hence the doctrine is firmly established that these ques-
tions of negligence are questions of fact for the jury to determine, and not
questions of law for the court; and this is the rule where the facts are con-
ced as well as where they are disputed."

In Railroad Company v. Ives, 144 U. S. 409, 417, 12 Sup. Ct. 679,
682, 36 L. Ed. 485, the Supreme Court, referring to the province of
the court and jury in determining what acts constitute contributory
negligence, said:

"There is no fixed standard in the law by which a court is enabled to arbi-
trarily say in every case what conduct shall be considered reasonable and
prudent, and what shall constitute ordinary care, under any and all circumstances. The terms 'ordinary care,' 'reasonable prudence,' and such like terms, as applied to the conduct and affairs of men, have a relative significance, and cannot be arbitrarily defined. What may be deemed ordinary care in one case may, under different surroundings and circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury, under proper instructions from the court. It is their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men under a similar state of affairs. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered as one of law for the court."

From these and other authorities that might be cited it would seem that the cases in which the court will determine the question of contributory negligence as a question of law would only be where, in the judgment of all reasonable men, but one conclusion could be drawn from the conduct of the plaintiff, and that would be in a case where he had shown such a plain and reckless disregard for his own safety in an act which, concurring or co-operating with the negligent act of the defendant, was the proximate cause or occasion of the injury complained of.

But the defendant in error cites a number of cases in which it is contended in effect that the conduct of the injured party was no more plainly reckless and negligent than in the present case, and that such conduct was decided by the courts to be contributory negligence as a matter of law.

The case of Hickey v. Boston & Lowell Railroad Co., 14 Allen (Mass.) 429, is cited as such a case. Hickey was a passenger riding in the smoking car of a train belonging to the defendant company. About 500 feet before coming into the station the smoking car, which was in front of the other passenger cars, was disconnected from the passenger cars, and the engine and smoking car switched off upon a side track, while the other cars continued upon the main track until they reached the station. On the occasion of the accident, before the smoking car was uncoupled from the passenger cars, Hickey left the smoking car, and with other passengers stepped on the front platform of the front passenger car for the purpose of riding into the station in that position. He went from the smoking car in order to avoid the inconvenience and delay which would be occasioned by remaining in the smoking car. The passenger car was proceeding at the rate of about five miles an hour, and ran against the smoking car while Hickey and others were on the front platform of the passenger car. By the collision both of Hickey's legs were broken, and he soon after died. Upon the trial of the case the plaintiff offered to show, among other things, that it had been the practice for passengers in the smoking car on this train to come out of that car just before it was uncoupled and go upon the platform of the forward passenger car, and, after the smoking car and engine had been uncoupled and switched off, to ride into the station in that position; that there was an express permission and consent to the practice and custom by the conductors and brake-
men, but only an implied one from the superintendent and directors of the road. The court held that the evidence was not material or admissible. Upon this ruling the plaintiff did not go to the jury and the case was reserved for a full court for a nonsuit to be entered if the ruling was correct. In the Supreme Judicial Court of Massachusetts the ruling of the trial court was affirmed and the nonsuit entered. It appears from the opinion of the court and the facts stated that if the deceased had remained in the smoking car he would have been switched off on the side track and finally carried to the rear end of the passenger car. To avoid this delay, he left the smoking car and took an exposed position on the platform of the passenger car in an eager desire to be first in and to arrive in the station at the front of the train rather than at the rear of the train. The safety of a person riding on the platform of the front passenger car depended at that time upon the engine and smoking car getting promptly and successfully switched away onto the side track, so that the passenger car could pass on to the station. In case of delay or any trouble with the switching, there was great danger of a collision between the forward passenger car and the smoking car. There was therefore, for one riding on the forward platform of the passenger car, good cause for a well-grounded apprehension of danger, and the disregard of this danger was clearly negligence. In passing upon this question, the court said:

"If sufficient and suitable provision be made within the car for all passengers, the managers of the train are not under obligation to restrict them to their proper places, nor to prevent them from acts of imprudence. If they voluntarily take exposed positions, with no occasion therefor, nor inducement thereto, caused by the managers of the road, except a bare license by non-interference, or express permission of the conductor, they take the special risks of that position upon themselves."

Aside from the negligence of the deceased in taking the special risks of an exposed position on the platform of the car, which under the circumstances was obviously dangerous, he did so, as the court said, "with no occasion therefor, nor inducement thereto caused by the managers of the road." In this last respect, if not in the former, the case differs from the case before the court, where the question as to the sufficiency of the inducement to justify the deceased in going upon the platform of the car at the time he did was a question of fact for the jury.

In the cases of the Memphis & Little Rock Ry. Co. v. Salinger, 46 Ark. 528 (two cases), Salinger and Goldberg, who were passengers, left their seats in the ladies' car of defendant's train and went out on the platform to smoke. They were warned by the brakeman and also by the conductor that it was dangerous to ride there, but they replied that they would go inside as soon as they had finished their cigars. While standing on the platform as the train was going over a bridge, the express, baggage, smoking, and emigrant cars broke through the bridge and turned over, either completely or partially. Salinger and Goldberg were standing on the platform between the ladies' car and the emigrant car, and were killed in the wreck. Suits were brought against the railroad company by personal representatives of the deceased-
ed to recover damages. In the trial courts the two cases were submitted to juries under instructions as to the contributory negligence of the deceased passengers. The Supreme Court, in passing upon these instructions, said:

"It is contributory negligence for a passenger to remain on the platform of a car propelled by steam when there is no reasonable excuse for so doing, and after he has been specifically warned of his danger."

The rule of this case, based, as it is, upon the passengers' reckless disregard of a specific warning of danger, is not applicable to the present case.

In Scheiber v. Chicago, St. P., M. & O. Ry. Co., 61 Minn. 499, 63 N. W. 1034, the plaintiff, riding on defendant's train, had gone on the platform of the passenger car and down on the steps as the train approached the station where he was accustomed to alight. He was led to believe that the train was going to stop, but, instead of stopping, steam was suddenly put on, the train gave a jerk, and he was thrown from the train and seriously injured. It appears that the train was running from 15 to 25 miles per hour at the time of the accident to the plaintiff. The trial court at the close of the evidence instructed the jury to return a verdict for the defendant, and it was so returned. The Supreme Court of Minnesota, in reviewing the case, said:

"It is not negligence per se for a passenger in a railway car, as it approaches a station to leave his seat and go to the door of the car in order to alight when it stops; neither is it such negligence, under all circumstances, for him to ride on the platform, or go upon it before the car stops for the purpose of getting off when it does stop, for there may be cases where from necessity, or by the express or implied invitation of those in charge of the train, a prudent man would do so; but in the absence of such facts it is such negligence. *

"There was neither necessity nor invitation, direct or implied by the defendant, to justify him in standing upon the steps of the car, which was approaching the station at a dangerous rate of speed."

Without referring to all the cases cited by the defendant, it is sufficient to say that upon careful examination of the facts of each case it is found that they are to be distinguished from the case at bar. They do hold, as said in Kentucky Central Railroad Co. v. Thomas' Adm'r, 79 Ky. 160, 42 Am. Rep. 208, that where the plaintiff himself has so far contributed to the misfortune by his own negligence or want of ordinary or common care and caution, and but for such negligence or want of ordinary care or caution on his part the misfortune would not have occurred, the plaintiff cannot recover, and the jury should be so instructed by the court. But they do not hold that this is a question that may be withdrawn from the jury and determined by the court as a question of law, where there is room for a difference of opinion on the part of reasonable men as to the inferences and conclusions which may be drawn from the admitted or proven facts. The case must be a very clear one that will justify the court in taking upon itself the responsibility of declaring as a matter of law that the plaintiff has been guilty of contributory negligence. As said by Chief Justice Cooley in Detroit & Milwaukee Railroad Co. v. Van Steinburg, 17 Mich. 99, 119:
"If the danger depends at all upon the action of any other person under a given set of circumstances, the prudence of the party injured must be estimated in view of what he had a right to expect from such other person, and he is not to be considered blamable if the injury has resulted from the action of another which he could not reasonably have anticipated. Thus the problem is complicated by the necessity of taking into account the two sets of circumstances affecting the conduct of different persons, and is only to be satisfactorily solved by the jury placing themselves in the position of the injured person, and examining those circumstances as they then presented themselves to him, and from that standpoint judging whether he was guilty of negligence or not. It is evident that such a problem cannot usually be one upon which the law can pronounce a definite sentence, and that it must be left to the sifting and determination of a jury."

In this view of the law we cannot say that the conduct of the deceased in the present case was so clearly reckless and negligent as to make the question of his alleged contributory negligence one of law. We think reasonable men may differ upon that question, and that it is, therefore, a question of fact for the jury under proper instructions.

The judgment is reversed.

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PACIFIC TELEPHONE & TELEGRAPH CO. v. PARMENTER.

(Circuit Court of Appeals, Ninth Circuit. May 3, 1909.)

No. 1,640.

1. TELEGRAPHS AND TELEPHONES (§ 15*)—POLES—MAINTENANCE.

Where a telephone company placed its poles, wires, and appurtenances along a county road where the public was accustomed to travel, it was bound to exercise care to maintain them in a reasonably safe condition.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 9; Dec. Dig. § 15.]*

2. NEGLIGENCE (§ 15*)—CONCURRENT OR SUCCESSIVE NEGLIGENCE.

If the concurrent or successive negligence of two persons combined result in an injury to a third person, he may recover of either or both, neither being able to interpose the defense that the prior or concurrent negligence of the other contributed to the injury.

[Ed. Note.—For other cases, see Negligence, Dec. Dig. § 15.*]

3. TELEGRAPHS AND TELEPHONES (§ 15*)—INJURIES—CONCURRENT NEGLIGENCE—JOINT OR SEVERAL LIABILITY.

A telephone company negligently maintained a telephone pole along a county road for 15 years and until the part imbedded in the ground had become decayed. The wire which had been used to strengthen the pole had been cut and not replaced, and as plaintiff was driving along the road a third person cut a tree on adjoining land which fell against the wires, putting a strain on the pole, which broke off at or near the surface of the ground and fell on plaintiff, causing the injuries complained of.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Dec. Dig. § 15.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
4. **Telegraphs and Telephones (§ 20*)—Defective Poles—Injuries to Travelers—Negligence—Question for Jury.**

In an action for injuries to a traveler by the fall of a defective telephone pole maintained along a county road, whether defendant telephone company was negligent in failing to maintain the pole in a safe condition held for the jury.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 13; Dec. Dig. § 20.*]

5. **Negligence (§ 136*)—Question for Jury.**

Negligence must be submitted to a jury as a question of fact, not only where there is room for difference of opinion between reasonable men as to the existence of the facts from which it is proposed to infer negligence, but also where there is room for such difference as to the inferences which might be drawn from conceded facts.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277–326; Dec. Dig. § 136.*]

6. **Negligence (§ 136*)—Proximate Cause—Question for Jury.**

Whether negligence, if established, is the proximate cause of an injury, is a question of fact for the jury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 327–332; Dec. Dig. § 136.*]

7. **Telegraphs and Telephones (§ 20*)—Defective Poles—Injuries to Travelers—Instructions.**

Where a tree was felled on certain telephone wires strung along a county road, resulting in a defective telephone pole falling on plaintiff as he was traveling along the road, an instruction that it was for the jury to consider whether the falling of the tree would not have caused the pole to fall and injure plaintiff if it had been a sound timber and defendant had not been negligent in felling a defective pole to support its wires in the highway, and that, if the pole would have fallen if it had been sound, defendant would not be liable, was proper.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Dec. Dig. § 20.*]

8. **Telegraphs and Telephones (§ 20*)—Injuries—Efficient Cause—Instructions.**

In an action for injuries to plaintiff by the falling of a defective telephone pole, caused by the felling of a tree against the wires, an instruction that, if defendant telephone company was negligent, the jury must still find that such negligence was an efficient cause of the injury, to find against defendant, and, if so, defendant would be still liable, though there was another cause of the accident, was proper.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Dec. Dig. § 20.*]

9. **Trial (§ 133*)—Argument of Counsel—Curing Error—Instructions by Court.**

Plaintiff was injured by the falling of a defective telephone pole, caused by S. felling a tree against the wires. Plaintiff's counsel in argument stated that the jury should presume that S. had a right to cut the tree, as the law would never presume that a man committed a wrong. Held, that an instruction that it was not important whether S. had a right to cut the tree down, but that as a matter of law he had no right to cut the tree in a way to cause injury to the telephone line, cured any error in such statement.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 316; Dec. Dig. § 133.*]

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
In Error to the Circuit Court of the United States for the Western Division of the Western District of Washington.

This was an action at law brought by the defendant in error against the plaintiff in error to recover damages for injuries sustained by him by reason of the alleged negligence of the plaintiff in error.

The complaint alleged that defendant was a corporation organized and existing under the laws of the state of Oregon, and that it had complied with the laws of the state of Washington; that it was engaged in the business of receiving and transmitting messages by telephone and telegraph, and for that purpose had constructed and maintained a line of telephone and telegraph wires through certain counties of the state of Washington, including one leading along one of the county roads of Lewis county, where plaintiff was doing business; that for the purpose of supporting and maintaining its telegraph wires the defendant had placed large poles in the ground, upon which said wires were supported; that on and prior to the 22d day of July, 1907, the defendant had carelessly and negligently permitted one of its poles so placed in the ground at a point described in the complaint to become so rotten, worn out, and decayed that it had become dangerous and was unsafe, and by reason thereof was liable to break and fall and occasion damage and injury to any person traveling along said road; that the condition of said pole was known to defendant, and by the use of ordinary care and diligence should have been known; that its condition was not known to the plaintiff; that on July 22, 1907, while the plaintiff was lawfully traveling along said road, said telephone pole, by reason of its rotten, decayed, and dilapidated condition, broke, and just as the plaintiff was opposite the same it fell over, on and upon, with great force striking the plaintiff on the head and shoulder, breaking his shoulder bone and dislocating his shoulder, and threw the bones out of place, straining, rupturing, and permanently impairing the ligaments of his right arm and shoulder, thereby disabling the plaintiff for the remainder of his life. The employment of a physician and surgeon to properly treat the injuries sustained by plaintiff was alleged in the complaint, and his inability to perform his ordinary work as farmer and carpenter for a period of 41 days.

The answer of the defendant denied the allegation of the complaint, charging the defendant with negligence.

It appears from the evidence that the plaintiff was traveling along the county road in a one horse rig on his way home from Centralia in the state of Washington. When he reached a point opposite the pole in question, a tree which was being cut by a third party some 600 feet away accidentally fell upon the wires of the defendant’s telephone line, causing the wires to bend and sag and putting a strain upon the poles; that the strain pulled over the pole which at the time was opposite to the plaintiff as he was passing along the road. The pole broke off at or near the surface of the ground, and, falling on plaintiff, caused the injuries complained of. The pole was of cedar and was set in place in 1892. The soil in which it was placed was of a gravelly character. The evidence tended to show that the pole was rotten and decayed at the butt. One witness testified that a pole of this character in that ground had an average life of 5 or 6 years; another witness testified that the pole would last from 4 to 10 years. It appeared that the pole stood at an angle in the road, and that a guy wire which held the pole in position had been cut some time before, and no effort had been made on the part of the defendant to replace it.

At the close of the testimony the defendant moved the court to instruct the jury to return a verdict in favor of the defendant on the ground that the primary, efficient, and moving cause of the injury was the falling of the tree, and the pole, whether defective or otherwise, was simply an instrumentality in working the injuries to the plaintiff. The court denied the motion, and the case was submitted to the jury upon the evidence. The jury returned a verdict in favor of the plaintiff in the sum of $3,750 and costs. The case is here upon writ of error.
E. E. Cushman, for plaintiff in error.
Hayden & Langhorne and B. H. Rhodes, for defendant in error.
Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). It was the duty of the defendant to exercise due care in maintaining its poles, wires, and appurtenances in a reasonably safe condition, having regard to the fact that the poles were placed along the country road where the public was accustomed to travel. Jones on Telegraph and Telephone Companies, § 190.

There was evidence that some of the poles of the size of the one in question, in the ground in which it was placed, would rot off in 5 or 6 years. The pole that fell had been in the ground 15 years. It was ascertained after the accident that it was rotten and liable to fall when subjected to a strain. The pole once had a guy wire to hold it in place, but this wire had been cut and had not been replaced. There was some evidence tending to show that the person who cut the tree which fell against the wire and pulled the pole down was guilty of negligence; but this fact, if established, did not relieve the defendant from liability. The rule is:

"If the concurrent or successive negligence of two persons combined together results in an injury to a third person, he may recover damages of either or both, and neither can interpose the defense that the prior or concurrent negligence of the other contributed to the injury." Thompson on the Law of Negligence, § 75.

In Johnson v. Northwestern Telephone Exch. Co., 48 Minn. 433, 51 N. W. 225, the action was for an injury caused by the falling in a street in Minneapolis of one of the poles of the defendant on which were suspended its line wires, which fall was, as alleged, due to the rotten and unsound condition of the pole (permitted to be so by the defendant's negligence), rendering it of insufficient strength to bear the weight of the wires suspended upon it. For the purpose of sustaining the pole and preventing it from falling, the defendant had extended a guy wire from the top of the pole to a building to which the other end of the wire was attached with the license of the owner of the building. The owner of the building revoked the license and required the removal of the wires from the building. The defendant failed to remove the wires, and thereupon the owner of the building cut them, and the pole, deprived of the stay afforded by the guy wires, broke off near the ground and fell into the street, injuring the plaintiff. At the close of the evidence the trial court directed a verdict for the defendant upon the apparent assumption that between the negligence of the defendant and the injury of the plaintiff there intervened an independent, adequate cause of the injury, to wit, the act of a third person, which it was said was what is termed in law the proximate cause of the injury. The Supreme Court held that it was a case of concurrent negligence, in which case each party guilty of negligence was liable for the result, and that the negligence of each as the proximate cause for the injury would not have occurred but for that negligence.

The facts of that case are almost identical with the facts of the present case, and the law as there stated is applicable here. The evi-

Whether the defendant was guilty of negligence in failing to maintain its poles in a safe condition under all the circumstances was a question of fact for the jury. The question of negligence must be submitted to the jury as one of fact, not only where there is room for differences of opinion between reasonable men as to the existence of the facts from which it is proposed to infer negligence, but also where there is room for such difference as to the inferences which might be drawn from conceded facts. Shearman & Redfield on Negligence, § 54.

It was also a question of fact for the jury to determine whether such negligence, if established, was the proximate cause of the injury. As stated by the Supreme Court of the United States in Milwaukee, etc., Railway Co. v. Kellogg, 94 U. S. 469, 474, 24 L. Ed. 256:

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

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

The refusals of the court to give certain instructions requested by
the defendant are assigned as error. It will not be necessary to re-
view these requested instructions. They related to the degree of care
required of the defendant, and the element of negligence entering into
its liability in maintaining its line of poles. They instructed the jury
that the defendant would not be negligent in assuming and acting on
the assumption that no one would fell a tree upon its telephone line
so as to break the line or pole; that the verdict should be for the
defendant if the jury believed from the evidence that the pole which
fell, although old and rotten, was so placed that it would not have
fallen into the road and upon the plaintiff but for the tree falling upon
the wires of the line. There were also requested instructions relating
to the question of proximate and remote cause, and independent and
intervening and controlling causes. It is manifest that some of these
instructions were not proper and should not have been given. On the
other hand, it appears that the court gave such instructions as were
proper in view of the evidence in the case. Among other instruc-
tions, the court gave the following:

"It is a fact that the cutting down of the tree, the contact of the tree with
the wires, precipitated the falling of the pole, and that was therefore a
proximate cause of the injury to the plaintiff; it was the efficient cause.
But where an injury is suffered and a combination of circumstances has
brought about that injury, that occurrence, so that here is more than one
efficient cause, and if one of those efficient causes was a wrongful act, then
the injured person has a right to claim compensation from that wrongdoer,
even though his wrongful act, or his negligence in combination with other
acts without which the injury would not have happened, produced the result.
"It will be for the jury to consider in this case whether the falling of the
tree would not have caused the pole to fall and injure the plaintiff if the pole
had been a sound timber, and if there had been no negligence on the part of
the defendant in the case with respect to suffering that pole in a defective
condition to support its wires there by the highway.

"If the pole had been sound and safe, as it should have been, and the de-
fendant guilty of no negligence in the matter, and still it would have fallen
by reason of the falling of the tree upon the wires, there is no liability on
the part of the defendant. If, however, you find that there was negligence
on the part of the defendant with respect to that pole, and that the injury
would not have happened by reason of the cutting down of the tree—if the
defendant had been free from the negligence charged in this complaint—then
you will be justified in finding that the negligence of the defendant was a
concurring cause which would render the defendant liable for consequential
injuries to the plaintiff.

"The jury should take into account all that has been proved by the evidence
with respect to the size and weight of the pole and its condition of soundness
or unsoundness, the support which it had by being connected in a line with
the wires, by the wires, any defect which the evidence shows by reason of the
absence of a guy wire, the length of time that had elapsed after the pole

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became in that condition, so as to judge of whether there was carelessness or negligence on the part of the defendant; and you are to judge from a consideration of the facts proven whether there was negligence; whether there was that degree of disregard of the conditions of this property which constitutes negligence and the omission of duty on the part of the defendant under all the circumstances. If there is no negligence, there is no liability, and the plaintiff cannot recover.

"If there was negligence, it is still a question of whether that negligence was an efficient cause of the injury; if so, the defendant is liable, notwithstanding that there was another cause."

We think these instructions correctly defined the law applicable to the case.

We have carefully considered the exceptions to the testimony admitted by the court over defendant's objections, and find no error to the prejudice of the defendant. Counsel for plaintiff in his argument to the jury, referring to the tree which fell upon the wires and which appears to have been cut down by one Sewall, said:

"If Mr. Sewall cut that tree down, you are to presume that he had a perfect right to do so. The law will never presume that a man is committing a wrong."

To this statement counsel for the defendant excepted, and requested the court to instruct the jury to disregard it. This the court did in its instruction, when it said:

"It is not important in this case whether Mr. Sewall had a right to cut the tree down; as a matter of law, he had no right to cut the tree down in a way to cause injury to this telephone line."

Whatever error there was in counsel's statement was manifestly cured by this instruction.

Finding no error in the record prejudicial to the defendant, the judgment of the court below is affirmed.

JENNINGS v. ALASKA TREADWELL GOLD MINING CO.

(Circuit Court of Appeals, Ninth Circuit. May 3, 1909.)

No. 1,638.

1. STATUTES (§ 228*)—ADOPTION FROM ANOTHER STATE—CONSTRUCTION.
A statute adopted from another state which has been construed by the highest court thereof is presumed to be adopted with the construction thus placed upon it.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 307; Dec. Dig. § 228.]

2. DEATH (§ 32*)—STATUTES—CONSTRUCTION.
Code Civ. Proc. Alaska, § 353, creates an action for wrongful death in favor of the personal representative of the decedent, and declares that the amount recovered, if any, shall be exclusively for the benefit of decedent's husband or wife or children when he or she leaves a husband, wife, or children him or her surviving, otherwise the amount recovered shall be administered as other personal property of the deceased person. Held, that such act having been taken substantially from the Oregon Code after its construction by the highest court of that state, in accordance

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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with such construction, it was no defense to an action for wrongful death that decedent left him surviving neither wife, children, nor family.

[Ed. Note.—For other cases, see Death, Dec. Dig. § 82.]

Construction of statutes, state laws as rules of decision in federal courts, see note to Wilson v. Perrin, 11 C. C. A. 72.]

3. DEATH (§ 95*)—DAMAGES—FAMILY.

In an action for wrongful death under Code Civ. Proc. Alaska, § 353, providing that the amount recovered should be exclusively for the use of decedent's husband, wife, or children, and in default thereof to be administered as other personal property of a deceased person, the damages recoverable for wrongful death, in the absence of wife or children, is the value of decedent's life to the estate, measured by his earning capacity, thriftiness, and probable length of life.

[Ed. Note.—For other cases, see Death, Dec. Dig. § 95.*]

In Error to the District Court of the United States for Division No. 1 of the District of Alaska.

R. W. Jennings and Z. R. Cheney (L. S. B. Sawyer, of counsel), for plaintiff in error.

Shackleford & Lyons and John Flourney, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. This action was brought by the plaintiff in error under section 353 of the Alaska Code of Civil Procedure to recover damages for the death of plaintiff's intestate caused by the alleged negligence of the defendant in error in failing to maintain in a reasonably safe condition the machinery and other appliances used in operating a hoisting apparatus in defendant's mining shaft. The case was tried before a jury. At the conclusion of the testimony defendant's counsel moved the court to instruct the jury to return a verdict for the defendant, for the reason that it was not shown that the defendant had been guilty of negligence with respect to any of the matters charged in the complaint. The court instructed the jury to return a verdict in favor of the defendant, but mainly upon the ground that there was a failure of proof that any one had suffered damage or pecuniary loss by reason of the death of plaintiff's intestate.

The case of Alaska Treadwell Gold Mining Co. v. Cheney (C. C. A.) 163 Fed. 593, involved the same accident as in this case, and we had before us in that case substantially the same evidence as in this case. We held there that the evidence of negligence on the part of the defendant was sufficient to go to the jury. The motion of the defendant to instruct the jury to return a verdict for the defendant on this ground should therefore have been denied. This leaves but the single question of damages to be determined upon this writ of error.

The evidence tended to show that decedent was a helper on a machine drill working in the bottom of the shaft, that he knew his business, looked like a healthy man, was about 24 years of age, and was earning about $3.75 per day and his board. The American Experience Tables of Mortality showing life expectancy were introduced in evidence.

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.
Joe Pazetti, a witness called on behalf of the plaintiff, testified that he knew the deceased. He was questioned as follows:

"Q. Did he have a family? A. He say so. Q. Where did he say his family was? A. He say they are in California. Mr. Cobb: We object to this line of testimony, for the reason that it is wholly irrelevant. This is not a suit brought by his family; it is brought by Mr. Jennings, as administrator of the estate. The Court: I think the objection ought to be sustained."

Section 353 of the Code of Civil Procedure of Alaska (Act June 6, 1900, c. 786, 31 Stat. 392) provides as follows:

"When the death of a person is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action, had he lived, against the latter for an injury done by the same act or omission. Such action shall be commenced within two years after the death, and the damages therein shall not exceed ten thousand dollars, and the amount recovered, if any, shall be exclusively for the benefit of the decedent's husband or wife and children when he or she leaves a husband, wife or children, him or her surviving; and when any sum is collected it must be distributed by the plaintiff as if it were unqueathed assets left in his hands, after payment of all debts and expenses of the administration, and when he or she leaves no husband, wife or children, him or her surviving, the amount recovered shall be administered as other personal property of the deceased person; but the plaintiff may deduct therefrom the expenses of the action, to be allowed by the proper court upon notice, to be given in such manner and to such persons as the court deems proper."

The Alaska Code of Civil Procedure is substantially the same as the Oregon Code of Civil Procedure, and section 353 of the Alaska Code is identical with section 381 of the Oregon Code (B. & C. Comp.), with the following exceptions: In the Alaska Code the amount that may be recovered "shall not exceed ten thousand dollars"; while in the Oregon Code the amount that may be recovered "shall not exceed five thousand dollars." In the Oregon Code it is provided that:

"The amount recovered, if any, shall be administered as other personal property of the deceased person."

In the Alaska Code there is a provision that:

"The amount recovered, if any, shall be exclusively for the benefit of the decedent's husband or wife or children, when he or she leaves a husband, wife or children, him or her surviving."

But that provision has no bearing on this case, as the deceased left no surviving wife or children. The next provision in the Alaska Code is:

"When he or she leaves no husband, wife, or children, him or her surviving"—that is this case—"the amount recovered shall be administered as other personal property of the deceased person."

This last provision, it will be observed, is identical with the Oregon Code.

In 1898, two years before the adoption of the Alaska Code by Congress, the section of the Oregon Code under consideration was brought before the Supreme Court of that state in the case of Perham v. Portland Electric Co., 33 Or. 451, 53 Pac. 14, 24, 40 L. R. A. 799, 72 Am. St. Rep. 730. In an elaborate opinion upon this statute the court refers to the construction placed upon the original Lord Campbell act
passed by the British Parliament in 1846, the incorporation of this act in one form or another into the legislation of most of the states of the Union, and the construction placed upon such statutes by the courts of the states. With respect to the beneficiaries under the Oregon act and the damages that may be recovered, the court said:

"It is next claimed that the complaint is defective because it does not show that the deceased left surviving him any heirs, legatees, next of kin, or creditors. * * *

"Under Lord Campbell's act and similar statutes, the damages recovered belong to the designated beneficiary, and are measured by the value of the life taken to the particular person entitled to the benefit of the statute; while under our statute they belong to the estate, and are coextensive with the value of the life lost, without regard to its value to any particular person. In the one case the object of the action is to recover the pecuniary loss sustained by the designated relatives, and in the other the value of the life lost, measured, as near as can be, by the earning capacity, thriftiness, and probable length of life of the deceased, and the consequent amount of probable accumulations during the expectancy of such life."

The court continues:

"It follows, therefore, that, so far as the right to maintain the action is concerned, it is immaterial whether the deceased left surviving him any relatives or creditors whatever. The right of action is given by the statute to the administrator or executor in his representatives, and is in the nature of an asset of the estate. The heirs, creditors, or distributees have no interest in the recovery on account of any right of action for the pecuniary injury sustained by them, but only by virtue of being creditors, or of kinship; and if the expense of the administration and debts of the deceased equal or exceed the assets, including the amount of the recovery, the next of kin would receive no benefit whatever from the right of action."


It is true that the two statutes are not identical as a whole, but the change in the Alaska Code from the Oregon Code makes more definite and certain the purpose of Congress to adopt the construction of the Supreme Court of Oregon for estates where the decedent left no husband, wife, or children. In such case the amount recovered should be administered as other personal property of the deceased person as provided in the Oregon statute; that is to say, the amount received should be for the benefit of the estate, and the damage to the estate would therefore be the value of the life to the estate, measured by the
earning capacity, thriftiness, and probable length of the life of the deceased.

In excluding testimony concerning the family of the deceased, the court below must have accepted the defendant's theory that the suit was brought for the benefit of the estate of the deceased; but upon the conclusion of the testimony the court held that there was a failure of proof of any damages, because it did not appear that any one had suffered loss by reason of the death of the decedent. Laying aside the inconsistency of the two rulings, we will consider the last ruling which is assigned as error. This ruling was based upon the authority of the case of Stewart v. B. & O. Railroad Co., 168 U. S. 445, 449, 450, 18 Sup. Ct. 105, 42 L. Ed. 537. In that case the action was brought in the District of Columbia against a railroad company by an administrator to recover damages for the benefit of a widow whose husband was killed in the state of Maryland through the negligence of the defendant company. In discussing the question of jurisdiction the court, referring to the differences between the statutes of the District of Columbia and the state of Maryland concerning the right of action, said:

"While in the District the nominal plaintiff is the personal representative of the deceased, the damages recovered do not become part of the assets of the estate, or liable for the debts of the deceased, but are distributed among certain of his heirs. By neither statute is there any thought of increasing the volume of the deceased's estate, but in each it is the award to certain prescribed heirs of the damages resulting to them from the taking away of their relative. * * *

"Another difference is that by the Maryland statute the jury trying the cause apportion the damages awarded between the parties for whose benefit the action is brought, while by the statute of the District the distribution is made according to the ordinary laws of distribution of a decedent's estate. But by each the important matter is the award of damages, and the manner of distribution is a minor consideration. Besides, in determining the amount of the recovery the jury must necessarily consider the damages which each beneficiary has sustained by reason of the death. By neither statute is a fixed sum to be given as a penalty for the wrong, but in each the question is the amount of damages."

The court held that the plaintiff was entitled to maintain the action in the courts of the District of Columbia for the benefit of the persons designated in the statute of Maryland. What the court said about the damages recovered not becoming part of the assets of the estate and being determined by the jury with respect to the loss which each beneficiary had sustained by reason of the death was based upon the express language of the statute of Maryland, providing that:

"In every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought."

The statute of the District of Columbia provided that:

"The damages recovered shall not be appropriated to the payment of the debts of the deceased, but ensure to the benefit of his or her family and be distributed according to the provisions of the statute of distributions."

It was the similarity of rights provided in these two statutes that entitled plaintiff to maintain an action in the District of Columbia for
the damages the wife had sustained by reason of the death of her husband in the state of Maryland. But the two statutes differ very materially from the Alaska statute. In the former the amount recovered as damages does not become part of the assets of the estate, while in the Alaska Code it does, and is administered as other personal property of the deceased person.

We are of the opinion that the construction placed upon the statutes of Maryland and the District of Columbia by the Supreme Court is not applicable to the Alaska statute under consideration. Following the construction placed upon the Oregon statute by the Supreme Court of Oregon, we are of the opinion that the case should have been submitted to the jury with proper instructions upon the evidence as to the earning capacity, thriftiness, and probable length of life of the deceased, and the consequent amount of probable accumulations during the expectancy of such life.

The judgment of the District Court is reversed.

BERWIND-WHITE COAL MINING CO. v. FIRMENT.

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


   Exceptions to the charge of the court not taken until after the jury has retired will not be considered by the appellate court.
   [Ed. Note.—For other cases, see Appeal and Error, Cent. Dlg. §§ 1611–1619; Dec. Dlg. § 272,* Trial, Cent. Dlg. §§ 254, 680.]

2. Witnesses (§ 246*)—Conduct of Judge—Examination of Witnesses.
   While a trial judge may in the exercise of a sound discretion take part in the examination of witnesses, yet where the parties are represented by competent counsel it is usually the better practice to allow them to conduct the examinations.
   [Ed. Note.—For other cases, see Witnesses, Cent. Dlg. §§ 852–857; Dec. Dlg. § 246.*]

   Where there was evidence that an employee suing for a personal injury resulting from the bursting of a steam pipe, and also his employer, the defendant, knew of a defect in the pipe two weeks before the accident, although contradicted, the question of defendant’s negligence in failing to have the pipe repaired was properly submitted to the jury.
   [Ed. Note.—For other cases, see Master and Servant, Cent. Dlg. § 1031; Dec. Dlg. § 286.*]

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

For opinion below, see 162 Fed. 758.

This is a writ of error to review a judgment of the Circuit Court, Southern District of New York, entered on a verdict against plaintiff in error, who was defendant below. The action was brought by the plaintiff to recover damages for personal injuries resulting from the

*For other cases see same topic & § number in Dec. & Am. Dlgs. 1907 to date, & Rep’r Indexes.
blowing out of a steam pipe in a boiler room on defendant's premises on Sunday, December 3, 1905.

Theall & Beam (Austin G. Fox, of counsel), for plaintiff in error.
Ira B. Wheeler, for defendant in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. The plaintiff testified that he had been in the habit of working in and about the boiler room where the explosion occurred, and that about two weeks before the accident he had assisted in making certain repairs and in putting flanges on one of the lengths of steam pipe. That at the time he noticed that there was a crack in one of the flanges extending from the outer rim down to the pipe, and that the pipe was rusty and the thread worn on both ends. That steam being then turned on through this length of pipe, it leaked a little from the flange and more from the pipe, whereupon he called attention to that fact, and they called the leak by putting gasket between the flanges, winding the pipe with brass wire, and bracing it up with a wooden brace. That on December 3d while engaged in oiling a fan outside of the boiler room, one Johnson, a machinist who was at work inside, called him to come in and help fix pipe on one of the boilers; he did so, and while at work there the blow-out or explosion occurred, he fell down, and a section of pipe was thrown against his legs, inflicting severe injuries. That he looked up and saw that the pipe had blown out from the flange, and that the flange was cracked as it was when he saw it two weeks before. A competent expert whom he called testified that a cracked flange was an element of weakness, because it would not grip the thread as a sound one would, and that under a pressure of 75 pounds—which was not unusual in this plant—it might be expected that at any time there would come a blow-out with such force as to scatter parts of the apparatus in a manner dangerous to any one near by.

Several witnesses, who testified to the occurrences of November 19th, December 3d, and December 1st, contradicted plaintiff's narrative, and there was a sharp conflict of evidence on several essential points. But the court would not have been warranted in taking the case from the jury merely because defendant's narrative of what took place did not accord with plaintiff's, and upon this appeal, with a verdict in his favor, we must assume that the jury reached the conclusion that his narrative was the correct one. Believing it to be correct, they would be justified in finding defendant negligent in failing for two weeks to substitute a sound flange for a cracked one. Defendant's motion for a direction of verdict in its favor cannot be sustained on any theory that there was not enough evidence of its negligence to send the case to the jury.

Direction of a verdict was further asked for on the ground that there was no evidence that Johnson (the machinist) had authority to give any orders to the plaintiff, or to order him to work in assisting him (Johnson) in the boiler house on the Sunday when the plaintiff was hurt. We do not find error in the refusal to direct a verdict on that ground, because there was evidence tending to show that the
plaintiff was actually employed by the company on that Sunday; that he worked, with the knowledge of the company, sometimes inside, and sometimes outside, of the boiler house. The request of the machinist, even if he were not a foreman or superintendent, for the witness to help him with one of the pipes, was one which the plaintiff might fairly accept as coming within the sphere of his general duties.

The complaint charged that one of the "pipes" connected with furnaces and boilers and filled with hot steam under high pressure was "insecure, defective," etc. Upon objection being made, when plaintiff offered evidence about the flange, the court allowed the complaint to be amended by adding the words "including the flanges." The amendment was not necessary; the complaint used the word "pipe" as generally descriptive of a conduit for steam, and the word fairly included the flanges which connected sections of pipe. If defendant wished more specific information it could have asked, in advance of the trial, for a bill of particulars, which it failed to do.

Defendant contends that plaintiff was allowed to recover on a cause of action not pleaded, to wit, the failure to comply with a promise to repair a dangerous defect. Plaintiff testified that, when he detected the cracked flange on November 19th, the superintendent was sent for, came, and said: "Fix it as best you can; a new pipe will come very soon." The plaintiff's own testimony, however, showed very plainly that this statement (assuming that it was made) had no effect on his mind nor induced him to assume any risk, because he—an unintelligent man without a machinist's experience—associated a cracked flange merely with a waste of steam through the leak, with no idea that the conditions which permitted such a leak were in any way dangerous.

Defendant assigns as error many statements in the charge and in refusals to charge, all covered by exceptions. It appears from the record that all these exceptions were reserved after the jury had withdrawn in custody of the bailiff. It is certainly surprising that in view of the opinions of this court in Park Brothers v. Bushnell, 60 Fed. 583, 9 C. C. A. 140, and Commercial Travelers' Accident Co. v. Fulton, 79 Fed. 423, 24 C. C. A. 654, such a practice should still be followed in this circuit. In the case at bar defendant itself suggested it. As we pointed out in the case last above cited, if this course had been followed by express direction of the trial judge, defendant could have excepted to a ruling which deprived him of the opportunity to take his exceptions at the proper time and thus reserved his rights, but he did not do so, and these belated exceptions will not be considered.

By proper objection and exception defendant reserved the point, which he now presents, that the cross-examination of defendant's witnesses was carried to such an extent and so conducted as to constitute reversible error. A similar point was argued before this court in N. Y. Transportation Co. v. Garside, 157 Fed. 521, 85 C. C. A. 285, where it was said:

"It must be admitted that a continual interposition by the trial judge in the examination of witnesses may prejudice the jury to the extent claimed; still the trial judge has a right, and indeed it is his duty, to see that the facts of the case are brought intelligibly to the attention of the jury, and to what extent he will intervene for this end is a matter of discretion."
We found no abuse of discretion in that case. In the case at bar the cross-examination by the court was much more extended, and, presumably through some errors either in the stenographic report or in its transcription into the case on appeal, there are passages where it is difficult to tell whether a particular statement is made by a witness in response to the court's questions, or is a summary by the court of what he understood the witness to have already testified to. Nevertheless, on a careful study of the record, we do not feel warranted in reversing on this exception. It may be proper, however, to expand somewhat the statement made in the Garside Case. Cases occasionally present themselves where a plaintiff or defendant is represented by incompetent counsel, and where the ends of justice require the trial judge to secure, so far as he can, a fair and full presentation of the case, so that the party who came into the court, expecting to have a full, fair, and just examination of the facts in controversy, will find his expectation realized. But where a party is represented by competent counsel—as the brief and oral argument demonstrate this plaintiff was—it would seem that the conduct of his side of the case had better be left to his own counsel. It is not unreasonable to assume that such counsel's study of the case and the information he possesses as to the personal equation of the different witnesses called against his client may make him a more competent cross-examiner than the trial judge, who never knew of the issues in the case till the pleadings were opened. Indeed, it might sometimes happen that a well-laid plan to discredit a hostile and unfair witness would be disarranged and rendered futile by premature cross-examination. The safer course would seem to be to allow the examination by counsel—direct, cross, redirect, and recross—to conclude, and then, if anything is obscure, if some point seems to be overlooked, or if, suspecting false swearing, he thinks cross-examination should be further pressed, the trial judge can, and indeed ought to, intervene so that the ends of justice may be subserved. Where, however, he takes the cross-examination out of the hands of competent counsel, there is danger that the jury, from this fact alone, may draw conclusions unfavorable to the witness and to the party on whose behalf the witness is called. The judgment is affirmed.

GREAT NORTHERN RY. CO. v. HOOKER.

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

No. 2,799.

1. MASTER AND SERVANT ($243*)—RULES—OBEDIENCE BY SERVANT.

When the duties of a servant in given circumstances are plainly specified in reasonable rules of the master, of which the servant has knowledge, his nonobservance of them at a time when they are capable of observance is negligence as matter of law.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 682, 759-775; Dec. Dig. § 243.*]

*For other cases see same topic & # NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
2. **Master and Servant (§ 284)—Rules—Interpretation by Court.**

When the printed rules of the master, specifying the duties of a servant in given circumstances, contain no terms which are not made plain by the rules, their interpretation falls within the general rule that the interpretation of a written instrument is a question of law for the court, and not a question of fact for the jury.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 284.*]

3. **Railroads (§ 316)—Crossings—Care Required—Speed—"Under Control."**

The rules of a railroad company required an engineer in approaching stations to do so with his train "under control," and so to proceed until the track was "plainly seen to be clear," and then, after providing that engines, freight trains, and work trains might occupy the main track between the outside switches at a designated station, declared that the responsibility for a collision within those limits would rest "entirely" with the approaching train. Held, that such rules plainly required an engineer in approaching those limits and proceeding therein in the nighttime, to adjust his control over his train to the distance he could see along the track as he advanced thereon, so that, if the track was already occupied at any point, he could stop his train and avoid a collision after that point came within the range of his observation.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1006–1008; Dec. Dig. § 316.*]

For other definitions, see Words and Phrases, vol. 8, p. 7158.]

(Syllabus by the Court.)

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

C. J. Murphy (Fred S. Duggan, on the brief), for plaintiff in error. George A. Bangs (C. C. McElwee, on the brief), for defendant in error.

Before SANBORN and VAN DEVANTER, Circuit Judges.

VAN DEVANTER, Circuit Judge. This was an action to recover for personal injuries sustained in a collision on the railroad of the Great Northern Railway Company, and one of the questions to be considered is whether or not the evidence was such as reasonably to admit of no other conclusion than that the plaintiff disregarded the rules prescribing his duties in the premises, and thereby was guilty of negligence which proximately contributed to his injuries. In that view of the evidence which is most favorable to him, and yet is reasonably permissible, these are the facts: The collision occurred within the station or yard limits at Lakota, N. D., in the early evening, while it was dark. Forty-seven cars of an east-bound freight train, extra 1200, were, and for three hours had been, standing upon the main track between the outside switches, and the engine and other cars were in another part of the yard, where one of the cars was being repaired. In that situation, the rules of the company required that certain signal lights be displayed upon and about the cars upon the main track to give warning of their presence at that place; but compliance with that requirement was neglected by those in charge of the train, and their negligence was attributable to the railway company under the state statute.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
The plaintiff was the engineer on a west-bound freight train, extra 1124, and knew that his train would meet extra 1200 at Lakota. As he approached that station, and when he was about a mile and a half away, he observed the headlight of an engine upon a side track within the station or yard limits, and after a brief time the headlight ceased to be observable. Thereupon he assumed that it was the headlight of extra 1200, that that train had been turned out from the main track to permit his train to pass thereon, and that thereupon the headlight had been hooded and thereby concealed, both of which acts should, and probably would, have been performed, if it had not been necessary, in the circumstances, to leave a part of extra 1200 upon the main track while one of the cars was being repaired upon another track. But, in truth, that train had not turned out from the main track, only the engine and a few of the cars being on a side track, and the headlight had not been hooded, but had ceased to be observable because the plaintiff's view of it was cut off by some cars standing on an intermediate track. In approaching the station or yard limits he slackened the speed of his train somewhat, but not enough, or approximately enough, to enable him to bring it to a stop within such distance as he could look ahead and see that the track was clear. On the contrary, he proceeded within the station or yard limits at such a speed that, although he was looking ahead carefully, although the appliances for stopping his train were in good working order, and although, when the cars standing upon the main track came within the range of his vision, he did all that could be done to stop his train, a severe and destructive collision ensued. Shortly thereafter he sent in a written report wherein he estimated that his train was moving "15 to 18 miles per hour," and the immediate results of the collision confirm that estimate. Both trains were regular ones, which were more than 12 hours behind their schedule time, and were proceeding under train orders, as provided in rule 44, which was as follows:

"Regular trains twelve hours behind their schedule time lose both right and class, and can thereafter proceed only by train order."

The order under which the plaintiff's train was proceeding, of which he had a copy, read as follows:

"Eng. 1124 will run extra Michigan to Devil's Lake ahead of No. 403 and meet extra 1200 east at Lakota."

On a time-table carried by the plaintiff was this special rule, with which he was familiar:

"At the following named stations, engines, freight trains, and work trains may occupy main track, and block signals will be operated as per block signal rule No. 16: Lakota."

The plaintiff was an experienced engineer upon that part of the defendant's road, knew the location and extent of the station or yard limits at Lakota, knew his relative position to them as he was approaching, and was familiar with the rules prescribing his duties in the premises. Those rules were as follows:

"Rule 53. All trains must approach all stations, under control, and so proceed until the track is plainly seen to be
clear. The responsibility for a collision at a station, or at a water tank between stations, will rest with the following or incoming train. This will not relieve train and enginemen from the responsibility of protecting trains at stations and water tanks as provided by rules 49 and 57."

The two rules so designated and block signal rule 14 required that certain signals be displayed upon and about trains and cars situated as was that part of extra 1200 which was upon the main track.

"Rule 69. When within the limits of the various yards all trains must be run with great care, and under control of the engineman.

"Switching engines will have the right to work upon the main track without special orders, within yard limits, upon the time of all except first-class [passenger] trains, but must clear the track immediately upon their arrival."

"Rule 81. In all cases of doubt or uncertainty, take the safe course and run no risks."

"Rule 223. The engineman is jointly and equally responsible with the conductor for the safety of his train and the movement of the same in strict compliance with the rules, and he must decline to obey any orders which involve peril to his train or violation of the rules."

"Block Signal Rule 16. Each division will specify important stations under 'special rules' on time-table, where engines, freight trains, and work trains may occupy the main track between the outside switches, except upon the time of regular passenger trains. The engines, freight trains, or work trains may be reported as having arrived at such stations when they are between the outer switches, providing block signalman has been notified by the conductor; and block signalman at adjoining stations may then give clear signal to any approaching train, except passenger train. The responsibility for an accident between outside switches of stations so specified will rest entirely with the train approaching said limits."

At the adjoining station a clear block signal was given to the plaintiff, which he rightly understood as meaning that the track was clear to Lakota, subject to the qualification in block signal rule 16 relating to the occupancy of the main track between the outside switches. As his train was approaching Lakota, the light at the east switch was green, and he rightly understood therefrom that the switch was lined up for the main track, and not the side track. The switching and yard work at that station was done by train engines and crews, no switch engine or crew being maintained there; and when a train engine was so engaged it usually was separated from the major part of the train. The plaintiff knew that that was so, and was expecting to stop on the main track at a point considerably west of where the collision occurred, and then to transfer some of the cars of his train to a side track in that way. He was not induced to proceed as he did by any false or misleading signal, for none such was given.

These facts, in our opinion, reasonably admit of no other conclusion than that the plaintiff disregarded the rules prescribing his duties in the premises, and thereby was guilty of negligence which proximately contributed to his injuries. The train order under which he was proceeding advised him that extra 1200 would be at Lakota, and the rules further advised him that it might be occupying the main track between the outside switches. That alone would have imposed upon him the duty of exercising great care in approaching and passing through the station or yard limits; but the rules did not leave the matter there. In express terms they laid upon him the duty of having his train "under control" in approaching those limits, and of
so proceeding until the track was "plainly seen to be clear," and then, as if to avoid any possible uncertainty as to his duty in the premises, it was declared that the responsibility for a collision between the outside switches would rest "entirely" with his train. This plainly meant that his control should be adjusted to the distance he could see along the track as he advanced thereon—that is, should be such that, if the track was already occupied at any point, he could stop his train and avoid a collision after that point came within the range of his observation; otherwise, it would not have been said, as in substance it was, that his control should be maintained until the track was "plainly seen to be clear," and that he should proceed on the theory that the responsibility for a collision would rest "entirely" with his train. True, other rules laid upon others the duty of displaying signal lights upon and about the cars upon the main track; but that did not relieve him of the duty so plainly laid upon him, or justify him in treating the absence of such signal lights as an assurance that the track was clear. On the contrary, the rules show that these duties were distinctly and separately imposed in a manner which prevented either from qualifying or lessening the other; the purpose being to provide for double or cumulative precautions against a collision. The plaintiff, although familiar with the rules applicable to him, did not have his train under control, but proceeded between the outside switches at a speed whereby he took chances upon the track being clear for a considerable distance beyond the range of his observation. The rules were reasonable and capable of observance, and, had he observed them by having his train under control, the collision would have been avoided. It follows that his nonobservance of them was negligence as matter of law. Kansas, etc., Co. v. Dye, 70 Fed. 24, 16 C. C. A. 604; St. Louis & S. F. Ry. Co. v. Dewees, 153 Fed. 56, 82 C. C. A. 190; Missouri, K & T. Ry. Co. v. Collier, 157 Fed. 347, 88 C. C. A. 127; Nordquist v. Great Northern Ry Co., 89 Minn. 485, 95 N. W. 323; Scott v. Eastern Ry. Co., 90 Minn. 135, 95 N. W. 892; Brown v. Northern Pacific Ry. Co., 44 Wash. 1, 86 Pac. 1053.

It is said that it was an admissible conclusion from the facts before recited that the plaintiff was justified in assuming that extra 1200 had turned out from the main track to permit his train to pass thereon, and therefore was justified in proceeding as he did. But the contention overlooks the binding force of the rules. The plaintiff was not at liberty to regulate his actions according to his own ideas of what prudently could be done, or according to mere probabilities or inferences drawn from the surroundings, but was required by the rules to proceed with his train under control until he plainly saw that the track was clear. It was foreseen that collisions likely would ensue if engineers were free to proceed, each according to his own judgment, in such situations, and therefore a fixed and safe course of action was prescribed for all. As particularly apposite we quote from Louisville & N. R. Co. v. Mothershed, 110 Ala. 143, 153, 20 South. 67, 69, where, in considering the obligatory effect of a like rule, it was said:

"The end and obvious tendency of its promulgation and enforcement was the all-important one of avoiding great peril of life and property. The high-
est considerations of duty to its employees, the general public, and itself impelled the defendant to its adoption. Being promulgated, and no unforeseen emergency arising which would render obedience to it in a given case impracticable or disastrous, all discretion as to the necessity of obedience was exhausted. The engineer having the means of observance, the rule was mandatory upon him. He had no right to inquire whether the surroundings seemed to render obedience necessary. It matters not, therefore, whether his disobedience was expressly willful, or inadvertent, or resulted from a reasonable belief, in his mind, that in the given instance obedience was unnecessary. He was equally culpable in either event.”


In the same connection it is also insisted that the plaintiff, after seeing the engine of extra 1200 upon a side track, was justified in assuming that no part of that train was occupying the main track, because block signal rule 16, although permitting “freight trains” to occupy that track, did not permit it to be occupied by the cars of such a train when detached from the engine. But the rule was not so restricted in its meaning. It manifestly was intended to facilitate switching and yard work at particular stations, such as Lakota, by according to the trains charged with that work greater freedom and protection in respect of the occupancy of the main track; and, this being so, it reasonably is certain that it was intended to sanction the occupancy of that track by that portion of the train which usually was at rest and detached from the engine while it was temporarily engaged in that work. The plaintiff’s asserted justification is predicated upon the assumption that he was not required to anticipate the presence at Lakota of any train other than extra 1200, and, for the purposes of the present discussion, we have given effect to this assumption, without stopping to consider whether or not, in view of the rules, it is well grounded.

The trial court treated the interpretation of the rules prescribing the plaintiff’s duty in the premises as a question of fact to be determined by the jury. But we are of opinion that it was a question of law to be determined by the court. Not only were the rules in the nature of a written instrument, but they contained no terms the meaning of which was not made plain by them; and, this being so, effect should have been given to the general rule that the interpretation of a written instrument rests with the court, and not with the jury. Bell v. Bruen, 1 How. 169, 183, 11 L. Ed. 89; Goddard v. Foster, 17 Wall. 123, 143, 21 L. Ed. 589; Higgins v. McCrea, 116 U. S. 671, 682, 6 Sup. Ct. 557, 29 L. Ed. 764; Scanlan v. Hodges, 52 Fed. 354, 3 C. C. A. 113; Bowes v. Shand, L. R. 2 App. Cas. 455; 1 Labatt, Master and Servant, § 215. Moreover, it is held by this court that the reasonableness of such rules it is to be determined by the court as a question of law, and not by the jury as a question of fact. Kansas, etc., Co. v. Dye, 70 Fed. 24, 16 C. C. A. 604; Little Rock, etc., Co. v. Barry, 84 Fed. 944, 28 C. C. A. 644, 43 L. R. A. 349. See, also, Scott v. Eastern Ry. Co., 90 Minn. 135, 140, 95 N. W. 892; Bailey’s Personal Injuries, § 3325. And it would seem that by analogy a like holding should be made when the question is one of interpretation,
At the conclusion of the evidence the defendant requested that a verdict be directed in its favor, because the evidence reasonably admitted of no other conclusion than that the plaintiff by his own negligence had proximately contributed to his injuries, and it follows from what has been said that the court erred in refusing that request.

The judgment is therefore reversed, with a direction to grant a new trial.

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Dwyer v. United States.

(Circuit Court of Appeals, Ninth Circuit. May 3, 1903.)

No. 1,606.

   Act July 5, 1892, c. 145, § 6, 27 Stat. 73, re-enacted June 1, 1898, c. 369, § 2, 30 Stat. 424 (U. S. Comp. St. 1901, p. 344), relating to the divisional jurisdiction of the District Court in Idaho, provides for the holding of terms at different places in the divisions of the district, and declares that all suits, prosecutions, process, recognizances, bail bonds, and other things pending in or returnable to the court are transferred to, and shall be returnable to, and have force in, the respective terms created by the act in the same manner and with the same effect as they would have had if the existing statute had not been passed. Held, that such provision had no relation to the jurisdiction of the divisions of the court, and hence that the court sitting in one division had jurisdiction to hear and determine a motion for a new trial in a criminal case tried in another division.
   [Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 950.*]

   It is within the sound discretion of a federal court to grant or refuse a new trial, the exercise of which discretion cannot be reviewed.
   [Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3067–3071; Dec. Dig. § 1156.*]

   Where a federal District Court excludes affidavits submitted by accused in support of a motion for a new trial, and exercises no discretion with respect to such motion because it erroneously supposed it had no jurisdiction to determine the same where it was then sitting, its action was preserved by an exception for review.
   [Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1059.*]

   Since an entryman who has made his preliminary sworn statement concerning the bona fides of his application and the absence of any contract or agreement by which the title would inure to the benefit of another is not required to make an additional oath to such facts on final proof, any regulation of the Commissioner of the General Land Office to the contrary notwithstanding, subornation of perjury cannot be laid on the alleged suborning of an entryman to swear falsely concerning the bona fides of his application in his final proof.
   [Ed. Note.—For other cases, see Perjury, Dec. Dig. § 13.*]

5. Criminal Law (§ 1172*)—Erroneous Instructions—Prejudice.
   In a prosecution for subornation of perjury the indictment contained six counts, the first three alleging subornation of an entryman to swear falsely concerning the bona fides of his entry in his preliminary affidavits, and the last three alleged subornation to swear falsely in his final proofs with reference to the same land. Notwithstanding the last three counts

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
were insufficient, the court charged that they were connected with the same timber claims referred to in the first and third counts, and that the jury should remember that they concerned the testimony on the same points involved in the first count, made at the time of final proof. An exception was taken with reference to the fourth, fifth, and sixth counts on the ground that the matters alleged therein were immaterial, which exception the court allowed. Held, that a conviction on all but the second count, which was not submitted to the jury, on which accused was sentenced to pay a fine of $500 and costs and be imprisoned for 18 months, was not sustainable on the theory that the judgment did not exceed that prescribed for a single offense, and was therefore supported by the first count alone.

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

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

The plaintiff in error in this case was indicted in the District Court of the United States for the Northern Division of the District of Idaho for subornation of perjury in proceedings relating to the entry of public lands under the timber and stone act (Act June 3, 1878, c. 151, 20 Stat. 59 [U. S. Comp. St. 1901, p. 1545]). The indictment contains six counts. The first three charge the defendant with suborning an entryman to swear falsely in his sworn statement or preliminary affidavit that he was applying to purchase the lands referred to therein in good faith for his own use and benefit, and that he had not made any contract or agreement by which the title he might acquire thereto would inure to the benefit of any other person. The counts differ only as to the name of the entryman. The first count referring to Hiram F. Lewis, the second to Charles Carey, and the third to Guy L. Wilson. The last three counts each charged the defendant with suborning one of the three entrymen referred to in the first three counts to swear falsely in his final proofs that he had not made any contract by which the title to the land he was applying to purchase would inure to the benefit of any other person except himself; that he was making the entry in good faith for his own use and benefit, and not for the use or benefit of any other person; that no other person, firm, or corporation had any interest in the said entry, in the lands, or the timber thereon.

The case was tried at the October term, 1906, of the District Court for the Northern Division held at Moscow, and on November 24, 1906, the plaintiff in error was found guilty on all but the second count, which was withdrawn from the consideration of the jury by the United States attorney. Judgment was entered upon the verdict at the May term of the Northern division at Moscow on June 17, 1907. The judgment was general in its nature, reciting that the defendant having been convicted of the crime of subornation of perjury, he should pay a fine of $500 and costs and be imprisoned in the penitentiary for 18 months. Notice of intention to move for a new trial was served and filed June 13, 1907, while the court was in session at Moscow. On September 3, 1907, the time in which to file bill of exceptions and affidavits on motion for a new trial was served by order of the judge of the court extended to November 1, 1907, and pursuant to stipulation of counsel the judge on November 2, 1907, ordered the United States to have until December 2, 1907, in which to propose and serve amendments to defendant’s proposed bill of exceptions. The bill of exceptions was settled and allowed by the judge of the court, and made a record in the cause on December 12, 1907.

The motion for a new trial was presented to Judge Dietrich at Boise City on December 13, 1907, at which time the District Court for the Central Division was in session and the District Court for the Northern Division had adjourned. Judge Dietrich declined to entertain or pass upon said motion or give consideration to any of the errors alleged to have been committed in the trial of said case, or any alleged errors set forth in the bill of exceptions filed in the case, or make any other or further order relative to said motion; said action being taken solely for the reason that in the opinion of said judge.

*For other cases see same topic & § Number in Dec. & Am. Digs. 1907 to date, & Rep’t Indexes 170 F.—11
the motion was presented to him at chambers, that for that reason he was without authority or power to act. The judge was in fact holding the District Court for the District of Idaho, but he was holding the court in the Central division, and not in the Northern division, where this case was tried, and the judgment entered against the plaintiff in error. The action of the court in declining to entertain or pass upon the motion of defendant for a new trial was made the subject of a supplemental bill of exceptions signed December 14, 1907. The case is here upon writ of error.

Forney & Moore and Geo. W. Tannahill, for plaintiff in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). It is assigned as error that the trial court refused to entertain the motion of plaintiff in error for a new trial, and refused to consider the errors set forth in the bill of exceptions. The refusal was based upon the fact that the defendant had been indicted, tried, and convicted in the District Court for the Northern Division held at Moscow, and the court for that division had adjourned, and the motion for a new trial was presented to Judge Dietrich at Boise City, Idaho, where he was holding the District Court for the Central Division. Section 1 of the act of July 5, 1892, c. 145, 27 Stat. 72 (U. S. Comp. St. 1901, p. 342), provides:

"That the state of Idaho shall constitute one judicial district."

Section 3 of the act of June 1, 1898, c. 369, 30 Stat. 423 (U. S. Comp. St. 1901, p. 343), provides:

"That for the purpose of holding terms of the District Court, said district is divided into three divisions, to be known as the Northern, the Central, and the Southern divisions."

The territory included in the three divisions is described in the section, and it is provided that the court for the Northern division must be held at the town of Moscow, the court for the Central division must be held at Boise City, and the court for the Southern division must be held at Pocatello. In section 6 it is provided:

"That the terms of the District Court for the District of the State of Idaho shall be held at the town of Moscow, beginning on the second Monday of May and the fourth Monday of October in each year; at Boise City, beginning on the second Monday of March and the second Monday of September in each year; and at the town of Pocatello beginning on the second Monday of April and the first Monday of October in each year; and the provision of statute now existing for the holding of said courts on any day contrary to the provisions of this act is hereby repealed; and all suits, prosecutions, process, recognizances, bail bonds, and other things pending in or returnable to said court are hereby transferred to, and shall be made returnable to, and have force in, the said respective terms in this act provided, in the same manner and with the same effect as they would have had said existing statute not been passed."

In Rosencrans v. United States, 165 U. S. 257, 17 Sup. Ct. 302, 41 L. Ed. 708, the Supreme Court referring to Act Cong. Feb. 22, 1889, c. 180, 25 Stat. 676, providing that the state of Montana should constitute one judicial district, and Act July 20, 1892, c. 208, 27 Stat. 252, dividing the district into two divisions, and the court referring also to
section 563 of the Revised Statutes (U. S. Comp. St. 1901, p. 455),
giving the District Courts jurisdiction "of all crimes and offenses cogniz-
able under the authority of the United States, committed within
their respective districts," and section 629, par. 20, providing that the
Circuit Courts should have "concurrent jurisdiction with the District
Courts of crimes and offences cognizable therein," said:

"These statutes declare the general rule, that jurisdiction is coextensive
with district. That being the general rule no mere multiplication of places
at which courts are to be held or mere creation of divisions nullifies it. In-
deed, the place of trial has no necessary connection with the matter of terri-
torial jurisdiction."

The court proceeds to consider the provisions of the Revised Stat-
utes and acts of Congress relating to the jurisdiction of the Circuit
and District Courts and the trial of offenses within the districts. Some
of these acts, the court says, increase in a district the places of trial,
and in others subdivide the district into divisions. "The former have
no effect on the matter of jurisdiction. Some of these latter acts spe-
cifically limit the jurisdiction in criminal actions of the courts held
in a division to the territory within that division; as, for instance, in re-
spect to Alabama Act May 2, 1884, c. 38, 23 Stat. 18 (U. S. Comp. St.
1901, p. 318), Lousiana Act Aug. 8, 1888, c. 789, 25 Stat. 388 (U. S.
Comp. St. 1901, p. 365), Michigan Act June 19, 1878, c. 326, 20 Stat. 175
63 (U. S. Comp. St. 1901, p. 403), Tennessee Act June 11, 1880, c. 203,
21 Stat. 175 (U. S. Comp. St. 1901, p. 415), Texas Act March 1, 1889,
c. 333, 25 Stat. 783, 786, while, on the other hand, some contain no
such provision, as in the case of Minnesota Act April 26, 1890, c.
167, 26 Stat. 72 (U. S. Comp. St. 1901, p. 374)—Post v. United States,
161 U. S. 582, 585, 16 Sup. Ct. 611, 40 L. Ed. 816—though this was
changed by the subsequent act of July 12, 1894, c. 132, 28 Stat. 102
(U. S. Comp. St. 1901, p. 376)—Post v. United States, 161 U. S. 583,
16 Sup. Ct. 611, 40 L. Ed. 816."

The distributing provision in the Alabama act for criminal offenses
is in the following language:

"That all offenses hereafter committed in either of said divisions shall be
cognizable and indictable within the division where committed."

In the other acts the provision is in substantially the same language.

In the light of this legislation, the court turns to Act July 20, 1892,
c. 208, 27 Stat. 252, creating the Southern Division of the District of
Montana, giving the Circuit and District Courts sitting at Butte (the
place in the Southern division where these courts were to be held)
"jurisdiction and authority in all civil actions, pleas or proceedings,
and in all prosecutions, informations, indictments or other criminal
or penal proceedings conferred by the general laws upon the Circuit
and District Courts of the United States." The court says:

"If the section stopped here, there would be no question. The mere creation
of a division does not disturb the general jurisdiction over the district. And,
in addition, the language just quoted makes an affirmative grant to the courts,
when sitting at Butte, of all the jurisdiction, civil and criminal, vested in the
Circuit and District Courts; that is, a jurisdiction coextensive with the district. The latter part of the section causes all the doubt in respect to the matter. In that are found two provisions: One that, where one or more of the defendants in any civil cause reside in one division and one or more in another, the plaintiff may institute his action in either division. This, of course, has no bearing on the question of jurisdiction in criminal cases. The second, that the act should not affect the jurisdiction of the court as to actions, proceedings, and proceedings already begun; that they should proceed where they were commenced, with a proviso that the court might in its discretion transfer all such actions, etc., as might properly be begun in the new division to the court in that division.

"This language," the court says, "is broad enough to include criminal actions. Too much stress should not be placed on the word 'properly.' The creation of divisions and the multiplication of places of trial are for the convenience of litigants, bringing the trial nearer to them and their witnesses. There is a manifest propriety, even when no jurisdictional necessity, in conducting criminal prosecutions as near to the place of the offense as possible. The idea of the vicinage is familiar to criminal law. And all that Congress may have intended by this second division was to make it clear that the court should have the power to transfer to this new division any pending proceeding which might with more convenience and therefore propriety be prosecuted at the place at which in the new division the sessions of the court were to be held."

After further discussing the language of this last proviso and the intention of Congress relative to the distribution of the territorial jurisdiction of the courts in the divisions of the district, the court says:

"We cannot assume that because Congress in creating some divisions distributed jurisdiction it meant, in creating other divisions, to also so distribute it, and, when we find that in some cases of division it distributed the jurisdiction and in other cases not, we are not justified in assuming that in this case it intended a distribution which it did not in terms make, simply because of the use of language which somewhat implies that a distribution had already been made."

The court accordingly held that an indictment found in one division could be remitted to the other division for trial.

The only provision in the Idaho act relating to the divisional jurisdiction of the district is in section 6 of Act July 5, 1892, c. 145, 27 Stat. 72, 73, re-enacted in section 6 of Act June 1, 1898, c. 369, 30 Stat. 423, 424 (U. S. Comp. St. 1901, p. 344), as follows:

"And all suits, prosecutions, process, recognizances, bail bonds, and other things pending in or returnable to said court are hereby transferred to and shall be made returnable to and have force in the said respective terms in this act provided, in the same manner and with the same effect as they would have had had said existing statute not been passed."

This provision has reference only to the change made in the terms for holding the District Court, and not to the jurisdiction of the divisions of that court, and specifically refers to pending cases. It is less a distributing provision for future cases than the Montana act, and has nothing of the divisional jurisdiction provided in the acts of Congress where such a division is clearly intended. In Logan v. United States, 144 U. S. 263, 297, 12 Sup. Ct. 617, 36 L. Ed. 429, it was held that an act of Congress requiring courts to be held at three places in a judicial district and prosecutions for offenses committed in certain counties to be tried and writs and recognizances to be returned at each place did not affect the power of the grand jury sitting at either place
to present indictments for offenses committed anywhere within the district.

Act July 20, 1882, c. 312, 22 Stat. 172 (U. S. Comp. St. 1901, p. 349), dividing the state of Iowa into two judicial districts, and these districts into three divisions each, and Act Feb. 24, 1891, c. 282, 26 Stat. 767 (U. S. Comp. St. 1901, p. 352), creating the Cedar Rapids division in the Northern division of the state, have provisions for the continuance of causes in the corresponding divisions of the two districts "with the same force and effect as though originally commenced therein."

In United States v. Kessel (D. C.) 63 Fed. 433, 434, the attorney for the United States moved the court that certain indictments returned by the grand jury in the Cedar Rapids division of the Northern district should be set down for trial at Dubuque, in the Eastern division of the same district. The court, in passing upon this motion, said:

"In the progress of time it has become customary for Congress to divide the several judicial districts into two or more divisions, and to provide for holding terms of court in the several divisions. The creation of these divisions does not, however, create new districts, nor establish new or additional district courts. Unless there is some special provision in the act of Congress creating such divisions in a given case, the District Court, in its jurisdiction over criminal cases, remains unaffected; and that jurisdiction, under section 563, Rev. St. (U. S. Comp. St. 1901, p. 455), is territorially coextensive with the district. * * * Thus it is clear that the grand jury which met at Cedar Rapids had full authority to present indictments against the defendant, Kessel, for any offenses he might have committed within the territorial limits of the Northern district of Iowa."

We are clearly of the opinion that the District Court sitting at Boise City had authority to pass upon the motion for a new trial in this case, and, as it appears that it was convenient for counsel on both sides to present the motion at that place and applied to the court to do so, it was the duty of the court to have heard and determined the motion on its merits.

It is an established law in the courts of the United States that to grant or refuse a new trial rests in the sound discretion of the court to which the motion is addressed, and that the result cannot be made the subject of review upon a writ of error. Henderson v. Moore, 5 Cranch, 11, 3 L. Ed. 22; Kerr v. Clampitt, 95 U. S. 188, 24 L. Ed. 493; Newcomb v. Wood, 97 U. S. 581, 24 L. Ed. 1085. But where the trial court excludes affidavits and exercises no discretion with respect to the matters therein stated, the action of the court is preserved by exception for review by the appellate court. Mattox v. United States, 146 U. S. 140, 147, 13 Sup. Ct. 50, 36 L. Ed. 917; Odgen v. United States, 112 Fed. 523, 525, 50 C. C. A. 380, 382. In the latter case the Circuit Court of Appeals for the Third Circuit said:

"It is not disputed that in the courts of the United States the allowance or refusal of a new trial rests in the sound discretion of the court to which the application is addressed, and that the result cannot be made the subject of a review by writ of error. The gravamen of the case, however, made by the plaintiff in error, is that the court below declined to exercise its discretion at all in refusing the motion for a new trial, and excluding from its consideration the reasons filed in support thereof. That the court did not exercise any discretion in respect to the motion for a new trial clearly appears from
the statements of the bill of exceptions, as above quoted from the record. Taking this to be a fact, as we must, the only question that remains is whether such refusal by the trial court to exercise its discretion at all can be reviewed by writ of error. To this question we are constrained, by reason and authority, to give an affirmative answer. The right to move for a new trial, and to have that motion considered upon the reasons presented for it, is an absolute one, and the granting or refusal thereof does not rest in the discretion of the court. The making of such a motion and the filing of reasons therefor is a regular and orderly step in the litigation of the cause, and is sanctioned by long-established and uniform practice of the courts, and, where not the subject of a special rule, the settled practice of common-law courts in this country and in England has prescribed the time when such motion can be made, and the period within which reasons therefor must be filed. To refuse leave to make or file such a motion and the reasons therefor is the denial of a right, for which the party aggrieved may seek redress in a reviewing court, where such refusal is properly excepted to, and made, by bill of exceptions, a part of the record in the case."

The objection to the action of the court in refusing to hear the motion for a new trial having been preserved by an exception duly taken by the plaintiff in error, the judgment must be reversed.

It is further objected to the judgment in this case that the fourth, fifth, and sixth counts of the indictment are based upon regulations contained in section 11 of a circular issued by the Commissioner of the General Land Office on July 11, 1889, relating to final proof in proceeding to obtain title to public lands under the homestead, desert land, and other laws. The allegation of each of the counts to which reference is made is as follows:

"And the proceeding to which the said oath was taken as aforesaid was then and there a proceeding in which a law of the United States and the rules and regulations of the Department of the Interior and of the General Land Office then and there authorized such oath to be administered."

In the case of Williamson v. United States, 207 U. S. 435, 28 Sup. Ct. 163, 52 L. Ed. 278, the Supreme Court held that an entryman who had made his preliminary sworn statement concerning the bona fides of his application and the absence of any contract or agreement by which the title which he might acquire from the United States would inure to the benefit of any person except himself is not required to make an additional oath to such facts on final proof, and a regulation of the Commissioner of the General Land Office exacting such additional sworn statement at the time of the final hearing is invalid. Under the authority of this case, it is clear that the judgment, so far as it is based upon the fourth, fifth, and sixth counts, cannot be sustained. But it is contended by the United States that the judgment being general in its nature, and not exceeding that prescribed for a single offense, the first and third counts charging subordination of perjury with respect to proceedings under section 2 of the timber and stone act (Act June 3, 1878, c. 151, 20 Stat. 89 (U. S. Comp. St. 1901, p. 1545), relating to the preliminary proof, are sufficient to support the judgment, and the case of Claassen v. United States, 142 U. S. 140, 12 Sup. Ct. 169, 35 L. Ed. 966, is cited as authority upon that proposition. But in that case the court mentions the fact that the record did not "show that any instructions at the trial were excepted to." In the present case the court
instructed the jury specifically with respect to the charges contained in the fourth, fifth, and sixth counts. The court told the jury that:

"They (the fourth, fifth, and sixth counts) are connected with the same timber claims referred to in the counts above named (the first and third), and they concern testimony upon the same points involved in the first count, but made at the time of their final proof. You will remember that."

The court then explains the charges contained in these counts in detail. To the charge of the court with reference to these counts exception was taken as follows:

"We call attention to that portion of the court's charge with reference to the fourth, fifth, and sixth counts in the indictment, and except to the same on the ground that the matters set forth in each of these counts in the indictment are immaterial, and are not based upon any law of the United States, and that perjury cannot be predicated upon the same, and that the same are collateral matters and tend to prejudice the defendant in the minds of the jury."

The exception was allowed by the court.

It follows that the judgment was erroneous as to the fourth, fifth, and sixth counts, and should be reversed. The judgment is accordingly reversed, with instructions to the court below to grant a new trial.

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KETTENBACH et al. v. UNITED STATES.
(Circuit Court of Appeals, Ninth Circuit. May 17, 1909.)
No. 1,605.

In Error to the District Court of the United States for the District of Idaho.
Forney & Moore and George W. Tannahill, for plaintiffs in error.
Before GILBERT, ROSS, and MORROW, Circuit Judges.

PER CURIAM. Upon the authority of William Dwyer, Plaintiff in Error, v. United States of America, Defendant in Error (decided at the present term) 170 Fed. 160, the judgment is reversed, and the cause remanded to the court below for a new trial.

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G. & C. MERRIAM CO. v. O'GILVIE.
(Circuit Court of Appeals, First Circuit. March 17, 1909.)
No. 800.

1. TRADE-MARKS AND TRADE- NAMES (§ 98*)—SUIT FOR UNFAIR COMPETITION—ACCOUNTING.
In a suit for unfair competition or a like case, if it appears to the court that an inquiry as to damages or profits would rest on no basis except conjecture or speculation, or would yield no profits or damages proportionate to the cost of the investigation, an accounting may not be ordered.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Dec. Dig. § 98.*
Unfair competition, see notes to Scheuer v. Muller, 20 C. C. A. 165; Lare v. Harper & Bros., 30 C. C. A. 376.]

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep*: Indexes
2. TRADE-MARKS AND TRADE- NAMES (§ 98*)—SUIT FOR UNFAIR COMPETITION—
ACCOUNTING.

Where, in a suit for unfair competition in which a cross-bill was filed, each party was found to have trespassed on the legal rights of the other, the court may in its discretion refuse to award an accounting in favor of either.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Dec. Digs. § 98.]

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

William B. Hale (Charles N. Judson, Frank F. Reed, and Edward S. Rogers, on the brief), for appellant.

George F. Bean, for appellee.

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

PUTNAM, Circuit Judge. This is the same case in which an opinion was passed down by us, and judgment entered, on January 30, 1908. 159 Fed. 638. A decree was entered in the Circuit Court pursuant to that judgment, with which the Merriam Company is dissatisfied as not giving it all the relief which the case demands. The objections are two. The first is that the Circuit Court did not insert in the decree what corresponds to what appears in the judgment in Singer Co. v. June Co., 163 U. S. 169, 204, 16 Sup. Ct. 1002, 41 L. Ed. 118, to the effect that the corporation proceeded against was enjoined from using the word “Singer” without clearly and unmistakably specifying, in connection therewith, that its machines were made by it, and were not the product of the complainant. We may also refer to the more specific corresponding provision in the judgment in Hall’s Safe Co. v. Herring Safe Co., 146 Fed. 37, 44, 76 C. C. A. 495, 14 L. R. A. (N. S.) 1182, as modified by the Supreme Court in Herring-Hall-Marvin Safe Co. v. Hall’s Safe Co., 208 U. S. 554, 560, 28 Sup. Ct. 350, 52 L. Ed. 616. This precise pointing out was not in terms provided for in the judgment of this court. Therefore, it would not be strange that the Circuit Court omitted it unless its attention was expressly called to it; and the record does not show that this was done. On the case being developed here, we conclude that the decree should be amended by directing that the following words be inserted by Ogilvie, and those who may succeed him, namely, “This dictionary is not published by the original publishers of Webster’s Dictionary, or by their successors,” and that, of course, these words should clearly and unmistakably appear in the title page of every volume published by the respondent, Ogilvie, or his successors or assigns, of the class to which this litigation relates. It is not for us to go further than this in directing the precise details which may be necessary to make the decree effective in this particular. It is impossible for the appellate court to foresee what changes future emergencies may require; therefore, as usual, whatever may be required further, if anything, for that purpose, must be worked out by the Circuit Court.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep’t indexes
The other ground of complaint of the Merriam Company is that the decree entered by the Circuit Court makes no provision for an accounting. We must first observe generally that it is doubtful whether any reference for an account of profits or damages would yield a return which would have a reasonable proportion to the cost thereof. The difficulties involved in ascertaining the profits or damages under the circumstances of this case are almost insoluble. Under some circumstances, it has been held that the profits to be accounted for would be the entire profits of publication; but the Supreme Court has never had occasion to consider a rule so harsh as this, and, following the analogy of the practice established in suits for infringements of patents for inventions, we are led to the conclusion that it would never go to that extent. The rule there is, we think, fairly stated by Mr. Walker in the fourth edition of his work on Patents, at section 719, to the effect that in patent suits the profits recoverable are only such as are due to the infringing parts or features of the thing made and sold, and that the burden rests on the complainant to prove the due proportion allowable therefor. A similar rule seems to have been applied to infringements of patented designs for carpets in Dobson v. Carpet Company, 114 U. S. 439, 445, 5 Sup. Ct. 945, 29 L. Ed. 177, affirmed in Dobson v. Dornan, 118 U. S. 10, 6 Sup. Ct. 946, 30 L. Ed. 63, and in subsequent cases.

The cases where there has been no division of profits, but the whole profits have been allowed, are proper trade-mark cases, in which, the defendant having used a trade-mark proper, the presumption was that the goods would not have been sold without that use. This is what is referred to in Sebastian's Law of Trade-Marks (4th Ed., 1899) 228, 229, and in Browne on Trade-Marks (2d Ed., 1885) 519; and the same rule is applied in the ordinary cases of a trade-mark proper, like Atlantic Milling Co. v. Rowland (C. C.) 27 Fed. 24, and Benkert v. Feder (C. C.) 34 Fed. 534; also in several cases stated in Hesseltine's Law of Trade-Marks (1906) 304, 305. The present case, however, does not fully take on that feature. The substantial offense of Ogilvie did not consist in availing himself of a Merriam Company's trade-mark, because both this court and the Circuit Court have expressly found that there was no trade-mark. It consisted in dressing up his publications unlawfully. Therefore, there is no concrete thing which belongs to the Merriam Company the value of which can be substantially determined in this connection. In a case relied on by the Merriam Company (Williams v. Mitchell, 106 Fed. 168, 172, 45 C. C. A. 265, decided by the Circuit Court of Appeals for the Seventh Circuit in 1901), the court seemed to proceed on the theory that the complainant was entitled to full damages on account of the use by the respondent of the word "Carrom"; but, in a later case with reference to the same word, the Circuit Court of Appeals for the Second Circuit, in Ludington Co. v. Leonard, 137 Fed. 155, 157, 62 C. C. A. 269, came to the conclusion that, under the circumstances, to attempt to segregate the profits resulting from the illegitimate use of the word, "would require an excursion into the realms of conjecture and speculation, without hope of any tangible result." It certainly is the law that, if the equity court per-
ceives that an inquiry as to damages or profits would result only as stated by the Circuit Court of Appeals for the Second Circuit, or would yield no compensatory profits or damages proportionate to the cost of the investigation, it will not order an accounting for either. Sebastian's Law of Trade-Marks (4th Ed., 1899) 229, and the later work, Kerly on Trade-Marks (2d Ed., 1901) 425. Neither equity nor admiralty will encourage litigation where the result will probably be only nominal. Without undertaking to dispose of the case for these reasons, we are strongly of the impression that a full investigation in reference thereto would require us to refuse the relief now particularly asked for.

There is a more serious difficulty, substantially that which was stated by the learned judge of the Circuit Court, to the effect that, as each party had been found at fault, he was strongly inclined to the opinion that neither was entitled to an accounting. It is true that both parties were not found in fault to the same extent. In the opinion passed down by us on January 30, 1908, it was held that the Circuit Court was correct in enjoining the Merriam Company from claiming the exclusive right to the use of the word "Webster" in connection with dictionaries. This was the extent of the erroneous action on the part of the Merriam Company. No lack of good faith was shown, and the case as against it rested on a misapprehension of its legal rights. On the other hand, we held in substance that Ogilvie had used artifice, with the view of inducing the public to purchase his dictionaries in lieu of those of the Merriam Company. Nevertheless, upon testing the matter practically, this difference in the position of the two parties would not justify us in overruling the Circuit Court with reference to this branch of the case, although, under somewhat different circumstances, the mere fact that both parties had been in default might not be decisive. The litigation commenced by a bill filed by Ogilvie on August 9, 1904, which prayed relief against certain notices from the Merriam Company to Ogilvie, and certain circulars which it had issued to publishers, each claiming an exclusive right to the word "Webster." The effect of the circulars was of such a character that, on August 17, 1904, dealers in Baltimore wrote Ogilvie that they were afraid to handle his dictionaries. One was to the effect that the Merriam Company had commenced suit against several parties publishing or selling dictionaries bearing "Webster" as a part of the title. It also stated that the suits referred to were only presages of others which would be commenced against all who might, without its consent, make or sell dictionaries bearing the name "Webster." The record gives another letter from publishers and wholesale dealers in New York to Ogilvie, dated on September 19, 1904, in which, on account of the circulars from the Merriam Company referred to, they not only declined to carry Ogilvie's publications in stock, but even refused to accept his advertisements. But the extent to which the Merriam Company went in this direction is made plain by their amended cross-bill before us, filed on September 20, 1904. That prayed for an injunction against Ogilvie, restraining him, both provisionally and perpetually, from directly or indirectly publishing, offering for sale, and selling any dic-
tionary bearing the title "Webster's Dictionary," either alone or in conjunction with any other word or words.

In view of the fact that an accounting in equity comes down to the time of the making of the master's report, we have not attempted to describe these circulars and notices in strictly chronological order. Some were issued before Ogilvie's bill was filed, and some after. We find a public circular, dated December 1, 1904, addressed to "The Book Trade." This referred to Ogilvie's suit, and alleged that the Merriam Company had filed its answer "denying all his charges and claims," and that it had also filed a cross-bill praying for an injunction against the publication and sale of his "Webster's Imperial Dictionary." The circular proceeded to say that "long and exclusive use has made the word 'Webster' the trade name of dictionaries prepared and published by us or under our supervision and control." It enlarged on this, and closed with a repeated claim to the exclusive use of the word "Webster" in this connection.

The opinion of the learned judge of the Circuit Court which was first appealed against states that there were two issues in the case: First, that of this exclusive right to the word "Webster," and, second, whether or not Ogilvie had sufficiently informed the public that the dictionaries published by him were not the dictionaries published by the Merriam Company. The record, however, shows that the fundamental issue raised by the Merriam Company was its claim to the exclusive right to the use of the word in controversy. The pleadings nowhere indicated the acquiescence, express or implied, of the Merriam Company in the use of it by Ogilvie, either qualified or unqualified. Certain it is that this position of the Merriam Company was persisted in until our decision was passed down on January 30, 1908.

It is apparent from the record that this claim of the Merriam Company to an exclusive right interfered with Ogilvie's trade, and was not lawful, though honestly made. If its claim had been in harmony with the conclusions which this court and the Circuit Court reached, and the notices and circulars had been framed accordingly, non constat Ogilvie would not have yielded, and this litigation been avoided. At any rate, it cannot be questioned that the action of the Merriam Company, in the way we have explained, unlawfully threatened Ogilvie's trade and the sale of his dictionaries; so that we have two parties, each of whom in the eyes of the law was a tort-feasor, involved in what was after all a single controversy, having, of course, two branches to it, and each injurious to the opposing party.

The Merriam Company commenced with, and insisted on, the proposition that it was entitled to the exclusive use of the word "Webster"; and it was out of this that the litigation arose. Under the circumstances which we have explained, equity would not be able to do clear justice if it now permitted that corporation to demand an accounting of profits or damages incident to the changed position which the case has taken on.

We do not see our way clear to award costs on this second appeal. The decree of the Circuit Court is reopened, and the case is remanded to that court, with directions to proceed in accordance with
our opinion passed down this 17th day of March, 1909; and neither party recovers costs on appeal.

The following is the final decree of the Circuit Court.

COLT, Circuit Judge. This cause came on this day to be heard, and it appearing that the defendant and cross-complainant, G. & C. Merriam Company, has taken an appeal from the decree of this court heretofore entered, to wit, on the 28th day of February, 1907, and has prosecuted said appeal in the United States Circuit Court of Appeals for the First Circuit;

And it further appearing that said United States Circuit Court of Appeals in an opinion handed down on the 30th day of January, 1908, has affirmed said decree of this court entered February 28, 1907;

And it further appearing that said United States Circuit Court of Appeals has directed that the injunction against said complainant and cross-defendant ordered in said decree be enlarged so as to include the title page and back of his dictionaries complained of by said defendant and cross-complainant;

And it also appearing that all questions of accounting are left open to this court by said United States Circuit Court of Appeals:

It is now, therefore, in consideration thereof, and after hearing the arguments of counsel for both parties, and in accordance with the opinion of said United States Circuit Court of Appeals, and the mandate to this court pursuant thereto, hereby ordered, adjudged, and decreed:

1. That a perpetual injunction issue in this suit restraining the defendant, the G. & C. Merriam Company, its officers, agents, attorneys, and servants, and all others claiming or holding through or under it, from publishing or issuing circulars, advertisements, or notices stating in form or effect, or in any manner claiming, that it, the defendant, or any person, firm, or corporation claiming under or through it, has the exclusive right to the use of the name “Webster” in the title of dictionaries.

2. That a perpetual injunction issue in this suit restraining the complainant, George W. Ogilvie, his agents, attorneys, and servants, and all others claiming or holding through or under him, from publishing or issuing in their present form the circulars and advertisements in this suit adjudged misleading or deceptive, or any other circulars, advertisements, or notices that are in any way calculated to deceive purchasers into purchasing complainant’s dictionary under the belief that it is a Webster's Dictionary published by the G. & C. Merriam Company.

3. That a perpetual injunction issue in this suit restraining the complainant, George W. Ogilvie, his agents, attorneys, and servants, and all others claiming or holding through or under him, from publishing or issuing the title pages and the backs of the dictionaries in the present form, or in any form calculated to deceive members of the public into purchasing his dictionary under the belief that it is a Merriam Webster’s Dictionary.

4. That neither costs nor an accounting be allowed to either party.
FARNUM v. KENNEBEC WATER DIST.

(Circuit Court of Appeals, First Circuit. May 7, 1909.)

No. 799.


A contract with a quasi municipal corporation created by the laws of Maine to put down a water pipe line for a number of miles in that state must be regarded as governed by the laws of Maine, in the absence of other circumstances.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 183½.*]


Plaintiff contracted to lay a water pipe line in Maine for defendant, a quasi municipal corporation, for compensation based on quantities to be paid for on monthly estimates by the engineer, with a reservation of 15 per cent, until a final estimate. The contract provided that defendant's delay in furnishing materials to the contractor should be ground for additional time, if not completed by December 15, 1904. The work was not completed at the time named by reason of such delay, and on January 4th, following, defendant took possession of the work and evicted plaintiff, though he was ready and willing to complete the contract within the extension to which he was entitled. Plaintiff lost money by the work done under the contract to the time of eviction, and the balance of the incomplete work at the contract price would have amounted to about $15,000, though for plaintiff to have completed would have entailed on him a further loss of from $2,000 to $3,000. Estimates had been paid him according to the contract relating to everything he had done or furnished before his eviction. Held, that plaintiff in an action on a quantum meruit was not entitled to have the contract treated as canceled from the beginning and to have the entire account restated, independent of the prices based on the quantities named in the contract, and to recover the reasonable value of the work done and material furnished, but that in the statement of his account plaintiff was bound by the contract prices in so far as the contract was executed.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 31–33; Dec. Dig. § 14.*]


Where a contractor was evicted from the work while he was willing to finish the same as required by the contract, a provision against an allowance of damages for delay in performing defendant's obligation to furnish materials was no defense to an action for damages for such eviction.

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


A judgment for defendant in an action by a contractor on a quantum meruit to recover the reasonable value of work done and materials furnished, after having been evicted from the work before complete performance, was no bar to a suit in the nature of an action of tort for breach of the contract or for any portion of a reserved percentage earned and unpaid.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 590.*]

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

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
William Frye White and Seth M. Carter (Wallace H. White, on the brief), for plaintiff in error.
Harvey D. Eaton, for defendant in error.

Before COLT, PUTNAM, and LOWELL, Circuit Judges.

PUTNAM, Circuit Judge. This is a suit at common law in which the Circuit Court directed a verdict for the defendant. Thereupon the plaintiff sued out a writ of error. It is convenient throughout to call the plaintiff below the plaintiff, and the defendant below the defendant. An agreement was filed under the statute waiving a jury, and, so far as all substantial purposes are concerned, the case was submitted to the court on an auditor's report. The record is in such form that it enables this court to order an affirmance of the judgment, or a reversal followed by a judgment for the plaintiff for the amount claimed by him, less some minor corrections made by the auditor. Chicago, etc., Railway Company v. Clark, 178 U. S. 353, 364, 20 Sup. Ct. 924, 44 L. Ed. 1099.

July 22, 1904, the plaintiff made a contract with the defendant for laying in Maine a pipe water line a distance of a number of miles. The contract was not for a round sum, but was based on quantities, with the usual provision for monthly estimate by the engineer, with a reservation of 15 per cent. until the final estimate. It contained the following provision:

"Delay in furnishing materials to the contractor shall not constitute ground for damage claims, but if the work be interrupted thereby, the time for completing the same shall be correspondingly extended."

By the terms of the contract the work was to have been completed by December 15, 1904, subject to the provision for delay in furnishing materials cited. The work was not completed at the time named; but this was caused by delay on the part of the district in furnishing pipe. On January 4, 1905, the defendant took possession of the work and evicted the plaintiff. The plaintiff did not abandon the work, but expressed himself ready and willing to complete it within the proper extension of time to which he was entitled. He had lost money by the work under his contract to the time of eviction. The balance of the incompletely completed work at the contract price would have amounted to about $15,000; but for the plaintiff to have completed the work would have entailed on him a further loss of from $2,000 to $3,000. The estimates have been paid him according to the contract, and they related to everything which he had done or furnished before his eviction. It was stated at bar by the defendant that, under a provision of the contract which permitted the defendant to pay bills incurred by plaintiff on the work, the same to be charged against the amount due him or to become due him, he has, in fact, been paid more than the entire estimates; so that, in fact, no reserve is due him. Nevertheless, whether the reserve has been paid him is not shown by the record nor admitted by both parties.

Under these circumstances the plaintiff claims to restate the entire account from the beginning, to reject the prices based on qualities named in the contract, and to recover under a quantum meruit reason-
able amounts for work done and materials furnished. If the account is to be restated as claimed, there would have been due him at the time the suit was brought, aside from any question of interest, $24,673.05; and the dispute here is over that sum.

It will be seen at once that the proposition of the plaintiff is on its face extraordinary. The work was done under a contract and paid for within 15 per cent. according to that contract; and yet the plaintiff claims that the defendant's breach is retroactive in its effect, to such an extent as to annul what was in fact done, and make that which was executed executory. Unless the authorities are the other way, this certainly is not in accordance with the fundamental principles of the law. It is true that in a contract of this nature the earlier part of the work is sometimes the more expensive, on account of the cost of installation of machinery, tools, and materials, so that sometimes the earlier part of the work is not profitable while the latter part is, and so that the contractor looks for his profit to come from his ability to close the whole enterprise. On the other hand, sometimes it is the other way, and, in the early part of work of this character, the contractor skims the surface, gets large estimates, and abandons his contract, leaving it to be finished at a loss to the party with whom it was made. Therefore, it is impossible here to give any weight pro or con to any suggestions of that character. If the condition of things is like that first suggested, the contractor had his remedy by bringing an action for breach. If, on the other hand, he sues on the common counts, as he certainly may under some circumstances, he does it at his own option. There is no necessity arising out of the circumstances which makes it proper, in order to secure justice, that the apparent rules of law should be violated or strained.

On the other hand, the plaintiff brings to us numerous decisions which he thinks sustain his propositions. In applying these, two important things are to be remembered. One is that those authorities which simply hold that an action lies on the common counts do not meet the issue here; because it must be conceded that, wherever there is a breach, and in consequence thereof the adverse party elects to abandon the contract, an action on the common counts lies for what has been done or furnished, as the same form of action would lie if the entire work had been completed. That it would lie under the latter condition, and also under the former, has been settled for a century. No issue of such a general character is here at all, so that we have no occasion to consider any authorities simply reiterating that rule. The other thing to be considered is that in some decisions the work to be done was of such a character, or the agreed compensation therefor was to be in such form, that it was impossible to formulate any practical rule except that which the plaintiff maintains; and in none of them had the contract actually been executed by payments in whole or in part for each and every item of work done or materials furnished, as in the case at bar. Dixon v. Fridette, 81 Me. 122, 16 Atl. 412, Wright v. Haskell, 45 Me. 489, and Mullaly v. Austin, 97 Mass. 30, were of the general character which we say do not assist us in this case. The plaintiff also cites decisions in no way authoritative with us, and we limit our detailed investigation to such as are.
The rule has been fixed in Maine under the conditions of departure by the contractor from the terms of the contract. It is laid down in White v. Oliver, 36 Me. 92, and has always been adhered to. There it was decided that, if the contractor for the erection of a building has departed from the contract as to the size of the building or the quality of the work, and the building has been accepted, he is entitled to recover the contract prices, deducting whatever the work may be worth less on account of departures; so that, under the circumstances supposed, the defendant could not have shown that the value of the work accepted should be computed from a lower standard. Consequently, where the breach is by the other party, as in the case at bar, justice, which should hold an even hand, requires the application of the same rule.

We have examined all the cases decided by the Supreme Judicial Court of the state of Maine so far as brought to our attention, and also all others which we could discover. One case which brings in the circumstance of a breach of condition by the person for whom the work is to be done is Holden Company v. Westervelt, 67 Me. 446, apparently relied on by the plaintiff. The particular controversy before us did not arise. Nevertheless, the court, at the conclusion of the opinion, pages 451 and 452, laid down the rules that, in all cases where the common counts are relied on, "the contract is the foundation of the action," and that it rests on the plaintiff to show that there is some good reason for departure, and, in conclusion, that "the contract is the starting point," and that it must be proved in the case. In Poland v. Brick Company, 100 Me. 133, 60 Atl. 795, the amounts recovered were at the contract prices, and no issue such as we have here was made; but, at page 136, the opinion reaffirmed that the contract price is a reasonable measure of value, in the absence of evidence showing any loss or damage by reason of failure to complete the work. In Serrretto v. Rockland, etc., Railway, 101 Me. 140, 63 Atl. 651, the actual contract prices were recovered, although the contractor was prevented from completing the work by the fault of the corporation. No particular issue was made in that case which bears directly on what we have before us; yet, at page 145, the opinion says that, so far as the work was done, "the engineer's estimate and certificate would be binding upon both parties in the absence of fraud." In fact, it was the engineer's certificates that determined the amount recovered. Therefore it is entirely plain that the trend of the Maine decisions is to the effect that the agreed prices in the contract would determine the amount to be paid, even if the matter of payment had been executory and not executed, in the absence of peculiar facts of a class not shown here.

In fact, the law in Maine is apparently the same as that stated in Koon v. Greenman, 7 Wend. (N. Y.) 121, 123, where the party for whom the work was being done unlawfully prevented its completion. There the opinion said that "the contract prices should be held conclusive between the parties," provided it did not appear that the infraction of the contract made the work more expensive than was contemplated when it was made, or than it otherwise would have been. An exception of this character might arise when, as suggested by us, the earlier work might be more expensive than the contract prices, and
the later work might furnish the profit. As we have already observed, nothing of that nature is shown here. Although not there in issue, this expression was reaffirmed in New York in Merrill v. Ithaca R. R. Company, 16 Wend. 586, 30 Am. Dec. 130. In a case cited by the plaintiff, Clark v. New York, 4 N. Y. 338, 53 Am. Dec. 379, this question was not under consideration, and Koon v. Greenman was not even referred to. We will add that we cite these New York cases, not because they are authoritative with us, but because they state with approximate accuracy the rules of law as we understand them to exist in Maine.

The contract does not show where it was executed; but, as it was with a quasi municipal corporation created by the laws of Maine, and as the work was to be done on realty in Maine, we have no doubt that it is to be regarded as made with reference to the laws of that state. Therefore, for authorities we look at the law as expounded by the courts there, and, further, to the Supreme Court. The only decisions of that court which have been cited to us, or which we have discovered on such examination as we have been able to give, are Chicago v. Tilley, 103 U. S. 146, 26 L. Ed. 371, United States v. Behan, 110 U. S. 338, 4 Sup. Ct. 81, 28 L. Ed. 168, and Lovell v. Insurance Company, 111 U. S. 264, 4 Sup. Ct. 390, 28 L. Ed. 423. Plaintiff seems to find some support in these cases, but we do not perceive that they assist us at all. Chicago v. Tilley, at page 154 of 103 U. S. (26 L. Ed. 371), lays down one of the general rules which is not disputed. It is evident from United States v. Behan, at pages 340, 343, and 345, of 110 U. S., 4 Sup. Ct. 81 (28 L. Ed. 168), that the petition to the Court of Claims from which the appeal was taken to the Supreme Court, and which petition was of the usual anomalous character, was for recovery of damages for a breach of contract. Moreover, it appears, at page 343 of 110 U. S., 4 Sup. Ct. 81 (28 L. Ed. 168), that the contractor had received no payment whatever, so that the whole was executory, and in no way executed as in the case at bar. Lovell v. Insurance Company only reiterates, at page 274 of 111 U. S., 4 Sup. Ct. 390 (28 L. Ed. 423), the rules stated in United States v. Behan applicable to a suit for damages for a breach.

For the reasons already stated, we will not undertake generally to go over the various citations made by the plaintiff from the decisions of other state courts, except that we will refer briefly to the line of authorities in Massachusetts. Those start with Dane's Abridgment, vol. 1, p. 221 et seq. At the time Mr. Dane wrote, the law touching this entire topic still remained in a somewhat confused condition, being to some extent at odds with the rules as then understood in England. In Hayward v. Leonard, 7 Pick. (Mass.) 181, 19 Am. Dec. 268, decided in 1828, and therefore after the Separation, the court of quantum meruit was referred to; but no issue of a definite character applicable here was there involved. The same observation may be made about Smith v. Congregational Meeting House, 8 Pick. (Mass.) 173, decided in 1829. The departure from the law as found in Maine is shown in Fitzgerald v. Allen, 128 Mass. 232, 234. The opinion of the learned justice in that case referred to Hayward v. Leonard and Smith v. Meeting House, but neither support Fitzgerald v. Allen. The opin-

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ion in the last case said that, under the circumstances, what the defendant received from the plaintiff was to be paid for "independently of the terms of the contract," and added: "The contract itself is at an end. Its stipulations are as if they had not existed." This has apparently been followed continuously in Massachusetts, as claimed by the plaintiff.

What we understand to be the rule in Maine is in harmony with fundamental justice. Using this case as an illustration of what we mean, the eviction of the plaintiff by the defendant saved the plaintiff from further loss; and yet the plaintiff claims that it imposed on the defendant what is more or less in the nature of a penalty, the sum of $24,673.05. If not strictly a penalty, it would be at least a loss to the defendant, and a corresponding gain for the plaintiff, for which there was no legal consideration moving from the latter. It was at the option of the plaintiff to bring an action for damages had he seen fit so to do, and in that action he could have recovered whatever he might have actually suffered as the consequence of the act of the defendant, as well as whatever might be due him on account of what he had already accomplished. In such an action full and exact justice would have been done. The rules of damages in such a case are stated in a general way in United States v. Behan, already cited, 110 U. S. 338, 345, 4 Sup. Ct. 81 (21 L. Ed. 168). There is no propriety in permitting the plaintiff, through his election of a form of action which is not the one primarily appropriate to the circumstances, to make a gain to which he is not entitled. Such would be the conclusion even if the questions between the plaintiff and the defendant were still executory with reference to payment for what the plaintiff has done or furnished; but, the payment having been completed, at least in part as to each and every item, as we have shown, the claim of the plaintiff to have the entire accounts restated, so far as we understand, is not supported by any decision of any court cited by him or which we have found.

It seems to be claimed by the defendant that the provision in the contract prohibiting the allowance of damages on account of the delay in furnishing materials is, of itself, a bar to this suit. Such clearly is not the fact. It may be true that, if there had not been that delay, the controversy out of which this suit arose would never have occurred, so that in one sense the delay is in the line of causation; but the law looks only at the causa causans. The basis of this suit, or of any other suit which the plaintiff might bring, is not the delay in furnishing materials, but the unlawful eviction of the plaintiff from his work, for which the contract made no provision pro or con. Therefore, it must be understood that the judgment rendered here is no bar to any suit which the plaintiff may bring in the nature of an action of tort for a breach of the contract, or for any portion of the fifteen per cent. reserve stipulated for therein, if there is any such portion unpaid.

The judgment of the Circuit Court is affirmed, and the defendant in error recovers its costs of appeal.
LIVERPOOL, LONDON & GLOBE INS. CO. v. M'FADDEN.

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LIVERPOOL, LONDON & GLOBE INS. CO. v. McFADDEN.

(Circuit Court of Appeals, Third Circuit. April 20, 1909. On Reargument, May 27, 1909.)

No. 52.

1. INSURANCE (§ 490*)—Fire Insurance—Construction of Contract—Value of Property at Time of Loss, Not at Starting of Fire, to be Taken.

Under a fire insurance policy which limits the liability of the insurer to the actual cash value of the property insured at the time the loss or damage occurs, the extent of the liability is not the cash value at the time the property is exposed to the danger of loss by the outbreak of the fire, but the actual cash value at the time the loss occurs, which is necessarily to be referred, if material, to the time when in point of fact, as nearly as can be ascertained, the fire reaches and consumes or damages it. Nor is a court authorized to adopt a different construction of the contract in a particular case because the property insured was a marketable commodity and the threatened loss was so extensive that it may itself have enhanced the market value prior to the time when the actual loss occurred.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 499.*]


In an action on a fire insurance policy to recover for a loss of cotton stored in New York City, the value of the cotton “at the time the loss occurred,” where that was during the hours when the Cotton Exchange was open, may be determined by taking the ruling price of “spot” cotton for the day as fixed by the committee of the Exchange.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 660.*]

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

Frederick B. Campbell, for plaintiff in error.
J. W. Bayard, for defendant in error.

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

ARCHBALD, District Judge. The plaintiff sued to recover the insurance on a quantity of cotton destroyed by fire while stored in certain warehouses in Brooklyn, N. Y. The fire occurred on June 8, 1905, breaking out in the morning, and, while it was under control by 6 o'clock of the same day, it burned actively for several days afterwards, and the cotton could not be got at or removed for nearly a week. The policy limits the liability of the company to the actual cash value of the property insured at the time the loss or damage occurs, according to which such loss is to be ascertained and estimated. A jury being dispensed with, the court found as a fact that the fire started on June 8th, at 8:55 a. m., but that the damage to the cotton was not done until a later hour (just when is not specified); and (evidence having been admitted, over the defendant's objection, of the selling price of cotton on the day of the fire) that the actual cash value at the time when the loss or damage occurred was 8.55 cents a pound. The contention here is that the cotton should have been valued according

*For other cases see same topic & § Number in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
to the market price when the fire, by which it was damaged, first broke out. Just what that was is not shown. But it appears by the stipulation on which the case was tried that at the close of the market on June 7th, the day before the fire, the ruling price for "spot" cotton in New York City, as found by the committee of the New York Cotton Exchange, the recognized authority upon the subject, constituting the actual cash value at that time, was 8.40 cents per pound, and that at 2 p.m., June 8th, when it was next fixed by the committee, which was after the fire had broken out and while it was still in progress, it was 8.55 cents per pound; the lower value, as it is claimed, being the one which the court should have adopted in making its finding.

The actual cash value of the property insured when the loss occurred was a question of fact for the court to pass upon. But assuming that the time to which this is to be referred is a question of law, the rule that the loss has occurred within the meaning of the policy, as soon as the fire breaks out, is more or less arbitrary, and can only be adopted as a matter of necessity, not merely of convenience or policy. It is pressed upon us, however, by considerations of alleged necessity. The contract of insurance, it is urged, is one of indemnity, and the situation has therefore to be looked to. In the present instance, for example, the exact time when the fire reached the cotton, as it is said, is purely conjectural, as it must be in many similar cases. And smoldering along as it did for several days, just when the damage was done, and the loss was complete, cannot be fixed with any certainty. Meanwhile, the quantity destroyed being large—some 40,000 bales out of a total of 127,000 at the port of New York—the market rose sharply. And the holder of a commodity like cotton having to protect himself against a fall in the price by selling "short," and being forced into the market by the fire to protect his contracts, and the insurance company being also compelled to buy on account of its policy, the market price at which it has to settle the loss is unduly enhanced, to its serious detriment, the fire being thus both the occasion of the loss and the means of aggravating it, unless, as it is claimed, it can be referred, as it should be, as a matter of justice, to a time when the fire first broke out, before it was subjected to these adventitious circumstances. The invariable practice in insurance circles in the case of a continuing fire, as we are further told, is to adjust the loss with reference to the time of its outbreak. And in line with this also, as it is pointed out, where a fire starts just as a policy is about to expire, say 11:55 a.m., the policy running out at 12 noon, even though by far the greater part of the destruction takes place afterwards, beyond the actual term of the policy, yet the loss is regarded as having occurred within the life of it, and the company held liable accordingly. May, Fire Ins. § 401; Rochester German Ins. Co. v. Peaslee Gaulbert Co., 120 Ky. 752, 87 S. W. 1115, 89 S. W. 3, 1 L. R. A. (N. S.) 364; Jones v. German Ins. Co., 110 Iowa, 75, 81 N. W. 188, 46 L. R. A. 860.

But without denying the force of some of the considerations which are so urged, and however properly a policy is held to cover a loss to the risk of which the property insured is initially exposed during its life, although not fully consummated until afterwards, we do not see
our way to adopt the rule contended for by analogy therefrom. The
terms of the policy are plain and must be adhered to. The extent of
the company's liability, as there declared, is not the cash value at the
time the property is exposed to the danger of loss by the outbreak of
the fire, but the actual cash value at the time the loss occurs, which
is necessarily to be referred, if material, to the time when, in point of
fact, as nearly as can be ascertained, the fire reaches and consumes or
damages it. It may be arrested before it gets there, or be put out with
only trifling loss. It is what happens in this respect, and just as it
happens, that controls. Possibly it might conduce to certainty to have
the loss estimated as of the time when the fire starts. But there is
nothing which compels this construction, and much less is it to be in-
duced by the commercial practices alluded to, even assuming that they
are prevalent. Nor, if prices are unduly enhanced thereby, is the hard-
ship that of the insurer alone; the insured, if called upon by business
necessities to replace what he has lost, having just so much the more
to pay for it. If it is desirable to eliminate questions of this kind, the
only way is to change the policy. It may be difficult to do this, being a
standard form extensively adopted. But so far as it has been pre-
scribed by statute, the same legislative authority by which it was origi-
nally established is capable of reforming it, and can be relied on to
do so, if the change ought to be made. It is not, however, for the
courts in any event to remake the contract by a construction which,
as we view it, is in no wise warranted.

The judgment is affirmed.

On Petition for Reargument.

PER CURIAM. The only thing that requires notice in the petition
for a reargument is the suggestion that there is no evidence that the
value of the cotton at the time the loss occurred, as found by the court
below, was 8.55 cents a pound. It is a question whether there is any
assignment of error which covers this; but, passing that by, the con-
tention has no merit. The value so taken was the price of "spot"
cotton the day of the fire, as fixed by the committee of the Cotton
Exchange, from actual sales made at different calls of the market,
which is clearly sufficient. It is true that the price the previous day
was 8.40 cents, and the fire broke out before the market had opened.
But we have rejected the idea that the price at the time the fire started,
which was pressed upon us as an arbitrary rule on considerations of
expediency, was the one to be followed; and, while the fire began at
8:55 in the morning, it did not reach the cotton, according to the evi-
dence, until later, and, being under control at 6 p. m., the damage was
probably done somewhere between those hours, which would bring it
within the market day, the ruling price for which was thus not im-
properly taken.

The petition for a reargument is dismissed.
WONG CHUN v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. May 10, 1909.)

No. 1,646.

1. ALIENS ($ 32*)—IMMORAL FEMALES—DEPORTATION.

Where, in deportation proceedings against an alleged immoral alien Chinese woman, she was described in the complaint and warrant as "Sally Doe," and it appeared from her own testimony that she was a Chinese person without a certificate of residence required by law and was not entitled to be or remain in the United States, she was thereby specifically identified by her status, by the place where she was found, and by her own testimony, and hence it was not material that she was not identified as the person named in the complaint and warrant.

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

2. ALIENS ($ 32*)—CHINESE—DEPORTATION PROCEEDINGS—APPEAL—CONCLUSION OF FACT—REVIEW.

Act Cong. May 5, 1894, c. 60, § 3, 27 Stat. 25 (U. S. Comp. St. 1901, p. 1320), declares that any Chinese person arrested under the act shall be adjudged to be unlawfully within the United States unless he shall establish by affirmative proof to the satisfaction of the justice, judge, or commissioner his lawful right to remain in the United States. Held, that a commissioner's finding, after seeing and hearing the witnesses, that they were not entitled to credit, and that an alien was not entitled to remain in the United States, should not be reversed on appeal.

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

Appeal from the District Court of the United States for the Northern District of California.

McGowan & Worley and F. C. Clift, for appellant.


Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. The appellant was arrested upon a complaint filed with the United States commissioner by Richard H. Taylor, inspector of immigration, praying for the arrest of one "Sally Doe," and that upon a hearing she be adjudged to be illegally in the United States, and that the proper order for the deportation of "Sally Doe" be made and entered.

Upon being arrested in a house of prostitution in San Francisco, she was interrogated by the inspector of immigration. On this examination she gave the name of Wong Chun, and said she was 25 years of age. When asked when she first came to the United States, she said she was born in San Francisco; afterwards she was asked the same question, and she said she was born in San Jose. On the examination before the commissioner she said she was born in San Francisco, and was 21 years of age. Her testimony was contradictory and unsatisfactory to the commissioner. The commissioner found:

"That the defendant is a Chinese person, and at all times during her residence in the United States has been, and now is, a manual laborer within the true intent and meaning of the Chinese exclusion acts; that on the 31st day of July, 1907, she was found within the state and Northern district of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
California, without the certificate of residence required by section 6 of the act of Congress, entitled 'An act to prohibit the coming of Chinese persons into the United States,' approved May 5, 1892, Act May 5, 1892, c. 60, 27 Stat. 25 (U. S. Comp. St. 1901, p. 1321), and the acts amendatory thereof, and she has not clearly established to my satisfaction that by reason of accident, sickness, or other avoidable cause she has been unable to procure such certificate of residence. I further find that the defendant was not born within the United States.

"And, as a conclusion of law, I find that the defendant is unlawfully in the United States, and is not lawfully entitled to be in and remain therein."

The commissioner thereupon ordered that the defendant, Wong Chun, be deported from the United States. She appealed to the District Court, where the order of deportation was affirmed.

It is objected that the complaint and warrant described the defendant as "Sally Doe," and that she has never been identified as the person named as "Sally Doe" in the original complaint or warrant. The answer to this objection is, the identification consisted in the fact that it appeared from her own testimony that she was not entitled to be and remain in the United States. She was a Chinese person without a certificate of residence as required by law, and it was against such a person found in a particular place that the complaint and warrant were directed; the individual was identified specifically by her status and place where found and by her own testimony rather than by her name. Had she produced a certificate of residence as required by law, or satisfied the commissioner by competent testimony that she was born in the United States, she would have identified herself as belonging to a class of Chinese persons entitled to be and remain in the United States, and this was the material question at issue; failing in this, she became legally identified as belonging to a class subject to deportation. Upon the merits she was not prejudiced in any substantial right by a failure to identify her by the name appearing in the original complaint and warrant of arrest.

It is further objected that on the appeal from the commissioner to the District Court the defendant was not given a trial de novo. The complaint is that the testimony taken before the commissioner was made a part of the record in the District Court without a re-examination of the witnesses who testified before the commissioner and without any ruling being made upon objections to the admission and rejection of testimony. It appears in the testimony taken before the commissioner that the attorney for the defendant asked the commissioner of immigration the following question: "Q. At the time you swore to the complaint in this case, did you have this specific defendant in mind?" To this question the attorney for the United States objected on the ground that the question was incompetent, irrelevant, and immaterial. The commissioner sustained the objection, and an exception was reserved. Thereupon the attorney for the defendant moved to dismiss the proceedings on the ground that it was not shown that the court had jurisdiction over the defendant, for the reason that it did not appear that the person in court was the person described in, the complaint and warrant of arrest. This motion and the ruling made thereon by the commissioner was called to the attention of the District Judge when the case was heard in the District Court, but no rul-
ing thereon was made by that court. We think we have sufficiently answered this objection in passing on the direct question of identification; the defendant not having been prejudiced in that respect, she was not deprived of any right by the failure of the District Court to rule upon the motion to dismiss for the same reason.

It is further objected that the order and judgment of the District Court and of the commissioner was contrary to the evidence, and hence contrary to law.

Section 3 of the act of May 5, 1892, 27 Stat. 25, provides as follows:

"That any Chinese person or person of Chinese descent arrested under the provisions of this act or the acts hereby extended shall be adjudged to be unlawfully within the United States unless such person shall establish, by affirmative proof, to the satisfaction of such justice, judge, or commissioner, his lawful right to remain in the United States."

By section 13 of the act of September 13, 1888, c. 1015, 25 Stat. 479 (U. S. Comp. St. 1901, p. 1317), it was provided that any Chinese person convicted before a commissioner of the United States court and adjudged to be one not lawfully entitled to be and remain in the United States may within 10 days appeal from said conviction to the Judge of the District Court in the district.

The law is now well settled that the finding of the commissioner, who sees and hears the witnesses and who reaches the deliberate conclusion that they are not entitled to credit, should not be reversed by an appellate court. Lee Sing Far v. United States, 94 Fed. 834, 35 C. C. A. 327; Ark Foo and Hoo Fong v. United States, 128 Fed. 697, 63 C. C. A. 249; Hong Yon v. United States (C. C. A.) 164 Fed. 330; Quock Ting v. United States, 140 U. S. 417, 11 Sup. Ct. 733, 851, 35 L. Ed. 501; Chin Bak Kan v. United States, 186 U. S. 193, 22 Sup. Ct. 891, 46 L. Ed. 1121.

The judgment of the District Court is affirmed.

STANDARD SILK CO. v. FORCE

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

No. 197.

MASTER AND SERVANT (§§ 286, 288, 289)—MASTER'S LIABILITY FOR INJURY TO SERVANT—ACTIONS—QUESTIONS FOR JURY.

Where plaintiff, an inexperienced boy 14 years old, employed in defendant's silk mill, was left during the noon hour alone in a room where shafting from which belts hung was running at high speed, without any warning or caution against the danger of meddling with the same, and in some manner became caught in a belt and injured, on conflicting evidence as to the manner of the injury, the questions of the defendant's negligence, and also of plaintiff's contributory negligence and assumption of risk, were properly submitted to the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1010-1050, 1068-1132; Dec. Dig. §§ 286, 288, 289.*]

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

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
For opinion below, see 160 Fed. 992.
This cause comes here upon a writ of error to review a judgment of the Circuit Court, Northern District of New York, entered upon verdict in favor of defendant in error, who was plaintiff. The action is for personal injuries sustained in defendant's silk mill.

White, Bond & Schoeneck (E. Schoeneck, of counsel), for the plaintiff in error.
J. J. Bixby, for defendant in error.
Before LACOMBE, COXE, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. The accident happened in the reeling room, in which there were eight machines; four of them not being in commission on the day the plaintiff was hurt. These machines were driven each by a belt which ran from a pulley on an overhead power shaft to a pulley on the driving shaft of the machine. The power shafts ran during the hour of noon recess; but it was the practice for the operators at the machines to cease work on signal given a few minutes before noon, whereupon a foreman or assistant foreman would stop the running of the machines by pushing the belts off the pulleys of the power shafts. The belts would then hang loose on the revolving shaft, reaching to the floor. Each belt was then tied or looped up so as to clear the floor. Whether or not this was always done was a fact in controversy on the testimony; plaintiff asserting that in the few weeks he had been there he had repeatedly seen belts reaching to and resting in part on the floor, adding:

"There was sufficient motion from the shaft so that the end of the belt that came in contact with the floor would wriggle."

There was also a conflict between competent witnesses called by both sides as to whether a looped-up belt suspended on a rapidly moving shaft would or would not "crawl" and sometimes wind up on the shaft. The jury was justified in finding that such an occurrence might reasonably be expected occasionally to happen. Evidence submitted by the defendant indicated that after being tied up the lower loop of the belt was slipped over the shaft of the machine (inside the pulley)—presumably to counteract the tendency to wind up. But if the jury believed plaintiff this was not always done.

Plaintiff was 14 years of age. He was employed to clean bobbins, using sandpaper to remove filaments of silk from them. He was not put to work at any machine. Usually, if not invariably, all the others employed in the reeling room left it during the noon recess; but he remained there, eating the lunch he had brought with him. This is not disputed. Two fellow employés testified, each to a different occasion when he casually cautioned plaintiff not to touch the belts. The plaintiff, however, said that no one ever warned him they were dangerous, and it seems well established by the proof that no one in authority ever cautioned him as to the dangers incident to belts or machines, or forbade him to interfere with them, or warned him against coming in contact with them. The plaintiff testified that on at least one occasion before the day of the accident, under the direction of the
foreman, he "put off three or four belts" from the main pulleys overhead. The foreman contradicted him on this point.

At the time of the accident plaintiff was alone in the room. His story of what took place is as follows: He sat in one of the windows about to eat his dinner, when his attention was attracted by a noise, which he saw was caused by a hanging belt which had wound up on the shaft and was revolving very fast; the end of it striking the ceiling every time the shaft went around. He took a step-ladder which was kept in the room, apparently for use when putting belts on, and set it up near the machine to which the belt belonged. He took four or five steps up the ladder and reached out his hand to the revolving belt. The hand was caught in the mass, he was whirled up and around, his arm torn off, and he fell to the floor. The defendant's theory of the occurrence is that the belt was properly tied up, with the lower loop caught over the shaft of the machine, not crawling or winding up at all; but that plaintiff through idle curiosity mounted the step-ladder to experiment with the belt and see if he could slip it on and off the power shaft pulley as he had seen the foreman and assistant foreman do. This theory is based on circumstances—the position of the belt when found, etc.—of the value of which the jury were competent to judge. It is but a theory, since the plaintiff was the sole eyewitness of the transaction.

At the close of the case defendant moved for the direction of a verdict on the grounds that: (1) No negligence of defendant was shown. (2) Plaintiff was guilty of contributory negligence. (3) The risk he took was an open and obvious one, which he assumed by remaining in the employ. (4) The negligence, if any, was that of a coemployé.

Upon the facts above set forth the questions of contributory negligence and assumption of risk were fairly for the jury, especially so in the case of an infant, where the degree of his intelligence and maturity, important elements of the problem, could be best determined by the triers of the facts, who saw and heard him on the witness stand. The view we take of the case makes it unnecessary to consider the fourth ground.

As to the negligence of defendant: There was enough to take the case to the jury on the theory that he had been put to work throwing off belts by his superior, the foreman; but that was not the only question submitted to them by the court. Whether plaintiff tried to reach the belt in some honest effort to be useful to his employer, or whether with the ignorance and inexperience of childhood he was attracted by what he saw and tempted to do as others had done, the salient and dominant fact remains that he was placed alone in this room, where moving parts running at high speed were likely to imperil an inexperienced person who came in contact with them, and was not warned by those who placed him there of his dangerous surroundings. In his decision on the motion for a new trial the trial judge says:

"I can conceive of no more vicious doctrine than to hold that owners of mills, in which are machinery and belts such as these were, dangerous to those who should intermeddle with them unless skilled in the business, may employ inexperienced boys and put them to work in the rooms with this machinery, and leave them there at noon with parts of it in motion and the rest
unguarded and easily accessible, without warning or instruction as to the dan-
ger of intermeddling with it, or without positive instructions to keep away
from it and not intermeddle, without being liable to the imputation of neg-
ligence in so doing."

In this conclusion we fully concur.

Defendant reserved exceptions to the refusal of several of his re-
quests to charge, which fully set forth his theory of the case. They
need not be separately discussed. They were based on the proposition
that unless actually put to work at a machine there was no obligation
on the part of the employer to warn the servant of the danger of in-
termeddling with it—a proposition to which we do not assent. We
find no errors in the admitting or excluding testimony or in the charge.
Judgment affirmed.

CHIN MAN CAN v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. May 3, 1909.)

No. 1,645.

APPEAL AND ERROR (§ 1008*)—REVIEW—QUESTIONS OF FACT.

In a Chinese deportation proceeding it was assigned as error that the
court did not find that defendant was a citizen and entitled to remain in
the United States, in sustaining the judgment and order of the commis-
sioner, and in remanding defendant to the custody of the marshal, and
adjudging he was unlawfully in the United States. Held, that the issues
presented by such assignments were issues of fact, and could not, there-
fore, be reviewed on a writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Digo. §§ 3955–
3969; Dec. Digo. § 1008.*]

In Error to the District Court of the United States for the South-
ern Division of the Southern District of California.

George L. McKeby and A. C. Hurt, for plaintiff in error.
Oscar Lawler, U. S. Atty.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. This is a writ of error to review the
decision of the District Court for the Southern District of California
ordering the deportation of Chin Man Can from the port of San Fran-
cisco on the ground that Chin Man Can is a Chinese person and a
laborer by occupation, and that he has failed to establish by affirma-
tive proof to the satisfaction of the court, or the judge thereof, his
lawful right to be and remain in the United States, and has not made
it appear to said court, or the judge thereof, that he is a subject or
citizen of any other country than China.

It is assigned as error that the court below did not find that the plain-
tiff in error was a citizen of the United States, and entitled to be and
remain in the United States, that the court erred in sustaining the
judgment and order of the commissioner, and that the court erred in
remanding the defendant to the custody of the marshal and adjudging
that he was unlawfully in the United States. The only questions and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date & Rep'r Indexes
issues presented by the record before the court are questions and issues of fact, and not of law. These questions cannot be reviewed upon writ of error. Leo Lung On v. United States, 159 Fed. 125, 86 C. C. A. 513, and cases there cited.

The writ of error is therefore dismissed.

RUSHMORE v. MANHATTAN SCREW & STAMPING WORKS.
(Circuit Court, S. D. New York. March 2, 1909.)

PATENTS (§ 326*)—SUITS FOR INFRINGEMENT—VIOLATION OF INJUNCTION—SALES IN FOREIGN COUNTRY.

An injunction against the infringement of a patent is not violated by the sale in a foreign country of infringing articles manufactured before the injunction was issued.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 614; Dec. Dig. § 326.*]

In Equity. On application to adjudge defendant in contempt.

Alfred Wilkinson, for complainant.

Briesen & Knauth, for defendant.

NOYES, Circuit Judge. The complainant's counsel states in his brief that he has no means of disproving the defendant's affidavits. In view of this, and of the fact that there is nothing improbable in those affidavits, I deem it my duty, upon this application, to accept them as stating the truth. From these affidavits it appears: (1) That none of the lamps covered by the injunction have been manufactured since it was issued. (2) That none of such lamps manufactured before the injunction was issued have been sold in this country since that time. (3) That some of such lamps manufactured before the injunction was issued have been sold by the defendant in Europe since that time.

Upon these facts the case is brought, in my opinion, within the principles of the decisions in Gould v. Sessions, 67 Fed. 163, 14 C. C. A. 366, and Bullock v. Westinghouse Co., 129 Fed. 105, 63 C. C. A. 607, holding, as I construe them, that an injunction against the infringement of a patent is not violated by the sale of the patented article in countries to which the monopoly does not extend. It is true that in the former case the court referred to the fact that "no preliminary arrangements for the sale were made in the United States"; but I cannot regard that statement as imposing a limitation upon the doctrine respecting sales in foreign countries.

The application to adjudge the defendant in contempt is denied.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.
RUSHMORE v. MOTOR CAR EQUIPMENT CO.

(Circuit Court, S. D. New York. March 20, 1909.)

PATENTS (§ 326*)—SUITS FOR INFRINGEMENT—VIOLATION OF INJUNCTION.

A defendant adjudged in contempt for violation of an injunction against infringement of a patent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 613-619; Dec. Dig. § 326.*]

In Equity. On motion to adjudge defendant in contempt, and on motion by defendant to modify injunction.

Alfred Wilkinson, for complainant.
Joseph L. Levy, for defendant.

NOYES, Circuit Judge. The injunction granted in this cause was broad and sweeping. The defendant did not oppose its issue, and apparently ignored it afterwards. The objections which it now offers constitute no reason why the injunction should not have been obeyed. The lamps which it sold and offered for sale manifestly come within its provisions.

It follows, therefore, that the defendant must be adjudged in contempt. It is ordered to pay a fine of $300—$250 of which shall be paid to the complainant for expenses incurred in the prosecution of this motion, and the remainder to the United States.

While the defendant has delayed in applying for the modification of the injunction, I have reached the conclusion that it is entitled to some relief. No reason is apparent why a broader injunction order should stand against this defendant than exists after its modification by the Circuit Court of Appeals in the case of the complainant against the Manhattan Screw & Stamping Works, 170 Fed. 188.

The order in this case may be modified to conform to the order referred to and to the decision of the Circuit Court of Appeals.

GENERAL ELECTRIC CO. v. HILL-WRIGHT ELECTRIC CO.

(Circuit Court, S. D. New York. April 6, 1909.)

PATENTS (§ 328*)—INFRINGEMENT—PROCESS OF EXHAUSTING AIR FROM LAMP BULBS.

The Howell patent, No. 726,293, for an improved process for exhausting the air from incandescent lamp bulbs, held not infringed.

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

In Equity. On final hearing. The usual patent suit, based on claims 1 and 2 of letters patent No. 726,293.

Richard N. Dyer and John Robert Taylor, for complainant.
A. Parker Smith, for defendant.

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
PLATT, District Judge. The bulb of an incandescent lamp must be practically divested of air in order that a reasonably long life shall be obtained for the carbon filament therein which gives us light. The patent in suit relates to a process for exhausting the bulbs, so that their interiors are brought to a state of high vacuum. It is a specific improvement upon the Malignani process, shown in patent 537,693.

The process of that patent briefly stated is this: The glass bulb was completely sealed, except at its enlarged end, which was elongated into a slender glass tube. This tube, having within it and near the bulb a certain chemical substance to be utilized later, was connected to a vacuum pump. A large proportion of the air was then withdrawn from the bulb by the pump, and connection with the pump was then stopped by fusing the thin tube between the pump and the inclosed chemical. The filament of the lamp was then brought by electricity to such a high state of heat as to fill the bulb with a peculiar bright blue haze, which indicated ionization. This condition, which was known as intensive incandescence, was the signal for heating the glass tube at the point where the chemical substance had been introduced, and then the gases from the chemical united with the gases generated by the filament and formed a solid or liquid precipitation, thus leaving within the bulb a practically perfect vacuum. This condition was indicated by a disappearance of the peculiar blue haze above referred to, and thereupon the thin glass tube was sealed off from the bulb at the point where it entered it, and the bulb was then, so far as the process had to do with it, completed.

In the practice of the Howell process, under the patent in suit, a similar glass bulb is used; but between the vacuum pump and the thin extension of the bulb a piece of heavy rubber tubing is used, one end connected with the pump and the other with the thin glass extension. A partial vacuum is then produced in the bulb, and pressure is applied to the tubing by a pinch cock, thus shutting off the pump connection. The filament is then brought to a state of high heat, and the gases of the chemical substance are released by heat applied to the thin extension at the point where the chemical substance had been located, the two gases unite, the solid or liquid precipitation follows, and the tube is sealed off. The only difference, then, between the patented process and that practiced by Malignani, is that, after all the air which can be conveniently removed from the bulb by the vacuum pump has been exhausted, the connection with the pump is closed in the one case by pinch cock pressure on the rubber tubing, and in the other case by fusing the thin glass extension with heat. The complainant says that it involved invention to do this, and the defendant says that it did not.

The patentee seems to have thought that the advantage from his invention, if we admit it to be an invention, was that he could shut off connection with the vacuum pump instantly, and without the use of heat, and so retain the partial vacuum in the bulb long enough to permit him to complete the vacuum by heating the chemical in the tube and letting it do the remaining work. If he used heat in closing the connection with the pump, that heat would be liable to let loose the chemical above, and he might have an overdose of volatilized chem-
ical, which would leave the bulb at the end in a spotted condition. He could also make the thin tube extension shorter than Malignani could, and in that way save much glass. The expert thinks he sees another advantage, in that the closure is controllable, and can be applied at the best possible moment; but I am unable to see how the operator has any means of knowing when that moment arrives, because confessedly the closure must occur before the heating of the filament by an increased potential of electricity begins.

To go back for a moment to the question of novelty and invention: There is no difference between Malignani and Howell, except the one suggested. It is due entirely to the different means used in effecting the closure. If the means adopted were old and well known, what invention could there be in using them? We are, therefore, brought to this: When Howell set to work to get rid of the troubles which arose in the practice of Malignani’s process, was it a common expedient in the art to connect the thin stem of a hollow glass vessel to a vacuum pump by a thick, heavy, noncollapsible rubber tubing, and provide for shutting off connection with the pump by other means than heat, of which the pinch cock pressure was the one suggested, and evidently the only one discovered? It is the impression of the writer that the answer ought to be in the negative; but the record put in by the defendant is so meager that it would be an ungracious thing for the decision of this case to be placed upon that basis. The application for the patent in suit was before the examiner for several years. The file wrapper and contents, which might throw light upon these matters, is not in evidence; and, as this suit can be easily decided upon another ground, the patent may be left breathing so far as the decree following this opinion is concerned.

The defendant urges seriously the defense of noninfringement. His reasoning in that respect is positively persuasive, leaving no loophole of doubt, and upon that defense alone it is right to dismiss the bill. I shall only say a word or two about my thoughts along that line. It is common sense and good law combined that a process requires certain things to be done with certain substances in a certain order. The process of the patent in suit calls for the doing of certain things in a fixed series of steps, viz.: (1) Putting a chemical into the tube. (2) Partial exhaustion by means of the pump connection. (3) Closing the pump connection at a point between the chemical and the pump. (4) Incandescing the filament. (5) Heating the chemical. (6) Sealing the lamp by fusion as near the bulb as possible. Both the fact witnesses in the case make it plain that in the process used by the defendant the filaments of the lamp were brought to a state of high incandescence before the connection with the vacuum pump was finally closed by the pinch cock. This was surely not the Howell process. It may have been, and probably was, the process which the complainant used in exhausting its lamps; but no monopoly of such a process can be spelled out of the patent in suit.

My reason for thinking it probable that complainant uses the last described process is that it would excuse the expert for finding the advantage of controllability in the closure, which was not found by
the patentee himself. The burden of proof on infringement is, of course, on the complainant; but, if it were on the defendant, it would be my duty to find with the same certainty that the defendant does not infringe.

Let the bill be dismissed.

DONALDSON v. ROKSAMENT STONE CO.

(Circuit Court, E. D. New York. April 29, 1909.)

PATENTS ($§ 328*—INFRINGEMENT—PROCESS OF MAKING ARTIFICIAL STONE.

The Stevens patent, No. 624,563, for an improved process of forming artificial stone, the principal feature of which is the use in the mold of relatively dry sand to extract the moisture from the plastic stone compound from which the blocks are cast, was not anticipated, and discloses invention, the process being novel and one of a high degree of merit. Also held infringed.

[Ed. Note.—For other cases, see Patents, Dec. Dlg. § 323.*]

In Equity. On final hearing.

O. Ellery Edwards, Jr. (R. A. Parker, of counsel), for complainant.
Heyn & Covington (George B. Covington, of counsel), for defendant.

CHATFIELD, District Judge. The complainant has acquired, by various assignments which need not be stated other than generally, the right, within certain territorial limits, to use, and to protect by the prosecution of infringers, certain patent rights originally obtained by one Charles W. Stevens, under date of May 9, 1899, No. 624,563, application filed November 12, 1897, and, as stated by him, the invention related to improvements in processes of making artificial stone, and particularly to that class exemplified by letters patent No. 583,515, granted June 1, 1897, to Charles W. Stevens. Stevens assigned his rights to an Illinois corporation, the Stevens Stone Company, and territorial rights were granted through this corporation to Stevens, then to the American Stone Company, a New Jersey corporation, then to the New York Cement Stone Company, by whom certain similar rights were granted to Edward R. Diggs, who in turn granted to John Donaldson, the complainant, the use of the patent in the territory, including the place where the alleged infringing acts of the defendant, at the defendant's factory, are charged to have been committed. The complainant has also shown other grants covering the entire Eastern district of New York, and the various documents seem to convey a prima facie title, which has not been controverted in this action.

The general purpose of the patent, and some discussion of the material thereby produced, must be had at the outset, in order to understand the issues and testimony in the case. Natural stone has been used as a building material, and has been known as a material object, since a period of which no record of such use exists. In a similar

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
way, the substance now called "concrete" has been used for centuries, and the terms "cement" and "mortar" need no explanation, except as a convenient method of distinguishing their use and construction. The following text-book definitions may therefore save confusion in the succeeding statement and argument:

"Cement. Portland cement is the slow-setting product of a high-temperature kiln burning a pulverized cement rock, or mixture of clay and limestone of a very exact and regular composition."

"Natural cement is the quick-setting product of a low-temperature kiln burning a cement rock of irregular composition."

(Dr. C. F. McKenna, defendant's expert.)

"Sand. This material, which forms one of the ingredients of mortar, is the granular product arising from the disintegration of rocks."

(Mahan's Civil Engineering.)

"Mortar. Is any mixture of lime in paste with sand. It may be divided into two principal classes: Hydraulic mortar, which is made of hydraulic lime, and common mortar, made of common lime."

"The term 'grout' is applied to any mortar in a thin or fluid state; and the terms 'concrete' and 'beton' to mortars incorporated with gravel and small fragments of stone or brick."

(Mahan's Civil Engineering.)

"Concrete. Consists of mortar in which is embedded small pieces of some hard material. The mortar is often referred to as the matrix, and the embedded fragments as the aggregate. Concrete is a species of artificial stone. It is often called beton, the French equivalent for concrete."

And again:

"The term 'concrete' is almost universally understood to be cement mortar, with pebbles or broken stone imbedded in it."

(Masonry Construction, by Baker.)

The difference between grout and concrete is stated, by the text-books above referred to, to consist in the fact that grout is fluid enough, or prepared in such plastic condition as to flow readily, and thus may be employed in filling in cracks and apertures, where a more solid or resistant material, like concrete, could not be made to enter all parts of the opening, and where even tamping would not accomplish the desired object, if the space would allow that method of distributing the substance itself.

Concrete in some forms has been shown to have had great durability and has stood the test of the elements, and of wear from the time of the Romans to the present date. The Pantheon is stated to be a building of concrete, and stands, in even more durable form, as the years go by. But such structures of concrete do not present an attractive appearance, and are not capable of ornamentation. They are not artificial stone, in the sense of possessing the same qualities which would be present in natural stone, but in durability and hardness they are much like the substance produced under the patent in suit, and this likewise has resulted in the adoption of the trade-names of "Litholite" or "Roman Stone," which are used by the complainant in his advertising matter, and which have been common enough to designate a certain character of building material, the process of making which is exactly defined in the Stevens patent above referred to.

The complainant has introduced in evidence many examples, both in the way of pictures and samples, of the value, practicability, and
extreme adaptability of this material for building purposes. He has also proven its use in many structures where durability, capacity for ornamentation in the way of carving, and attractive appearance have been desired. The complainant has also furnished a striking illustration, as evidence of the durability of the stone, in a power house at Niagara Falls, where the mist of the falls, freezing during the winter months, has caused disintegration of buildings composed of natural stone, while buildings composed of complainant's material have become harder and more substantial with the continued exposure.

These illustrations are all that is necessary upon the questions of adaptability and value, and there is little contention made by the defendant as to infringement. The defendant has, it is true, produced some witnesses who have not had successful results when attempting to work under a license from the complainant, but these instances would seem to be failures in carrying out the method, rather than in the method itself, and the success of the complainant's own work more than overcomes the doubt suggested by the defendant's witnesses. And, in the same way, testimony to the effect that the defendant is not infringing is of slight weight in comparison with the testimony showing the use of a similar process by the defendant at its factory near the Gowanus Canal, in Brooklyn.

The question of anticipation, however, and of unpatentability, in that the idea is claimed to be no more than an old and well-known method in various arts, brings up more difficult issues, and requires a somewhat careful delineation of the method itself, and of the processes of other patents, as well as the general principles of molding in all kinds of trades and arts. The defendant has cited a number of patents, among them letters patent to Hunt, No. 54,910, May 22, 1866; Quinby, No. 240,459, April 19, 1881; Sellars, No. 244,321, July 12, 1881; Hoyt, No. 368,398, August 16, 1887; Stevens, No. 457,231, August 4, 1891; Stevens, No. 583,515, June 1, 1897; as well as English patents to Hind, No. 2,280, October 6, 1859; McLean, No. 8,747, June 9, 1884; McLean, No. 1,262, December 28, 1889; Parker, No. 4,881, March 20, 1890—showing the application of the principle of casting in a mold, with fluid, whether mineral or metal, and of allowing the molten or fluid material to cool and harden or set, as is commonly known in the casting of iron and in the making of objects with plaster of paris, or even of filling in the spaces between material with mortar, which sets through the action of the cement or lime, in hardening, both by evaporation and by chemical action.

But the patent under discussion, as described by Stevens, depends upon another well-known and fundamental principle, which adds to the chemical and evaporating action of cement or mortar, namely, that of drainage and solidification by settling and capillary attraction, rather than by internal contraction, such as occurs with evaporation. The Stevens patent when first presented to the Patent Office was rejected in so far as its claims described merely a molding, such as was known and used with all kinds of material; but when Stevens added to his claims the language with relation to the drainage and concentration thereby obtained, the patent was granted, and the claims in their present form allowed.
The language used by Stevens, in its final form, is as follows, in claim 1, which is merely amplified in statement in the other claims of the patent:

"(1) The process of forming artificial stone, consisting in molding the stone compound while in a plastic or semi-liquid state in or on a mold formed of relatively dry sand, and then allow the mass to set until the sand absorbs the surplus moisture from the compound, thereby converting the latter to a solid or non-liquid form, substantially as and for the purpose set forth."

Stevens in his specifications refers to a former patent, No. 583,515, dated June 1, 1897, over which he seeks an improvement by the patent in suit.

The Stevens patent, No. 583,515, was substantially a method for forming, within a mold of sand, a casting out of cement or other suitable substance by saturating the sand, and thus, through the chemical action of the water contributed by the sand, turning the cement into artificial stone; while in the patent at bar, the sand is kept in a dry condition, the material from which the stone is to be manufactured is poured in in a wet or plastic state, and the sand drains water from the material, instead of furnishing moisture thereto. Stevens describes methods for shaping the mold and inserting facing boards in the sand, so as to make ventilating flues or edges and lines, so as to construct any shape of block which may be desired, and to a certain extent the sand itself may be used in the form of a mold for giving a general design or shape to the block.

But the important feature of the patent lies in the principle of extraction of the water, and the resulting contraction of the material into a homogeneous mass, which will fracture in rough and uneven surfaces, like the fracture of natural stone when no distinct line of cleavage is present, and in furnishing a material upon which tools may be used, and from which carved surfaces can be produced. The samples of decoration and even of architectural statuary made out of this stone, and introduced as exhibits in this case, illustrate better than description can do the exact product of the Stevens patent.

The defendant has cited the Stevens patent bearing No. 583,515 as anticipation, but it in no sense seems to show the idea of the present patent, except in so far as it plainly illustrates the improvement and desirability of the new method. None of the patents cited taught the idea finally discovered by Stevens, nor did they apply the principles thereof in such a way as to indicate those principles, nor to show their necessary consideration by any of the previous inventors in their several patents. The nearest approach is in another patent of Stevens, No. 457,231, granted August 4, 1891. In that patent, Stevens, in an attempt to manufacture artificial stone, formed a mold of sharp sand or broken pieces of stone, which he arranged in an irregular design in the bottom of a wooden box. He then poured plastic material into this mold, and found that more or less of the sand and rough material of which he had composed his mold adhered and became a part of the artificial block which he was producing, and thus gave it a rough or more or less stonelike appearing surface. The quantity of sand used in the bottom of the box was small, and the fact that Stevens states that he pours plastic material, of which "a portion of the ce-
ment sinks into the sand" and then "penetrates an unequal distance into the mass of sand by reason of the unequal density of the mass and its consequent unequal resistance to permeation by the liquid cement," indicates that to a slight extent the face of the stone produced by that patent may have been affected by the process of the patent in suit. But Stevens, in order to give the material produced under his former patent the "roughened and irregularly shaped surface of hammer-broken stone," found it necessary to form inequalities in the surfaces of his mold, and in no way seems to have considered or to have described, nor to have produced, anything except what in an accidental and immaterial way corresponded with the idea of his later patent.

It is strange that Stevens did not follow his earlier patent with the idea of the later one, much sooner than seems to have actually been the case. It is now a short step from one to the other. But it appears to the court that, although artificial stone has been used in considerable quantities in the years during the life of this patent and especially in the way of concrete walks, curbs, and extensive structures of a like nature, the principle of the Stevens patent was not suggested, and was not used with appreciative knowledge by any one, until the improvement occurred to Stevens himself, and he applied for the latest patent.

The defendant produces several English masons, who testify to the use of sand molds in England some 40 years ago, and to the application of the principle of a sand mold upon the Cosmopolitan Building, at Irvington-upon-the-Hudson, in the years 1893–97. But it ultimately appeared that Mr. Jones, who also was called as a witness, was in charge of the work at Irvington-upon-the-Hudson, and he is shown, both in his testimony and by the statements of other witnesses, to have never understood or appreciated the methods used by Stevens, until he saw them put in use by Stevens, subsequent to the application for the patent in suit. The results of Mr. Jones' and the English mechanics' work do not support the claim that they were obtained by similar methods to those of Stevens. The general effect of their testimony leads to the conclusion that, in whatever they were doing, they were using sand as a mold, for the purpose of giving shape to the concrete blocks, that the sand was ordinarily coated with some non-absorbent or waterproof material, and that the features of the Stevens patent were neither known nor made use of to any appreciable extent.

Such an invention as that of Stevens should be given the protection of the patent law, for it is the protection and the reward of such ideas upon which the policy of the patent law itself is based. The case of Carnegie Steel Company, Limited, v. Cambria Iron Company, 185 U. S. 403, 22 Sup. Ct. 698, 46 L. Ed. 968, citing the Risdon Locomotive Works v. Medart, 158 U. S. 68, 15 Sup. Ct. 745, 39 L. Ed. 899, is the conclusive standard by which processes of manufacture are held to be patentable, and in which the distinction between a mere mechanical use of a device and the process involved in the patentable use of the mechanism are distinguished. The present instance shows the application of a physical law as well as a chemical process. But the idea involved is more than the mere effect of pouring a cement
mixture into a mold. Stevens was careful to impress this point, and he says in his specification that he relies upon the sand to extract the moisture from the stone compound.

In the course of the trial the complainant manufactured stone in court, under the system used by him, with the aid of a sand mold and semiliquid material. The immediate and continued gradual abstraction of liquid was marked, and explains, better than any amount of discussion, the causes producing the results of the Stevens patent. It is apparent from this actual experiment that no construction, in which form may be given to a plastic or molten material by a mold, is responsible for the effects produced upon the plastic material employed according to the Stevens patent.

The defendant having, therefore, infringed a patent which had not been anticipated at the time of its issue, and which contained the merits of patentability, originality, and exceedingly great commercial value, should be enjoined and compelled to account; and, more important than this, the presumption of validity in favor of the patent should be strengthened by a decision upholding the patent as valid.

The complainant may have a decree.

ZINN v. AUTO STROP SAFETY RAZOR CO.
(Circuit Court, S. D. New York. April 13, 1909.)

PATENTS ($228*)—INFRINGEMENT—SAFETY RAZOR.
The Scheuber patent, No. 679,639, for a safety razor having a movable and spring-adjustable guard, construed, and held not infringed.
[Ed. Note.—For other cases, see Patents, Dec. Dig. § 228.*)

In Equity.
Clifford E. Dunn and Thomas W. Bakewell, for complainant.
Walter D. Edmonds and T. F. Bourne, for defendant.

PLATT, District Judge. This is an equity suit, based upon an invention of August Wm. Scheuber, shown in letters patent No. 679,639, granted July 30, 1901, to the complainant as Scheuber’s assignee. The subject of the invention is the well-known safety razor, and it is for improvements therein. The claims involved are:

"1. A safety razor, comprising a casing or blade support and an automatic or self-adjusting guard, substantially as described.

"2. A safety razor, comprising a casing or blade support and a spring actuated or adjusted guard for the blade, substantially as described.

"3. A safety razor, comprising a blade support and a blade-adjusted movable guard, substantially as described."

"4. A safety razor, comprising a blade support and a guard normally moved inward on the support and adapted for engagement by a blade, substantially as described.

"7. A safety razor, comprising a casing or blade support and an automatic or self-adjusting guard movable relatively to or independently of the casing, substantially as described.”

*For other cases see same topic & $ number in Dec. & Am. Dig. 1907 to date, & Rep’t Indexes
"9. A safety razor casing combined with an automatic or self-setting guard having its opposite portions movable or adjustable independently of one another, substantially as described.

"10. A safety razor casing or blade support and a blade-adjustable guard provided with lugs or stops for securing the proper relative position of the guard to the blade or casing, substantially as described.

"11. A safety razor, comprising a blade support and a blade-adjustable guard provided with oppositely located blade-engaging stops, said guard having its opposite sides independently movable or adjustable, so that each end portion of the blade can set its respective portion of the guard, substantially as described."

After cutting away the refinements of the case, the real defense is understood to be that, in view of the prior art and the specifications of the patent in suit, one is obliged to construe the claims of the patent so narrowly that the defendant's device does not infringe. The alleged infringing safety razor is a cunningly arranged device. Among many operations needed to produce it are the following: The blade, it will be seen, is securely held by a frame which revolves upon a permanently located axis. At one point of its revolution it brings the blade to a place of rest which is nearly in line with the plane of movement of the safety guard, which is spring-actuated and provided with lugs. By pressing the spring the guard is pushed outwardly, and the rigidly held blade is permitted to fall into the plane of movement of the guard, and then, the pressure being released, the spring as it contracts brings the guard back, so that its lugs press against the blade and it remains there exerting a constant steady pressure. The razor is then ready for use.

The operations described offer an opening for the charge of infringement to come in and get a hearing. In this situation, if we confine our thoughts to the claims of the patent in suit, we might think that one element of the alleged infringing device is "an automatic or self-adjusting guard," or "a spring actuated or adjusted guard for the blade," or "a guard adapted for engagement by a blade," etc. It will be noticed, however, that claim 3 calls for "a blade-adjusted movable guard," and that claims 10 and 11 correspond. Complainant's expert says of claim 3:

"I understand this claim to cover a movable guard which is adjusted by the blade. The blade performs the function in the adjustment of the guard."

He also says that it differs little, if any, from claim 1; and of the patented device he says:

"The stops on the guard are in position to be immediately engaged by the blade, which, as the blade slides into place, causes the guard to be moved outwardly or adjusted by the blade."

It will be noticed that in the alleged infringement the blade takes no active part in the adjustment, but, on the contrary, bears simply and purely a passive, inactive relation to the adjustment. It prevents the guard from further spring retraction. It is merely an obstacle to further rearward progress by the guard. Is there so broad a thought as pure self-adjustment of the guard in the general disclosure and claimed monopoly of the patent? To my mind enough appears in the pat-
ent in suit, as explained by the expert, to warrant a negative answer without going further, although to make assurance doubly sure, the entire matter has been examined with more care than the brevity of these comments would indicate.

The problem presented in the art of safety razors was to effect such a combination between the blade of a razor and a safety guard that the unskilled user could by simple mechanical manipulation bring the two into such relation that the resulting device could be used upon the face in such a way as to leave it reasonably free from hair without cutting the skin. Many difficulties were met and overcome, and gain was steady, until we come to Kampfe’s patent, No. 637,511; but in all cases, including this, the safety guard was immovable, and the blade, in a variety of ways, was adjusted to the guard.

The Kampfe patent was granted November 21, 1899, and the most casual comparison of the patent in suit therewith shows that Scheuber took the Kampfe construction as the basis for his alleged improvement. The essence of the Kampfe invention seems to be that by the use of a spring which could be used upon different sizes of blades the blades could be brought into proper relationship with the immovable guard. The device protected by that patent met with large success in the market. Scheuber took the Kampfe construction, made the guard movable, and applied a spring adjustment to it, so that, when pushed down against the face of the spring by the contact of the blade with the lugs on the guard, it would, after the blade had been clamped in position by its own spring, bear constantly against the blade. Thus the blade was being pressed by its spring against the guard, and the guard by its spring against the blade.

Kampfe had the old-time blade sprung toward an old-time immovable lugged guard, while Scheuber makes the old-time guard movable, and, after adjusting the blade to it, clamps his blade in the proper position and leaves the blade with the guard constantly pressing against it. This capacity for pushing the guard to the place where it would fit in properly with different sized blades, and then holding constant the proper relationship between the guard and blade by spring tension, is the new thing, if there is any patentably new thing, in Scheuber. To extend this to self-adjustment on the part of the guard, in and of itself, without any connecting thought, would obliterate patentable novelty from the Scheuber device.

Up to the time of Scheuber it had been necessary to adjust the blade to the guard. The spring above the blade had been doing all the work. Now, in Scheuber, the guard being movable and spring actuated, the blade could adjust the guard to itself. I cannot see why the spring that pushed the guard up was not quite as likely to become weakened and inefficient as the spring of Kampfe, which had pushed the blade down; and as, in Scheuber, there are two springs employed, one working up on the guard, and the other down on the blade, the chances for inefficiency would seem to have increased. This may be the reason why the complainant has nothing more than a confessedly paper patent.

What has been said ought to enable one to examine the patent and learn what the invention was, and what it was claimed to be. Scheu-
ber, after having used his blade to adjust his guard and then clamped it into the proper relationship with the guard, leaves his guard snugging up against the blade at the prearranged position. This snugging-up function is the one which we find in defendant's device, and is not the foundation of the operation for which he claims his patent.

All through the specifications we find the blade doing something. It may be true that, after positioning the guard, it is clamped and held as rigidly as possible with the means at hand, and permits the guard to press against it; but no advantage is suggested as accruing therefrom. The gain in the art comes, the inventor says, because he has shown how, by making his guard movable and under spring control, different shapes, sizes, and thicknesses of blades can be taken care of. With an immovable guard the ignorant user must have a blade exactly fitted to the device in advance; but the movable guard would accept and provide for irregularities in blades. If there is any intention to be found, it must, as before suggested, cover so small a field that no trace of defendant's feet can be found upon it.

So far as the invention is disclosed in Figures 1 to 6, the complainant admits that the normally spring-retracted guard was forced forward by the insertion of the blade. But he says that was only one way of doing it, and that Figures 7 and 8 show a construction in which the blade was inserted in the holder and then the spring-actuated guard, f, was allowed to move back under the action of the operating spring until the lugs, r, contacted with the edge thereof, and properly positioned itself with respect thereto. Quoting from page 2, lines 17 to 20, of specifications:

"When the front is closed, or the guard snapped up or swung or moved to the blade, the spring hinge or pressure will hold or adjust the guard to the edge."

He overlooks the fact that what has just been quoted is connected with and supplemental to the statement (line 9 et seq., same page):

"It may be noted that a hinge, h, not only allows automatic adjustment or setting of the guard relatively to the blade, but also allows the opening of the case to give access to the interior for cleaning."

It was after the cleaning that it was put back to duty as suggested by complainant's quotation.

He also overlooks the patentee's earlier statement (page 1, line 91 et seq.) about the function of the spring hinge:

"A spring hinge, h', arranged to normally swing or move the guard inward, but the spring of which yields to allow the blade to move the guard more or less outward, will automatically effect adjustment or proper relative position of the guard and blade."

The more one looks, the more the active use of the blade in bringing about the correspondence between guard and blade is made manifest. In closing, let me restate briefly the two contentions:

Complainant says that the art of safety razors had reached a point, when the patentee came in, where the proper relation of the blade to the guard had been taken care of by advancing a movable blade against an immovable guard, and then sustaining that relation by spring action on the blade. The patentee showed how to take the same old
elements, and, making the blade immovable, to so arrange the old
guard, by making it movable and spring-actuated, that it would bring
itself into proper relation with the immovable blade and remain there
under spring tension.

Defendant says the patentee made no such disclosure, and made no
such claim based thereon, and, if he did, it disclosed no invention; that
what he did show was a much narrower and trifling thing, which could
not be of any use, and never was used; that his effort produced a
purely paper patent, which happens to be so worded in its claims that
if one looks there, and nowhere else, an opportunity has arisen for
the complainant to use it for an attack upon defendant's profits which
have accrued from a totally different device, which in one of its un-
important features may be said to have trespassed upon the imaginary
ground which the complainant, by a refinement of reasoning, seems
to have become satisfied that she has pre-empted.

Construing the patent as I understand it, the defendant has not in-
fringed. Let the bill be dismissed.

UNITED STATES v. ROUT.

(District Court, E. D. Pennsylvania. May 14, 1909.)

No. 17.

ALIENS (§ 38*)—OFFENSES AGAINST IMMIGRATION LAWS—LIABILITY OF MASTER
OF VESSEL FOR PERMITTING LANDING OF CHINESE—INDICTMENT.

An indictment charging the master of a vessel with a violation of Act
Sept. 13, 1888, c. 1015, § 9, 25 Stat. 473 (U. S. Comp. St. 1901, p. 1316),
which makes it a misdemeanor if the master of any vessel "shall know-
ingly bring within the United States on such vessel, and land, or attempt
to land, or permit to be landed any Chinese laborer or other Chinese per-
son in contravention of the provisions of this act," must aver that de-
fendant "knowingly" permitted such Chinese person to be landed.
[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 38.]

On Demurrer to Indictment.

J. Whitaker Thompson and Jasper Yeates Brinton, for the United
States.

Howard H. Yocum, for defendant.

J. B. McPHERSON, District Judge. The indictment avers that the
defendant, being the master of the British steamship Langbank, "did
knowingly bring within the United States on board the aforesaid
vessel, to wit, did knowingly bring on board the aforesaid steamship
Langbank, to the city and port of Philadelphia aforesaid, a certain
Chinese laborer, to wit, one Wong Sing, the said Wong Sing being
then and there manifested as chief cook on the said steamship Lang-
bank, and he, the said William J. Rout, master as aforesaid, did then
and there, to wit, on the day and year aforesaid, at the city of Phila-
delphia aforesaid, unlawfully land and permit the landing of the
aforesaid Wong Sing, Chinese laborer as aforesaid, at the aforesaid
port and city of Philadelphia."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
The demurrer raises the question that the statutory offense, whether it be regarded as based upon Act Sept. 13, 1888, c. 1015, § 9, 25 Stat. 478, or Act May 6, 1882, c. 126, § 2, 22 Stat. 58, as amended by Act July 5, 1881, c. 220, 23 Stat. 115 (U. S. Comp. St. 1901, p. 1316), is not committed unless the defendant "knowingly" landed, etc., and therefore that the indictment is defective because this essential qualification does not appear.

A similar indictment was quashed by Judge Holt in the Eastern district of New York for the reason that is now urged by the demurrer. The case is United States v. Walker (C. C.) 156 Fed. 987, and the report states that:

"The indictment alleged that the defendant did unlawfully allow and permit a certain Chinese sailor and a member of the crew of the steamer to land in and to be landed in the United States at the borough of Brooklyn. The indictment did not allege that the master knowingly permitted him to be landed, and the motion is made to quash the indictment on that ground."

Upon this condition of the record the court said:

"In my opinion it is essential that the indictment should allege that the master of the vessel knowingly permitted the person to land. The district attorney asserts that it is extremely difficult to obtain proof in any case that the master knowingly permitted such act. What degree of proof is necessary to establish knowledge on the part of the master is a question which must be determined in each case as it arises; but the statute provides that knowledge is essential to guilt, and, in my opinion, it would be extremely unjust to permit a master of a vessel to be convicted of a misdemeanor for an act done absolutely without his knowledge and against his most strenuous efforts to prevent it."

And it is even more to the point that the question was decided in this district in United States v. Reid, No. 16, June sessions, 1906. The indictment there is in all essentials identical with the indictment before the court. The question, however, arose on the trial, and in charging the jury in March, 1907, Judge Holland said (the case is not reported, but a copy of the charge is before me):

"The defendant has been indicted in this case for having knowingly brought a Chinaman within the United States on board a vessel; it being charged that he 'did on the 14th day of May unlawfully land and permit the landing' of this Chinaman in the United States at the port of Philadelphia. The indictment follows the language of the act, charging that the defendant 'knowingly brought within the United States on board a vessel a Chinaman, and unlawfully landed or permitted him to land in the city of Philadelphia'; and it is contended, therefore, on the part of the government, that this defendant had an absolute duty to perform, not qualified by anything that he might do, to prevent the landing of a Chinaman that he knowingly brought within the domain of the United States on his vessel.

"The defendant contends that the government is required to prove that he knowingly brought the Chinaman within the United States on his vessel, and that he knowingly permitted him to land, before it can convict. You will see the difference. If the law said that a man should be guilty of permitting a Chinese laborer to land here, regardless of whether he knew it or whether he did not know it, then there would be no question in the case as to his knowledge, and it would not be material; but, if the act says he is guilty only when he knowingly permits a Chinese laborer to land, then it is incumbent on the government to show that the captain knew, that he landed or knowingly permitted him to do it, and that he had a knowledge of it.

"It would not require, however, that the government should bring positive evidence here to show or to have somebody swear that the captain actually
helped him to land, or admitted that he knew that he was going to steal off and land; but it would be incumbent on the government to prove, not only that the man landed, but some circumstances which would warrant the inference that he knowingly permitted it to be done. 'Knowingly permitted to be done' means that he either actually took part in it and saw it being done, or so left the conditions or the surroundings that it could occur and he knew that it could occur; in other words, if the government proves facts and circumstances from which you could infer that the captain knew that it could and would likely be done, or from which you would probably go the length of saying that he had neglected to take such precautions as the circumstances required, then you could properly say that he knowingly permitted it to be done. * * *

"As I have said to you, however, I am not convinced that the government is right in its contention as to the construction to be put upon this ninth section of the Chinese exclusion act, which reads: 'If the master of any vessel shall knowingly bring within the United States on such vessel and land, or attempt to land, or permit to be landed, any Chinese laborer,' etc., 'he shall be guilty.' The government says that this word 'knowingly' applies only to that part of the statute 'bringing within the United States on a vessel'; that, if he knowingly brings a Chinaman within the United States on a vessel and then permits him to land, he is guilty, regardless of whether he knew it or not. They say the word 'knowingly' does not qualify 'permit.' To that I cannot assent. I think it means that the master of a vessel who knowingly brings within the United States on any vessel, who knowingly lands, knowingly attempts to land, or knowingly permits to be landed, a Chinese laborer, shall be guilty. * * *

"So that we hold here and, I think you will regard it as a reasonable construction, that the captain, if he acts in good faith, does all he can and is expected to do, to prevent an escape, and then the man escapes clandestinely, and without any connivance or neglect on the part of the captain, and without any knowledge on his part, that he then should not be held guilty, and that that was the intention of Congress when they enacted this legislation."

These decisions, especially the ruling in United States v. Reid, are conclusive for present purposes, and I follow them without hesitation.

It may be added that, although the point is not now made, it might deserve consideration in a proper case, whether the prohibition of bringing and landing any Chinese laborer or other Chinese person was intended to apply to a member of a crew who was a bona fide employee and manifested as such. Taylor v. United States, 207 U. S. 120, 28 Sup. Ct. 53, 52 L. Ed. 130; Re Ah Kee (D. C.) 22 Fed. 519; Re Jam (D. C.) 101 Fed. 989.

The demurrer is sustained.

BENTON v. VAN DYKE.

(Circuit Court, S. D. New York. March 15, 1903.)

COPYRIGHTS ($ 85*)—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

A preliminary injunction restraining infringement of a copyright should not be granted, where on the showing made and the facts appearing the question of infringement is in serious doubt.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 78; Dec. Dig. § 85*]

In Equity. On motion for a preliminary injunction.

Ewing & Ewing, for complainant.

Griggs, Baldwin & Pierce, for defendant.

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
COXE, Circuit Judge. This is a motion for a preliminary injunction based upon a copyright. The copyrighted pamphlet in evidence is one of a series published weekly and gives information regarding the range of prices of stocks and bonds dealt in on the New York Stock Exchange and it contains other financial news. The defendant is engaged in business similar to that of the complainant and publishes a pamphlet for the information of his customers.

It is conceded on all hands that the information found in both books could be readily obtained from a great variety of sources, including any one of the daily papers published in the city of New York. Any list containing the fluctuation of prices on the Stock Exchange for a given period must inevitably bear a marked similarity to another list giving the same information.

The only direct evidence of infringement is found in the affidavit of Marie L. Doty who says that in making up the figures for "high 1906" and "low 1907" and "high and low 1908" she took part of the information from the "Financial Indicator"—the complainant's book—and "checked up" from that publication under the direction and instruction of the defendant.

This is denied by the defendant. Assuming that the complainant has a valid copyright, regarding which I express no opinion, I think the question of infringement is too much in doubt to justify the granting of a preliminary injunction. Such a writ should never issue unless the court is clearly of the opinion that the complainant will succeed at final hearing. I am not so convinced. Besides, it is not easy to perceive why the complainant needs the protection of an injunction for, as both pamphlets are issued on the same day, it is difficult to understand how the defendant can copy anything of importance from the complainant's book even if he desires to do so. It is most improbable that he will publish the complainant's news a week after it has appeared in the "Indicator."

The motion is denied.

THE LAURA M. LUNT.

(District Court, E. D. Louisiana. March 9, 1909. On Rehearing, March 25, 1909.)

No. 14,091.

1. SEAMEN (§ 2*)—SCOPE OF STATUTORY PROVISIONS—"AMERICAN SEAMAN."

Every sailor on an American vessel is an "American seaman," within the meaning of Act Dec. 21, 1898, c. 28, § 1, 30 Stat. 750 (U. S. Comp. St. 1901, p. 3081), and entitled to the protection thereof, regardless of his nationality.

[Ed. Note.—For other cases, see Seamen, Dec. Dig. § 2.*]

2. SEAMEN (§ 20*)—WAGES—REDUCTION BY MASTER.

The master of a vessel has no authority to arbitrarily reduce the wages of a seaman, signed as such, on the ground that he proved incompetent to fill the position of a mate, although there may have been a verbal agreement on the subject.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 86-91; Dec. Dig. § 20.*]

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
In Admiralty. Libel for wages.
Geo. C. Bodine, for libelant.
Rouse, Grant & Rouse, for claimant.

FOSTER, District Judge. It seems to me that Act Dec. 21, 1898, c. 28, § 1, 30 Stat. 755 (U. S. Comp. St. 1901, p. 3081), is broad enough to apply to all sailors on an American vessel, and that they should be held to be American seamen, regardless of nationality.

It seems also clear that the captain arbitrarily reduced the wages of this seaman from $30 per month, as stipulated in the articles, to $25 per month, alleging that he did so by reason of the seaman's incompetency to fill the position of second mate. It appears by the articles that he was shipped as a seaman, and not as second mate, and the captain cannot give effect to an alleged verbal agreement of that sort.

Therefore there will be judgment for the full amount of wages claimed, and a penalty of $1 a day, from date the wages were due, for 100 days from the date of the libel.

On Rehearing.

In this case I have carefully considered the able arguments of counsel for the claimant, but on a further examination of the authorities see no reason to reverse the decree. However, as it is not clear that libelant could not have taken his testimony more promptly, and as I consider the statute was intended to prevent an injustice to the seaman by arbitrarily withholding his pay, rather than to afford a fixed ratio of liquidated damages, the penalty awarded will be reduced to $50, and a rehearing refused.

UNITED STATES v. GRIMAUD et al.
(District Court, S. D. California, N. D. May 3, 1909.)
No. 2.


The provision of the sundry civil appropriation act of June 4, 1897, c. 2, § 1, 30 Stat. 35 (U. S. Comp. St. 1901, p. 1540), making it a criminal offense to violate any rule or regulation which should thereafter be made by the Secretary of the Interior under the power therein conferred (since transferred to the Secretary of Agriculture) for the protection and preservation of forest reservations, is void for lack of any designation or definition by Congress of any act which shall constitute an offense, which is essential to the creation of a crime against the United States.

[Ed. Note.—For other cases, see Woods and Forests, Dec. Dig. § 10.*]


Such provision is also unconstitutional and void as an attempted delegation of legislative power to an executive officer, in that it leaves it to the Secretary to prescribe in his discretion what acts shall constitute crimes.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 62.*]

On Demurrer to Indictment.

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

WELLBORN, District Judge. The charge against defendants is that of grazing sheep, without permission, in the Sierra Forest Reserve.

By act of Congress, approved June 4, 1897, entitled "An act making appropriations for sundry civil expenses of the government for the fiscal year 1897, and for other purposes" (Act June 4, 1897, c. 2, § 1, 30 Stat. 35 [U. S. Comp. St. 1901, p. 1540]), it is provided, among other things, that:

"The Secretary of the Interior shall make provisions for the protection against destruction by fire and depredations upon the public forests and forest reservations which may have been set aside or which may be hereafter set aside under the said act of March third, eighteen hundred and ninety-one, and which may be continued; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; and any violation of the provisions of this act or such rules and regulations shall be punished as is provided for in the act of June fourth, eighteen hundred and eighty-eight, amending section fifty-three hundred and eighty-eight of the Revised Statutes of the United States."

The jurisdiction of the Secretary of the Interior over forest reserves was subsequently transferred to the Secretary of Agriculture, and, thereafter, on June 12, 1906, the latter official promulgated the following:

"Regulation 45. All persons must secure permits before grazing any stock in a forest reserve, except the few herd in actual use by prospectors, campers and travelers, the milch or work animals not exceeding a total of six head owned by bona fide settlers residing in or near a forest reserve, which are excepted, and require no permit."

A demurrer to the indictment has been interposed on the grounds that the act of Congress above mentioned, so far as it attaches a penalty to any violations of the rules and regulations thereafter to be made by the Secretary of the Interior, is void, because it does not completely or at all define the acts to be punished, and because it attempts a delegation of legislative power to an executive officer. These two grounds will be considered in the order in which I have stated them.

The Supreme Court of the United States has often declared, in unmistakable terms, that there can be no crime against the authority of the United States except where the forbidden act is defined and penalized by statute. U. S. v. Hudson, 7 Cranch, 32, 3 L. Ed. 259; U. S. v. Coolidge, 1 Wheat. 415, 4 L. Ed. 124; U. S. v. Britton, 108 U. S. 199, 206, 2 Sup. Ct. 531, 27 L. Ed. 698; U. S. v. Eaton, 144 U. S. 677, 12 Sup. Ct. 764, 36 L. Ed. 591. And the Circuit Court of Appeals for this circuit has spoken in decided terms to the same effect. Peters v. United States, 94 Fed. 127, 131, 36 C. C. A. 105.

In United States v. Hudson, supra, where it is held that the courts of the United States have no common-law jurisdiction in criminal cases, the Supreme Court uses the following language:
"The legislative authority of the Union must first make an act a crime, affix a
punishment to it, and declare the court that shall have jurisdiction of the
offense."

In Peters v. United States, supra, the court says:

"It must be borne in mind that the national courts do not resort to com-
mon law as a source of criminal jurisdiction. Crimes and offenses cognizable
under the authority of the United States can only be such as are expressly
designated by law. It devolves upon Congress to define what are crimes, to
fix the proper punishment, and to confer jurisdiction for their trial. U. S. v.
Walsh, 5 Dill. 60, Fed. Cas. No. 16,636; U. S. v. Martin, 4 Cliff. 156, Fed. Cas.
No. 15,728; In re Greene (C. C.) 52 Fed. 104; Swift v. Railroad Co. (C. C.) 64
Fed. 59; U. S. v. Hudson, 7 Cranch, 32, 3 L. Ed. 239; U. S. v. Coolidge, 1
Ed. 698."

The same doctrine has been elsewhere declared as follows:

"In the consideration of this indictment it should be borne in mind that
there are no common-law offenses against the United States; that the federal
courts cannot resort to the common law as a source of criminal jurisdiction;
that crimes and offenses, cognizable under the authority of the United States,
are such, and only such, as are expressly designated by law; and that Con-
gress must define these crimes, fix their punishment, and confer jurisdiction
to try them." In re Greene (C. C.) 52 Fed. 104, 111.

There can be no pretense that Congress itself has defined as a crime
the act for which defendants are here indicted, namely, grazing sheep,
without permission, in a forest reserve. The statute itself does not
forbid or make any reference whatever to sheep grazing, nor in the
remotest degree suggest that Congress had it at all in mind, and, ac-
cording to the government's own theory, it did not become a crime
until nine years after the passage of the statute, which the government
claims made it criminal, and then only because of the promulgation of
an administrative rule which it contravenes. The mere statement
of the theory, it seems to me, condemns it, and, after much reflection,
I have now no hesitancy in holding that the statute, in so far as it
affixes punishment to infractions of executive rules and regulations
thereafter to be promulgated, is incomplete and wholly inadequate
to form the basis of a criminal prosecution.

It must be borne in mind that part of a statute may be unconstitu-
tional and void, and the residue constitutional and valid (28 Am. &
Eng. Ency. of Law [2d Ed.] p. 570), and that there is no controversy
here over the validity of any part of the act of Congress in question
except the provision specifically indicated. That provision was not
before the court in Dastervignes v. United States, 122 Fed. 30, 58
C. C. A. 346, and although it is mentioned, by way of recital, in the
syllabus, there is not the slightest reference to it in the opinion, nor
anything whatever to show or suggest its pertinency. Indeed, the
question could not have arisen there, because the case was not a crim-
inal prosecution, involving, and which alone could involve, the mat-
ter of punishment, but simply a civil suit to enjoin grazing, and to
which suit the penalty clause of the statute had no possible relation
or pertinency. The court specifically points out that part of the act
which was before it, and held to be constitutional, as follows, under-
scoring mine:
"It must be admitted that the legislative authority of the United States is vested in Congress, and that Congress has no authority to delegate legislative power to the Secretary of the Interior, or to any administrative officer the authority to make laws; and if the act of Congress approved June 4, 1897 (chapter 2, § 1, 30 Stat. 35, U. S. Comp. St. 1901, p. 1540), is legally susceptible of the construction contended for by appellants, it would clearly be unconstitutional. By that act the Secretary of the Interior was authorized to 'make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction.' Does this language delegate any power to the Secretary of the Interior to make a law, or does it simply confer upon the Secretary an authority to adopt such rules and regulations as to him may seem fit and proper in order to secure the objects for which the reservation was created, and such acts to be exercised under and in pursuance of the law enacted by Congress? Let us see. Congress cannot delegate its power to make a law; but it can make a law to delegate a power to an administrative officer to determine a fact or condition of affairs in regard to which the law makes its own action depend."

The court nowhere holds, or intimates, that the statute is complete or valid in so far as it attempts to punish such acts as might thereafter be forbidden by the Secretary of the Interior; but it may be fairly inferred that the court would have held to the contrary, if the question had been presented, from the following expressions at page 34 of 122 Fed., at page 350 of 58 C. C. A., underscoring mine:

"The Secretary, by adopting this rule, acted simply as the arm that carries out the legislative will. He did not invade any of the functions of Congress. He did not make any law, but he exercised the authority given to him, and made rules to preserve the forests on the reservation from destruction. Such rules, within constitutional limits, have the force and effect of law, and it is the duty of courts to protect and enforce them in order to uphold the law as enacted by Congress."

This declaration, clear and emphatic, that executive rules are not laws, taken in connection with the elementary principle, already adverted to, that nothing but a law can define or create a crime, absolutely determines the incompleteness and inadequacy of said act of Congress as a penal statute.

Nor is the case of Union Bridge Co. v. United States, 204 U. S. 364, 27 Sup. Ct. 367, 51 L. Ed. 523, applicable here. The statute there involved declares the maintenance, after notice from the Secretary of War, of any bridge which unreasonably obstructs free navigation, to be a misdemeanor, punishable by a fine not exceeding $5,000, and, furthermore, in substance and effect, though not in terms, makes the final order of the Secretary, for which it provides, conclusive evidence as to the fact of unreasonableness. Act March 3, 1899, c. 425, § 18, 30 Stat. 1153 (U. S. Comp. St. 1901, p. 3545).

This statute, it will be seen, fully defines the crime and affixes the punishment, and is, therefore, complete within itself. Its only peculiarity is that, as I have already indicated, it impliedly establishes in that class of cases a special rule of evidence. This, however, is clearly within the scope of legislative power, and not infrequently done, either by implication, as above shown, or in express terms, as appears from the instance below cited. Thus, section 16 of the act of Congress approved August 6, 1846 (chapter 90, 9 Stat. 63 [U. S. Comp. St. 1901, p. 3706]), entitled "An act to provide for the better
organization of the treasury," etc., contains a provision, subsequently embodied in section 5494 of the Revised Statutes, which reads as follows:

"Upon the trial of any indictment against any person for embezzling public money under the provisions of the six preceding sections, It shall be sufficient evidence, for the purpose of showing a balance against such person, to produce a transcript from the books and proceedings of the treasury, as required in civil cases, under the provisions for the settlement of accounts between the United States and receivers of public money." Section 5494. Rev. St. U. S.; Act Aug. 6, 1846, c. 90, § 16, 9 Stat. 63 (U. S. Comp. St. 1901, p. 3706).

Examples to the same effect might be multiplied, but the one just referred to sufficiently illustrates the exercise of legislative power in the matter of special procedure.

While the conclusion which I have above announced as to the incompleteness of the statute here in question disposes of this case favorably to the defendants, yet, inasmuch as the other ground of the demurrer is the one most largely, if not wholly, discussed in the briefs, and touches closely a principle of high moment, I shall give it hurried consideration. There is no feature of our government more distinctive or beneficent than the division of its powers into separate departments, and, therefore, the rule which confines the making of laws to Congress is at once elementary and inflexible. Concerning this rule, the Supreme Court of the United States has made the following declaration:

"That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." Field v. Clark, 143 U. S. 650, 692, 12 Sup. Ct. 495, 36 L. Ed. 294.

There can be no controversy whatever about the principle itself; the only room for dispute lies in its application. In the case at bar, the statute does not declare the grazing of sheep, without permission, to be a crime, nor does it make the slightest reference to that matter, but declares that whatever the Secretary of the Interior may thereafter prohibit shall be a misdemeanor. Congress merely prescribes a penalty, and then leaves it to the Secretary of the Interior to determine what acts shall be so punishable. Thus it will be seen that the very essence of the alleged crime, namely, what act shall constitute it, is not fixed by Congress, but wholly confided to the discretion of an administrative officer. If this does not necessarily involve a delegation of legislative power, it is difficult to conceive of a statute challengeable on that ground.

While arguments ab inconvenienti of themselves are rarely conclusive, yet in many cases they are entitled to much weight, and this is one of the cases; for, if the contentions which the government here urges were to prevail, Congress, so far as any legal difficulties are concerned, could easily abdicate in favor of the executive department practically all its powers. To illustrate: Among the large number of crimes relating to the postal service is the use of the mails for immoral and fraudulent purposes. Congress could repeal existing legislation on this subject, and, by a new law, authorize and require the Postmaster General to protect the mails against immoral and fraudu-
lent uses by suitable rules and regulations, and further provide that any violations of such rules and regulations should be punished in a specified manner, and, under this grant of authority, said officer could occupy with regulations, springing from his own discretion and will, but enforceable through penal sanctions, the large field now covered by the criminal laws on that subject, and in this way it would be possible to confer upon the administrative branches of the government powers whose full exercise would substitute with penalized rules well-nigh the whole volume of federal criminal law. It is needless to add that no reasonable interpretation of the Constitution will admit of such a startling result.

This precise question has been under review and ably discussed in another jurisdiction, as follows:

"It is fundamental that the citizen has the right to rely upon the statutes of the United States for the ascertainment of the acts which constitute an infraction of its laws. This principle was expressed by the Supreme Court in Re Kuleck, 165 U. S. 533, 17 Sup. Ct. 446, 41 L. Ed. 815, as follows: 'We agree that the courts of the United States, in determining what constitutes an offense against the United States, must resort to the statutes of the United States, enacted in pursuance of the Constitution.'

"A citizen desiring to obey the laws would search the acts of Congress in vain to find that grazing sheep upon a forest reserve without the permit of the Secretary of Agriculture is a criminal offense. It has been suggested that the acts under which the indictment is drawn give notice that the Secretary may make rules and regulations, and that the search would not be complete and the inquiry concluded until it be ascertained whether he has made any rules and regulations, the violation of which it is expressly declared shall be a criminal offense. But here we are led back to the delegation of legislative power. The rules prescribed by the heads of departments are not necessarily promulgated. While they may be procured, they are not as easily available as are the statutes of the United States; nor does our system contemplate an examination of those rules for the ascertainment of that which may or may not be a crime, for the right to prohibit a given thing under penalty belongs to Congress alone. * * * *

"In discussing the statute, the Supreme Court laid down this wholesome doctrine: 'Much more does this principle apply to a case where it is sought substantially to prescribe a criminal offense by the regulation of a department. It is a principle of criminal law that an offense which may be the subject of criminal procedure is an act committed or omitted "in violation of a public law, either forbidding or commanding it."' 4 American & English Encyclopedia of Law, 642; 4 Bl. Com. 3. 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 carrying on or conducting the business of a wholesale dealer in oleomargarine, in such manner as to become a criminal offense punishable under section 18 of the act. * * * It is necessary that a sufficient statutory authority should exist for declaring any act or omission a criminal offense, and we do not think that the statutory authority in the present case is sufficient.'


"Have we here a case involving the delegation of legislative power? That Congress intended to punish by penalty made certain the violations of regulations made by the Secretary of Agriculture, and to declare the same a criminal offense, is beyond controversy. But the grazing of stock upon the forest reserves has not been prohibited by any congressional act. The prohibition rests entirely upon regulations made by the Secretary. Regulation No. 9 prescribes, as we have seen, that all persons before grazing sheep in a forest reserve must secure a permit, and any person responsible for grazing the same without a permit becomes a violator of the law; that is, whoever violates a rule pro-
nulligated by the Secretary violates a law passed by Congress. The evident embarrassment attending the making of regulation 9. In an attempt to bring it within the act of Congress, is apparent by the language used. Clearly there was a keen appreciation of the necessity of supplying that which Congress had failed to enact, and this was attempted by the use of the words 'is liable to punishment for violation of the law.' At times the line is somewhat indistinct between that which constitutes the delegation of legislative power and the delegation of administrative authority.

"This case does not fall within the rule so well explained and amplified by the authorities that the executive branch of the government may make proper rules and regulations for carrying into effect the legislative will of Congress. The President may be authorized to declare by proclamation that a law shall go into effect upon the happening of a certain contingency. The Secretary of the Treasury may make rules and regulations for the enforcement of the revenue statutes and the like. So may the heads of all the departments make like regulations, but the authority to do so must be expressly delegated, and the law must be complete in itself. The rules and regulations may only be prescribed for carrying out what Congress has expressly declared to be the law. Such powers do not pertain to the legislative functions, but are referable to administrative duties. Congress cannot leave a statute to be enlarged upon either by the courts or the executive department. It cannot authorize any other branch of the government to define that which is purely legislative, and that is purely legislative which defines rights, permissives things to be done, or prohibits the doing thereof. Certainly, here, it is the Secretary of Agriculture who has undertaken to enact this law. He is who has designated that which constitutes the crime. The thing prohibited, the thing for which the party is to be punished, the act which is the offense, is prescribed by the Secretary, and not enacted by Congress. As we have seen, this cannot be done."

"The objection to the indictment is the absence of a law defining the act therein charged as a criminal offense. Upon that ground the demurrer must be sustained, and the defendant discharged." United States v. Matthews (D. C.) 146 Fed. 306, 308.


In the former of said cases, at page 652, it is said:

"There is another aspect of the case, however, which furnishes as strong an argument against plaintiff's contention as the one just considered, and it is this: A department regulation may have the force of law in a civil suit to determine property rights, as in Cosmos Exploration Co. v. Gray Eagle Oil Co. supra (112 Fed. 45; 144 C. C. A. 79), and yet be ineffectual as the basis of a criminal prosecution. U. S. v. Eaton, supra. The Supreme Court of the United States, in the case last cited, marks the distinction thus:

"'Regulations prescribed by the President and by the heads of departments, under authority granted by Congress, may be regulations prescribed by law, so as to lawfully to support acts done under them and in accordance with them, and may thus have, in a proper sense, the force of law; but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do this thing a criminal offense in a citizen, where a statute does not distinctly make the neglect in question a criminal offense.'"

"The obvious ground of said distinction is that to make an act a criminal offense is essentially an exercise of legislative power, which cannot be delegated, while the prescribing by the President or head of a department, thereto duly authorized, of a rule, without penal sanctions, to carry into effect what Congress has enacted, although such rule may be as efficacious and binding as though it were a public law, is not a legislative, but ministerial function."

In the latter of said cases, United States v. Blasingame (D. C.) 116 Fed. 654, the opinion is brief, and as follows:
"I am of opinion that the act (Act June 4, 1897, c. 2, 30 Stat. 11) entitled 'An act making appropriations for sundry civil expenses of the government for the fiscal year ending June thirtieth, eighteen hundred and ninety-eight, and for other purposes,' in so far as it declares to be a crime any violation of the rules and regulations thereafter to be made by the Secretary of the Interior for the protection of forest reservations, is in substance and effect a delegation of legislative power to an administrative officer, with the Supreme Court of the United States, in Field v. Clark, 143 U. S. 640, 12 Sup. Ct. 495, 36 L. Ed. 294, and also in Re Kollock, 165 U. S. 526, 17 Sup. Ct. 444, 41 L. Ed. 813, held that there was no unconstitutional delegation of power in either case, yet, applying and observing here the principles and distinctions there enunciated and recognized, it is impossible to escape the conclusion which I have announced. U. S. v. Eaton, 144 U. S. 677, 12 Sup. Ct. 764, 36 L. Ed. 591, although not precisely like the case at bar, may also be aptly cited in support of said conclusion. Clear statements and pertinent applications of the doctrine announced by the Supreme Court of the United States in the two cases first above cited, that legislative power can be exercised only by that branch of the government to which the Constitution commits it, will be found in People v. Parks, 58 Cal. 624, Ex parte Cox, 63 Cal. 21, and Board of Harbor Commrs v. Excelsior Redwood Co., 56 Cal. 491, 26 Pac. 375, 22 Am. St. Rep. 321."

I have given to the extract quoted in plaintiffs' brief from an opinion by former Attorney General Griggs that respectful attention which the high character and distinguished ability of its writer, as well as the great office he then held, demands, and can but think that the quotation rests upon a superficial view of the subject. (For the full quotation see footnote at bottom of page.) It starts out with an assumption, which, to my mind, is manifestly erroneous, namely, that:

"The statute proclaims the punishment for an offense which in general terms is defined by law, the regulation dealing only with a matter of detail and administration, necessary to carry into effect the object of the law."

The statute—and I refer, of course, only to that provision now under consideration—so far from proclaiming the punishment for an offense which in general terms is defined by law, does not even pur-

"But here the statute proclaims the punishment for an offense which in general terms is defined by law, the regulation dealing only with a matter of detail and administration necessary to carry into effect the object of the law. The protection of the public forests is intrusted to the Secretary of the Interior. Section 5388, Rev. St. (U. S. Comp. St. 1901, p. 3649), makes it an offense, punishable by fine and imprisonment, for any person wantonly to destroy any timber on a public reservation. In furtherance of this policy, the act of June 4, 1897, directs the Secretary to make provision for the protection of the forests and authorizes him to regulate the use and occupancy of the forest reservations and to preserve the forests thereon from destruction, making for such purpose appropriate rules and regulations. Any violation of such rules and regulations is, by the statute, made an offense, punishable as provided in section 5388. * * * It seems to me Congress has a right to do this. Suppose Congress had provided that the occupation or use of a forest reservation by any person, without permission of the Secretary, should be a misdemeanor. Would this not be a valid exercise of legislative power? The present statute does no more. The regulation is reasonable and necessary. It restrains no one in the enjoyment of any natural or legal right. To use the language of Mr. Chief Justice Fuller, in Re Kollock, 165 U. S. 526, 533, 17 Sup. Ct. 444, 446, 41 L. Ed. 813: 'The regulation was in execution of, or supplementary to, but not in conflict with, the law itself, and was specifically authorized thereby in effectuation of the legislation which created the offense.'"

22 Opinions Attorneys General, 207.
port to punish a transgression of law, but the prescribed penalty is affixed to the violation of such rules as the Secretary in his discretion might subsequently make, and which in fact, as I have already indicated, were not made until nine years after the statute was enacted. Again, the quotation:

"Suppose Congress had provided that the occupation or use of a forest reservation by any person, without permission of the Secretary, should be a misdemeanor, would this not be a valid exercise of legislative power?"

The answer to this question must be in the affirmative, because, in the case supposed, the statute is complete within itself. The legislative power has been duly exercised in prescribing the act which constitutes the crime; but, when the quotation goes on to add, "The present statute does no more," another erroneous postulate, as it seems to me, is assumed. Congress has nowhere declared that the grazing of sheep in a forest reservation without permission of the Secretary is a misdemeanor, but the alleged crime results only from the joint operation of the statute and a rule subsequently made by the Secretary. Without the rule there is nothing to which the penalty can attach, and, in order to charge the so-called crime, it is necessary, as has been done here, to allege the promulgation and infraction of the rule, without which the statute is wholly devoid of force or effect.

The cases mainly relied on by the government are Dastervignes v. United States and Union Bridge Company v. United States, supra. In the former, as I have already shown, the penalty clause of the statute was not before the court, and, besides, there are views expressed in the opinion utterly incompatible with the constitutionality of said clause, and that case, therefore, so far as applicable at all, is against, rather than favorable to, the government's claim. In the other case, Union Bridge Company v. United States, the crime was fully defined, and the punishment fixed by the statute, and the duties devolved upon the Secretary of War were only administrative acts in aid of the execution of the statute. In its opinion (at page 382 of 204 U. S., at page 373 of 27 Sup. Ct. [51 L. Ed. 523]), the court quotes approvingly from a prior decision, Field v. Clark, as follows:

"'He was the mere agent of the lawmaking department to ascertain and declare the event upon which its expressed will was to take effect. It was a part of the law itself as it left the hands of Congress that the provisions, full and complete in themselves, permitting the free introduction of sugars, molasses, coffee, tea, and hides, from particular countries, should be suspended in a given contingency, and that in case of such suspensions certain duties should be imposed.' Again: "The true distinction," as Judge Ranney, speaking for the Supreme Court of Ohio, has well said, 'is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.' Cincinnati, Wilmington, etc., Railroad v. Commissioners, 1 Ohio St. 77."

Again (at page 385 of 204 U. S., at page 374 of 27 Sup. Ct. [51 L. Ed. 523]) the court says:

"As appropriate to the object to be accomplished, as a means to an end within the power of the national government, Congress, in execution of a declared policy, committed to the Secretary of War the duty of ascertaining all the facts essential in any inquiry whether particular bridges over the water-


ways of the United States were unreasonable obstructions to free navigation. Beyond question, if it had so elected, Congress, in some effective mode and without previous investigation through executive officers, could have determined for itself, primarily, the fact whether the bridge here in question was an unreasonable obstruction to navigation, and, if it was found to be of that character, could by direct legislation have required the defendant to make such alterations of its bridge as were requisite for the protection of navigation and commerce over the waterway in question. But investigations by Congress as to each particular bridge alleged to constitute an unreasonable obstruction to free navigation and direct legislation covering each case separately would be impracticable, in view of the vast and varied interests which require national legislation from time to time. By the statute in question Congress declared in effect that navigation should be freed from unreasonable obstructions arising from bridges of insufficient height, width of span, or other defects. It stopped, however, with this declaration of a general rule, and imposed upon the Secretary of War the duty of ascertaining what particular cases came within the rule prescribed by Congress, as well as the duty of enforcing the rule in such cases. In performing that duty the Secretary of War will only execute the clearly expressed will of Congress, and will not, in any true sense, exert legislative or judicial power."

There the crime was created—that is, it was defined and the punishment affixed by the statute itself—and, as above stated, the duties which the statute devolved upon the Secretary of War were only in aid of its enforcement.

If I am correct in the views which I have expressed of the Dasterville Case, then two of the other cases relied on by the government, United States v. DeGuierre (D. C.) 152 Fed. 568, and Dent v. United States, 8 Ariz. 413, 76 Pac. 455, are unfavorable to its contention, because, in each, a contrary decision was overruled, solely on the authority and under a mistaken apprehension of the Dasterville Case, indicating that both of said courts, if uncontrolled by the Dasterville Case, would hold the statute void. On the first hearing in the latter case, Dent v. United States, 8 Ariz. 138, 146, 71 Pac. 920, 922, the opinion is elaborate, able, and convincing, and, with uncommon force and clearness, compresses into a single paragraph its unanswerable argument, as follows:

"We think the fatal defect of the act, so far as the question in the case at bar is concerned, is that unlimited power is given thereby to the Secretary of the Interior to determine what is and what is not a crime under the act. It is left to his discretion to determine the acts or omissions which shall render all persons amenable to the criminal law. The act does not prohibit the grazing of sheep on forest reserves, and there is no statute which prohibits it. Whether or not in all cases the authority of the several heads of the departments of the federal government to make regulations for their respective departments is limited to the precise and literal terms of the acts of Congress applicable thereto, we think that, in so far as by such regulations an act is defined to be a crime which is not so defined by any public law, and which, without such regulation, would not be a crime or punishable as such, it is an exercise of lawmaking power, vested by the Constitution, not in such official, but in Congress alone, and as such is unconstitutional."

In most, if not all, of the cases relied upon by the government, the authority delegated was limited to the ascertainment of facts in particular cases, and these were held to be administrative acts. In the case at bar, however, there is no pretense that the Secretary of Agriculture has been charged with the duty, or has acted in the ascertainment of the facts of particular cases, but what he has undertaken to
do is to determine and define a crime, which, according to all the authorities, is a matter of legislative discretion.

In United States v. Shannon (C. C.) 151 Fed. 863, 865, the court says:

"Let us remember that we are not now dealing with a question of a regulation by the Secretary of the Interior, which makes a violation thereof a crime. Were such the point of inquiry, principles not necessarily here applicable would have to be discussed. United States v. Eaton, 144 U. S. 677, 12 Sup. Ct. 764. 38 L. Ed. 591; United States v. Matthews (D. C.) 146 Fed. 306. We can therefore eliminate any question of the liberty of the citizen, and proceed to inquire into the matter of the policy of the state concerning cattle growers, to ascertain the force of that policy in the present instance."

From this it appears that the court, in the last case, was careful to avoid any expression which might be applied to the question here under consideration.

Plaintiff, in its brief, advances the proposition that "The government, in dealing with forest reservations, is acting not only in its sovereign capacity, but as a landed proprietor," and seeks to draw therefrom the inference, that trespasses upon such reservations become crimes without legislation to that effect. This inference, to my mind, is obviously a non sequitur. The fact that the government may be endeavoring to protect its own lands in no way affects the vital principle of our Constitution, as it is distinctively called by the Supreme Court, which forbids the delegation of legislative power.

In the clause quoted in plaintiff's brief with emphasis from Cambell v. United States, 167 U. S. 518, 525, 17 Sup. Ct. 864, 867, 42 L. Ed. 260, "If the act be construed as applying only to fences actually erected upon public lands, it is manifestly unnecessary, since the government as an ordinary proprietor would have the right to prosecute for such a trespass," the words "prosecute for such a trespass" manifestly refer to civil suits, such as the one before the court.

The government's contention on this branch of the case is fully met by the numerous Supreme Court decisions hereinbefore cited to the effect that, under the federal system, there can be no crimes except such as are created—that is expressly defined and penalized—by an act of Congress.

The demurrer to the indictment will be sustained.

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WHEELING CREEK GAS COAL & COKE CO. v. ELDER et al.

SAME v. CROW et al. (two cases).

(Circuit Court, N. D. West Virginia. May 3, 1909.)

1. REMOVAL OF CAUSES ($ 52*)—SEPARABLE CONTROVERSY—SUIT FOR SPECIFIC PERFORMANCE.

In a suit by a purchaser to enforce specific performance of a contract for the sale of land against the vendor and a grantee to whom he conveyed the land subsequent to the contract with complainant, but before it was recorded, there is a separate controversy with such grantee involving his right to hold the land as against the complainant, which gives

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
him the right to remove the cause where he is a nonresident and the requisite amount is involved.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 102, 103, 105; Dec. Dig. § 52.*]

Separable controversy, see notes to Robbins v. Ellenbogen, 18 C. C. A. 86; Mecke v. Valleytown Mineral Co., 35 C. C. A. 155.]

2. VENDOR AND PURCHASER (§§ 3, 57*)—CONSTRUCTION OF CONTRACT—SALE OR OPTION.

A writing signed by the owner of land only, by which he agreed to convey a vein of coal thereunder at a certain price per acre to be paid by a time stated, otherwise the agreement to be considered rescinded, and for which no consideration was paid, is not a contract of sale but merely an option, or a continuing offer to sell, subject to withdrawal at any time before acceptance, and to be strictly construed, and of which, if accepted, time is of the essence.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 8, 87; Dec. Dig. §§ 3, 57.*]

3. VENDOR AND PURCHASER (§ 214*)—OPTION CONTRACT—ASSIGNABILITY.

An option or offer to sell land given to a person, "his heirs and assigns," is assignable by him, but is not reassignable by the assignee.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 443; Dec. Dig. § 214.*]

4. SPECIFIC PERFORMANCE (§ 17*)—CONTRACTS ENFORCEABLE—MUTUALITY—OPTIONS.

To entitle an assignee of a contract giving his assignor an option to purchase real estate to enforce specific performance of the same, the offer must have been accepted within the time limited therein, and he must have succeeded to the entire interest of the assignor and be in such position that specific performance could be enforced against him.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 39½; Dec. Dig. § 17.*]

5. SPECIFIC PERFORMANCE (§ 17*)—OPTION TO PURCHASE REAL ESTATE—RIGHT OF ASSIGNEE.

Defendants, without any consideration paid, gave written options to purchase a vein of coal under their lands until a stated time to a person and his heir and assigns. Before the options expired he assigned the same to two individuals jointly, one of whom, signing himself as treasurer of a coal company, served notices on defendants that "we, the undersigned," accepted the offers, and made to each a small payment, for which he took a receipt running to him as such treasurer. At that time there was no such company in legal existence, but long after the option had expired a corporation by that name was organized, to which the assignees assigned the contracts and which thereafter demanded performance. Held, that such corporation acquired no rights which entitled it to enforce specific performance, because, first, there was no attempted acceptance by the assignees nor by any one against whom defendants could have enforced such performance, and, second, the assignees had no right which they could assign.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 39½; Dec. Dig. § 17.*]

6. LIS PENDENS (§ 11*)—BONA FIDE PURCHASER—PROTECTION AGAINST PRIOR CONTRACT OF SALE.

Under the law of West Virginia as established by statute and decision, an appeal from a circuit court to the Supreme Court of Appeals is the beginning of a new, and not a continuation of the old, suit, and one who, after final decree of a circuit court dismissing a bill for specific performance of a contract to sell land and before an appeal is taken, purchases the property in good faith, will be protected in such purchase although

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
an appeal is afterward taken on which the decree is reversed, and the 

fact that he had knowledge of the suit or even covenanted to protect the 

vendor against loss or damage by reason thereof is immaterial.

[Ed. Note.—For other cases, see Lis Pendens, Cent. Dig. § 30; Dec. 

Dig. § 11.*]  

In Equity. On demurrers to amended bills.  

In August, 1899, Staggers procured from the farm owners contracts touch-

ing about 1,500 acres of the Pittsburg or River seam of coal with mining 

rights in Marshall county, W. Va. In these writings the same form was used 

in all, and they are practically identical, except as to names and descriptions 

of the lands. The material part of them is that the landowners “agree to 

sell and convey to H. C. Staggers, party of the second part, his heirs and as-

signs, all the coal of Pittsburg or River vein” in and under the lands set forth 

and described, “with the right to mine and remove all and every part of the 

same” under conditions prescribed, “for which the party of the second part, 

heirs or assigns, shall pay six dollars per acre, * * * one-third when deed 

is signed, sealed and delivered, the remainder in two equal annual install-

ments thereafter.” It is further provided, “a general warranty deed, clear 

of all incumbrances, to be made to the said party of the second part, his heirs 

and assigns, when the first payment is made (party of the first part to fur-

nish complete abstract of title) and others are secured by deed of trust mort-

gage on said property hereby sold. It is expressly understood and agreed 

that if the first payment after said is not made on the 30th day of November, 

A. D. 1899, or as soon thereafter as the title shall be examined and accepted 

by the party of the second part, or his heirs or assigns, this agreement shall 

be considered as rescinded, and neither party shall be bound thereby.” No 

consideration was paid at the time to the landowners for the execution of 

these writings, nor did Staggers himself sign them. On October 24, 1899, Stag-

gers assigned all his right, title, and interest in these contracts to D. H. and 

S. H. Pearsall, having done nothing toward compliance with them. On No-

vember 22, 1899, “D. H. Pearsall, Treas. Wheeling Creek Gas Coal and Coke 

Company,” served notices on the landowners that “we, the undersigned, 

hereby accept your offer for the sale of your coal underlying your farm 

* * * according to the options made to H. C. Staggers, on the date of Au-

gust 17th, 1899, subject to examinations and approval of the titles thereto, with 

complete abstract of title.” On the same day service of notice was accepted 

by, and a small sum varying from $5 to $20 was paid to, each landowner and 

a receipt taken as follows: “Received of D. H. Pearsall, Treasurer of the 

Wheeling Creek Gas Coal and Coke Company * * * as part purchase 

money on the within tract of coal.” At May rules, 1901, the Wheeling Gas 

Coal & Coke Company filed its bills against a number of the landowners, 

one against each, but in each one the allegations are practically the same, set-

ting forth the facts as above in detail, and alleging that “before the 30th day 

of November, 1899, the said D. H. and S. H. Pearsall proceeded to accept 

the terms and conditions of said options, and notified the said * * * to 

prepare abstracts and deeds” for the coal; “that at the time of said notice 

the said D. H. Pearsall and S. H. Pearsall held the said options for and as 

agents of the plaintiff, the Wheeling Gas Coal & Coke Company, and the 

said notice and acceptance was in fact and in truth for said Wheeling 

Creek Gas Coal & Coke Company. That a contract and understanding existed 

at that time by which the said options, contracts, and all matters pertaining 

to the sale of said Pittsburg or River vein of coal underlying the said tracts 
of lands were the property of the said Wheeling Creek Gas Coal & Coke Com-

pany. That on the 26th day of April, A. D. 1901, in accordance with a pre-

vious contract, the said options and contracts were duly assigned to the said 

plaintiff, by virtue of which said assignment this plaintiff became and is 

now fully substituted to all the rights and benefits under the said option and 

contract that the said H. C. Staggers and the said D. H. and S. H. Pearsall 

were entitled at any time. “Refusal on the part of the landowner to com-

ply with the contract, to accept the money, or execute the deed for the coal is 

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep’t Indexes
then charged and specific performance is prayed. As stated, both the facts and
the pleadings are substantially the same in all the cases. Quotations have
been made above from the pleadings in the first or Elder Case, and future
references in this statement will be made from it. This original bill was re-
mended to rules, and a first amended bill was filed at September rules, 1901.
This amended bill is almost in haec verba that of the original one, except it
makes the wife of the landowner a party defendant, charges the option to
Staggers to have been made by the husband and wife, charges default and re-
fusal in execution on both, and files copy of the assignment under date of
April 26, 1901, of the Pearsalls to the plaintiff company, a corporation under
the laws of West Virginia.

To this bill written demurrer was filed by the landowner, alleging the bill
to show on its face a noncompliance with the conditions of the option within
the time required. That it appears from the face of the bill that plaintiff com-
pany had no interest in the contract prior to April 28, 1901, by which time the
contract was forfeited and void. That a deed exhibited with the bill showed
the Pearsalls had only an undivided eighth interest in the option, and the
balance of interest belonged to persons not made parties. This demurrer
was sustained by the state court, and a second amended bill was filed. This
second amended bill alleges the plaintiff to be a corporation under the laws
of the state of West Virginia, and, after repeating the allegations of the
two first bills as to the option given Staggers and his assignment thereof
to the Pearsalls, alleges that at the time of this assignment the Pearsalls had
been commissioned by a number of persons named to purchase a suitable coal
field, and that the assignment taken by the Pearsalls was for the benefit of
themselves and these associates; that on November 7, 1899, the Pearsalls
and their associates met and ratified the taking of the assignment of the op-
tion, organized themselves into a company or association by the name of the
Wheeling Creek Gas Coal & Coke Company, agreed to be incorporated under this
name and to act under this name until incorporated; that at this meeting S.
H. Pearsall was elected president, D. H. Pearsall treasurer, and T. H. Patton
secretary, and the affairs of such association were conducted by such officers
until the company was incorporated on January 9, 1901, whereupon on April
26, 1901, the Pearsalls assigned to it the options. It is further alleged that
the association and the landowner agreed at the time the notice was accepted
and the small sum was paid that the association and landowner would join
together with other interested owners in employing an attorney to make ab-
tracts of titles and prepare deeds, and did employ attorneys for this purpose;
that no further payment of purchase money was to be required until these
abstracts were made; that defects in title were found and corrected, but when
the company sought to pay the money and perform the contract the landowner
refused on his part to comply. Specific performance is again prayed. To
file a second amended bill written demurrer was entered based on the same
grounds as the former one, and, in addition thereto, alleging the notice served
on the defendants not to be in accordance with the option, and that acceptance
of the option was made upon condition the defendants surveyed the lands, a
condition not required by the contracts; that the bill seeks to set up verbal
contracts, indefinite and uncertain, relating to the sale of real estate, and
therefore void under the statute of frauds. On April 18, 1902, the circuit
court of Marshall county sustained this demurrer to the second amended bill,
and, the plaintiff not seeking further to amend, dismissed the several causes
with costs. No suspension of these decrees was asked for, but an appeal was
subsequently taken to the Supreme Court of Appeals of the state, in the El-
der Case, and the decree in that case, by that court, was on December 5, 1903,
reversed, the demurrer to the second amended bill was overruled, and the
case remanded with direction to require further amendment by making
Staggers, the Pearsalls, and their associates parties. After the final decree
completing the bills in the lower court and before appeal taken, the landowners
sold and by deeds conveyed their coal to the defendant Josiah V. Thomp-
on and 13 others. These deeds were duly admitted to record. These conveyances
were made on July 11, 1902, and it was not until October 7, 1902, that the
appeal was taken in the Elder Case. As stated, no appeal in the other cases
was taken to the decrees of April 18, 1902, dismissing the causes, but after
the reversal in the Elder Case on February 12, 1904, an order was entered in each, by consent, setting aside such final decrees and overruling the demurrers in each to the bills.

On March 26, 1904, the plaintiff filed its third amended bill against the original landowners and wives. Staggers, the Peursalls and their associates, and the defendant Josiah V. Thompson and his 13 associates reriterating in great detail the allegations and statement of facts set forth in its former bills, the sale to Thompson and associates, and praying that the landowners be required to specifically perform the option contracts, and to this end that their deeds to Thompson and associates be set aside and canceled.

Thompson and associates on April 9, 1904, filed their petition, as nonresidents of the state and claiming a separable controversy, for removal to this court, and by regular order entered by the circuit court of Marshall county all three of the causes have been so removed. In this court the defendants Thompson and associates have filed in each case their combined demurrer and joint answer, in which they rely upon the grounds of demurrer therefore relied upon in the state court, and for answer deny many of the allegations of the bill, and set up and rely upon their purchase of the coal and the conveyance thereof to them after the final decree by the state circuit court and before appeal therefrom was taken.

J. B. Sommerville, for plaintiff.
Wm. H. Hearne and Riley & Ritz, for defendants.

DAYTON, District Judge (after stating the facts as above). Were these causes properly removable to this court? I think so. The facts are very similar to those involved in Elkins v. Howell (C. C.) 140 Fed. 157, where, after careful consideration of the question, I held that:

"In a suit by a purchaser to enforce specific performance of a contract for the sale of lands against the vendor and grantees, to whom he conveyed the land subsequent to the contract with complainant, but before it was recorded, there is a separate controversy with such grantees, involving their right to hold the land as against the complainant, which gives them the right to remove the cause, where they are nonresidents and the requisite amount is involved."

This being so, and the causes being properly here for determination, I think it necessary at the outset to determine the character and scope of the original contract entered into between Staggers and the landowner—whether it be a contract of sale conditional, or an option to buy only—for the principles to govern in each contingency are materially different. In attempting to determine this, I am confronted with a direct conflict of authority, either one of which, in the absence of the other, would be binding upon me in the premises. The Supreme Court of Appeals of this state in the appeal in the Elder Case (Gas Co. v. Elder. 54 W. Va. 335, 46 S. E. 357) has construed this contract, the notice and acceptance, "not as options, but as actual sale, and the presence of a subsequent condition of defeasance does not make them options or any the less contracts of sale. Monongah v. Fleming, 42 W. Va. 538, 26 S. E. 201. Viewed as such, no acceptance was necessary." On the other hand, the Circuit Court of Appeals for this Fourth Circuit in Standiford v. Thompson, 135 Fed. 991, 68 C. C. A. 425, in construing a contract arising in the same neighborhood, doubtless using the same printed form and in the exact words, except names, dates, and descriptions, has held it to be only
an option, in which time would be held to be of the essence and strict compliance would be required. The Elder Case was decided by the state court in December, 1903; the Standidford Case by the federal court in February, 1905. I have determined to adopt the construction held in the Standidford Case, for four reasons: First, because I regard it as paramount in its binding force upon me as a subordinate federal judge; second, because it is the latest decision of the matter; third, because my personal judgment is in entire accord with the reasoning of Judge Brawley, and in distinct opposition to that of Judge Brann on as set forth in their respective opinions; and, fourth, because I further think the Supreme Court of Appeals in cases subsequent to the Elder One have in principle overruled it. In the Elder Case Staggers is held to have secured by this paper an estate by purchase in these coal lands, notwithstanding he never signed it, never paid a copper consideration for it, never attempted personally to comply with it in any single particular, never recorded it, and assigned it for a consideration of $1. By its express terms it lacked mutuality. The landowner had no right under it to enforce specific performance against him; it was wholly dependent upon his own will and pleasure whether he would comply or not, and he was given by its terms from August until the last day of November to make up his mind. In a more recent case, that of Rease v. Kittle, 56 W. Va. 269, 49 S. E. 150, where a much stronger contract of like character—stronger in that a valuable consideration for it is acknowledged in it—it is held:

"A contract in writing by which one party, for a valuable consideration, agrees to sell and convey to the other a tract of land for a specified price within a certain time thereafter, the whole amount of the purchase money to be paid in cash within such time, and, on failure to take and pay for the land within the time stipulated, the contract to be void, is a continuing offer to sell, and not revocable within the time limited."

And in Tibbs v. Zirkle, 55 W. Va. 49, 46 S. E. 701, 104 Am. St. Rep. 977, also decided since the Elder Case, it is held:

"An option given for a valuable money consideration cannot be revoked until the time limit therein has expired. If such option is without consideration, it may be withdrawn or revoked at any time before acceptance."

In considering the contract involved in Rease v. Kittle, supra, where Howell, in consideration of $1 paid, was to have the right to purchase Kittle's land at a fixed price per acre, and in case Howell failed to pay the balance of purchase money before the expiration of five years from date, then the contract to be void, Poffenbarger, J., says:

"A peculiarity of these two contracts is that in no event could the optionee have any remedy against the optionee. He could not sue within the time limited for performance, for all that time was accorded to the optionee in which to perform or not as he might elect. The contract provided that, upon the expiration of that time, it should be null and void, so that neither party could then have any remedy against the other. That is one of the peculiarities of the contract in this case. There was no time when Kittle could sue Howell. He could not sue within the five years nor after the expiration of that period. However, there is mutuality in the contract, for a consideration has been paid, although it is insignificant in amount," and because of the payment of the dollar consideration, and it alone, conclusions are reached that, while the contract is enforceable "before payment or tender of the purchase money within the time stipulated, such contract does not vest in the person to whom the
offer of sale is made any title to the land, either legal or equitable, and his assignment of his rights under the contract passes no title to the assignee."

How can such rulings be reconciled with those maintained before time in the Elder Case, by the same court, where the contract did not have the dollar consideration to stand upon? In this more recent case the decision in the Elder one is in no way sought to be distinguished; it is not referred to. The conclusion is inevitable that, by this common but unfortunate method of ignoring cases in which the same court has found itself on the wrong track, it avoided the embarrassment of direct acknowledgment of the fact.

These latter rulings of the Supreme Court of Appeals of West Virginia are, in my judgment, in full accord with the clear and irrefutable reasoning of Judge Brawley in Standiford v. Thompson, supra, whereby this contract is held to not be a contract of sale of the coal land upon a condition subsequent, vesting a title in the land at once in the purchaser, subject to be defeated on the nonpayment of the money upon the day specified, but an option, "an unaccepted offer to sell," without consideration, and therefore, under the rulings in Rease v. Kittle and Tibbs v. Zirkle, subject to withdrawal at any time before acceptance. If not withdrawn and acceptance of and compliance with it is undertaken, time becomes of the essence, and the compliance must be strictly in accord with its terms and conditions.

If it be made to the optionor alone, it is not subject of assignment, as held in Rease v. Kittle, supra. If to the optionor, "his heirs or assigns," it is subject of assignment, but an assignee can occupy no better position thereby than that of the original optionor. Such assignee must be entitled in his own right to the whole of the option contract, not a part of it. He must be in a position to be required to specifically perform after acceptance, as well as to require specific performance on his part. Such assignee must be a legal entity at the time, either as person, partnership, or corporation. As well said, too, by Judge Brawley in the Standiford Case:

"If the subject of the contract is one likely to be of greater or less value, according to the effluxion of time, and a definite time is fixed therein for its performance, there is a necessary implication that time was the essence of the contract relating to it. As said by the court in Waterman v. Banks, 144 U. S. 403, 12 Sup. Ct. 646, 36 L. Ed. 470: 'This principle is peculiarly applicable where the property is of such character that it will likely undergo sudden, frequent, or great fluctuations in value. In respect to mineral property, it has been said that it requires, and of all properties, perhaps, the most requires, the parties interested in it to be vigilant and active in asserting their rights.'"

Viewed in the light of these principles, it is clear that this writing to Staggers was an offer to sell to him this coal land until November 30, 1899, unless withdrawn before that time by the landowner; that, being given to him "and his assigns," he could transfer his right, such as it was, to an assignee; that he did assign such right to D. H. and S. H. Pearsall jointly, who did not, holding such right, attempt to accept the offer as such assignees within the time limit, but "D. H. Pearsall, Treas. Wheeling Creek Gas Coal and Coke Company," did eight days before its expiration, attempt to accept such offer; that such Wheeling Creek Gas Coal & Coke Company at that
time had no existence either as a person, firm, or corporation, and no assignment to it at the time could have been legally made by the Pearsalls, if it had had entity, because the assignment of Staggers of it to them was to them alone, and not to them "and their assigns." They alone as individuals could accept the offer under the ruling in Rease v. Kittle. They made no attempt to accept it. The attempted acceptance of it on behalf of the Wheeling Creek Gas Coal & Coke Company was wholly abortive, because, first, it had no right to accept, having no assignment until April 26, 1901, after its incorporation; and, second, the Pearsalls had no right to assign the offer to it or any one else under the terms of the assignment under which they held. But it is said the Pearsalls were acting for and on behalf of an association of individuals at the time known as the "Wheeling Creek Gas Coal & Coke Company," who had agreed to purchase this coal. No such agreement in writing is shown, and in my judgment the allegations of the bill clearly show that no such agency existed whereby these Pearsalls could have bound the individual members of this "association" in a purchase of this realty from the landowner in a way to defeat the statute of frauds. At most, as shown by the subsequent act of incorporation, these individuals had agreed to take stock in the corporation to be chartered in futuro.

But if all this were not true, there is another reason why these bills cannot be maintained. Final decrees, dismissing these causes, were entered on April 18, 1902. On July 11, 1902, Thompson and his associates purchased these coal lands from these landowners, paying a cash consideration, incidentally twice as large as that provided to be paid them under the Staggers option. Not until October 7, 1902, was an appeal taken in the Elder Case. No stay to these final decrees was asked or given. They were final in the full sense of the word, at least from April to October, during which time Thompson and his associates purchased, paid for, and took and recorded deeds to the lands. The Supreme Court of West Virginia in Wingfield v. Neall, Trustee, 60 W. Va. 106, 54 S. E. 47, 10 L. R. A. (N. S.) 443, 116 Am. St. Rep. 882, has held that the rule of "the civil law and equity jurisprudence that the object of an appeal was to take the whole case to the higher tribunal, there to be tried and determined de novo upon the issues between the parties, as though the cause had originated in the appellate court," has been abrogated by statute in this state, and now an appeal from the circuit to the supreme court of appeals is the beginning of a new, and not a continuation of an old, suit. Therefore "one who, after final decree and termination of the suit, and before an appeal is obtained, purchases, in good faith, property which is the subject of the litigation, will be protected in such purchase." This establishes a rule of property in this state by its court of last resort, and therefore should be followed by the federal courts. The fact that in the deeds taken by Thompson and his associates there is charged to be an agreement that they would "assume the conduct, management and result of a suit of Wheeling Creek Coal & Coke Company against first party (landowner) in the circuit court of Marshall county, and to indemnify and save harmless the first party from any loss or damage in case said suit may be decided against them,"
does not affect the force of this decision in this case. In the Wingfield Case it was charged the purchaser between final decree and appeal had notice of the litigation, but such knowledge was held immaterial. Here such covenant possibly should be held mere surplusage, for the suit in the circuit court of Marshall county was at the time ended. At most it can be construed only as an agreement to indemnify the landowner in any action at law brought by the company against him for breach of his contract. It cannot affect the title of Thompson and his associates to the coal land, or authorize the cancellation of their deed therefor as prayed for. Nor does the fact that after the reversal of the final decree in the Elder Case the then parties to the other causes consented to the entry of orders therein whereby these final decrees were "set aside and held for naught" change the situation as to Thompson and his associates in regard to the coal lands involved in these causes. This for the simple reason that these consent decrees were not entered until February, 1904, nearly two years after they had purchased, taken, and recorded deeds, during which time the final decrees were in force. These consent orders setting aside these final decrees were made, so far as appears, without their knowledge, and certainly when they were not parties and therefore in no way bound thereby.

Specific performance is not a matter of right, but is one of sound discretion, controlled by established principles of equity, and will be granted or withheld by the court upon consideration of all the circumstances of each particular case. 7 Words & Phrases, 6605.

These cases seem to me to be very clear ones where such discretion should not be exercised, and the causes must be dismissed, with costs.

POTTER v. SELWYN & CO.

(Circuit Court, S. D. New York. April 30, 1900.)

Courts (§ 508*)—Federal and State Courts—Priority of Jurisdiction—Injunction by Federal Court to Restrain Proceedings in State Court.

A federal court cannot grant an injunction to restrain proceedings in a state court, unless necessary for the exercise of its own jurisdiction, previously obtained.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1418–1430; Dec. Dig. § 508.*

Enjoining proceedings in state courts, see notes to Garner v. Second Nat. Bank, 16 C. C. A. 90; Central Trust Co. v. Grautham, 27 C. C. A. 575; Copeland v. Brunker, 63 C. C. A. 437.]

In Equity. On application for injunction.

Louis Stechler, for complainant.

Dittenhoefer, Gerber & James, for defendant.

NOYES, Circuit Judge. The case presented upon the briefs and arguments is quite a different one from that shown in the pleadings. The action is described in the briefs as a suit for a general accounting.

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep't Indexes.
between the parties, and as necessarily involving the determination of their rights and obligations under certain contracts relating to the plays called "The Queen of the Moulin Rouge," "The Girl from Rectors," "The Honor of the Family," and others. But the only prayer for relief in the bill of complaint, relating in any way to an accounting, is as follows:

"That the defendants may be compelled under the direction of this court to account and pay over to your orator all royalties for the use heretofore of the said play, and that your orator may have judgment of such sum as may, upon such accounting, be found to be due to him from the said defendants."

The phrase "said play," in this prayer, evidently refers to the play there last mentioned, "The Queen of the Moulin Rouge." But, even if it be so broadly construed as to refer to all the plays mentioned in the bill, a mere accounting for the royalties due from the defendants to the plaintiff as prayed for in the bill does not involve the subject-matter of the action in the Municipal Court which the plaintiff seeks to restrain. In that action the present defendants sue the plaintiff for moneys retained in violation of a contract assigning royalties from the play "The Honor of the Family." But the amount which the plaintiff retains under this particular contract is not necessarily connected with nor dependent upon the amount which the defendants owe the plaintiff for royalties under other contracts. The plaintiff in his prayer demands only a one-sided and limited accounting. The prosecution of the action in the state court cannot impede his obtaining in this court all the relief which he prays for.

But the power of this court to enjoin proceedings in state courts exists only when it is necessary for the exercise of jurisdiction previously obtained. Assuming, then, but not deciding, that, if the bill prayed for a mutual and general accounting, this court would have the right to enjoin the proceedings in the Municipal Court, it is sufficient to say that no case is presented calling for the exercise of such power.

The application for an injunction restraining the proceedings in the Municipal Court is denied. An order may be entered accordingly.
RAILROAD COMMISSION V. CENTRAL OF GEORGIA RY. CO.

RAILROAD COMMISSION OF ALABAMA et al. v. CENTRAL OF GEORGIA RY. CO.

(Circuit Court of Appeals, Fifth Circuit. April 6, 1909. Rehearing Denied April 19, 1909.)

Nos. 1837-1862.


A preliminary injunction is not a matter of strict right, and it is often the duty of a court to refuse such an injunction where it is doubtful what upon the final hearing may be ascertained to be the real facts in the case, and where the rights of the complainants are such that they will suffer no more injury if they finally succeed than would be inflicted upon the defendants if unjustly enjoined. Especially is this true where it is sought to enjoin the operation of a state law fixing railroad rates alleged to be confiscatory but which has not yet gone into effect, when it is probable that a practical test of the law will be required to ascertain the truth, and in such case an injunction should not be granted on ex parte affidavits alone merely stating opinions.

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


In a suit by railroad companies to enjoin the enforcement of rates fixed by a state law as confiscatory, the fact that bonds may be required from complainants for the protection of passengers and shippers against loss from overcharges if the law shall be finally held valid is not a sufficient ground for granting preliminary injunctions, it being evident that such bonds would not practically give adequate protection to many of such passengers and shippers, where the amount involved was small.

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


The public has an interest in the enforcement of every law until it is repealed or judicially annulled, which should be taken into consideration before granting a preliminary injunction restraining its enforcement where questions of fact are involved.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 137.*]


On appeals from orders granting preliminary injunctions restraining the putting into effect of railroad rate statutes which are prima facie valid, their invalidity depending on facts to be proved, the effect of such injunctions being to prevent a practical test of the law before the final hearing, it is the duty of the appellate court to examine the whole case on the law and the facts, regardless of the usual rule as to the weight to be given to the decision of the court below in matters involving the exercise of discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3318-3321; Dec. Dig. § 954.*]


The provision of the Alabama railroad rate statute of August 9, 1907 (Gen. Acts Ala. 1907, p. 711), authorizing the State Railroad Commission to change rates fixed by statute from time to time as conditions may in its judgment render it expedient or proper to do so, is not void as an at-
tempted delegation of legislative power in violation of section 243 of the state Constitution of 1901, which confers power to regulate rates on the Legislature.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 94-102; Dec. Dig. § 62.*]

6. STATUTES [§ 64*]—VALIDITY—EFFECT OF INVALID PROVISIONS.

The validity of state statutes regulating railroad rates is not dependent on the question of the validity of provisions imposing penalties for their violation, where such provisions are not a necessary and inseparable part of the acts.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 53-63, 195; Dec. Dig. § 64.*]

Pardue, Circuit Judge, dissenting.

Appeals from the Circuit Court of the United States for the Middle District of Alabama.

Bill against the Railroad Commission of Alabama and another by the Central of Georgia Railway Company. With this were heard bills against the Railroad Commission of Alabama and another by the Central Trust Company of New York, by the Western Railway of Alabama, by the South & North Alabama Railroad Company, by the Nashville, Chattanooga & St. Louis Railway, and by the Louisville & Nashville Railroad Company.

For opinion below, see 161 Fed. 925.

The bills in these cases were filed to enjoin the enforcement of certain passenger and freight rates statutes of the state of Alabama, upon the claim that they were confiscatory in their effect upon the property of the complainant railroad companies.

In all the cases, except that of the Central Trust Company of New York, original bills were filed in the United States Circuit Court at Montgomery, in the latter part of March, 1907, against the three members of the Railroad Commission of Alabama, and also against A. M. Garber, Attorney General of the state of Alabama. The bill of the Central Trust Company was filed on December 3, 1907, at or about the same time that the other complainant railroad companies filed their supplemental bills. In the original bills of the railroad companies, they assailed certain legislation enacted at the regular session of the Legislature of Alabama in 1907, and the supplemental bills and the original bill of the Central Trust Company also assailed certain legislation of the special session of the Legislature of Alabama held in November, 1907. The Central Trust Company assailed also the passenger rate acts of the regular session of 1907.

The legislation enacted at the regular session, and assailed by the original bill, is as follows:

(1) An act approved February 14, 1907, establishing for steam railroads in the state engaged in carrying passengers a charge not exceeding 2½ cents per mile per passenger for carrying any passenger from one point to another in Alabama. Gen. Acts Ala. 1907, p. 104.

(2) An act approved March 2, 1907, which classified certain articles, and also classified the railroads, and which fixed the maximum rate to be charged by railroads in the state of Alabama for the transportation, originating and terminating in the state, of said articles, 110 in number, and which is known as the “110 Commodity Act.” Gen. Acts Ala. 1907, p. 206. This act was repealed at the special session of November, 1907.

(3) An act, approved February 9, 1907, known as the “Maximum Rate Bill,” which made the railroad freight rates in force January 1, 1907, for transportation originating and terminating within the state, the maximum rates. Gen. Acts Ala. 1907, p. 80.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep’r Indexes
On August 9, 1907, the Legislature, by statute then approved, authorized the Railroad Commission to change any classification of railroad, or of any articles of freight, or any maximum rates or charges, for the transportation of passengers or freight over any railroad in this state which have been or may hereafter be prescribed by statute, or any prevailing rates or charges for such transportation which have been or may hereafter be by statute made the maximum rates or charges, and to change such rates and classifications, or any of them, from time to time, as conditions may, in its judgment, render expedient or proper to do so, whether the effect of such change be to increase or reduce any of such rates or charges, and to establish and order to be put in force in lieu thereof any new classification or rate or charge which it may deem reasonable or proper; and the classifications, rates, or charges so established by it shall be the legal classifications, rates, or charges until further changed by said Railroad Commission. Section 2 of the act provides that the changes may be made by the Railroad Commission upon its own motion, or upon complaint or petition of any railroad company affected by such classification or rates, or of any person, firm, corporation, or association, or of any mercantile, agricultural, or manufacturing society, or of any body politic or municipal corporation or organization; but no such change shall be made which shall have the effect of reducing any such rates or charges, except upon an investigation or hearing had after at least 10 days' notice to the railroad company or companies to be affected by such change. Gen. Acts Ala. 1907, p. 711.

(4) The original bills also complained of certain provisions of the acts of the Legislature of Alabama, set forth therein, which made the charging of a higher fare than that prescribed by the acts a misdemeanor, and which also imposed upon the officer, agent, or employee of any railroad company who violated the provisions of the act a penalty, upon conviction of a fine and imprisonment. The penal provisions complained of by the original bills were repealed at the special session of the Legislature, and different provisions made, to be hereafter referred to.

(5) The original bills also referred to and set up certain provisions of the statutes of Alabama, enacted at the regular session of 1907, whereby provision was made for proceedings to contest the validity, fairness, or reasonableness of freight and passenger rates established by the Railroad Commission, or by statute, or made by statute the maximum rates. These provisions were repealed at the special session of the Legislature, and hence are not given in detail, another proceeding for contest of rates before the Railroad Commission, with right of appeal being as prescribed, as will hereafter be stated.

(6) The original bills also referred to certain statutes making it the duty of the Railroad Commission and of the Attorney General to enforce the passenger and freight rates, by suit or otherwise; but at the special session of the Legislature, as will hereafter appear, the power and duty upon the part of said officials to enforce the rates were withdrawn, and said officials were forbidden to enforce them.

Shortly after the filing of the original bills in March, 1907, injunctions were granted against the members of the Railroad Commission and the Attorney General, as prayed for in the original bills, and enforcement of the passenger rate act and of the commodity rate act was restrained pending the suit.

On November 23, 1907, at a special session, eight separate statutes were enacted by the Legislature, fixing the maximum rates to be charged by railroads for intrastate transportation of certain articles or commodities, to be known as group 1, 2, 3, 4, 5, 6, 7, and 8 respectively, and for this purpose to classify the railroads. Gen. Acts Ala. Sp. Sess. 1907, pp. 91, 101, 100, 117, 123, 133, 143, 152. These acts are exhibited with the supplemental bills, and they provide, in section 3, p. 93, that, "until otherwise provided by an order of the Railroad Commission, the maximum rates to be charged for the transportation" of the articles named in the schedule of maximum rates for freight, known as a certain group, numbered in the bill, should not exceed the rates named and specified therein.

The Legislature, at the special session, did not alter or amend the passenger rate bill enacted at the regular session, but it repealed the "110 Commodity Bill," as heretofore stated.
At the special session, the Legislature enacted a statute, approved November 23, 1907, entitled, "An act to provide for and authorize appeals from any action or order of the Railroad Commission of Alabama affecting or relating to, or reducing or increasing or refusing to increase, any rates, fares or charges by common carriers for the transportation of property, freight or passengers, specifically prescribed by statute, or made the maximum rates by statute, or established by said Railroad Commission." Gen. Acts Ala. Sp. Sess. 1907, p. 49.

The Legislature also enacted at its special session a statute, approved November 23, 1907, excluding from the Railroad Commission, and the members thereof, and the Attorney General, all power, authority, or duty to enforce any rates, fares, or charges for the transportation of property or passengers which have been or which may hereafter be prescribed by statute or made the maximum rates by statute, or any law now existing, or which may hereafter be enacted, prescribing such rates, charges, or fares, or any rates, fares, or charges which have been or which may hereafter be established by the Railroad Commission's orders fixing the same, and all power and authority to instruct, direct, or request the Attorney General to institute any legal proceedings or to enforce such rates, fares, charges, statutes, or orders. Gen. Acts Ala. Sp. Sess. 1907, p. 28.

Other acts referred to in the supplemental bills, were passed at the special session of the Legislature, prescribing penalties and forfeitures designed to secure compliance with the rate laws.

The Railroad Commission of Alabama was created by an act, entitled "An act to create a Railroad Commission, to be known as the 'Railroad Commission of Alabama,' define its duties and powers and provide for its mode of procedure and prescribe penalties for violation of its orders," approved February 23, 1907. Gen. Acts Ala. 1907, p. 135.

The act is too long to be set out in full, but it confers power upon the Railroad Commission to supervise, regulate, and control transportation companies doing business in the state in all matters relating to the performance of their public duties and their charges therefor, and the commissioners were thereby authorized, from time to time, to prescribe rates as may seem reasonable and just, which rates the commission may, from time to time, alter or amend; but it did not authorize the commission to increase rates or charges that had been fixed by statute. However, a later statute conferred this power upon the commission, as above stated. Section 14 of the act creating the commission conferred upon it the power and authority, at all times to the control of the Legislature, of regulating railroad freight and passenger tariffs, and requiring reasonable and just rates of freight and passenger tariffs. The act conferred many other powers upon said commission usually found in such statutes. Of course, the commission could regulate intrastate rates only.

Section 25 of the act authorized the commission, whenever it believed that any rate or charge was unreasonable or unjustly discriminatory, upon its own motion to investigate the same. After such investigation, the commission was authorized to order a hearing and determine whether the rate so investigated was unreasonable or unjustly discriminatory.

By section 30 of said act, it is provided that whenever, upon an investigation under the provisions of the act, the commission shall find an existing rate or rates to be unreasonable or unjustly discriminatory, it shall so determine, and by order fix a reasonable rate or fare or joint rate to be imposed, observed, and followed in the future in lieu of that found to be unreasonable or unjustly discriminatory; and it shall cause a certified copy of such order to be delivered to any officer, superintendent, or station agent of the transportation company affected, which order shall, of its own force, take effect and become operative 20 days after the service thereof.

By section 31 of the act, the commissioner, at any time, on notice to the transportation company, and after an opportunity for it to be heard, was authorized to rescind, alter, or amend any order made by the commission fixing any rate or rates; and certified copies of the same shall be served, and take effect, as provided for original orders.

By section 35 of the act, it is provided that "all rates, fares, charges, classifications and joint rates and orders establishing rules, regulations, practices or
services, fixed by the commission, shall be in force and shall be prima facie reasonable, until finally found otherwise * * * or until changed by the commission."

The commission, however, by the act passed in November, 1907, was forbidden to take action to enforce its rate orders, as has already appeared.

After the enactment of the legislation at the special session of November, 1907, the railroad companies filed supplemental bills, and the Central Trust Company filed its original bill, assailing the legislation enacted at the special session and seeking to enjoin the enforcement of the eight commodity acts, the passenger rate act, the acts providing for forfeiture, fines, and penalties against the railroad companies, their officers, agents, and servants, also the several acts authorizing the Railroad Commission to establish rates, or to alter, amend, or change the rates established by statute or otherwise, for the transportation of passengers and freight between points in the state of Alabama. Upon said supplemental bills, and upon the said original bill of the Central Trust Company injunctions were granted.

The orders made, superseding the rate bills and granting the injunctions in the several cases, were very similar. We refer to one of the decrees from which the appeals were taken as typical of all.

After overruling various motions and objections filed by the defendants, or some of them, with a view to preventing the granting of the order sought by the complainants, the Circuit Court ordered and decreed, in substance, as follows:

(1) That the several rates established by the eight acts of the Legislature of Alabama, styled the "Commodity Acts," and any and all modifications or changes that may be, or may have been, made therein by the Railroad Commission of Alabama, or that may be authorized by the Code of Alabama of 1907, be and the same are superseded and suspended until the final hearing and determination of the cause.

(2) The defendants, W. F. Vandiver and the other individuals and corporations named, "and all shippers or consignees of freight and all other passengers and persons," were restrained from instituting or prosecuting any suit or suits against complainant, in their own name or names, or in the name of the state of Alabama, to recover of complainant any fines, penalties, or forfeitures for or on account of any refusal by complainant to transport, between points in the state of Alabama, any passenger or passengers upon its railroad, at a rate of 2½ cents per mile, or at the rate of 2¾ cents per mile, or at any rate less than 3 cents per mile, fixed or that may be fixed by the Railroad Commission of Alabama; or for or on account of complainant's having charged, exacted, or received more than 2½ cents per mile, or more than the rate of 2¾ cents per mile, for transportation between points in the state of Alabama of a passenger or passengers; or for charging for the transportation of any of the commodities provided for in one or more of the said several acts in complainant's first supplemental bill referred to and styled "Commodity Acts," which said commodity acts are each approved November 23, 1907, and are entitled as stated in the order. The same parties were also restrained from instituting or prosecuting any suit or suits against complainant under the other statutes referred to in the order, under which suits might have been brought for damages, penalties, or forfeitures, by reason of the failure of the complainant to comply with the passenger rate statute.

(3) The decree also restrained D. C. Almon and the other individuals named, who were the solicitors or prosecuting attorneys in the counties in or through which complainant's road was operated; and the order for injunction included "their substitutes and successors in office, and all other persons, whether acting by procurement or in their stead, or otherwise"; and such solicitors and all other persons so acting were by the order restrained "from instituting or causing to be instituted, prosecuting or causing to be prosecuted, or aiding in prosecuting, any criminal proceeding of any kind or character whatsoever against complainant, its officers, agents, or servants, or against any of them, for any act done or committed, or that may hereafter be done or committed, by complainant, its officers, agents, or employees, or any of them, in violation or alleged violation of the provisions of the acts of the Legislature of the state of Alabama, passed at its regular and special sessions held in the year
1907, or either of them, fixing, regulating, or relative to the rates at which carriers shall transport freight between points in the state of Alabama, or in violation of the provisions of any of said acts, or in violation of the provisions of the Code of Alabama of 1907 relative to said matters, or any of them, or in violation of any order of the Railroad Commission of Alabama fixing or regulating fares for the transportation of passengers at less than three cents per mile, or freight at less than complainant's rate in force at the commencement of this action on March 25, 1907; and from further drawing any affidavit, complaint, indictment, or warrant of arrest against complainant or its officers, agents, or employes, or any of them, charging it or them with noncompliance with the statute to prevent, by the use of fences, bars, etc., persons intending to take passage at a regular station from reaching or boarding the train.

(4) The order further restrained T. W. Smith and the other individuals named as clerks of courts in the several counties of the state, "the deputy or deputies of either of them, their substitutes and successors in office, and all other persons acting for or in their stead or on their behalf or by their procurement, or that of either of them" as clerks aforesaid, from performing their official duties in reference to any suit that might be brought against the complainant for a violation of the passenger or commodity rate acts, or the other acts referred to, designed to secure compliance with the passenger and commodity acts. The order for the injunction in this respect is quite extensive and elaborate, and includes a restraint upon the clerks from filing any complaint or complaint, signing or issuing any summons or other process, or placing the same in the hands of or delivering said process to sheriffs or other officers for service; and from receiving, indorsing, or filing or signing any warrant of arrest or other process of any kind under any indictment or other charge against complainant's officers and servants for the violation of any provision of any act or acts of the Legislature of Alabama passed at its regular or special session in the year 1907, or of the Code of Alabama of 1907, fixing or regulating rates for the transportation of passengers and freight.

(5) The order further restrained J. A. Chambless and the other individuals named as sheriffs of the several counties of the state, their deputies and their successors in office, and all other executive or ministerial officers, state, county, or municipal (without naming them), empowered with authority to make arrests or to serve or execute warrants, summons, or other process, from executing or serving upon complainant or its officers or agents, and from arresting them under any summons, or summons and complaint, or other process, in any civil, penal, or "criminal suits, actions or proceedings had or instituted in from, in any manner, interfering with or molesting the complainant, or any of its agents, servants or employes, for or on account of any violation or alleged violation of any provision of any of the acts of the Legislature of Alabama" set out in the complainant's bill, or of the Code of Alabama of 1907, fixing or regulating or relative to passenger or freight rates, etc. The said sheriffs or other persons not named were also restrained from taking into their custody, or otherwise detaining, any of complainant's officers or agents, or from incarcerating them in any jail under any warrant of arrest or other process, or indictment or charge of misdemeanor, for a violation or alleged violation of any of the terms of said acts of the Legislature of Alabama, or of said Code, fixing rates between points in the state of Alabama. In other words, the said named sheriffs and other parties not named were restrained from performing any of their official duties in reference to civil or criminal suits that might be brought, based upon any violation of said statutes of the state of Alabama. The order is more extensive than is here stated, but what is said will suffice to indicate its general character.

(6) The order further restrained the members of the Railroad Commission of Alabama, and their successors in office, "from making any order, as such commission, reducing any freight or passenger rate of complainant between points in Alabama, or fixing any freight or passenger rate of complainant, or for its observance, on any of its lines in Alabama, at less than complainant's rate for the same, existing at the commencement of this suit on March 25, 1907, except as modified in the order of this court heretofore made, granting to complainant an injunction pendente lite with respect to certain articles between certain points, as specified in said order."
The order further provided that "the several acts and provisions of said Code hereinafore superseded and suspended are so superseded and suspended during the pendency of this cause and until its final determination."

The defendants, the Railroad Commission of Alabama and others, duly appealed to this court from such orders in each case, and it is assigned, with numerous specifications, that the Circuit Court erred in granting the interlocutory orders and issuing the injunctions.

Adrian H. Joline, Hugh Nelson, Albert Rathbone, and Henry V. Poor, for appellee Central Trust Co. of New York.
George P. Harrison, Robert E. Steiner, B. P. Crum, and Leon Weil, for appellee Western Ry. of Alabama.
T. M. Cunningham, Jr., Robert E. Steiner, Lawton & Cunningham, and Steiner, Crum & Weil, for appellee Central of Georgia Ry. Co.
Gregory L. Smith and Claude Waller, for appellee Nashville, C. & St. L. Ry.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge (after stating the facts as above). We assume as true and indisputable that the federal courts have jurisdiction and authority to annul and enjoin acts of a state Legislature that are confiscatory and otherwise in conflict with the Constitution; that they have no right to decline to exercise such jurisdiction when properly invoked; that every citizen, when the amount involved is sufficient and there is either diverse citizenship or a federal question involved, has the right to invoke such jurisdiction; that when such jurisdiction has attached it is exclusive, in the sense that state courts or state authority cannot interfere with it; that the process of injunction may be lawfully issued to preserve such jurisdiction from invasion by either civil or criminal proceedings; and that an injunctive suit to stay action by state officers under an unconstitutional state law is not necessarily a suit against the state. There is in our minds no doubt as to these general principles, though innumerable difficulties and disputations arise in their practical application.

Many questions are raised in these cases as to the breadth and scope of the injunctions—whether future action of the Railroad Commission can be legally enjoined; whether injunctions against clerks and sheriffs are not, in effect, injunctions against state courts; whether the effect of these injunctions is illegally to restrain action by the state grand juries; and other questions of like character. The view we take of the case makes it unnecessary to enter these inviting fields of discussion and to consider and decide these and many other questions urged on our attention.

These being appeals from interlocutory decrees granting injunctions, the ultimate question to be decided is whether or not, on the law and the facts disclosed by the record, the injunctions were im-
providently issued. The question can be intelligently decided only by considering separately the material grounds alleged as authorizing the injunctions.

1. The complainants claim that the rates are confiscatory; that they are so low as to deprive them of adequate return on their property; and that, therefore, the statutes fixing the rates are contrary to the due process clause of the fourteenth amendment and to like provisions of the state Constitution.

This contention raises a question of fact, and the main inquiry in these cases is whether or not it is sufficiently sustained by the records before us to have authorized the interlocutory injunctions.

Where it is doubtful what upon the final hearing may be ascertained to be the real facts of the case, and where the rights of the complainants are such that they will suffer no more injury if they finally succeed than would be inflicted on the defendants if unjustly enjoined, it is often the duty of the court to refuse a preliminary injunction. Especially is this true in a case where it is sought to enjoin the operation of a law fixing rates alleged to be confiscatory, when it is probable that a practical test of the law will be required to ascertain the truth. To adopt a different rule, the defendants might be unnecessarily and improperly restrained from doing what they have a right to do, and, through such restraint, suffer an injury for which they could obtain no adequate compensation. Brewer, J., observed, speaking for the Supreme Court of Kansas:

"An injunction in limine is not a matter of strict right. It may sometimes be properly refused upon the same facts which would entitle the party of right to an injunction on final hearing." Akin v. Davis, 14 Kan. 143.

See, also, by the same judge, Conley v. Fleming, 14 Kan. 381. It is true that in the event the contention of the complainants is finally sustained after a practical test of the acts, this result would show that they had unjustly suffered loss; but that only proves that laws regulating rates, like laws imposing taxes, cannot be so made and enforced as to always insure perfect equity. On the other hand, if the operation of the laws is enjoined and they afterward prove valid, some injustice has been done those entitled to the immediate benefit of the laws.

It is argued that the injunction should be issued because the rights of the defendants and all interested are secured by bonds. It is true that the courts have held that the fact that the defendants' rights may be secured by bond is sometimes a sound reason, in cases where the final result is doubtful, for exercising judicial discretion in favor of granting the preliminary injunction. But that rule is not always controlling, and clearly it should not be applied in cases where the bond does not afford adequate protection. Here the bonds given are intended to secure innumerable passengers and shippers or consignees. It is not at all probable that the claims of one-tenth of them, on breach of the bonds, would ever be presented, or, if presented, would be paid, and to enforce payment in the courts, unless those injured combined in their efforts, would cost more than the claim is worth. Those familiar with the Tift Case know that the bond proved ineffectual as
complete indemnity in that case, although the parties sought to be protected were large shippers of lumber. Tift et al. v. Southern Railway Company et al. (C. C.) 123 Fed. 789; Id., 10 Interst. Com. R. 548; Id. (C. C.) 138 Fed. 753; Southern Railway Company et al. v. Tift et al. (C. C. A.) 148 Fed. 1021; Id., 206 U. S. 428, 27 Sup. Ct. 709, 51 L. Ed. 1124; Tift et al. v. Southern Railway Company et al. (C. C.) 159 Fed. 555. Where the injunction is granted, the bonds should, of course, be required, but the court cannot safely exercise its discretion upon the theory that the bond in a case like this gives complete indemnity.

It is urged by the complainants that the temporary injunction was properly issued because required to protect their property rights. That contention assumes a disputed assertion to be true. If no one else was concerned, the courts might yield to that view without much hesitation. But the passengers and shippers, if, strictly speaking, they have no property interest involved, have a pecuniary interest in the enforcement of the rate laws. So there are rights on both sides deserving careful thought. And the public has an interest in the enforcement of every law until it is repealed or judicially annulled. The courts should, of course, with strong hand protect property from all unlawful invasion, but they should not be so engrossed by that thought and duty as to forget the rights of others, whether property rights or not. We would be slow to hold that any man or corpora
tion was entitled to the immediate enforcement of an alleged right inconsistent with the rights of others.

The litigation is likely to end sooner if no injunction is in force. Its dispatch is greatly dependent upon the conduct of the case by the complainants. They would not be inclined to press the case for speedy decision when they have once secured a preliminary injunction. As long as it stands, it is as good as any other, and experience shows that it often has practically the effect of a permanent injunction. Knowledge of this fact was probably one of the causes for the enactment of the statute allowing appeals from these interlocutory orders. Act April 14, 1906, c. 1627, 34 Stat. 118. In these cases the preliminary injunctions have been in force for two years. If no injunction had been granted, it is probable that a final decree of the Circuit Court would have been reached in one-fourth of that time.

There is no statute allowing an appeal from the Circuit Court to the Supreme Court from an interlocutory order granting an injunction. We have, therefore, as to the cases at bar, no controlling authority directly in point. Two recent cases, however, indicate the views of that court on the questions involved here.

In Wilcox v. Consolidated Gas Company of New York (decided January 4, 1909), 29 Sup. Ct. 192, 53 L. Ed. —, the bill was filed to enjoin the enforcement of certain acts of the New York Legislature alleged to be unconstitutional because the rates fixed by the act (prices to be charged for gas) were confiscatory. The court, in refusing to grant the relief prayed for, made observations that throw light on the measure of proof required in such cases: “We cannot say there is no fair or just doubt about the truth of the allegation that the rates are insufficient.” And the court suggested that “there may be other
cases where the evidence as to the probable result of the rates in controversy would show that they were so nearly adequate that nothing but a practical test could satisfy the doubt as to their sufficiency." And it was further said "that a reduction in rates will not always reduce the net earnings, but, on the contrary, may increase them." The court dismissed the bill in that case, repeating the rule as to the measure of proof required, holding that the complainant had not shown "beyond any just or fair doubt that the acts of the Legislature of the state of New York are in fact confiscatory." In the order of reversal dismissing the bill without prejudice, the court said:

"It may possibly be, however, that a practical experience of the effect of the acts by actual operation under them might prevent the complainant from obtaining a fair return, as already described, and in that event complainant ought to have the opportunity of again presenting its case to the court."

The opinion in that case is very instructive as to the strict rule of evidence applicable to such cases, and the importance the court places on a test by actual trial before coming to the conclusion that an act in question is confiscatory. It appears from the statement of the case made by Mr. Justice Peckham, who delivered the opinion, that a preliminary injunction was issued by the Circuit Court, the cause referred to a master, who reported in favor of the complainant, and the Circuit Court confirmed the report. After such elaborate investigation, the Supreme Court indicated in its opinion the importance of a practical test by an actual trial of the statute. It would clearly have been the better course in that case for the Circuit Court to have refused the preliminary injunction and let the test be made at first.

The case of Mayor and Alderman of the City of Knoxville v. Knoxville Water Company (decided January 4, 1909) 29 Sup. Ct. 148, 53 L. Ed. —, was brought by a bill to enjoin an ordinance fixing maximum rates to be charged by the company. It was alleged that the ordinance was confiscatory, the rates being fixed too low. The complainant, after reference to a master, report, and confirmation, was granted relief by the lower court, and the injunction was made permanent. The court, speaking by Mr. Justice Moody, quoting earlier cases, said:

"In the first place, no injunction ought to be granted unless in a case reasonably free from doubt. We think such rule is, and will be, followed by all the judges of the federal courts. * * * Judicial interference should never occur unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulations as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use."

The court laid stress on the fact that the case did not rest on "observation of the actual operation under the ordinance."

Again, showing the importance the Supreme Court attaches to the experience had by the actual operation of an ordinance or statute fixing rates, it should be noted that in reversing the decree and in dismissing the bill it was done without prejudice, so that, if it appeared by a test that the ordinance was in fact confiscatory, the suit could be renewed. It seems from an attentive examination of the opinion in the case that the better course for the Circuit Court to have
taken in the Knoxville Water Company Case would have been to have permitted the practical trial of the ordinance before issuing the preliminary injunction. See, also, Cumberland Tel. & Tel. Co. v. Railroad Commission (C. C.) 156 Fed. 834, refusing temporary restraining order, and the same case, on final hearing, granting an injunction; also the same case, decided by the Supreme Court, February 23, 1909, reversing the order granting the injunction, 29 Sup. Ct. 357, 53 L. Ed. —.

In Central of Georgia Railway Company v. McLendon et al. (C. C.) 157 Fed. 961, 978, after an order was made at chambers by a Circuit Judge denying a temporary restraining order ([C. C.] 155 Fed. 975), the case came on for hearing on a motion to grant a temporary injunction. Judge Newman, who heard the motion, declined to grant the temporary injunction, holding that the rate claimed to be confiscatory should be tried to ascertain its effect upon the railway company's business. The practice pursued by Judge Newman in that case, we think, is to be commended.

The records before us consist mostly of affidavits giving opinions relating to schedules, rates, values, and various involved and intricate facts. There has been no opportunity to cross-examine the affiants—a time-honored means of ascertaining the truth. The statutes enjoined have not been permitted to be in force one day. There has been no practical test of the rates by observation of their effect. We have not before us even the result of the trial of rates nearly like these by the several Alabama railroads which are not contesting but obeying these laws. There has been no reference to a master, deliberate investigation by him, and formal report and confirmatory decree. After such deliberate and careful contradictory trial, the courts, as we have seen, have sometimes held that the validity of the statute as to the confiscatory question could only be settled by the practical test of its actual trial.

The several records, as presented in this court, contain about 4,000 closely printed pages. We have not attempted to quote it or condense it, and have only dealt with it by indicating our conclusions after an attentive consideration. Ordinarily, in a bill seeking an injunction and in the affidavits filed in support of it, we find statements of fact based on knowledge. These bills are filed to enjoin rates that have never gone into effect, and are necessarily based mostly on opinions or suppositions. The ultimate fact sought to be placed before the court is what per cent., if any, of net earnings would accrue to the complainants respectively on the value of their property used in intrastate business if the rates enjoined were enforced. The answer must depend on the actual value of the property devoted to the intrastate business, and the net amount that would be earned on the intrastate business if the rate enjoined was in operation; this, of course, depending on the amount of gross revenue from such business and the actual expense of conducting it. Take it for granted, for instance—which is not at all clear—that by opinions of experts the value of the property is ascertained, and that the cost of doing $100 worth of such business is ascertained with reasonable certainty, so that the net gain is made plain; there is left an element of uncertainty that is
not answered by a reference to last year's profits, to wit, the amount of business that would be done under the lower rates, and this nothing but a practical test would show. "May it not be possible—in deed, does not all experience suggest the probability—that a reduction of rates will increase the amount of business, and, therefore, the earnings?" Chicago & G. T. Railway Company v. Wellman, 143 U. S. 339, 343, 12 Sup. Ct. 400, 36 L. Ed. 176.

Our attention is called to the numerous decisions of this court refusing to reverse interlocutory decrees granting injunctions pendente lite, and announcing that the making of such decrees was within the sound judicial discretion of the lower court, and that it would not be interfered with unless violative of some rule of equity procedure, and unless, under all the circumstances, the injunction was improvidently granted. Lehman v. Graham, 135 Fed. 39, 67 C. C. A. 513, and cases there cited. Such is the general rule that has been announced in ordinary suits between parties so situated that the rights of the defendant could be fully protected by bond in case the injunction on the final hearing was dissolved. It has never been applied by this court in a case where the situation was such that the rights of the defendants or others having interests could not be so protected, where the defendants were restrained from the exercise of a right conferred by a statute which was prima facie valid, and where the granting of the injunction would prevent a practical test that would probably be necessary before the case could be fairly and finally decided. Clearly, this rule should not control in a case like this, where the purpose is to arrest the operation of a law on the ground that it is confiscatory and, therefore, void. It is a rule in equity in ordinary cases that the master's findings approved by the lower court must be treated as unassailable so far as it depends upon conflicting testimony, or upon the credibility of witnesses, or so far as there is any evidence consistent with the findings. Davis v. Schwartz, 155 U. S. 631, 636, 15 Sup. Ct. 237, 39 L. Ed. 289. But the Supreme Court held that the established rule was not applicable to a case where the complainants sought to enjoin an ordinance as confiscatory. "This court," said Mr. Justice Moody, "will not fetter its discretion or judgment by an artificial rule as to the weight of the master's findings, however useful and well settled these rules may be in ordinary litigation." Knoxville v. Knoxville Water Company, supra. We think that on appeals from orders annulling statutes which are prima facie valid, their invalidity depending on facts to be proved, it is the duty of the appellate court—and a responsibility which it cannot avoid—to examine the whole case on the law and the facts. We do not mean to say that the decision of the lower court is not entitled to great weight, or that, as a practical question, it may not sometimes be treated as conclusive. But where the usual result of an interlocutory injunction is to enjoin the operation of the law for a long period, and where the dissolution of the injunction is the only means of obtaining a practical test, which may at last be necessary, the ends of justice will be promoted by an examination of the merits by the appellate court.

Cases, of course, may occur where the rates are apparently so flagrantly unjust, so in conflict with experience and common knowledge
as to what is right, as to seem unfair and probably confiscatory on their face. In such instances, it may be that the sworn bill, with proper averments and with the affidavits of experts as to their opinions, would be sufficient to overcome the prima facie presumption that the rates established by legal authority are valid. But where the rates are not manifestly unfair, where it may be that in their practical enforcement they may not greatly lessen the income and may possibly increase it, it seems to us unreasonable that the law should be suspended on such procedure. Take, for illustration, the passenger rates of $1.75 cents per mile established by the acts in question here. The rate before the act was 3 cents. Whatever the final trial may show, the change does not seem to us so unreasonable that the presumption of its validity should be overcome without the test of its practical trial, or, at least, without the safeguards of an investigation in equity that usually precedes a final decree. Such statutes, not apparently extreme or unjust, should not, in our opinion, be suspended at all on ex parte opinion affidavits. The courts cannot as a rule yield their right of judgment to the opinions of interested experts who are not even subjected to cross-examination. If they did so, in railroad law the regulation of rates would become obsolete, and in criminal law murder would cease to be a punishable crime.

We cannot refrain from quoting, in conclusion, the wise and conservative words of Mr. Justice Moody, speaking for the Supreme Court in the case of Knoxville v. Knoxville Water Company, supra:

"The courts, in clear cases, ought not to hesitate to arrest the operation of a confiscatory law, but they ought to refrain from interfering in cases of any other kind. Regulation of public service corporations, which perform their duties under conditions of necessary monopoly, will occur with greater and greater frequency as time goes on. It is a delicate and dangerous function, and ought to be exercised with a keen sense of justice on the part of the regulating body, met by a frank disclosure on the part of the company to be regulated. The courts ought not to bear the whole burden of saving property from confiscation, though they will not be found wanting where the proof is clear. The Legislatures and subordinate bodies, to whom the legislative power has been delegated, ought to do their part. Our social system rests largely upon the sanctity of private property, and that state or community which seeks to invade it will soon discover the error in the disaster which follows. The slight gain to the consumer which he would obtain from a reduction in the rates charged by public service corporations is as nothing compared with his share in the ruin which would be brought about by denying to private property its just reward, thus unsettling values and destroying confidence. On the other hand, the companies to be regulated will find it to their lasting interest to furnish freely the information upon which a just regulation can be based."

2. It is claimed that the statutes in question are contrary to the provisions of the Alabama Constitution.

Section 44 of the Constitution of 1901 of Alabama provides that:

"The legislative power of this state shall be vested in a Legislature, which shall consist of a Senate and a House of Representatives."

Section 243 provides that:

"The power and authority of regulating railroad freight and passenger tariffs, the locating and building of passenger and freight depots, correcting abuses, preventing unjust discrimination and extortion and requiring reasonable and just rates of freight and passenger tariffs, are hereby conferred upon the Legislature, whose duty it shall be to pass laws from time to time regu-
lating freight and passenger tariffs, to prohibit unjust discrimination on the
various railroads, canals, and rivers of the state, and to prohibit the charging
of other than just and reasonable rates and enforce the same by adequate
penalties."

The first section of the act of August 9, 1907, is as follows:

"That in all cases where any classification of railroads or of any articles of
freight or any maximum rates or charges for the transportation of passengers
or freight over any railroad in this state have been, or may hereafter be, pre-
scribed by statute, or any prevailing rates or charges for such transportation
have been, or may hereafter be, by statute made the maximum rates or
charges, the Railroad Commission of Alabama shall have the power and is
hereby authorized to change such classifications and such rates or charges,
or any of them, from time to time as conditions may, in its judgment, render
it expedient or proper so to do, whether the effect of such change be to in-
crease or to reduce any of such rates or charges, and to establish and order
to be put in force in lieu thereof any new classification or rate or charge which
it may deem reasonable and proper, and the classifications, rates or charges
so established by it shall be the lawful classifications, rates or charges until

There are similar provisions in the acts known as the "Eight Group
145, 153.

It is contended by the appellees that these statutes which authorize
the Railroad Commission to fix and change rates are void as an at-
tempt to delegate to the commission legislative power over rates.

It is a familiar principle that a grant of legislative power to do a
certain thing carries with it the power to use all proper and necessary
means to do it.

The Legislature in Alabama, under the Constitution, has regular
sessions every 4 years, which are to continue only 50 days. It would
not be possible, without the introduction of a commission or some
other agency, for it to properly exercise the power of regulating rates
committed on it by the state Constitution. It is true that the function
of fixing rates is legislative in its nature, yet it seems well settled
now that the creation of a commission, with power to fix rates, is not
an unconstitutional delegation of legislative power. It was held in
Georgia, where the constitutional provision is similar to the one
quoted from the Alabama Constitution, that, although the Legislature
itself could fix the rates, it was competent to avail itself of a Railroad
Commission and to confer on it the authority to prescribe and change
rates from time to time as a changed condition might justify or re-
quire. Georgia Railroad et al. v. Smith et al., 70 Ga. 694; Chicago,
(C. C.) 35 Fed. 866, 1 L. R. A. 744. There are numerous authorities
to the same effect which we do not cite, for we understand that, to
this extent, counsel on both sides are agreed. The contention of the
complainants is that, the Legislature having prescribed rates, or maxi-
mum rates, it could not by previous or subsequent statutes authorize
the Railroad Commission to change them. It is not denied that the
Legislature could confer on the commission the power to fix the rates,
or that the Legislature could, if it chose, when practicable, fix them
itself. The contention is that, when once fixed by legislative enact-
ment, power cannot be conferred on the commission to change or repeal the law. That may be conceded to be true as a general proposition. If the Legislature were to fix the rates as permanent rates, without in the same or some previous act conferring authority on the commission to regulate or change them, the rates could only be changed or repealed by the Legislature itself. But, looking at the acts in question and the other legislation relating to this subject, it is plain that the Legislature has not intended, and did not fix, the rates as permanent rates. It was not intended to fix rates to last four years—from one meeting of the Legislature to another. The intention was—and the statutes, we think, show it—that rates were stated in the act to stand till conditions made it expedient and proper for the commission to change them. Looking at the system of laws on this subject, the intent of the lawmakers is clear. But, aside from that, we find in the letter of the law sentences pointing the same way. Rates are prescribed "until otherwise provided by order of the Railroad Commission." The commission, from the time of its creation, had the power to reduce rates, and, when the Legislature fixed maximum or other rates, it knew of this power of the commission, and did not repeal it. We think the Legislature had the power to confer the authority in question on the commission. Saratoga Springs v. Saratoga Gas, etc., Co., 191 N. Y. 123, 83 N. E. 693. Whether established directly by legislative action or by the commission, the rates are always subject to the limitations of both the state and federal Constitutions. To hold that the Legislature could not confer on the commission the power in question would either deprive the Legislature of the right to make rates by direct act, or deprive the commission of the power to regulate them. This would not be sound, for, as a question of power, they may be regulated by either the Legislature or the commission.

We regret that the Supreme Court of Alabama has not had occasion to pass on the question of the constitutionality of these statutes. Its construction of the Constitution and statutes of that state would be followed by this court. In advance of a decision by the Supreme Court of Alabama to that effect, we would be very reluctant to strike down the acts as void. Every statute is presumed to be constitutional until the contrary is made clearly to appear. When there is a doubt as to the validity of a statute, the expressed will of the Legislature should be applied.

We have carefully examined the case of Mitchell v. State ex rel. Florence Dispensary, 134 Ala. 392, 32 South. 687, and we do not think it controlling or even applicable here. That it is not applicable, we think, is shown by other and later cases decided by the same court. Ward v. State ex rel. Parker (Ala.) 45 South. 655; Tallassee Falls Mfg. Company v. Commissioners' Court (Ala.) 48 South. 354.

We do not think the statutes in question are void as conferring on the commission legislative power in violation of the Alabama Constitution.

It was claimed in argument that the statutes fixing rates were void because of provisions or separate statutes fixing severe penalties. The provisions imposing penalties may or may not be void. That
question is not here for decision, and we intimate no opinion on the subject. They are not a necessary and inseparable part of the acts, without which they would not have been passed. The validity of the rates is not dependent on the question of the validity of the provision imposing penalties. Wilcox v. Consolidated Gas Company of New York, supra. If the complainants obey the laws until they are repealed or declared void by judicial authority, it may not be necessary to decide questions raised as to the penalties.

Each of the decrees appealed from is reversed and annulled, the injunction or injunctions issued on each decree is dissolved, and each cause is remanded to the Circuit Court for further proceedings in conformity with the opinion of this Court.

In each case it is so ordered.

PARDEE, Circuit Judge (dissenting). In my opinion the statutes of the state of Alabama, conferring power upon the Alabama Railroad Commission to fix and adjust rates, are constitutional, and, therefore, I think that the orders of injunction appealed from, restraining the commission in respect to making other and future rates, except within certain limits defined by the court, are erroneous, and should, in that respect, be modified.

A painstaking examination of the transcripts satisfies me that the complainants made sufficient proof as to the confiscatory nature of the rates sought to be enjoined, and that they are entitled to the protection of the court pending a final hearing; and, therefore, in my opinion, the injunction orders appealed from, except as to future rates, should be affirmed.

E. E. TAENZER & CO. v. CHICAGO, R. I. & P. R. CO.

(Circuit Court of Appeals, Sixth Circuit. April 19, 1909.)

No. 1,866.

1. RAILROADS (§ 139*)—SALES AND LEASES—CORPORATE LIABILITIES—ASSUMPTION OF PRE-EXISTING DEBTS.

An action at law is not maintainable against a successor corporation by purchase or lease to recover damages for a breach of contract by its vendor or lessor without proof of an express assumption of liability or that possession of the assets of the succeeded corporation was obtained by virtue of some relation by which liability for its prior obligations is imposed by statute.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 139.*]

2. RAILROADS (§ 139*)—SALES AND LEASES—CORPORATE LIABILITIES—ADOPTION OF CONTRACT OF PREDECESSOR.

A railroad company which succeeded to the road and property of another and continued to carry out a contract between its predecessor and a lumber company relating to shipments by the latter and the connection and operation of a private branch road owned by it, receiving the benefits thereof and demanding performance from the lumber company, thereby adopted the contract as its own and is bound by all of its provisions, and may be held liable for its own breaches thereof in a direct action at law.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 139.*]
   Estoppels in pais are called equitable merely because they arise from
   facts that make their application just, and not because they are peculiar
equity, and that a defendant's liability on a contract is based on such
estoppel, arising from the fact that, although it was not originally a
party to such contract, it adopted the same and claimed and received its
benefits, does not require the other party to resort to a court of equity
to recover thereon for a breach.

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

   A spur railway line built by a lumber company on its own land, forming
a connecting line between a railroad and its mill, some miles distant, for
the purpose of transporting its own products to the railroad for shipment,
which had no rolling stock except an engine and logging cars and which
neither did, nor held itself out to do, carrying for the public, is not a
common carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1, 462; Dec.
Dig. § 3.*]

5. Carriers (§§ 60½, 171)—Contract with Shipper—Construction and
Operation.
   By a contract between a railroad company and a lumber company the
latter agreed to build a road from a connection with the railroad to its
mill, 12 miles distant, the connection and the maintenance of a station
there to be at the joint expense of the parties. It also agreed to build a
side track "for the placing of cars" under the supervision of the railroad
company's engineer, which should be sufficient to enable the railroad
company with its engines to transfer cars "to and from its railroad and
the switch and upon the railroad" of the lumber company, which also
bound itself under penalties to ship all of its products, except such as
should be sent by water, over the road of the railroad company, held
that such contract was not one between connecting common carriers, the
lumber company's road being intended and used solely for its private
business, but was one between the railroad company as a carrier and the
lumber company as a shipper, and by implication bound the former on
reasonable notice to furnish cars on the side track in necessary numbers
for the use of the lumber company in conducting its business.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. §§ 60½, 171.*]

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

The plaintiff in error (plaintiff below) brought suit against the defendant
(hereafter called the Rock Island Company) for the recovery of damages on
account of the breaches—first, by the Choctaw, Oklahoma & Gulf Railroad
Company (hereafter called the Choctaw Company); and, second, by the de-
fendant company, in failing to deliver cars as required by a contract of
November 22, 1900, between the Choctaw Company and the Gifford-Frisbee
Lumber Company. The terms and conditions of this contract, and the cir-
cumstances under and the purposes for which the same was made, are these:

At the time the contract in question was made the Gifford-Frisbee Lumber
Company owned a tract of about 3,000 acres of land in Cross county, Ark.
(about 54 miles west of Memphis), the north line of this tract being about 12
miles north of Round Pond, which was a station on the Choctaw Road where
the latter received timber products for shipment. The lumber company also
owned the stumpage rights on about 3,200 acres of timber lands adjoining
the tract mentioned. The tract referred to extended north and south about four
miles, the south line being thus about eight miles north of Round Pond. The
lumber company had a mill at Short Bend, on the St. Francis river, near the
north line of its tract. The land was exclusively timber land; there was no
town or city near it or accessible to it. Short Bend was simply a mill site.
Nobody lived there except those connected with the lumber company's opera-

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
170 F.—16
tions. The land and the surrounding territory was bottom land, wild timber land, with no inhabitants in the neighborhood to speak of. The nearest town to the property was Parkin, Ark., about 6 1/2 or 7 miles north of Short Bend. The nearest place was Round Pond. The tract comprised between ninety and one hundred million feet of timber. The lumber company (which was engaged solely in the lumber business) desired facilities for marketing its logs and lumber, and the railroad company desired the transportation of, and the freight on, those timber products. In these circumstances, the railroad company and the lumber company on November 22, 1900, made a written agreement by which the railroad company agreed to give to the lumber company "a connection with its (the railroad company's) railroad at or near Round Pond, for the construction of a line of railroad by the party of the second part from said connection in a northerly direction for a distance of about 12 miles to a point on the St. Francis river," and to construct at its own cost that portion of the railroad which should be on its own right of way, and which it should own. The lumber company on its part agreed, at its own expense, to construct a road from the St. Francis river to the point where such road should intersect the north boundary line of the railroad right of way, the grading, bridging, and construction of the lumber company's road to be subject to the approval of the chief engineer of the railroad company, "the connection of the railroad of the (lumber company) with the railroad of the (railroad company) at said joint of intersection to be under the supervision of, and according to the plans prepared by, the chief engineer of the (railroad company)." The lumber company further agreed to construct "at its own cost and expense, and on its own right of way, a switch or side track near the place of intersection of said railroads, for the placing of cars," and agreed "that said switch or side track and that portion of the main line of the (lumber company) between said switch and the joint of intersection of said railroads—or such portion of said main line and side track of the (lumber company) as in the judgment of the chief engineer of the (railroad company) shall be sufficient to enable the (railroad company) with its engines to transfer cars to and from its railroad to the switch and upon the railroad of the (lumber company)—shall be laid with" rails of a certain weight, to be furnished by the railroad company at a given price. The lumber company further agreed that, after the line of its road should be surveyed and located, maps of the same, showing its connection with the railway company's road, should be made. The railroad company in turn agreed to furnish to the lumber company the frogs, switches, spikes, and bolts at cost, to be paid for by the lumber company in cash when delivered. It also agreed to sell to the lumber company the necessary rails and fastenings for the construction of the road at agreed prices per ton, payment of the purchase price of such rails and fastenings to be secured by a mortgage payable six years from the date of the contract, the latter providing for application upon this purchase price of a given part of the proportion of through freights due the lumber company under an arrangement for such division hereafter referred to.

It was further agreed that passenger and freight depot buildings and platforms should be erected at the joint expense of the railroad company and the lumber company, at the point of connection of the lumber company's road with the railway company's road, each party to stand one-half the cost of maintenance of the buildings and platform, station agents, etc. The lumber company then bound itself to ship over the railroad company's lines, during a period of 10 years, all of its lumber and the traffic originating on the lumber company's road, except such as the latter might desire to ship to and from Memphis by way of the St. Francis and Mississippi rivers. The contract provided (in case of the breach of such agreement) for an immediate maturity of the lumber company's indebtedness for rails and fastenings, with the right in the railroad company to take immediate possession thereof, and that, in case of the shipment of lumber by the lumber company over any other line of railroad, the lumber company should pay to the railroad company a certain freight rate as stipulated damages. A memorandum of through rates from and to points on the lumber company's road for a period of 10 years was attached to the contract, and provided for rates on lumber from mills on the lumber company's line to Hopefield and Memphis, on cotton to those places, on merchandise to and from Memphis, and on grain and grain prod-
ducts from stations on the railroad company's line to points on the lumber company's road. September 23, 1902, E. E. Taenzer, then a manufacturer and wholesale dealer in lumber, doing business as E. E. Taenzer & Co., succeeded by assignment to the rights of the Gifford-Frisbee Lumber Company in the contract referred to; and thereupon the Choctaw Railroad Company, in writing, assented to, ratified, and confirmed the assignment. Taenzer assuming by the written agreement all of the liabilities and obligations of the contract and freight rate agreement, and agreeing to fully perform them. The plaintiff was incorporated as the successor of Taenzer in the lumber business, and succeeded to all the latter's rights. The lumber company's road, neither during plaintiff's ownership nor in that of its predecessors, had any rolling stock except some logging cars used for furnishing logs to the mill at Short Bend, over the lumber company's road referred to, together with an engine used for hauling these logging cars and hauling the railroad company's freight cars between the connection at Round Pond and the plaintiff's mill at Short Bend. The railroad was never incorporated until after the commencement of this suit, but was a part of the lumber company's property, and used entirely in the business of the lumber company as a mere means of getting its output to the railroad company's tracks. It touched no town or property except the lumber company's timber lands. It never hauled any cotton, and there was no cotton in that part of the country for it to haul. It was never advertised as a common carrier for the purpose of obtaining shipments of any commodity. Upon the trial in the Circuit Court proof was given or offered that the Choctaw Company continued to operate the railroad and to carry out the contract in part until the early part of 1904, at which time the defendant road in some way "took over" the Choctaw Road; that after such taking over no change was made in the method of conducting the business between the railroad company and the lumber company; the same local railroad officers were continued in authority; the same literature and letter heads were used; the Rock Island Company proceeded with the execution of the contract and claimed the benefit of it, demanding of the plaintiff the execution by it of the contract in so far as it required payment of the indebtedness to the Choctaw Road as created by the contract—all these acts being done in the corporate name of the Rock Island Company, as on its own behalf; that the plaintiff had no knowledge of any change in the corporate entity; that among the acts of the Rock Island Company asserting such rights of ownership is a letter from defendant to plaintiff, dated March 12, 1906, demanding freight due under the contract, and saying, "Our contract indicates that one-half the total expense of the station shall be borne by your company"; also a letter from defendant's general superintendent to its local superintendent at Little Rock, dated May 25, 1906, saying: "I wish you would get contract between this company and the St. Francis River Railroad and E. E. Taenzer & Company, go over it carefully and then issue such instructions to your agent at Round Pond as will make him understand he is a joint agent representing equally the St. Francis River Railroad and the Rock Island Railway"; also letter of November 6, 1906, by the defendant's general auditor to E. E. Taenzer, as president of the St. Francis River Railroad, referring to "statement of balance due this company as of June 30, 1900, under contract of November 22, 1900, between Clif, ford (evidently meaning Gifford) and the Choctaw, Oklahoma & Gulf Railroad."

There was, however, neither proof nor offer of proof as to the terms and conditions under which the defendant took over the property of the Choctaw Company, whether by lease, through consolidation, or sale, nor any proof that defendant ever expressly assumed liability for breaches of the contract on the part of the Choctaw Company. Plaintiff introduced evidence that throughout the execution of the contract, both by the Choctaw Company and defendant, it was the regular practice of the railroad company to place the cars furnished for the lumber company upon the latter's tracks for the purpose of being hauled by the lumber company's engines to the latter's mill and to points on the line of the lumber company's road, and there loaded with lumber or logs and hauled back and delivered to the railroad company at the point of connection referred to. Plaintiff further introduced evidence that at numerous times during the operation, both by the Choctaw Company and the
defendant, its demands for cars necessary for hauling out its lumber or logs for shipment had not been complied with, and tending to show that such failures to so comply were unnecessary and unreasonable, and that plaintiff suffered large damages through such failure to so furnish cars.

The defendant introduced no testimony. The court (having previously held that there was no evidence showing a liability on the part of defendant for the defaults of the Choctaw Company) at the close of plaintiff's case directed a verdict for the defendant, upon the grounds that the so-called St. Francis River Railroad was shown to be a common carrier; that in the absence of special contract the defendant could, as a common carrier, owe no duty to the St. Francis River Railroad to supply the latter with rolling stock for the purpose of hauling freight over its own lines; that the written contract of November 22, 1900, between the Choctaw Company and the Gifford-Frisbee Lumber Company, did not require the railroad company to so furnish cars to the lumber company; that the defendant's only duty was to receive for transportation logs and lumber delivered at Round Pond, on the right of way of the defendant company; and that there was no proof of a refusal or failure by the defendant company to receive logs or lumber delivered upon its right of way.

Caruthers Ewing, for plaintiff in error.

E. E. Wright, for defendant in error.

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

KNAPPEN, District Judge, after stating the facts as above, delivered the opinion of the court.

1. The trial court rightly held that there was no testimony tending to show the defendant liable for breaches of the contract on the part of the Choctaw Company. As appears by the statement of facts above, no testimony whatever was introduced tending to show by what means (whether consolidation, lease, or otherwise) the defendant acquired its interest in the contract or in the property generally of the Choctaw Company; much less was there any evidence that the defendant, by virtue of either statutory obligation or express agreement, undertook to become liable for the prior defaults of the Choctaw Company. Plaintiff's counsel frankly says in his brief that:

"On this record it is impossible to tell whether the defendant represents the result of a consolidation of the Choctaw and some other road; it is impossible to tell whether the defendant is a purchaser of the Choctaw Road or a lessee thereof."

Plaintiff's right to recovery is rested upon the proposition that "the fact of assumption of the liabilities of the contract is conclusively presumed from the defendant's admission that it received the benefit of the contract." No cases are cited, and we know of none, which support the proposition that a suit is maintainable at law against a successor corporation, through lease or purchase, for recovery of damages on account of a prior default of the original contracting corporation, without proof either of an express assumption of liability by the successor corporation, or that the possession of the assets of such corporation was obtained by virtue of some relation by which liability for the prior obligations of such corporation is imposed by statute. On the contrary, the authorities are express that neither a lessee nor a purchaser becomes liable for the prior debts or obligations of the lessor or vendor, in the absence of either express contract or statutory provision therefor.

2. The question next arises whether the testimony presented tended to show the defendant liable for breaches of the contract by it after its succession to the rights of the Choctaw Company. The testimony tended to show an actual acquirement by the defendant of the rights of the Choctaw Company under the contract of November 22, 1900, an express assertion of its rights under the contract as against plaintiff, the proceeding to carry out the contract under such claim of right so to do, demands upon the plaintiff that it perform its reciprocal obligations, and the receipt from the plaintiff of the benefits of the contract by virtue of such claim of right thereto.

In Wiggins Ferry Company v. Ohio & Miss. Ry. Co., 142 U. S., at page 408, 12 Sup. Ct., at page 192 (35 L. Ed. 1055), it is said:

"It is not necessary that a party should deliberately agree to be bound by the terms of a contract to which he is a stranger, if having knowledge of such contract he deliberately enters into relations with one of the parties which are only consistent with the adoption of such contract. If a person conduct himself in such manner as to lead the other party to believe that he has made the contract his own, and his acts are only explicable upon that theory, he will not be permitted afterwards to repudiate any of its obligations."

In the case cited, the ferry company, which operated a ferry across a navigable river and owned the land at the landing and about the approaches, contracted with a railroad company for the use of the land for the purposes of its business so long as they should be used and employed for such uses and purposes. In consideration thereof the railroad company agreed, among other things, always to employ the ferry company in its transportation across the river. After the railroad company had for several years performed its contract, its property was purchased by the defendant company, no formal assignment of the interest of the railroad company in the contract mentioned having been made. The defendant entered into possession of the land leased to the railroad company, and for several years continued to carry on the business as it had been carried on before, but without making any new contract or any agreement for rent. The defendant later diverted a portion of its transportation across the river to other carriers. The proceeding was brought to recover damages for such diversion. It was held that by reason of this course of dealing the defendant "and the ferry company sustained the same relation as had previously existed under the deed between the railroad company and the ferry company, or at least that both parties are equitably estopped from denying that such was the case." This conclusion was rested upon the ground that the defendant had by its conduct adopted the contract between its predecessor and the ferry company and made that contract its own.

In Chicago & Alton R. R. Co. v. Chicago, Vermillion & Wilmington Coal Co., 79 Ill. 121, which is cited with approval in the Wiggins Ferry Case, 142 U. S. 409, 12 Sup. Ct. 188, 35 L. Ed. 1055, certain individuals interested in the coal company constructed a coal railroad
from Streator to Winona, on the Illinois Central Railroad, and later sold this coal road to the Jacksonville Railroad Company, by the terms of which sale it was agreed that all coal carried from the coal company’s mines at Streator to Winona, for the use of that town and its vicinity, or for delivery to the Illinois Central Railroad Company for the use of that company, or for further transportation on its line of railroad, should be carried over the coal road in question at a certain price per car. The Jacksonville Company at once turned over the coal road to the appellant company. There was no covenant in the deed of transfer that appellant should perform the obligations assumed by the Jacksonville Company to the coal company, but for more than three years appellant did carry the coal company’s coal from Streator to Winona, over the road in question, at the price stipulated in the contract between the coal company and the Jacksonville Company. It was held that “appellants placed their own construction upon this contract and of their obligations under it by carrying coal for three years. By doing this they expressly assumed the contract of the Jacksonville Company, * and they must be held estopped by their own act and conduct.” These cases establish the proposition that the defendant may be held, under the testimony presented, to have adopted the contract of the Choctaw Company, and to be liable for its own breaches thereof.

3. The question next presents itself whether plaintiff’s remedy is at law, or whether it must be sought in equity. The proceeding in the Wiggins Ferry Case for the recovery of damages was in equity in this respect: that the relief was sought under an intervening petition filed in a pending foreclosure suit in equity. And it is true that in that case the court said (without other discussion of form of remedy) that the railway company “must be held in a court of equity to have adopted such contract and made it its own.” In that case it was necessary to the liability of the railway company that it should have acquired by virtue of its relations with the ferry company the rights held by the originally contracting railroad company. The defendant held no deed of the premises affected. The remark above quoted seems to refer to this situation, in connection with the conclusion that “the railway company acquired an equitable estate in the premises of like character as the legal estate previously held by the railroad company.” The decision contains not even an implication that a resort to equity would be necessary unless in a case where the acts of adoption were insufficient for the acquisition of legal rights. In the instant case no deed or instrument in writing was necessary to the adoption by the railroad company of its predecessor’s contract. The original contract was not under seal. Under the view we have taken of the liability of the defendant, no question of answering for the default of another is involved. It is only for its own default that the liability of the defendant is under consideration. The provision of the statute of frauds requiring contracts for more than one year to be in writing is not contravened as to actions for breaches occurring during the period covered by the actual carrying out of the contract. If, as asserted in the Ferry Case, a party is to be held to have adopted, and to be bound by, the terms of a contract to which he is a stranger, when with knowledge of such con-
tract he deliberately enters into relations with one of the parties which are consistent only with the adoption of such contract, no reason is apparent why the remedy should be confined to equity, unless the right asserted is merely equitable. In the case here presented the defendant's obligation was not predicated upon mere acquiescence but upon an affirmative, express adoption of the contract and assertion of rights under it. The fact (if it be so regarded) that the liability is made to depend upon the principle of equitable estoppel does not limit the relief to equity; for it is well settled that estoppels in pais are called equitable merely because they arise from facts that make their application just, and not because they are in any way limited to cases in equity. They are fully as applicable in courts of common law. Barnard v. German-American Seminary, 49 Mich. 444, 13 N. W. 811; Dickerson v. Colgrove, 100 U. S. 578, 582, 25 L. Ed. 618; Drexel v. Berney, 122 U. S. 241, 253, 7 Sup. Ct. 1200, 30 L. Ed. 1219; Anglo-American Land, etc., Co. v. Lombard, 132 Fed. 721, 733, 68 C. C. A. 89.

It is true that in some jurisdictions the beneficiary of a promise made to a third person can sue for its enforcement only in equity, although it is the prevailing rule in this country that such beneficiary may maintain an assumpsit on a promise not under seal (Hendrick v. Lindsay, 93 U. S. 148, 149, 23 L. Ed. 855), the question of remedy depending in the federal courts upon the law of the forum in which the case is tried (Willard v. Wood, 135 U. S. 309, 312, 313, 10 Sup. Ct. 831, 34 L. Ed. 210). But in the jurisdictions in which the right to sue at law is denied, such denial is based upon the lack of privity between the promisor and the beneficiary of the promise. There is to our minds no analogy between an action of that nature and that under consideration here; for here the defendant, as successor in interest of the Choctaw Company, by direct relations with the successor in interest of the lumber company, is claimed to have adopted the contract as its own. A mutuality of contract would thus be created, and by such dealings the parties regarded as having made a new contract between themselves, on the same terms as those of the contract between the original parties, so long at least as such relations continue. It is worthy of note that in the case of Railroad Co. v. Coal Co., 79 Ill. 121, which, as before stated, was cited with approval in the Wiggins Ferry Case, the action was at law. In the case of Florida Central & Pen. R. R. Co. v. Bucki, 68 Fed. 864, 16 C. C. A. 42, which was an action at law for damages for breach of a contract as to freight charges made by the predecessor of the defendant, based upon the proposition that the defendant had by its acts adopted, ratified, and confirmed the contract, the Court of Appeals of the Fifth Circuit seems to have considered that a cause of action existed at law, provided the adoption of the contract was sustained by proofs.

We have not overlooked the fact that in the case of Sloss Iron & Steel Co. v. So. Car. & Georgia R. R. Co., 85 Fed. 133, 29 C. C. A. 50, the Court of Appeals of the Fourth Circuit seems to have construed the decision in the Wiggins Ferry Case as based upon purely equitable principles. The Sloss Case likewise involved elements making a resort to equity necessary, on the ground of mistake, and we find nothing in that case in conflict with the conclusion we have reached as to
the remedy in the instant case. The conclusion reached is that, under the facts presented here, plaintiff's remedy is not confined to equity.

4. In our opinion, the court erred in holding that the St. Francis River Railroad was a common carrier, and in interpreting the contract as imposing no obligation upon the railroad company save that owing at the common law from one common carrier to another. The chief arguments adduced in favor of the proposition that the so-called St. Francis River Railroad is a common carrier are that the term "railroad," as contained in the name under which the road was operated, imports the status of common carrier; that the provisions in the contract for joint construction and maintenance of passenger and freight depot buildings and platforms (including joint station agent), the reference therein to the lumber company's line as a "railroad" and to its "right of way," the provision for division of freight rates as between two connecting carriers, and the including in the agreement for rates and division thereof shipments of cotton and of merchandise, are consistent only with the status of the St. Francis River Railroad as a common carrier. But these considerations cannot outweigh the substantial considerations shown not only by the contract, but by the conditions and circumstances under which it is shown to have been made. They cannot overcome the fact, which clearly stands out, according to the proofs given or offered, that the so-called railroad was intended, both by the railroad company and the lumber company, merely as a spur to the mill for the purpose of enabling the lumber company, not as a carrier, but as a shipper, to transport its forest products over the line of the Choctaw Road; that, throughout, the lumber company's relation to the railroad company was in fact that of a shipper—a relation emphasized by the requirement that the lumber company ship "its products over the Choctaw Railroad unless transported by river."

The terms used and the provisions relied upon as establishing the status of common carrier cannot prevail against the considerations that this lumber and logging road had no rolling stock suitable for any purpose except logging; that there was in the neighborhood no cotton or other merchandise to ship, and no inhabitants to serve as carrier, either in the relation of passengers, shippers, or consignees; and that there was no holding out of the road as such carrier by advertisement or otherwise. No rule for the interpretation of contracts is better settled than that in construing a contract the court should place itself so far as possible in the situation of the parties when the agreement was made. Construing this contract in the light of the situation shown by the evidence admitted or offered, we have no difficulty in holding that the St. Francis River Railroad was not a common carrier, but was a mere spur extending through the timber and to the mill of the plaintiff as a mere adjunct to its lumber business. In Moore on Carriers, at page 20, it is said:

"According to all the authorities, the essential characteristics of the common carrier are that he holds himself out as such to the world; that he undertakes generally, and for all persons indifferently, to carry goods, and deliver them, for hire; and that his public profession of his employment be such that if he refuse, without some just ground, to carry goods for any one, in the course of his employment and for a reasonable and customary price, he will be liable to an action."

But independently of the status of the St. Francis River Railroad as a common carrier, the trial court was in error in holding that there was nothing in the written contract of November 22, 1900, which obligated the railroad company to furnish cars for logs or forest products to be delivered elsewhere than directly upon the railroad company's right of way. The provisions in the contract, first, requiring that the connection of the lumber company's road with that of the railway company at the "joint of intersection shall be under the supervision of and according to plans prepared by the railroad's chief engineer; second, by which the lumber company agreed to construct a switch or side track near the place of intersection of the roads "for the placing of cars"; third, the stipulation for the laying with a certain weight of steel rails that portion of the lumber company's "main line" between the switch and the "joint of intersection," or such portion of the "main line" and side track of the lumber company as in the judgment of the chief engineer of the railway company shall be sufficient to enable the (railway company), with its engines, to transfer cars to and from its railroad to the switch and upon the railroad of the lumber company; and, fourth, the requirement that the lumber company, under drastic penalties for failure to do so, must ship all its products over the railroad company's line—in connection with the other provisions of the contract referred to in the statement of facts preceding this opinion, construed in the light of the circumstances under which the contract was made, necessarily affirm the existence of relations beyond those arising between common carriers in the absence of contract, and necessarily show that it was contemplated by the parties that the railroad company should place its cars upon the lumber company's switch provided for the placing of cars, and should in turn haul them therefrom over the "joint of intersection" to and upon the railroad company's tracks, and necessarily imply an agreement on the part of the railroad company that cars in necessary numbers and upon reasonable notice should be placed by the railroad company upon the spur track for the use of its patron in connection with the logging and lumbering plants constructed and to be constructed along the line of the spur.

The testimony as to the custom of the railway company to make such deliveries of cars upon the lumber company's tracks, for the purposes stated, does not violate the rule which forbids altering the terms of an unambiguous contract by proof of custom. Such testimony was admissible for the purpose of showing the actual adoption by the defendant of the contract made by its predecessor, and in connection with that adoption the practical construction placed by the defendant upon the contract which it was adopting. The contract as construed by us is not subject to the objection of lack of mutuality, for the lumber company was under stringent obligations to ship its products over the line of the railroad company.
5. But the obligation imposed by the contract upon the railroad company was not to furnish cars whenever and in whatever quantities demanded. There is no provision for the furnishing of any specified number of cars, or at any specified times; much less an agreement that plaintiff should be the sole judge of the reasonableness of its own demands. The obligation imposed was, however, to furnish cars in necessary numbers and upon reasonable notice. A liability for failure to furnish cars must thus depend upon proof of special and reasonable requests by the plaintiff, having in mind the reasonable demands and the proper conducting of defendant's business, followed by an unreasonable refusal or failure on the part of defendant to comply with such special and reasonable requests. What cars were necessary and what notice was reasonable, and whether defendant's failures to furnish were unreasonable, were questions of fact in the case of each alleged demand. Evidence was introduced or offered tending to show in certain instances such special and reasonable demands by the plaintiff, and in some instances unreasonable failures by defendant to comply therewith. There thus existed questions of fact for the jury, to whom the case should have been submitted.

We find no occasion upon this record to discuss the various questions presented by counsel as to the sufficiency of the proofs as to the reasonableness of plaintiff's demands or the unreasonable of defendant's failures to comply therewith, nor to pass upon questions of damages resulting from such failures. None of these questions have been passed upon by the court below, and they may never arise upon a trial had under the views we have expressed.

The judgment of the Circuit Court must be reversed, and a new trial ordered.

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ATCHISON, T. & S. F. RY. CO. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. May 5, 1909.)

No. 1,590.


In a prosecution of an interstate carrier for giving a rebate on an interstate shipment of lime, constituting a departure from the established and published rate, in violation of Elkins Act Feb. 19, 1903, c. 708, 32 Stat. 847 (U. S. Comp. St. Supp. 1907, p. 880), denouncing such departure when willfully made, the intent of the carrier is of the essence of the offense.

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

2. Carriers (§ 38*) - Interstate Commerce - Rebating.

A departure from an established and published interstate freight rate by a carrier in order to constitute a crime denounced by Elkins Act Feb. 19, 1903, c. 708, 32 Stat. 847 (U. S. Comp. St. Supp. 1907, p. 880), must be willful.

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


*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
carriers from the established and published tariff rates an offense, an indictment alleging that the established and published rate per car for bulk lime between two points was $70 per car of 40,000 pounds minimum, and that defendant charged and received for a specified car the sum of $64.75 and no more, sufficiently charged that defendant granted a "concession" prohibited by the statute, though the count did not use the word "concession" to describe the alleged rebate.

[Ed. Note.—For other cases, see Carriers, Dec. Dlg. § 38.*
For other definitions, see Words and Phrases, vol. 2, p. 1386.]


A tariff sheet showing an established and published rate on bulk lime between two points of $3.50 per ton in car load lots of not less than 40,000 pounds did not sustain an indictment against the carrier for granting a concession alleging that the established rate was $70 a car of 40,000 pounds minimum.

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


Where, in a prosecution against a carrier for alleged rebating on shipments of bulk lime, it was shown that the regular published rate was $3.50 per ton, 40,000 pounds minimum, that the value of the lime was $3.50 a ton at the point of shipment, and that the carrier had accepted in settlement sums varying from 35 cents to $14.85 per car less than such established rate, evidence that the shipper had claimed that each of the cars had been loaded with at least the minimum amount, but that various amounts had been lost in transit, and that the carrier had not exacted freight on the amount so lost, was admissible as showing absence of the carrier's intent to grant a concession from the established freight rate.

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

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

For opinion below, see 163 Fed. 111.


Before GILBERT, ROSS, and MORROW, Circuit Judges.


We are in entire accord with the learned judge of the court below in his holding that this act, as well as all other acts upon the same subject, should be so construed and enforced by the courts as to promote their policies and extirpate the evils against which they are directed. Yet in respect to their criminal features this can only be done upon valid indictment, and in accordance with the established principles governing criminal prosecutions. The indictment in the present case contains 66 counts, upon each of which the plaintiff in error, defendant below, was found guilty by the jury, and upon each of which it was sentenced by the judgment brought here for review upon vari-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
ous assignments of error. All of the counts are similar and involve the same questions of law and similar questions of fact, so that it will be sufficient to set forth the substance of the first count, which, after stating the corporate character of the defendant, and that it is, and was at all the times mentioned in the indictment, a common carrier subject to the provisions of the interstate commerce act, and engaged in the transportation over its continuous line of road, of freight and property, in interstate commerce, from the town of Nelson, in the territory of Arizona, to the town of Barstow, in California, and all stations on the said continuous line south of Barstow, charged: That on the 15th day of June, 1905, the defendant in the manner and form acquired by law established and filed with the Interstate Commerce Commission, and had, as required by law, published, a tariff of rates of fare and charges for the transportation of freight and property in interstate commerce, which was in force from June 15, 1905, to July 16, 1906, upon the defendant's continuous line of route between the towns of Nelson and Barstow, and all stations on said line south of Barstow within the state of California. That the tariffs so established, filed, and published by the defendant company plainly stated the places upon its railroad lines between which property would be carried, and contained the classification of freight at said times in force, and further stated the quantity of the respective commodities designated in said classification to which each of the rates of fare and charges therein specified were applicable, and in connection with which said respective rates were to be established.

"That at all the times between said 15th day of June, in the year 1905, and the 16th day of July, in the year 1906, the lowest total lawful rate and charge established in said tariff by said corporation, common carrier, the Atchison, Topeka & Santa Fé Railway Company, and in force on its said continuous line and route for the transportation of bulk lime in car load lots from said town of Nelson, in said territory of Arizona, to the said town of Barstow, in the state of California, was, as shown by said tariff so established, filed and published by said corporation common carrier, as aforesaid, seventy (70) dollars for each car load lot of bulk lime shipped and transported over said continuous line and route from said town of Nelson, in the territory of Arizona, to said town of Barstow, Cal., or to any station on said line and route south of said town of Barstow, in the said Southern District of California, as aforesaid. That the Grand Canyon Lime & Cement Company at all the times herein mentioned was, and still is, a corporation organized and existing under and by virtue of the laws of the state of California, having its principal place of business at the city of Los Angeles, county of Los Angeles, division and district aforesaid, and also having a place of business and factory at the said town of Nelson, in the territory of Arizona.

"And the grand jurors aforesaid, on their oath aforesaid, do further present: That heretofore, on the 17th day of June, in the year 1905, said Grand Canyon Lime & Cement Company, a corporation as aforesaid, delivered to said the Atchison, Topeka & Santa Fé Railway Company, railroad corporation and common carrier as aforesaid, at the said town of Nelson, in said territory of Arizona, for shipment and transportation by the said common carrier and its railroads, over said line and route, to J. S. Schirm, at the city of Los Angeles (said city of Los Angeles being a station on the line and route of said common carrier south of said town of Barstow, Cal.), within the Southern division of the Southern district of California, a certain car load lot of bulk lime, which said lime was then and there contained in car of the said the Atchison, Topeka & Santa Fé Railway Company No. 17,256, which said car load lot of bulk lime was transported in said car No. 17,256 by said railway company by way of and over said continuous line and route from said town of Nelson,
territory of Arizona, through and by way of said Southern Division of the Southern District of California, to said city of Los Angeles. That the lawful amount of freight due and payable to said Atchison, Topeka & Santa Fe Railway Company, common carrier as aforesaid, under, pursuant to, and in accordance with said tariff so established, filed, and published by said railroad corporation as aforesaid was the sum of seventy (70) dollars. That said Atchison, Topeka & Santa Fe Railway Company, corporation, common carrier, as aforesaid (notwithstanding the existence of said lawful rate of seventy [70] dollars for the transportation of said car load lot of bulk lime as aforesaid), did charge, demand, and receive from the said J. S. Schirm for the transportation and shipment of said car load lot of bulk lime from said town of Nelson, in the territory of Arizona, to the said city of Los Angeles, in the state of California, the sum of sixty-four and seventy-five one hundredths (64.75) dollars, and no more, which said sum of sixty-four and seventy-five one hundredths (64.75) dollars was at the city of Los Angeles, within the Southern Division of the Southern District of California, paid by said J. S. Schirm to said the Atchison, Topeka & Santa Fe Railway Company on the 22d day of June, in the year 1905, for such transportation.

The foregoing constitutes the charging part of the first count of the indictment.

The Elkins act in its first section provides, among other things:

"That anything done or omitted to be done by a corporation common carrier subject to the act to regulate commerce and the acts amendingary thereof, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent or person acting for or employed by such corporation, would constitute a misdemeanor under said acts, or under this act, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof shall be subject to like penalties as are prescribed in said acts or by this act with reference to such persons, except as such penalties are herein changed. The willful failure upon the part of any carrier subject to said acts to file and publish the tariffs or rates and charges as required by said acts or strictly to observe such tariffs until changed according to law shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine not less than one thousand dollars nor more than twenty thousand dollars for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant or give or to solicit, accept or receive any rebate, concession or discrimination in respect of the transportation of any property in interstate or foreign commerce by any common carrier subject to said act to regulate commerce and the acts amendingary thereto whereby by any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said act to regulate commerce and the acts amendingary thereto, or whereby any other advantage is given or discrimination is practiced. Every person or corporation who shall offer, grant or give or solicit, accept or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars. * * * In construing and enforcing the provisions of this section the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier acting within the scope of his employment shall in every case be also deemed to be the act, omission, or failure of such carrier as well as that of the person. Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the act to regulate commerce or acts amendingary thereto, or participates in any rates so filed or published, that rate, as against such carrier, its officers or agents in any prosecution begun under this act shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this act."

On the trial the government introduced the tariff established by the defendant company and filed with the Interstate Commerce Commis-
sion, showing the rate over its line of road on line from Nelson to the stations referred to in the indictment to be 350 cents per ton for a minimum car load weight of 40,000 pounds. It was also shown on the trial that during the time covered by the indictment—more than a year—384 cars or thereabouts of lime, aggregating between 9,000 and 10,000 tons, and on which the total freight amounted to about $32,000, were shipped from Nelson over the defendant's road, concerning 66 of which cars (those embraced by the indictment) a question arose between the shipper and the railroad company in respect to lime claimed by the shipper to have been lost therefrom in transit, amounting in value to from 35 cents to $14.35 a car, and aggregating less than $500. Frederick P. Gregson, the freight agent of the defendant company having charge of such matters, was called as a witness by the government, and was examined by its counsel as well as by the counsel for the railroad company, and in respect to those claims made by the shipper for those losses gave testimony tending to show that in respect to each of the 66 shipments covered by the indictment the shipper complained to the company that the full minimum car load weight of 40,000 pounds had been loaded into the cars of the plaintiff in error at Nelson, and that a freight bill for the minimum car load, according to the tariff of $70, had been made, and that that amount was demanded by the defendant company for freight on each of those cars, but that as a matter of fact, according to the railroad company's scales at or near the destination of the shipment, it appeared that each of the 66 cars contained less than 40,000 pounds of lime, in consequence of which the shipper insisted that the company had lost in transit his lime to the amount of the difference between 40,000 pounds and the weight so shown by the scales, and insisted that he should not lose the lime, and at the same time pay freight on the lime so lost. That it cost $3.50 per ton to produce the lime at Nelson, and as the freight, according to the tariff, was $3.50 per ton, the shipper offered to waive any claim for the loss of the lime if the company would waive demand for the freight on the amount so claimed to have been lost, and that a compromise was made between the witness acting for the railroad company and the shipper on that basis, and that the company accepted payment only on the lime actually transported at the rate of $3.50 a ton. Other witnesses gave testimony tending to corroborate that of Gregson, all of which evidence was subsequently, on motion of counsel for the government, withdrawn from the consideration of the jury and stricken out, and the jury subsequently instructed, in part, as follows:

"The parties having stipulated that the government's Exhibit No. 5 is a copy of the tariff filed by defendant with said commission (Interstate Commerce Commission), said exhibit was at the times mentioned in the indictment its legal tariff, under and by virtue of which the rate of freight on lime in carload lots from Nelson to points on its line south of Barstow is fixed at $3.50 per ton, applicable to quantities of not less than 40,000 pounds, or 20 tons, and that said tariff was binding and conclusive upon the defendant, and it could not by any means whatever lawfully charge or collect for the transportation of any of the property mentioned in the indictment any greater or less rate than that specified in said tariff. You are further instructed that, if the defendant did accept for the transportation of said lime a less rate than that fixed by its legal tariff, it is wholly immaterial whether the difference between
the tariff rate and the rate so accepted was large or small. You are further
instructed that, if you find that the defendant did accept and receive for the
transportation of said lime a less rate than that fixed by said tariff, you need
not inquire or determine whether or not the defendant intended thereby to
violate the law, for such intention or lack thereof upon its part is entirely im-
material."

These rulings and instructions of the court below, as well as the
instructions hereinafter referred to, were excepted to by the defend-
ant, and are here assigned as error.

The indictment does not charge, nor in the record is it anywhere
contended, that there was in the first place any agreement or under-
standing of any nature that the defendant should carry the lime at any
departure or concession from the established rate; and, while it is
entirely true that it was the purpose of the statutory enactments upon
the subject to cut up by the roots the entire system of rebates and dis-
 discriminations, however made, by railroad companies in favor of par-
ticular localities, special enterprises, favored corporations, or individ-
uals, and that the courts should be astute to discover and severely pun-
ish any and every such unlawful and wicked act, it was not, we think,
the purpose of Congress to punish as a crime any innocent act com-
mitt ed by a corporation any more than by an individual.

The view taken by the trial court of the nature of the charge made
by the indictment in its ruling on granting the government's motion to
strike out all of the evidence tending to show that the deductions
made from the original freight bills by the defendant's agent, varying
from 35 cents to $14.35 on the 66 car loads in question because of the
contention of the shipper that he was not legally bound and should
not in justice pay freight on lime lost by the company in transit and
which it did not transport, is shown by the ruling itself, where the
learned judge said:

"I hold that the acceptance by the defendant of a less sum of money than
that named in its tariff for the transportation of the property described in
the indictment, if there has been such acceptance, was a departure from the legal
rate, and that it is no justification for such a departure, nor is it any defense
to a prosecution therefor that the acts of the carrier were done in compromise
of claims for loss of property in transit."

Passing, for the moment, the question whether the collection of
$3.50 a ton for all the lime in fact transported by the railroad com-
pany for the shipper between the stations mentioned is in law or fact
any departure from the established rate of $3.50 a ton on that com-
modity between those stations, it is plain, we think, that if the charge
upon which the defendant was being tried was, as indicated in the rul-
ing of the court from which we have quoted, "a departure" by the
defendant from its established rate, then clearly the intention with
which such departure was so made was of the essence of the offense,
because made so by the statute itself in expressly denouncing such
departure when "willfully" made. When the court below, however,
came to charge the jury, it instructed them that to constitute the of-
fense charged in the first count of the indictment "five things are
necessary," the first three of which need not be referred to, since they
were stated by the court to be admitted. The fourth and fifth were
stated by the court to be as follows:
“Fourth. That the defendant, as alleged in said count, filed with the Interstate Commerce Commission a tariff or schedule of rates, of which United States Exhibit 5 is a copy, and that the lawful amount of freight due the defendant on said shipment under said tariff was $70.

“Fifth. That said amount of $64.75 was paid by said Schirm, and that its acceptance by defendant was a concession by defendant to said Schirm whereby said lime was transported at a less rate than that named in said tariff.”

If, as we take it, by the word “concession” in these instructions the court meant the “departure” from the tariff rate referred to in its above quoted ruling in striking out the evidence referred to, the same observations are of course, applicable to such “concession” as to the departure from the tariff rate; that is to say, it must have been “willful” to constitute a crime under the statute. Although the charging part of count one of the indictment does not use the word “concession,” it does allege, in effect, that the rate established and published by the defendant per car from Nelson to Los Angeles was $70, and that, notwithstanding that sum was the lawful rate for the transportation between those points for such car loads of lime, the defendant did charge, demand, and receive for the car referred to in count one the sum of $64.75, and no more. Since the defendant, of course, knew and must be held to have known the tariff of rates established and published by itself, the averment that, notwithstanding the alleged rate of $70 for the car referred to, the defendant, in fact, charged and accepted $64.75 only, would seem to be sufficient to constitute the concession prohibited by the statute. The name is of but little moment. The essence of the thing is what characterizes and identifies it. Therefore we conclude that the objections made by the defendant to the sufficiency of the indictment are not well taken. But the established and published tariff introduced by the government does not support that charge. The tariff rate as established and published by the defendant for the transportation of bulk lime between Nelson and Los Angeles was $3.50 a ton in car load lots of not less than 40,000 pounds. It is true that, to entitle a shipper to that rate, he was required to put into the car at least 40,000 pounds; and it is also true that, by loading that quantity, he was entitled to that rate regardless of how much the carrier might deliver at the point of destination. If the shipper put in the car more than 40,000 pounds, he was not entitled to a rate of $70. In that event he was required to pay not $70 only, but $3.50 a ton on the quantity actually loaded and delivered; that is to say, $3.50 a ton was the established and published rate—not $70 a car. It is true that the freight would amount to $70 in cases where exactly 40,000 pounds were loaded and transported; but that was a mere incident. It might be more and it might be less—more when more than 40,000 pounds were loaded and transported, and less where at least 40,000 pounds were loaded, but not that amount was transported and delivered at the point of destination, the rate, however, all the time remaining the same, to wit, $3.50 a ton. Gregson testified, among other things, that the shipper explained to him how the loading was done at Nelson, which was a remote and unimportant station, and convinced him that at least 40,000 pounds of lime were loaded into every one of the cars shipped from that place. The ship-
per was, therefore, as has been said, legally entitled to have each of those shipments transported at the rate fixed in the defendant's tariff, to wit, at the rate of $3.50 per ton. The loss of some of the lime by the carrier in transit could not legally or justly deprive the shipper of the rate applicable to the minimum car load weight, any more than it would confer upon the carrier the right to charge for the transportation of that which it did not transport. The loss in transit was the fault of the carrier, for which loss it, and not the shipper, must be held to be the sufferer. Assuming, as, of course, we must in passing upon the rulings of the trial court, the facts to be as the evidence tended to prove them, we do not see how under the circumstances testified to it can fairly be said that the shipper in this case had his lime transported at a less rate than the regularly established and published rate. He was entitled to the car load rate of $3.50 a ton because he loaded at least 40,000 pounds in each of the cars in question, and he was not legally or equitably bound to pay freight on any of the lime which the carrier lost in transit and failed to deliver at the point of destination.

Of course, if all of this was a mere pretense, and if, in truth, it constituted but a concocted scheme or device of the defendant for the purpose of departing in any way from its established and published schedule or making to the shipper any concession of any character, the crime denounced by the statute was committed; but that was a question of fact for the jury, in the consideration and determination of which the evidence stricken out was important to the defendant. While "courts rightly are keen to penetrate an innocent appearing device to reach an illegal transaction," said the Circuit Court of Appeals for the Seventh Circuit in a case involving an alleged criminal violation of the Elkins act, "they should also be alert to save a lawful act, though it be hid under a false cover." Chicago & A. Ry. Co. v. United States, 156 Fed. 558, 560, 84 C. C. A. 324. And in the case of Camden Iron Works v. United States, 158 Fed. 561, 564, 85 C. C. A. 588, which was also based on the Elkins act, the Circuit Court of Appeals for the Third Circuit said:

"It is pertinent to remark that the legislation which has been under examination is highly penal in its character, and while it is the duty of the courts to so construe its terms as to suppress, if possible, the mischief against which it is directed, it is no less their duty to see to it that no person, natural or artificial, shall be held guilty of a crime upon an interpretation of the statute creating it which does not appear with at least a reasonable degree of certainty to be the correct one."

A similar right of a defendant charged with a similar crime under the same statute was very recently under the consideration of the Supreme Court in the case entitled New York Central & Hudson River Railroad Company v. United States (decided February 23, 1909) 212 U. S. 481, 29 Sup. Ct. 304, 53 L. Ed. —. There the charge was against the railroad company, its general and assistant general traffic manager. The indictment, among other things, charged the making and publishing of a through tariff rate upon sugar by certain railroad companies, including the New York Central & Hudson River Company, fixing the rate at 23 cents per 100 pounds from New York City.
to Detroit, and charging the railroad company's general and assistant general traffic manager with entering into an unlawful arrangement with certain sugar refining companies and the consignees of the sugar shipped by them, whereby it was agreed that for sugar shipped over the line whereon the full tariff rate was paid the railroad company should subsequently give a rebate of 5 cents for each 100 pounds. The indictment charged that during the months of April and May, 1904, shipments were made under this agreement and the regular tariff rates paid, and that on the 14th of July of that year a claim for a rebate in the sum of $1,524.99 was presented by the agents of the shipper and consignees, and paid on the 31st day of August to one Palmer, agent of the sugar company, for the benefit of the shippers and consignees. The foregoing were the allegations of the second count of the indictment, and similar averments were made in other counts. It appeared that the sugar refining companies were engaged in selling and shipping their produce in Brooklyn and Jersey City, and that W. H. Edgar & Son were engaged in business in Detroit, where they were dealers in sugar. By letters between Palmer, in charge of the traffic of the sugar refining companies and of procuring rates for the shipment of sugar, and the general and assistant traffic managers of the railroad company, it was agreed that Edgar & Son should receive a rate of 18 cents per 100 pounds from New York to Detroit. The letters referred to showed that this concession was given to Edgar & Son to prevent them from resorting to transportation by water route between New York and Detroit, thereby depriving the roads interested of the business, and to assist Edgar & Son in meeting the severe competition with other shippers and dealers. The shipments were made accordingly, and claims for rebate made on the basis of a reduction of 5 cents a 100 pounds from the published rates. These claims were sent to the assistant freight traffic manager of the railroad company by Palmer, the agent of the sugar companies, and then sent to one Wilson, the general manager of the New York Central and Fast Freight Lines at Buffalo, N. Y. Wilson returned to the assistant traffic manager of the railroad company a cashier's draft for the amount of the claim, which draft was then sent to the agent of the sugar companies and his receipt taken. It was stipulated that these drafts were ultimately paid from the funds of the railroad company.

One of the points made by the plaintiff in error and considered by the Supreme Court is thus stated by the court in its opinion:

"It is further contended that the court below erred in its reference to the absence of the witness Embleton, and the nonproduction of books in which entries were made concerning the transactions in question. It appears that Embleton was a clerk in the employ of Wilson, and had charge of the books in which these transactions were entered, that he did not appear at the trial, having left because of sickness, nor were the books produced. The comment objected to was made in connection with this paragraph of the charge:

"On this question of intent also, gentlemen, it is competent for you to take into consideration the method in which these transactions were carried on. The letter from Palmer to Guifford was headed private and confidential. It will be proper for you to take into consideration the fact, if you believe the evidence in the case, that the method of making these payments, instead of being by a direct check drawn at Buffalo by or on behalf of this defendant, was by purchasing a draft drawn by the Bank of Buffalo upon the Chemical
Bank in favor of Mr. Palmer; and you may take into consideration upon that
question the evidence in this case that the original claim presented by Pal-
mer to Pomeroy and sent by Pomeroy to Wilson have been destroyed, and the
fact that when Embleton, the man in charge of the shipments, left the em-
ployment there a book containing entries in reference to these claims disap-
ppeared, and that Mr. Wilson testified in this case that he did not know where
it was.

"'Now, it is for you to say, gentlemen, whether these occurrences and these
facts are consistent with innocence or with guilt, because if a man carries on
an act, or any person does anything which upon its face is apparently unlaw-
ful, and he does it in a furtive and secret manner, showing that his intention
while he does the act is to do it in such a way as to conceal it, the jury may
draw the inference from that fact, if they see fit—they are not obliged to, but
they may if they see fit—that the intention with which the act was done was
to perform an illegal or a criminal act.'

"We do not perceive any prejudicial error in this charge. It simply amount-
ed to permitting the jury to consider the circumstances enumerated as bear-
ing upon the guilty purposes of the parties charged in the indictment. It left
to the jury to attach such weight as they saw fit to the circumstances of Emble-
ton's absence and the nonproduction of the books. It is to be noted in this con-
nection that the judge in the latter portion of his charge, at the request of
the defendant, said: 'There is no evidence that the defendant corporacion or
those who controlled its corporate action destroyed or failed to produce upon
the trial any paper for which the government has asked.'"

The question of intent entered into the charge made by the indict-
ment against the defendant in the present case, and, that being so, it
necessarily results that the court below was in error in withdrawing
from the consideration of the jury the evidence to which reference has
been made, and in the giving of its instructions.

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

TURNER v. CITY OF FREMONT et al.

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

No. 2,835.

1. MUNICIPAL CORPORATIONS (§ 352*) — CONTRACTS — BID FOR PAVING — CON-
STRUCTION.

Where the specifications upon which paving bids were based provided
that the city engineer might make certain tests of the brick to be used
at any time during the progress of the work, and that if they did not
stand the tests they should be rejected, and also required bidders to de-
posit samples of the brick on which their bids were based, such samples
to be labeled, showing the commercial name of the brick, a statement in
plaintiff's bid that he proposed to use "Capital" brick as per sample sub-
mitted did not work a modification of his proposal to do the work ac-
cording to the plans and specifications, so as to make the quality of his
samples determine the quality of the brick to be used, and do away with
the provision requiring them to answer the specified tests.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. §
352.*]

2. MUNICIPAL CORPORATIONS (§ 337*) — CONTRACTS — ACCEPTANCE OF BID FOR
PAVING.

Where, after plaintiff had been declared the lowest bidder for paving
work and his bid accepted by a city, he refused to enter into a contract,
and a deposit required and made by him was declared forfeited, the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
rights of the parties were thereby fixed, and were not affected by the subsequent action of the city council in declaring another the lowest bidder and accepting his bid.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 337.*]

3. DAMAGES (§ 78*)—LIQUIDATED DAMAGES AND PENALTIES—CONSTRUCTION OF STIPULATION.

An agreement between a city and a bidder for paving work that a deposit of 5 per cent. of the amount of his bid required to be made by the bidder "shall be considered as liquidated damages" and forfeited to the city if the bidder's proposal is accepted and he fails to enter into a contract will be construed in accordance with its terms, as one for liquidated damages and not for a penalty, and in view of the fact that the actual damages were uncertain, and could not then be known, such agreement is valid and enforceable, without regard to the amount of the actual damages as afterward ascertained.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 157–163; Dec. Dig. § 76.*]

Appeal from the Circuit Court of the United States for the District of Nebraska.
For opinion below, see 159 Fed. 221.

William H. Baily (Baily & Stipp, on the brief), for appellant.
C. E. Abbott (F. Dolezal, on the brief), for appellees.

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

RINER, District Judge. This was a suit in equity, brought by the plaintiff to enjoin the city of Fremont, E. N. Morse, L. D. Richards, and John C. Cleland, defendants herein, and each of them, from retaining in their possession two certified checks or collecting the money thereon and appropriating it to the use of the city of Fremont. The bill further prayed that the other defendant, the Fremont National Bank, be enjoined from paying said certified checks or the money represented thereby to either of the defendants first named or any one claiming under them.

It was alleged in the bill that the defendant the city of Fremont is a municipal corporation organized under the laws of the state of Nebraska, and that the defendant E. N. Morse was the chairman of the board of public works; that the defendant L. D. Richards was secretary of the board, and the defendant John C. Cleland was the treasurer of said city, respectively; that the defendant the Fremont National Bank was a national banking association having its place of business in the city of Fremont. In December, 1906, the city council of the city of Fremont created two paving districts in the city, known as "District No. 10" and "District No. 12," and thereafter in March, 1907, the board of public works by notice duly published invited bids for the paving to be done in the two districts; the notice advising bidders that the work was to be done according to the plans and specifications therefor on file in the office of the city engineer. By the terms and conditions of the specifications the city reserved the right to reject any and all bids or parts of bids which seemed not to be advantageous

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
to the city, and required each bidder to deposit with his proposal a certified check for an amount equal to 5 per cent. of the value of the work, as specified in his bid, "which," the specifications further provided, "is hereby agreed shall be considered as liquidated damages, which shall be forfeited to the city of Fremont if such a proposal is accepted, the work awarded, and the bidder fails to enter into the contract in the form hereinafter prescribed with legally responsible sureties within 10 days after written notice so to do have been given the bidder by the board of public works." The quality and dimensions of the brick or brick blocks to be used were described, and the bidder was required to submit with his bid 10 samples of the kind of brick or brick blocks bid upon, duly labeled, showing the name of the bidder and the commercial name thereof. The specifications further provided that the brick and brick blocks should be of the kind known as "repressed brick," and, further, that the brick used should be subjected to the following tests:

"Specimen vitrified paving brick and vitrified brick blocks shall be placed in a machine known as a 'rattler,' twenty inches long, twenty-eight inches in diameter, making thirty revolutions a minute. Nine to twelve bricks shall constitute a charge for a single test. In addition 300 pounds of cast-iron foundry shot shall be placed in the rattler. These shot will be of two sizes, viz., one and one-half (1½) inch cubes, and oblong pieces two and one-half (2½) inches square section, and four and one-half (4½) inches long. The number of revolutions for a standard test shall be eighteen hundred, and if the loss of weight by abrasion or impact during such test shall exceed 18 per cent. of the original weight of brick or brick blocks tested, then the brick or brick blocks shall be rejected. All pieces of one pound weight or less shall be counted as loss. An official test to be the average of two of the above tests. The city engineer may, at any time during the progress of the street work, take any number of the bricks or brick blocks for testing purposes, and, should they not meet the requirements, other satisfactory brick or brick blocks shall be substituted at once."

April 5, 1907, pursuant to the notice inviting bids for this work and after examining the plans and specifications, plaintiff submitted separate bids for the two districts, numbered 10 and 12. In these bids he proposed to do the work, in compliance with the plans and specifications in the office of the city engineer, for certain prices set out in the bid, and, further, to enter into a contract within 10 days after notice that the contract had been awarded to him, if his proposal was accepted, and in the event of his failure to enter into such a contract within 10 days after receipt of the notice that the check enclosed with the notice "shall be forfeited as prescribed in the specification." In the proposal for paving district No. 10, after his signature, he added the following:

"If awarded the contract, I propose to use 'Capital' brick or block, as per sample submitted."

On the bid for paving district No. 12 there was written at the top of the bid:

"I propose to use 'Capital' brick or block, as per sample submitted."

The check accompanying the bid for district No. 10 was for $2,100, and for district No. 12 $1,600, and both checks were indorsed on the back as follows:
"Pay to the order of city, and E. N. Morse, chairman of board of public works, Fremont, Neb., in event that work bid for is awarded undersigned and refusal is made to enter into legal contract as per specifications and bid dated April 5th, 1907. J. W. Turner."

The plaintiff's bids were accepted by the city, he was notified, and two contracts, one for each district, were forwarded to him to be executed. These contracts provided in each case that the work should be done according to the plans and specifications therefor. The plaintiff refused to sign the contracts, and submitted to the board of public works two other contracts, in which it was provided that the work should be done according to plans and specifications, except that the brick to be used were to be according to the samples submitted by him, and also that if the work should be delayed "by strikes, bad weather, failure of others to promptly deliver materials, or from any other cause not due to the fault or neglect of the party of the second part, then the time for completing such improvements shall be extended for a period equivalent to such delay." He refused to sign the contracts requiring the brick to be submitted to the tests provided for in the specifications for the work, contending that the written provisions, "If awarded the contract, I propose to use 'Capital' brick or block, as per sample submitted," was a modification of the proposal that the work was to be done according to the plans and specifications. Upon the plaintiff's refusal to execute the contracts submitted by the city requiring the work to be done as provided in the plans and specifications, the city council declared the checks accompanying his bids forfeited, and the contract was then let to one Hugh Murphy, the next lowest bidder.

It is contended by the plaintiff that the contracts tendered by him conformed to his bids. Upon this question, Judge Munger, who heard this suit, said:

"That the advertisement for bids, plaintiff's bid, and the acceptance thereof by the proper city authorities constituted the agreement between them is unquestioned; the controversy being as to the interpretation thereof. It is fundamental that the primary object of construction in contract law is to discover the intention of the parties. To do this, the entire agreement is to be considered; not what separate parts may mean, but what the agreement means when considered as a whole, and, if possible, the agreement should be construed so as to give effect to each provision inserted therein. With these principles in view, it is not difficult to determine what was the agreement between the parties and as understood by them.

"The notice inviting bids provided, as we have seen, that the work was to be done according to certain plans and specifications. The specifications indicated the character of the material to be used, and the test to which the brick were to be subjected to determine whether or not they complied with the provisions of the contract, and it provided that these tests should be made by the city engineer at any time he desired during the progress of the work, and if the brick did not comply with the tests they were to be rejected and other brick substituted in their stead. The specifications also provided that each bidder should deposit with his bid 10 samples of the kind of brick upon which his bid was based, such samples to be labeled, showing the commercial name of the brick or brick blocks. This however, did not do away with the express provision that the brick should be from time to time, as the city engineer desired, subject to the tests provided by the specifications. The statement in the bid of plaintiff that he proposed to use 'Capital' brick, as per samples submitted, was merely a statement that the samples which he submitted were the samples asked for by the specifications, and was not
Intended as a statement that the brick with which he proposed to do the work, if according to sample, should not be required to undergo the test expressly provided for in the specifications. This holding gives full force and effect to each provision of the contract. If the specifications had not required the bidders to present samples, and plaintiff had presented samples with his bid, with the statement that he proposed to use brick as per samples, his argument that such provision was to be a substitute for the test provision would have some force. Considering the fact that the specifications required samples to be submitted with the commercial name thereof upon which the bidder's bid was based, together with the tests which might be made from time to time by the city engineer in determining whether the brick used complied with the specifications, it seems to me clear that the statement by the plaintiff that he proposed to use brick, the commercial name of which was "Capital," was only a statement that the samples were the samples called for by the specifications. The contract was to be let to the lowest responsible bidder. The object of the samples, and the commercial name thereof, was to enable the authorities to investigate, ascertain the probabilities of the contractor being able to procure brick of that commercial name in sufficient quantities to fulfill the contract, and whether the brick of that commercial name would generally comply with the specifications. It was not intended, and could not have been understood by plaintiff in making his bid, that the quality of the samples alone was to determine the quality of the brick to be used in the construction of the work, unless by the tests provided for in the specifications.

"I think the evidence clearly establishes a refusal on the part of plaintiff, after his bid had been accepted and the contract awarded to him, to enter into such a contract as was required by the specifications, and as referred to in his indorsement upon the certified checks." 169 Fed. 221.

We fully concur in the foregoing conclusions reached by the Circuit Court. The mere statement upon plaintiff's bids that he proposed to use "Capital" brick did not relieve him from the obligation to furnish brick that were capable of withstanding the test provided for in the specifications. He might have used "Capital" brick, provided the brick would withstand the test which the specifications called for. He was familiar, as the record shows, with the specifications and the test to which the brick to be used in this work were to be subjected, and his bid was made with full knowledge of this requirement.

It is next insisted by the plaintiff that the city council, by declaring that Hugh Murphy was the next lowest responsible bidder, revoked or rescinded its action in accepting plaintiff's proposal. There is no merit in this contention. The plaintiff, by his failure to enter into the contract in conformity to his bid, terminated his relations with the city so far as this work was concerned, and is in no position to raise this question. Colo. Pav. Co. v. Murphy, 78 Fed. 28, 23 C. C. A. 631, 37 L. R. A. 630.

It is further insisted by plaintiff that the checks accompanying his bids were deposited as security and as a penalty only, and cannot be forfeited or held as liquidated damages. The specifications required each bidder to deposit with his bid a certified check as a guarantee of good faith and provided, "which it is hereby agreed shall be considered as liquidated damages, which shall be forfeited if the bidder fails to enter into a contract." The bids submitted provided that, in the event of a failure to enter into a contract within 10 days after notice of award, the check accompanying the bid "shall be forfeited as prescribed in the specifications." In Whitney v. Wyman, 101 U. S. 392, 25 L. Ed. 1050, the Supreme Court, in construing a contract, said:
"As the meaning of the lawmaker is the law, so the meaning of the contracting parties is the agreement. Words are merely the symbols they employ to manifest their purpose that it may be carried into execution. If the contract be unsealed and the meaning clear, it matters not how it is phrased. The intent developed is alone material, and when that is ascertained it is conclusive."

As we understand counsel's argument, it is to this effect: That the court not only has the right, but that it is its duty, to disregard the particular expressions of parties and to consider the amount named merely as a penalty, even though it is specifically stated in the specifications that the amount of the checks are to be "considered as liquidated damages." This contention, we think, cannot and ought not to be sustained. As far back as Lord Mansfield's time, in Lowe v. Peers, 4 Burr. 2225, it was said:

"Courts of equity will relieve against a penalty, upon a compensation; but, where the covenant is to pay a particular liquidated sum, a court of equity cannot make a new covenant for a man; nor is there any room for compensation or relief."

And in Wallis v. Smith, 21 Ch. D. 243, Jessel, Master of the Rolls, said:

"He perfectly well knew that, whatever had been the doctrine of equity at one time, it was not then the doctrine of equity to give relief on the ground that agreements were oppressive, where the parties were of full age and at arm's length. It is very likely, and I believe it is true historically, that the doctrine of equity did arise from a general notion that these acts were oppressive. At all events, long before his time, it had been well settled in equity that equity did relieve from forfeiture for nonpayment of money; and I think I may say, in modern times, from nothing else."

The inclination of courts of equity to decline to grant relief against a contract merely because of inadequacy of consideration well illustrates its disposition not to interfere unnecessarily with the contracts of individuals. It declines to grant relief merely because of inadequacy of price, or any other inequality in a bargain, unless, indeed, the bargain be so unconscionable as to warrant the presumption of fraud, imposition, or undue influence. Story, Eq. Jur. §§ 244, 245.

While there is some apparent diversity of opinion upon this question in the different courts, we think the weight of authority both in England and in this country does not lend support to the contention that parties may not bona fide, in a case where the damages are of an uncertain nature, as was true in this case at the time of the breach of the agreement, estimate and agree upon the measure of damages which may be sustained from the breach of the contract. On the contrary, we think the rule is well established that the intention of the parties is to be arrived at by a proper construction of the contract made between them, and that whether a particular stipulation to pay a sum of money is to be treated as a penalty or as liquidated damages is to be determined alone by the contract fairly construed, and where the damages are uncertain, and have been liquidated by an agreement, it is the duty of the court to enforce the contract. This principle is clearly stated by Chief Justice Nelson, in Dakin v. Williams, 17 Wend. (N. Y.) 447, as follows:
"The next question presented upon the above conclusion is whether the sum of $3,000 is to be viewed as damages liquidated by the contract of the parties, or only in the light of a penalty? There are many cases in the English books in which this question has been very fully examined and considered; but it would be an unprofitable consumption of time to go over them with a view or expectation of extracting any useful general principle that could be applied to this case. The following are the leading cases: Astley v. Weldon, 2 Bos. & Pul. 346; Burton v. Glover, Holt's N. P. R. 43, and note; Reilly v. Jones, 1 Bing. 302; Davies v. Penton, 6 Barn. & Cres. 216; Crisdee v. Bolton, 3 Carr. & Payne, 240; Randall v. Everest, 2 Carr. & Payne, 577; Kemble v. Farren, 6 Bing. 141. In our court are the following: Dennis v. Cummins, 3 Johns. Cas. (N. Y.) 297, 2 Am. Dec. 160; Slosson v. Beadle, 7 Johns. 72; Spencer v. Tilden, 5 Cow. (N. Y.) 144, and note page 150; Nobles v. Bates, 7 Cow. (N. Y.) 307; Knapp v. Maltby, 13 Wend. (N. Y.) 587. From a critical examination of all these cases, and others that might be referred to, it will be found that the business of the court, in construing this clause of the agreement, as in respect to every other part thereof, is to inquire after the meaning and intent of the parties; and, when that is clearly ascertained from the terms and language used, it must be carried into effect."

And in Bagley v. Peddie, 16 N. Y. 469, 69 Am. Dec. 713, it is said:

"If the language of the parties evince a clear and undoubted intention to fix the sum mentioned as liquidated damages in case of default of performance of some act agreed to be done, then the court will enforce the contract, if legal in other respects." Wood et al. v. Niagara Falls Paper Co., 121 Fed. 518, 58 C. C. A. 266; Sun Printing & Pub. Ass'n v. Moore, 138 U. S. 642, 22 Sup. Ct. 240, 46 L. Ed. 396; Supplee v. Essex County Park Com., 149 Fed. 944, 75 C. C. A. 60; Brooks v. City of Wichita, 114 Fed. 297, 52 C. C. A. 209.

It is urged on behalf of the plaintiff that, if the plaintiff made default, the court should ascertain what the damages amount to and award plaintiff a decree for the balance of his deposit. We do not think this case falls within the rule, recognized by the courts, that, where a gross sum is provided for the failure of a party to perform some particular covenant of a contract, such an amount will be held to be a penalty, and not considered as liquidated damages. The case of Van Buren v. Digges, 11 How. 461, 13 L. Ed. 771, is a good illustration of the rule which the plaintiff seeks to have applied here. It is there said:

"The clause of the contract providing for the forfeiture of 10 per centum of the amount of the contract price, upon failure to complete the work by a given day, cannot properly be regarded as an agreement or settlement of liquidated damages. The term 'forfeiture' imports a penalty. It has no necessary or natural connection with the measure or degree of injury which may result from a breach of contract, or from an imperfect performance. It implies an absolute infliction, regardless of the nature and extent of the causes by which it is superinduced."

It will at once be seen, we think, from the mere statement of it, that the rule has no application to the question now under consideration. While it is true that the evidence disclosed that the city's actual loss, by reason of the failure of plaintiff to carry out his contract, was but $2,500, yet at the time the plaintiff entered into the contract the amount which the city would suffer by reason of his failure to perform could not possibly be ascertained. It might have been more than the deposit. It might have been less. No one could tell. It turned out in this case that it was less than the amount of the deposit;
but that fact cannot change the situation, so far as the plaintiff's right to recover back the amount deposited, or any part of it, is concerned. The conclusion reached is that the decree of the Circuit Court was right, and it is affirmed.

CHURCH COOPERAGE CO. et al. v. PINKNEY et al.

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

No. 213.

1. Shipping (§ 42*)—Charters—Fitness of Vessel.
   A ship which is fit for the carrying of an article is one which will carry such article without injury, and the liability of a shipowner for breach of a warranty of fitness is not limited to such injury to the cargo as is apparent before its delivery, but extends to a latent injury.
   [Ed. Note.—For other cases, see Shipping, Cent. Dig. § 158; Dec. Dig. § 42.*]

2. Shipping (§ 42*)—Charters—Injury to Cargo.
   A warranty of the fitness of a vessel chartered to carry a cargo of whisky barrel shooks known by the owner to be intended for use in making wine casks, whether express or implied, rendered the owner liable for injury to the shooks by being so impregnated by creosote fumes that they were unfit for use, due to the fact that the vessel had last carried a cargo of creosote, in the absence of any stipulation in the charter against such liability.
   [Ed. Note.—For other cases, see Shipping, Cent. Dig. § 158; Dec. Dig. § 42.*
   Implied warranty of seaworthiness, see notes to The Carib Prince, 15 C. C. A. 388; Neillson v. Coal, Cement & Supply Co., 60 C. C. A. 179.]

3. Shipping (§ 42*)—Charters—Construction—Warranty of Fitness.
   A charter of a vessel to carry a cargo of whisky barrel shooks and heads contained a general warranty of fitness for the voyage. It also recited that the vessel was then on a voyage with a cargo of creosote, and provided that "vessel agrees to have holds as clean as possible," Held, that such provision did not limit or modify the absolute warranty of fitness, but was an additional requirement to prevent injury owing to the known character of the preceding cargo, and that the fact that such cleaning was done did not abridge the right of the charterer to recover for damage done to the cargo by creosote fumes which the cleaning failed to prevent.
   [Ed. Note.—For other cases, see Shipping, Cent. Dig. § 158; Dec. Dig. § 42.*]

4. Shipping (§ 42*)—Charters—Warranty of Fitness—Waiver.
   The fact that the cleaning was done under direction of the charterer's agent and to his satisfaction, and that he thereafter accepted and loaded the vessel and refused to cancel the charter as offered by the owners, did not constitute a waiver of the fitness, nor did a release given by the charterer on payment of a small sum for damage which was known when the cargo arrived, the damage from the creosote fumes not being known until some of the casks had been made up and found unfit for the use intended.
   [Ed. Note.—For other cases, see Shipping, Dec. Dig. § 42.*]

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
CHURCH COOPERAGE CO. V. PINKNEY. 267

5. APPEAL AND ERROR (§ 722*)—ASSIGNMENT OF ERRORS—FORM—DESIGNATION OF COURT.

An assignment of errors filed in a District Court for an appeal should bear the title of that court and not of the Circuit Court of Appeals, but such informality will not invalidate the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 722.*]

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

For opinion below, see 163 Fed. 653.

J. Parker Kirlin and Charles R. Hickox, for appellants.

Wing, Putnam & Burlingham and Harrington Putnam, for appellees.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

NOYES, Circuit Judge. On February 15, 1906, the libelants, through their agent, the Gulf Cooperage Company, chartered the bark Alexandra from the respondents, as chartered owners thereof, for a voyage from Galveston, Tex., to Buenos Ayres, Argentina.

The charter party stated that the bark was then sailing from Glasgow to Port Arthur, Tex., with a cargo of creosote, and contained the following provisions, which are of especial importance in this case:

(a) "The said vessel shall be tight, staunch, strong, and in every way fitted for such a voyage. * * * The said party of the second part doth engage to provide and furnish to the said vessel, a full and complete cargo of * * * not exceeding forty thousand (40,000) whisky barrel shooks and heads in bundles, and two hundred and sixty-five (265) net tons hoop iron, packed flat in bundles * * *.

(b) "Captain to open hatches whenever practicable during the voyage to ventilate cargo."

(c) "Vessel agrees to have holds as clean as possible."

The charter party from the owners of the bark to the respondents was similar in its provisions to the charter in question, except that it did not contain the preliminary recital that the bark was carrying creosote, and had the following clause:

"Captain to clean holds before loading as much as possible, but charterers must risk consequences of ship having carried creosote."

After the bark arrived at Port Arthur she proceeded to Galveston, where her holds were made as clean as possible under the superintendence of the libelants' agent, one Thompson. She was then loaded with her cargo of shooks and hoop iron, and in April, 1906, proceeded upon the voyage to Buenos Ayres. She reached there in about 70 days and discharged the cargo in apparent good order, except that a few bundles of shooks were stained. For this damage a settlement was made by deducting $100 from the freight, and a receipt given by the libelants through their agent "in full settlement of our claim for damages to cargo delivered in bad condition." After delivery, some of the shooks were sold and made into wine casks. The wine put into these casks tasted of creosote, and they proved to be unfit for holding wine and practicably unsalable for any other purpose.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
As just shown, the staves are described in the charter as "whisky barrel shakes." This phrase, we think, designates a particular size and quality of staves, rather than the intended contents of the barrels to be made therefrom. We are also of the opinion that the weight of evidence establishes that the respondents, when they undertook to obtain a ship for the libelants, were informed that the staves were to be shipped to supply the wine trade. The testimony of the witness Winant that at the outset of the negotiations for a ship the parties talked over the wine shook business in the Argentine Republic—in which these libelants proposed to engage—seems to us wholly in accordance with probability. Moreover, we are satisfied that the staves, by reason of the creosote impregnation, would have been unfit for making barrels designed to contain whisky or any other alcoholic drinkable.

It thus appears that the libelants had a charter party expressly warranting the fitness of the vessel for carrying the staves. A similar warranty was also implied by law. A ship is impliedly warranted to be fit for carrying the merchandise which she undertakes to transport. The Southwark, 191 U. S. 1, 24 Sup. Ct. 1, 48 L. Ed. 65; The Silvia, 171 U. S. 462, 19 Sup. Ct. 7, 43 L. Ed. 241; The Thames, 61 Fed. 1014, 10 C. C. A. 238; Tattersal v. National S. S. Co., 12 Q. B. D. 297. It also appears that the staves were damaged by reason of the condition of the vessel. Consequently, the inquiries of primary importance in the case are: (1) Was the warranty, express or implied, broad enough to cover damage from creosote fumes? (2) Was the warranty modified by the other provisions of the charter? (3) Did the libelants waive or release their rights under the warranty?

The staves when taken from the bark were in apparent good order. It was only when the casks from which they were made were filled with wine and the wine was tasted that the damage was disclosed. The alcohol in the wine drew out the creosote taint. At first glance, it seems harsh to hold the carrier liable for damage of this nature. It seems a somewhat remote consequence of the conveyance of the staves. And yet the vessel was warranted fit for the purpose of carrying the staves. A ship fit for the purpose of carrying an article is a ship which will carry the article without injury to it. This ship did not carry these staves without injury to them. On the contrary, they were impregnated with creosote fumes while in her hold. The damage was the direct result of the unfitness of the vessel, and the warranties covered it, notwithstanding the injury was not disclosed until after the staves had been removed from the bark and used for their intended purpose. Neither principle nor authority supports the proposition that the warranty of fitness, express or implied, affords protection to the owner of the cargo only for injuries apparent before its delivery.

And, with respect to the contention that a warranty of fitness should not be so broadly construed as to apply when damages arise under unusual conditions to a cargo susceptible of serious injury from apparently slight causes, the language of Judge Blatchford in The Lizzie W. Virden (C. C.) 19 Blatchf. 340, 8 Fed. 624, is in point. In that case a ship which had carried petroleum took on a cargo of al-
monds, which was injured by the petroleum odor remaining in the vessel. The court said:

"The answer to any evidence in this case that cargo like this must be damaged if carried on a vessel which has previously had in her a cargo of petroleum which has leaked, provided there is heat and sweat in the hold, is that in this case the risk was not on the shipper. If the petroleum leaks out, and if the wood forming the vessel will absorb it, then, if heat and sweat in the holds are necessary incidents of the voyage, the shipowner must protect himself by proper provisions if he does not wish to be liable for damage caused by the liberation of the fumes of petroleum by the heat of the hold. His contract in this case was to provide a vessel fit to carry this cargo. She was not fit. The shipper took no risks but the perils of the sea, and the damage in this case was not a peril of the sea."

The next inquiry is whether the warranty of fitness was modified by the clause in the charter party: "Vessel agrees to hold as clean as possible." As we have seen, the vessel was both expressly and impliedly warranted fit. The staves were damaged by creosote fumes while upon the vessel. The damage came within none of the exceptions of the charter party. There was no stipulation—as in the charter which the respondents themselves took—that "charterers must risk consequences of ship having carried creosote." The warranties of absolute fitness are to be cut down, if at all, by the clause providing for cleaning the holds. The respondents contend that the clause has this effect: that by it the respondents' contract was changed from a warranty to an undertaking to use every possible care to clean the hold of the vessel from the creosote taint. In considering this contention of the respondents, it must be borne in mind that "clauses exempting the owner from the general obligation of furnishing a seaworthy vessel must be confined within strict limits." The Carib Prince, 170 U. S. 659, 18 Sup. Ct. 753, 42 L. Ed. 1181. Also The Caledonia, 157 U. S. 124, 15 Sup. Ct. 537, 39 L. Ed. 644; Steel v. State Line Steamship Co., L. R. 3 App. Cas. 72. And certainly no such interpretation should be placed upon a charter party as to hold that a clause apparently imposing an additional burden upon the shipowner really lessens his liability; that, having given a warranty of the absolute fitness of the vessel, the respondents could wholly escape liability thereon by agreeing to clean its holds. Any such result should follow from the use of definite and certain language, and not arise by way of uncertain implication from possibly inconsistent provisions. Moreover, the provision for cleaning the holds is not inconsistent with the warranty; nor is it necessary to narrow the warranty to give it meaning. It may be true that, as a matter of law, a warranty of absolute fitness in case of loss is not added to by an agreement to clean the vessel. As stated by the District Judge:

"If the ship, after fulfilling her engagement of unusual cleanliness, is still held to a complete absence of creosote odor, then the meaning of the charter party would be exactly the same with or without a sentence obviously inserted solely on account of the known cargo and its known characteristics."

But while, from a strictly legal point of view, this may be correct, we think the clause practically can be given a meaning as an addition to the warranty. While the respondents were liable under their warranty for damage from creosote, it may well be that both parties de-
sired to eliminate the possibility of damages occurring and giving rise to suits to enforce legal liability. The clause providing for cleaning the holds insured certain acts upon the part of the respondents which they otherwise might not have taken. In addition to the warranty of fitness which afforded compensation after damage took place, this clause insured a cleansing process which might have prevented the damage from taking place. A provision in a contract requiring precautions to prevent injury is not meaningless, even though other provisions insure compensation in case of injury. The clause in question was inserted in the charter party by the respondents. They did not adopt the language of their own charter, which would have made the matter clear beyond question. The clause which they inserted is not inconsistent with the warranty, and we are of the opinion that it should not be construed to abridge the right of the libelants to have a vessel fit for their cargo.

In reaching this conclusion, we are not unmindful of the case of The Carlotta, 9 Ben. 1, Fed. Cas. No. 2,413, decided by Judge Blatchford in 1877. In that case it is true that it was held that a provision in the charter of a vessel carrying petroleum, that she should be "cleaned as customary" before taking on a return cargo of fruit, rendered her not liable for injuries to such cargo; the cleaning being established. But this particular point did not receive extended consideration, and in so far as the case may hold that the effect of a mere cleaning clause is to prevent the operation of a warranty we think, for reasons already stated, that it is contrary to sound principle.

The remaining inquiry is whether the libelants released or waived their rights under the warranty. With respect to the release executed at Buenos Ayres after the Alexandra arrived and certain items of damage were apparent, we fully agree with the holding of the District Judge:

"The release does not, in my opinion, cover the claim in suit, which is not for breakage, rust, or stains even of creosote, but for the loss of practically the entire cargo of wine casks, as receptacles for wine, because of an impregnation by creosote odor, undiscovered and unsuspected when the claim was advanced for which the release was executed."

Finally, the respondents claim that the libelants waived their rights under the warranty by accepting the vessel after the cleaning process at Galveston, and by not agreeing to the cancellation of the charter, when the respondents proposed that course. We have no doubt that Thompson was the libelants' agent at Galveston, and that the vessel was cleaned under his directions and was accepted by him. But by none of these acts did the libelants waive the warranty of fitness. As already shown, the agreement to clean the holds had a meaning distinct from the warranty, and any acceptance by Thompson was a waiver only of further performance under that agreement. Undoubtedly Thompson thought the vessel fit to receive her cargo, but there is nothing to show that he undertook to release the respondents from their warranty that she was so. After the vessel was cleaned—even under Thompson's directions—the risk of her being fit was still upon the respondents as chartered owners, and Thompson's action in permitting her to be loaded did not operate to release them from the
risk of latent unfitness. If Thompson had prevented the respondents from taking steps which they thought necessary to thoroughly clean and prepare the vessel for her cargo, there might be ground for claiming that the libelants became estopped to insist upon a breach of warranty. But Thompson compelled the ship to do more than her master desired, and anything less than an agreement to waive the warranty would have failed to have that effect.

Neither does any principle of estoppel arise in the respondents' favor by the failure of the libelants to accept their offer to cancel the charter. No claim is made that the charter party was obtained by misrepresentations. The respondents made their contract and were bound to carry it out. Their offer to cancel it imposed no obligation upon the libelants. No element of estoppel was present.

For these reasons, we think that the libelants have a valid demand upon the respondents upon their warranty. It is a hard case, but the cargo was seriously damaged, and the loss must fall somewhere. The chartered owners, not the charterers, under the charter party took the risk of the damage which occurred. They could have protected themselves by employing the same provisions which appeared in the charter which they themselves took. They failed to do so, and entered into one of the broadest possible contracts—that of warrantors of the fitness of a vessel. They must bear the burden of that contract.

The assignment of errors filed in the District Court in this case bore the title of this court. This was incorrect. The title should have been that of the District Court—the court in which the paper was filed. But this informality did not invalidate the appeal.

The decree of the District Court is reversed with costs, and the cause is remanded with instructions to enter a decree for the libelants for their damages—to be ascertained in the usual way—and costs.

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

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

No. 2,859.

MASTER AND SERVANT (§ 96*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—NEGLIGENCE OF THIRD PERSON.

Plaintiff was employed by defendant railroad company as a boiler maker's helper, and worked at a roundhouse to which an addition was being built by an independent contractor. At a time when the new part was nearly completed and in use, and plaintiff was working therein, he was injured as he was about to enter one of the doors. The evidence did not show directly the cause of injury, but tended to show that he was struck by a brick swept from the roof by one of the contractor's employees. Held, that defendant was not liable on the ground that it had failed to provide plaintiff with a reasonably safe place to work; the place itself being safe, and the injury having been caused by an act of negligence of one over whom it had no control, and which it had no reason to anticipate.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 96.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'y Indexes.
In Error to the Circuit Court of the United States for the District of Kansas.

Joseph E. Waters (John C. Waters, on the brief), for plaintiff in error.

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

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

RINER, District Judge. The plaintiff in error was the plaintiff in the Circuit Court, the defendant in error was the defendant in the Circuit Court, and the parties will be hereafter referred to as plaintiff and defendant, respectively.

This action to recover damages for personal injuries was brought in the state court, and removed to the Circuit Court by the defendant. At the conclusion of the evidence the court instructed the jury to return a verdict for the defendant, and this action of the court is assigned for error.

The record shows that on the 15th of January, 1906, the plaintiff was employed as a boiler maker's helper in the shops of the defendant, at Horton, Kan.; that he had been in the employ of the defendant at its shops for about six years, and for the last three years preceding the injuries which he alleged he received on the 15th of January, 1906, he had been working as a boiler maker's helper; that his work was entirely about the engines after they had been brought into the roundhouse at the end of a run. At the time the plaintiff received the injuries for which he seeks to recover damages, the roundhouse at Horton was being enlarged by constructing an addition thereto. The work of constructing the addition to the roundhouse had been let to a contractor by the name of Fellows. The contractor had no relations whatever with the defendant other than his contract for the construction of this addition. Neither the defendant nor any of its employés had any supervision, control, or direction over the work or the men employed by the contractor. During the construction of this addition the defendant used the roundhouse as originally constructed, and also the new portion as fast as the work had progressed far enough for it to do so.

The evidence shows that for about a week prior to the 15th of January, the employés of the contractor had been engaged in laying the roof on the new part of the roundhouse, and during that time discarded pieces of material would occasionally fall to the ground; that this was not of frequent occurrence, and was not known to the foreman in charge of the shops; that the laying of the roof had, a day or two prior to the injury to the plaintiff, been completed, except sawing off uneven projecting ends of the roof at the eaves; that on the morning of the 15th of January some of the employés of the contractor went upon the roof for the purpose of sawing off these projecting ends; that there was some snow on the roof which had fallen the night before, and also some debris, consisting of pieces of boards, broken bricks, and a few whole bricks. In order that they might run a chalk line to guide those employed in sawing off the uneven ends,
the foreman of the contractor ordered two of the men under him to sweep off the roof, and, while they were engaged in this work, plaintiff and his superior, a boiler maker, were working on an engine in the roundhouse; that it was found necessary, in the performance of their work, to use an air hose, and they both left the roundhouse in search of one; that as the plaintiff was returning to the roundhouse, and when about six or eight feet from one of the doors, he was seen to rise on his toes and fall forward, striking his head against the rail of a track leading into the roundhouse. When picked up he was unconscious, and there was a wound on his head. No one saw anything strike plaintiff. Plaintiff himself testified that he did not know how the accident happened, and did not know that anything struck him, aside from the fact that there was a wound on his head. There was evidence, however, tending to show that there was a blood spot upon the snow at the place where he fell, and that a brick was found at that place which seemed to fit a dent in the hat worn by the plaintiff at the time he was injured. This, taken in connection with the fact that men were at the time engaged in removing the débris and snow from the roof, and that this débris consisted in part of bricks and pieces of bricks left on the roof by the masons who had been repairing the fire wall after the roof was laid, tends to support the contention of the plaintiff that in cleaning off the roof the men engaged in that work had swept a brick from the roof which struck plaintiff upon the head and caused his injuries.

A recovery is sought in this case upon the ground that the defendant had failed to provide plaintiff with a reasonably safe place to work, and that this was a positive duty upon the part of the master which could not be delegated to another.

While it is undoubtedly the duty of the master to exercise ordinary care to provide the servant with a reasonably safe place in which to work, and that this is a positive personal duty which the master cannot delegate to another, yet we are unable to perceive the application of this rule to the facts in this case. The undisputed testimony is that the construction of the new part of this roundhouse was under the exclusive charge of Fellows, an independent contractor; that the defendant had no direction, supervision, or control over him, the method of construction, or the workmen engaged by him to perform the work. The plaintiff was employed to assist the boiler maker in repairing engines in the roundhouse, and it is not contended that that place was unsafe. He had been employed there continuously from the time the work of construction commenced upon this addition, and was necessarily as familiar as any one with the manner in which the work was being carried on. It is not contended that the defendant knew that pieces of roofing material were allowed to fall in the process of constructing the roof, or that the men on the roof were engaged in sweeping snow or waste material from the roof. There was no testimony tending to show that material had been swept from the roof prior to this time, and it does not appear that the defendant had any reason to anticipate such a thing would be done.
In American Bridge Co. v. Seeds, 144 Fed. 605, 75 C. C. A. 407, 11 L. R. A. (N. S.) 1041, this court, speaking by Judge Sanborn, said:

"It is not conceded that the alleged omissions of the defendant constituted any breach of its duty to the plaintiff to exercise ordinary care to provide him a reasonably safe place in which to do his work. But, if they had constituted such a breach, it is not perceived how they could sustain a judgment against the bridge company for an injury caused by the negligent act of another, which it did not induce and could not have foreseen. The test of liability in cases of alleged concurrent negligence, like the one in hand, is the same as in all other actions for negligence. It is the true answer to the questions: Was the injury the natural and probable consequence of the acts on which the action is based? Was it reasonably to be anticipated from them? If it was, the action may be maintained, although the negligence of another concurred to produce it. The burden of proof was upon the plaintiff to establish a state of facts which would naturally lead to the conclusion that his fall was the natural and probable consequence of the loosely planked space and of the absence of the snub rope. The only evidence upon this subject was the evidence of experience. These omissions never did cause a fall. None ever occurred until a new and independent force, the careless signal of the foreman, sent the swinging load against the plaintiff and threw him to the ice below."

And in Burt v. Advertiser Newspaper Co., 154 Mass. 238, 28 N. E. 1, 13 L. R. A. 97, Mr. Justice Holmes said:

"Wrongful acts of independent third persons, not actually intended by the defendant, are not regarded by the law as natural consequences of his wrong, and he is not bound to anticipate the general probability of such acts, any more than a particular act by this or that individual."

And in the case of Taylor v. Washington Mill Co. (Wash.) 97 Pac. 243, it was said:

"It is not the duty of an employer to follow his employés around in order to protect them from situations made dangerous by unusual occurrences unexpected, and not to be anticipated by either the master or the servant."

The true test in this case is clearly stated in Thompson on Negligence, vol. 2, § 22. It is there said:

"The general rule is that one who has contracted with a competent and fit person exercising an independent employment to do a piece of work, not in itself unlawful or attended with danger to others, according to the contractor's own methods, and without his being subject to control, except as to the results of his work, will not be answerable for the wrongs of such contractor, his subcontractor or his servants, committed in the prosecution of such work. An independent contractor is one who renders service in the course of an occupation representing the will of his employer only as to the result of his work and not as to the means by which it is accomplished. The contractor must answer for his wrongs committed in the course of the work by his servants." Brady v. Chicago & G. W. Ry. Co., 114 Fed. 100, 52 C. C. A. 48, 57 L. R. A. 712; American Bridge Co. of N. Y. v. Bainum, 146 Fed. 267, 76 C. C. A. 633; Williams Cooperage Co. v. Headrick, 159 Fed. 650, 86 C. C. A. 548; Southern Pacific Company v. Seley, 152 U. S. 145, 14 Sup. Ct. 590, 38 L. Ed. 391; Water Co. v. Ware, 16 Wall. 566, 21 L. Ed. 485; Atwood v. Chicago, R. I. & P. Ry. Co. (C. C.) 72 Fed. 447; Dwyer v. Nat. Steamship Co. (C. C.) 4 Fed. 493; McNamee v. Hunt, 87 Fed. 298, 30 C. C. A. 653; Casevett v. Brown, 148 U. S. 615, 13 Sup. Ct. 672, 37 L. Ed. 552; Salliott v. King Bridge Co., 122 Fed. 378, 58 C. C. A. 406, 65 L. R. A. 620.

In the case of Penner v. Vinton Co., 141 Mich. 77, 104 N. W. 385, a Michigan case, the plaintiff was employed by the defendant in a building which was being remodeled. At the time of his injury he was
engaged in removing some joists. The plaintiff testified that he did not know what hit him, but that he was knocked senseless. No person saw him struck, but the evidence tended to show that above the place where the plaintiff was at work there were openings in the brick wall which the masons, working for an independent contractor, were filling. A recovery was sought in that case as in this, based upon the failure of the defendant to provide a safe place for the plaintiff to work. It was there alleged that the workmen above, employés of the contractor, in the course of their work permitted a brick or something of a hard nature to fall upon the plaintiff, causing his injuries. At the trial the court directed a verdict for the defendant, and, in sustaining the judgment, the Supreme Court said:

"(1) The negligence which caused the plaintiff's injury, if any, was that of an employé of Mr. Fisher, over whom the defendant had no control. The wall was not being torn down, but being built up. Defendant is not chargeable with negligence that any of these bricklayers might commit in throwing or dropping a brick from the building.

"(2) The doctrine of a safe place has no application here. The place was safe, and was only made unsafe by the negligent act of a third party, for which the defendant was not responsible."

Here the place furnished the plaintiff for the performance of his work was in itself no way dangerous, and the defendant had no occasion to anticipate that the servants of the contractor, over whom it had no control whatever, would sweep bricks from the roof and thereby cause injury to the plaintiff.

The conclusion reached is that the record fails to show actionable negligence, or any negligence, upon the part of the defendant, and the judgment of the Circuit Court is affirmed.

INTERNATIONAL MERCANTILE MARINE CO. V. FELS et al.

(Circuit Court of Appeals, Second Circuit. April 30, 1909.)

No. 223.


It is the duty of a shippers of a commodity which is liable to cause an explosion or is otherwise dangerous as part of the cargo of a ship to fully disclose its dangerous character to the carrier before shipment.

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

2. Explosives (§ 7*)—Injury from Dangerous Cargo—Action by Carrier Against Shipper—Burden of Proof.

Where a suit by a steamship company to recover for an injury to a vessel by an explosion caused by a commodity shipped by respondent is based on the alleged fact that respondent failed to disclose the dangerous character of such commodity before shipment, the burden of proving such allegation rests on the libellant.

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

3. Explosives (§ 7*)—Injury from Dangerous Cargo—Liability of Shipper.

Respondents, who were manufacturers of "Fels-Naphtha" soap, which contained from 6 to 9 per cent. of chemically free naphtha, before making any shipments of the same on the vessels of libellant steamship company

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
notified its agent of the character of the soap, that it gave off naptha fumes, which, if the soap were stowed in a confined space, might be dangerous, and arranged that it should be stowed in a place where there was a free circulation of air. A subsequent shipment of 1,000 boxes was stowed by libellant in the lower hold, and an explosion occurred which injured the vessel. Held, that the disclosure made by respondents was a full compliance with the requirements of the law and the bills of lading in that respect, and that libellant itself was in fault for negligent stowage and could not recover from defendants for the loss.

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

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

For opinion below, see 164 Fed. 337.

Robinson, Biddle & Benedict (Roderick Terry, Jr., Norman B. Beecher, and W. S. Montgomery, of counsel), for appellant.

Archibald Cox and Frank Pritchard, for appellees.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

NOYES, Circuit Judge. The respondents are manufacturers of a washing soap called "Fels-Naptha Soap." This soap contains from 6 to 9 per cent. of chemically free naptha, and will very slowly give off fumes or vapor. When about 6 to 8 per cent. of these fumes are mixed with air, a compound is formed which will explode upon ignition. But unless the soap is so confined that the naptha vapor cannot readily diffuse in the air, it cannot be regarded as of a dangerous nature. It has been extensively used in this country and abroad, and has been transported upon many different railroads and transportation lines. Prior to the accident in question it does not appear that any explosion was ever charged to it.

The libellant is a steamship company and the owner of the steamship Haverford. On or about June 2, 1906, the Haverford sailed from Philadelphia for Liverpool, having on board in a lower hold a shipment of 1,000 boxes of the respondents' soap. Each box contained 100 bars, and was marked on the outside "Fels-Naptha Soap." The hatches were on during the voyage. The ventilation was by means of two pipe ventilators about four inches in diameter. On June 13, 1906, the ship arrived at Liverpool. The next day the stevedores took off the hatches preparatory to discharging the cargo. Very shortly afterwards an explosion occurred which killed and injured a number of men and greatly injured the ship.

The soap was shipped under a bill of lading which contained the following clause:

"Also that shippers shall be liable for any loss or damage to steamer or cargo caused by inflammable, explosive or dangerous goods shipped without full disclosure of their nature, whether such shipper be a principal or agent; and such goods may be thrown overboard or destroyed at any time without compensation."

The libellant contends that the respondents are responsible for the damages sustained, because: (1) The explosion was caused by the vapor from the soap. (2) The respondents, before making shipments, failed to fully disclose the nature of the soap, as required by the provi-

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
sions of the bill of lading and by the common law. The District Court sustained the first contention, but dismissed the libel because it failed to find the second contention established.

Upon a careful consideration of the evidence, we think the conclusion reached by the District Court that the explosion was caused by vapor from the soap well founded. But as we think its conclusion with respect to the second contention also correct, any discussion of the cause of the accident is unnecessary. If the respondents are not responsible if the vapor were the cause, no purpose would be served by a review of our examination concerning the cause.

It is, however, incumbent upon us to fully express our views upon the second question—whether the respondents failed to fully disclose the nature and qualities of the soap to the libelant before the shipment. That it was the duty of the respondents at common law to make such a disclosure is unquestionable. Wellington v. Downer Kerosene Oil Company, 104 Mass. 64; Waters-Pierce Oil Co. v. Deselms, 212 U. S. 159, 29 Sup. Ct. 270, 53 L. Ed. ——. And, as we have already seen, a similar duty—possibly a broader obligation—was imposed by the bill of lading.

The first inquiry, perhaps, relates to the burden of proof, although the evidence is of such character that there is little necessity for balancing testimony in reaching a conclusion. In the early case of William v. East India Co., 3 East, 192, where the plaintiff declared that the defendants, who had chartered his ship, put on board a dangerous commodity (by which loss happened) without notice to the captain or other person employed in the navigation, it was held that it lay upon him to prove such negative affirmation. This seems to be the rule today. The libel alleges that the respondents failed to inform the libelant of the dangerous character of the soap, and the burden was undoubtedly upon it to establish such allegation.

But instead of the libelant establishing its negative affirmation of failure to disclose, the case presented by this appeal is one in which the respondents, on their part, have shown to the satisfaction of the District Court that a disclosure was made. It seems certain that in 1902, before any shipments of the soap upon the libelant's ships were made, the respondent Joseph Fels had an interview with Lee McKinstry, the eastbound freight agent of the libelant at Philadelphia, for the purpose of making arrangements for shipping it. This respondent testified in substance that he told McKinstry that he wished the libelant to know the character of the goods he was offering for shipment; that the soap contained naptha and gave off vapors, which might cause an explosion if confined, and that he wanted it stowed in a ventilated part of the ship if carried at all. McKinstry, when called as a witness, practically corroborated this testimony. He stated that Fels told him that other lines had refused to carry the soap on account of its having a percentage of naptha, and that there was some disposition to suppose that there might be danger connected with it; that he did not wish the libelant to take it under a misapprehension; that the soap gave off fumes or vapor, and that in a confined place something might happen, but that in a ventilated place it was probable that nothing would happen. It was also testified that McKinstry offered the cattle decks of the ships
for carrying the soap, they being especially well ventilated. As a result of this interview, McKinstry sent the following telegram to Kobbe, the east-bound freight agent of the libelant at New York:

"Do you see any objections to booking 5,000 to 10,000 case lots Fels-Naptha soap? Would you consider it a dangerous product in any sense of the word?"

Other evidence and memoranda show an expectation that the soap would be carried on the cattle decks or in a special compartment. As a result of the negotiations between McKinstry and the respondents, the latter began to ship large quantities of their soap by the libelant’s ships, but to what extent it was carried on the cattle decks does not clearly appear. As already shown, the soap which caused the explosion was in a lower hold.

After reviewing the testimony, to which we have thus briefly referred, the District Judge said:

"I fail to see how there can be any doubt that the respondents sufficiently informed the libelant of the character of the goods they were shipping."

The District Judge saw the witnesses Fels and McKinstry upon the stand, and could note their appearance and behavior. He had opportunities which we do not have to determine the weight to be given to their testimony. He believed their statements, and we find nothing in the record requiring us to disturb his conclusion.

Really the most serious criticism which the libelant is able to make of the testimony of Joseph Fels is that it is in some respects inconsistent with the allegations of the answer and with the testimony of the other respondent, Samuel S. Fels—that in one place it is said that the soap is dangerous, and that notice of its dangerous character was given, while in another place it is said not to be dangerous at all. But we think these inconsistencies are more apparent than real. Under proper conditions of ventilation it is clear from the evidence that the soap is not dangerous. Under certain conditions it may be dangerous. If we view Joseph Fels’ statements to McKinstry as of a precautionary nature, there is nothing necessarily inconsistent with the other statements referred to. Certainly no such inconsistencies appear as would warrant this court in saying, in view of the finding of the District Court, that they serve to discredit the testimony of the witness.

In view of the testimony and of the credit given to it by the District Court, we must accept it as established that the respondents made a disclosure of the nature of the soap to the libelant before it was offered for transportation. And we think that the disclosure as testified to was full and sufficient. It seems impossible that the explosion could have occurred if the soap had been carried in a well-ventilated place, e. g., upon the cattle deck of the ship. As the testimony shows an express disclosure, it is unnecessary to consider whether the libelant obtained notice of the nature of the soap in any other way.

The respondents having failed in the performance of no duty imposed either by the bill of lading or by the common law, the libel was properly dismissed.

The decree of the District Court is affirmed, with costs.
1. **Insurance (§ 146*)—Construction of Contract—General Rules.**

While it is a rule of construction of insurance policies that words of exception or limitation of liability are to be strictly construed against the insurer, and forfeiture avoided if possible, yet if the language used by the parties has a plain meaning, and is not inconsistent with other clauses or provisions of their contract, effect must be given to it.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 294–297; Dec. Dig. § 146.*]

2. **Insurance (§ 283*)—Avoidance of Policy for Breach of Condition—**

   **“Chattel Mortgage.”**

A vessel is a chattel, and a mortgage thereof a “chattel mortgage,” within the meaning of a provision of a policy of insurance thereon that it shall be void “if the subject of insurance be personal property and be or become incumbered by a chattel mortgage.”

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 283.*

   For other definitions, see Words and Phrases, vol. 2, pp. 1098–1106.]

3. **Insurance (§ 283*)—Avoidance of Policy for Breach of Condition—**

   **Incumbrance by Chattel Mortgage—“Present Incumbrance.”**

A mortgage on a vessel to secure a debt of the mortgagor is a “present incumbrance” by a chattel mortgage, within the meaning of a provision of a policy of insurance on such vessel making it void, in case of such incumbrance, so long as the debt secured is outstanding, although it is not in default.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 283.*]

4. **Corporations (§ 474*)—Power to Mortgage—Bonds Issued in Pledge.**

The power given corporations by Rev. St. Ohio, § 3256, to borrow money and issue its notes or bonds therefor secured by mortgage, includes the power to pledge its bonds secured by mortgage to secure the payment of another of its obligations, and the delivery of such bonds in pledge to a trustee is an issue of them, and renders the mortgage a present incumbrance, which continues so long as the debt remains unpaid.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 474.*]

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

Harrington Putnam, for plaintiff in error.

H. D. Goulden and T. H. Duncan, for defendant in error.

Before LURTON, SEVERENS, and WARRINGTON, Circuit Judges.

SEVERENS, Circuit Judge. This is an action brought by the plaintiff in error upon a policy issued by the defendant, insuring the steamer Yakima, her tackle, apparel, etc., against loss or damage by fire. The policy was issued May 5, 1905. The steamer was damaged by fire on the 13th day of June following. The insurance company denied its liability upon the ground that the policy was void because

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*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
of a condition in it upon the existence or occurring of which the policy was to be or became void. The condition was in the following language:

"This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void * * * if the subject of insurance be personal property, and be or become incumbered by a chattel mortgage."

This action having been brought, the insurance company defended upon the ground that the vessel was so incumbered at the date of the policy. The parties stipulated in regard to the facts, and, waiving a jury, submitted the cause to the court. The finding of facts by the court was identical with the stipulation of the parties. It is unnecessary to give a statement, verbatim, of the whole of these findings, and we abstract only so much as is needful to the determination of the question or questions presented by the controversy, as follows:

"Third. On or about the 4th day of May, 1905, the said defendant, in consideration of a premium of fifty dollars ($50.00), paid to it by the plaintiff, issued and delivered to the plaintiff the defendant’s certain policy of insurance, a true copy of which, together with all agreements or stipulations indorsed on or added to the same, is annexed to the petition marked ‘Exhibit A’ and is hereby made a part hereof."

Exhibit A is a standard fire insurance policy, insuring the Yakima, her tackle, etc., for one year. It contained, among other conditions to its validity, the condition against incumbrance by chattel mortgage above recited.

"Fourth. Plaintiff was the sole and unconditional owner in sole possession of the steamer Yakima, her hull, awnings, apparel, furniture, boats, equipment, engines and boilers, machinery, connections, and appurtenances thereto belonging on board or attached to said vessel in said policy (‘Exhibit A’) mentioned, free of any interest, lien, or incumbrance therein or thereon existing in favor of any other person or persons, corporation or corporations, whatsoever, on the 1st day of July, 1904, and thereafter at all times down to and including the 13th day of June, 1905, except to the extent, if any, disclosed by the facts in this stipulation set forth."

Fifth. The damage to the Yakima by fire.

"Eighth. On the 1st day of July, 1904, the plaintiff executed and delivered a certain instrument in writing, bearing date on said day, a true copy of which (omitting all enrollments, save that of the Yakima, which omissions are by consent) marked, ‘Exhibit B,’ is hereto attached and made part hereof, to the Cleveland Trust Company, of Cleveland, Ohio, a corporation duly organized and existing under the laws of the state of Ohio, and authorized and empowered to act as trustee under such an instrument in the manner provided therefor, and on the 6th day of July, 1904, said instrument was recorded in the office of the collector of customs in the port of Cleveland, Ohio, in Book 24, pages 67 to 173, inclusive, of Vessel Mortgages.

"Ninth. The plaintiff never issued, sold, or otherwise disposed of or parted with the possession of any of the bonds mentioned in said instrument, Exhibit B, except that on the 6th day of July, 1904, it pledged and delivered eighteen hundred and twenty-five (1,825) of said bonds, and on the 4th day of August, 1904, it pledged and delivered one hundred and fifty (150) of said bonds, with said the Cleveland Trust Company as trustee. All of said bonds so pledged were duly certified by the trustee as required by said instrument Exhibit B, and a true copy of each of said bonds, except that the serial number of each was different, is hereto attached, marked ‘Exhibit C,’ and made a part hereof."
The bonds were in the ordinary form of negotiable coupon bonds, payable to bearer. The mortgage or deed of trust (Exhibit B) is a mortgage of as many as 66 vessels, among them the Yakima, to secure the payment of bonds of the company of even date to the amount of $2,000,000. There is nothing in it, so far, as we can see, which is so far peculiar as to require special attention for the present purpose.

"Tenth. All of said bonds so pledged and delivered were pledged with the Cleveland Trust Company under and pursuant to a certain instrument, a true copy of which is hereto attached, marked 'Exhibit D,' and made part hereof, to secure payment of certain promissory notes of plaintiff then outstanding amounting on July 6, 1904, to the sum of seven hundred and thirty thousand dollars ($730,000.00) and also to secure payment of certain other promissory notes of plaintiff intended from time to time thereafter to be made by the plaintiff, evidence of all of which notes was duly furnished and certified by plaintiff to the trustee, as required in said 'Exhibit D.' Said bonds have ever since remained so pledged with the Cleveland Trust Company to secure such notes of the plaintiff, and the total amount of the notes so secured has never at any time exceeded the sum of seven hundred and ninety thousand dollars ($790,000.00), of which indebtedness part was to the Cleveland Trust Company and part to other persons and corporations, part of said indebtedness existed at the time of the pledging of said bonds, and part was created at the time of or subsequent thereto. Said notes were payable at different times, not exceeding in any case six months from their date, and as they have from time to time fallen due have been duly paid or renewed, so that none of them has at any time become unpaid or in default. Any payment of or on account of said bonds securing said notes or any thereof or the coupons thereto attached has never been made or demanded."

"Thirteenth. The defendant was not informed and did not in fact know any of the facts set forth in the eighth, ninth, tenth, eleventh, and twelfth articles of this stipulation until after the aforesaid fire and loss, nor were any of such facts mentioned in the proofs of loss served by plaintiff."

Enough has been stated to show the general character of the mortgage or deed of trust securing the bonds and of the pledge by virtue of which the bonds were delivered to the Cleveland Trust Company. References will be made to particular stipulations in the last-mentioned instrument in the course of this opinion. The court below was of opinion that the defense was established, that it was valid in law, and that judgment should go for the defendant. Judgment was entered in accordance with this finding.

Counsel for the plaintiff in error urge that the judgment should be reversed upon grounds stated in their brief, which as there summarized are:

"That the policy should be strictly construed against the defendant, and a forfeiture avoided if possible; that a vessel mortgage is not such a chattel mortgage as the policy intended; that the making and recording of the general trust mortgage was not of itself a breach of the policy conditions; that the pledging of the bonds did not create a present incumbrance under the bonds and mortgage, and, the pledge debt never having become in default, an incumbrance by mortgage within the meaning of the policy never arose."

These we will consider in their order.

1. It is urged that the principle of construction which should be applied to the policy is that:

"Words of exception or limitation of liability in an insurance policy are to be strictly construed against the insurer, and forfeiture avoided if possible."
And Continental Ins. Co. v. Vanlue, 126 Ind. 410, 26 N. E. 119, 10 L. R. A. 843, Dilleber v. Home L. Ins. Co., 69 N. Y. 256, 25 Am. Rep. 182, McMaster v. Ins. Co., 183 U. S. 25, 22 Sup. Ct. 10, 46 L. Ed. 64, and May on Insurance, § 175, are cited. We think the law is in substance correctly stated by counsel. Yet we must add that if the language used by parties has a plain meaning, and is not inconsistent with other clauses or provisions of their contract, effect must be given to it. The court cannot ignore express stipulations in order to obviate a hardship. It is to be observed, however, that upon the facts of such a case as this it would be unfair to press the rule of strict construction to its utmost limits. Here were two intelligent and perfectly competent parties. It is right to infer that the quality of the insurance had its counterpoise in the price paid for it. The insured knew of the existence of the incumbrance, while the insurer did not; and it was undoubtedly a condition material to the risk.

2. It is insisted that:

"Although a vessel is personal property, yet it is not such personal property, and a vessel mortgage is not such a mortgage, as the chattel mortgage clause in the standard policy had in view."

We cannot accede to this proposition. The word "chattel" is of no special significance when applied to a mortgage of chattels. The word itself, says Burrill, "is a very comprehensive term in our law, and includes every species of property which is not real estate or a freehold"—a definition borrowed from 2 Kent's Commentaries, 340. Besides, the parties to this contract of insurance were dealing with the steamer as a chattel, a thing which might be mortgaged as a chattel. It is said by counsel, as if to distinguish it, that a vessel is sui generis, and is the subject of special legislation, which may be conceded. But that proves nothing. Many things which are undoubtedly chattels have such peculiarities. To hold that these words do not mean what in plain and readily apprehended significance they do mean is to nullify that stipulation in the contract. This we have no right to do, except in a case where the stipulation is so inconsistent with the dominant purpose that it must necessarily give way.

3. It is further said that:

"The principle is well settled that a mortgage, although of record and nominally a lien, is not an incumbrance by mortgage, within the meaning of the policy clause, unless also the mortgage indebtedness is actually owing under the obligation which the mortgage undertakes to secure."

If by this is meant that there must be some valid existing obligation to support the mortgage, we agree. But if, as we suppose, it is meant that if the obligation which the mortgage purports to secure is contingent merely, and has not yet become absolute, there is no incumbrance by the mortgage, we cannot assent. A mortgage, unless there is in it an express stipulation to pay the debt, always rests upon a contingency—a contingency that the debt be not paid at maturity. But, notwithstanding the liability of the mortgage is contingent until the default in payment of the debt secured, and in that event will never become absolute, it is still an incumbrance from the beginning. Of course, after the extinguishment of the debt, the mortgage is defunct
and ceases to be an incumbrance. But so long as there is a possibility that the debt will not be paid, or somehow satisfied, the incumbrance of the mortgage remains. These propositions are so well established as not to require further argument, and yet they seem sufficient to remove the tabulam in naufragio on which the counsel relies.

4. The last ground taken is that:

"The pledge by plaintiff in error of its bonds, in order to secure other obligations than those evidenced by the bonds which the mortgage was to secure, did not create a present incumbrance under the bonds and mortgage, and did not forfeit the policy."

This contention is equally hopeless. It is doubtless true that a mere additional promise by a debtor to pay his own debt is a vain thing. But not so if the additional promise to pay is itself secured by some new security. In that case the new promise may be used as a link to connect the new security to the old debt. However, there is no need of circuity. It is now well settled that a corporation may lawfully issue to a creditor its bonds secured by mortgage in pledge for the payment of another of its obligations. This appellant was authorized by its charter to issue and sell its bonds to raise money for, or otherwise promote, the purposes of its incorporation; and it has been held that this includes a power to pledge its own bonds for the payment of its debt, upon the principle that the greater includes the less. It was so held by this court in Farmers' Loan & Trust Co. v. Toledo & S. H. R. Co., 6 U. S. App. 469, 54 Fed. 759, 4 C. C. A. 561. In that case the bill was filed to foreclose a mortgage on the defendant's railroad given to secure its bonds. The bonds had been delivered by the defendant to a bank in pledge to secure the payment of a loan. An intervener, claiming to have an interest in the mortgaged property either as a judgment creditor having a lien or as the equitable owner of shares in the stock of the railroad company, sought an annulment of the bonds and mortgage and the pledge thereof upon the ground that the railroad company had no power to make them. The court held that the bonds, the mortgage, and the pledge were all valid and ordered a decree enforcing them. In the opinion, delivered by Judge Jackson, it was said in reference to the pledge, that:

"It admits of little or no question that under said section 3352, How. Ann. St. Mich. and said resolution, there was ample authority to pledge the bonds as collateral for the money borrowed of the First National Bank of New York. Under the New York statute, from which section 3352 of the Michigan law is evidently taken, it is settled that under authority to borrow money, and to issue and dispose of bonds in connection therewith, there is the right to pledge such securities as collateral for the sums borrowed"—citing Duncomb v. Railroad Co., 84 N. Y. 190.

The powers given to such corporations as the Gilchrist Transportation Company by the Ohio statutes are not less ample than those given by the laws of New York and Michigan. Among those statutes are these:

Section 3239, Rev. St. Ohio:

"Corporation Thereby Created, and Its General Powers. Upon such filing of the articles of incorporation, the persons who subscribed the same, their associates, successors, and assigns, by the name and style provided therein, shall thereafter be deemed a body corporate, with succession, and power to
sue and be sued, contract and be contracted with, acquire and convey at pleasure all such real or personal estate as may be necessary and convenient to carry into effect the objects of the incorporation, to make and use a common seal, the same to alter at pleasure, and to do all needful acts to carry into effect the objects for which it was created.

Section 3256:

"May Borrow Money on Bond and Mortgage. A corporation may borrow money, not exceeding the amount of its capital stock, and issue its notes or coupon or registered bonds therefor bearing date any rate of interest authorized by law, and may secure the payment of the same by a mortgage of its real or personal property, or both."

A like decision was made by the Circuit Court of Appeals for the Fourth Circuit in William Firth Co. v. South Carolina L. & T. Co., 122 Fed. 569, 59 C. C. A. 73. And in several state decisions the doctrine stated in Farmers' Loan & Trust Co. v. Toledo & S. H. R. Co., supra, has been approved and applied. Lehman v. Tallassee Mfg. Co., 64 Ala. 567; Nelson v. Hubbard, 96 Ala. 238, 11 South. 428, 17 L. R. A. 375; Morris Canal Co. v. Fisher, 9 N. J. Eq. 667, 64 Am. Dec. 423; Morris Canal Co. v. Lewis, 12 N. J. Eq. 323. And see 10 Cyc. 1170, par. 2; 1 Morawetz on Corp. § 349.

The delivery of bonds in pledge for the security of a debt is an "issue" of them. They come under an obligation. They cannot be recalled, as in the case of one having the possession, merely, subject to the order of the owner. The mortgage was given to the Cleveland Trust Company. It was an incident of the debt manifested by the bonds, and would pass to the holder of the bonds, and constantly attend upon them, whether it should be formally assigned or not. Carpenter v. Longan, 16 Wall. 271, 21 L. Ed. 313. If the debt be not paid, the pledgee may sell the bonds on giving notice to the pledgor, and the purchaser will take the mortgage as well as the bonds, and may proceed to enforce the one by foreclosure and the other by an action at law, or he may do both.

The finding by the court is that the debt for which the bonds and mortgage were pledged has never been paid. Thus, from the date of the pledge and the delivery of the bonds, the mortgage has continued to be an incumbrance on the vessel. It is an incumbrance in the sense that any mortgage is an incumbrance, and it is in fact immaterial whether its liability had become absolute by default in the payment of the debt, or not, since the issuance of the policy.

The judgment of the Circuit Court must be affirmed, with costs.

THE SEATTLE
(Circuit Court of Appeals, Ninth Circuit. May 3, 1909.)
No. 1,615.

1. Joint Adventures (§ 7*)—Rights as to Third Persons.
Where W., with his associates, interested in a dredging contract, contracted for the construction of a dredge, and W. expressly authorized his associates to obtain money from a bank to build the dredge and to mortgage it as security, and he was in charge of the work in which the dredge

*For other cases see same topic & § Number in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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was used, he was charged with actual notice of the mortgage, whether recorded or not.

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

2. JOINT ADVENTURES (§ 7*)—POWER COUPLED WITH INTEREST—REVOCATION.

Where a party to a contract for the construction of a dredge, to be used in performing a dredging contract in which he was interested, authorized his associates to borrow money to build the dredge and to mortgage it for that purpose, such authority constituted a power coupled with an interest, which was not subject to revocation.

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

3. JOINT ADVENTURES (§ 7*)—MORTGAGE—EXECUTION.

Where one of the parties to a contract for the construction of a dredge, to be used in certain dredging operations in which he was interested, gave his associates power to build the dredge and mortgage it for loans for that purpose, a mortgage executed pursuant to such power was binding on him, whether his signature was attached thereto or not.

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

4. BANKS AND BANKING (§ 261*)—NATIONAL BANKS—EXCESSIVE LOAN—EFFECT.

In having expressly authorized the mortgaging of his interest in a dredge to secure money to build it and to carry out a dredging contract, also knew that a national bank was financing the building of the dredge, and that the amount necessary exceeded $60,000. Held, that W. or his assignee could not object to a chattel mortgage executed to the bank for advancements in excess of one-tenth of its capital stock, in violation of Rev. St. U. S. § 5200 (U. S. Comp. St. 1901, p. 3494); there being no penalty imposed on a national bank for violation of such section, unless it be a forfeiture of its charter, as provided by section 5239.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 261.*]

5. CHATTEL MORTGAGES (§ 138*)—FUTURE ADVANCEMENTS.

Where by the terms of a first chattel mortgage it was made optional with the mortgagee whether to make or refuse future advancements, which the mortgage provided it should secure, such future advancements were within the lien of the mortgage and prior to that of a second mortgage, if made by the first mortgagee without actual notice of the second incumbrance, which is not imported by the recording of the second mortgage.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 228–236; Dec. Dig. § 138.*]

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

On December 12, 1889, the Seattle Bridge Company, a copartnership consisting of H. T. McPherson and D. McL. Brown, as party of the first part, entered into an agreement with Alexander Watt, party of the second part, in contemplation of the award to the parties thereto of a dredging contract in the harbor of Everett, Wash., for which they had submitted bids. By the terms of the agreement it was provided that, in case said dredging contract should be so awarded to said parties, a dredger should be built, embodying the invention covered by the United States patent issued to A. B. Bowers, which invention the said Watt claimed to have the right to use, and it was agreed, further, that the said Watt should have the charge and supervision of the contract, and that the profits thereof should be shared between the said parties, two-thirds to the Seattle Bridge Company and one-third to Watt, and that of the dredger forty-nine hundredths should belong to the bridge company and fifty-one hundredths to Watt. The agreement contained the following express provision: “It is further agreed that the said first party shall have the right to hypothecate, by mortgage or other suitable instrument in writing, all interests of both parties hereto in any dredger constructed as aforesaid to the First National Bank of Seattle, or such other corporation, person, or persons as

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
may furnish money for building said dredger or for carrying out such dredger contract, to secure to such bank, corporation, person, or persons the repayment of all moneys so advanced. And the said second party hereby constitutes the said party of the first part, by its managers, H. T. McPherson and D. McL. Brown, his attorney in fact, to make, execute, and deliver in the name and behalf of said second party any instrument necessary or proper for the purpose." On July 24, 1902, a bill of sale, intended as a mortgage of the dredger, was executed to the First National Bank of Seattle, and signed by D. McL. Brown, W. A. Brown, D. A. Brown, and C. M. Nettleton, who then composed the co-partnership of the Seattle Bridge Company, and to the bill of sale the name of Alexander Watt was signed by D. McL. Brown as attorney in fact. There was attached to the bill of sale an affidavit, in compliance with the laws of the state of Washington, sworn to by all the parties whose names were appended thereto, save and except Alexander Watt. On July 25, 1902, the bill of sale was filed of record in the Miscellaneous Records of the office of the auditor of King county, Wash., and on January 5, 1903, a certified copy thereof was recorded in Miscellaneous Records of the auditor of Snohomish county, and on January 21, 1905, a certified copy was filed in Miscellaneous Records of the office of the auditor of Pierce county, and on January 21, 1905, a certified copy was recorded in the Records of Chattel Mortgages of the office of the auditor of Pierce county.

On December 31, 1901, the Seattle Bridge Company had borrowed from the First National Bank of Seattle $55,517.35. At the date of the bill of sale the debt had been reduced to $50,517.35. Subsequently it was further reduced, so that on August 29, 1904, it was $24,517.35. Thereafter other loans were made by the bank to the co-partnership, and other payments were made on the debt by the co-partnership. On February 25, 1903, Watt sold to the Seattle Bridge Company his interest in the dredger, and took in payment thereof three notes, of $9,166.90 each, secured by a chattel mortgage on the dredger. The mortgage was duly executed and recorded on April 25, 1903, in the Records of Chattel Mortgages in the office of the auditor of King county, Wash. At the date of its execution the bridge company owed the bank $28,517.35. On February 23, 1905, for a consideration of $14,000, Watt transferred his mortgage to the appellant herein. The mortgage to the bank was transferred to the appellee, and thereafter the latter filed its answer to the intervening libel of the appellant in the court below to enforce its lien upon the dredger, alleging that the amount thereof was $31,510.87. The question in controversy in the court below was one of the relative rank of the two chattel mortgages. The court found that the lien of the appellee was prior, and awarded it the sum of $45,781.51, which was the amount in the registry of the court after the sale of the dredger and the payment of certain liens thereon adjudged to be maritime. The sum so awarded was less than the total sum due on the appellee's mortgage.

Ira Bronson and D. B. Trefethen, for appellant.
Ballinger, Ronald, Battle & Tennant, Ira A. Campbell, and James Kiefer, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). The appellant claims priority for its mortgage, first, because, the appellee's bill of sale not having been duly recorded as a chattel mortgage, the record thereof was not constructive notice to appellant's assignor, Watt; and, second, it was not shown that Watt ever had actual notice thereof. In view of the contract of December 12, 1899, as we construe it, it is not material to this question of the priority of the liens whether the mortgage to the appellee was duly recorded, or was ever recorded. The provisions of that contract, to which Watt was a party, import to him notice of the mortgage to the bank and of its terms and conditions. Watt did not appear as a witness in the case, and his
whereabouts could not be ascertained. There is but little testimony in the record as to actual notice to him of the mortgage to the bank; but it is enough to say that the mortgage was expressly authorized by him by the terms of the contract above referred to. He knew that the other parties to that contract, who were to furnish the money to build the dredger, were to obtain the money for that purpose upon a mortgage. He expressly authorized them to obtain it in that manner. He knew that the dredger was constructed, and that it was used upon the contract for which it was to be constructed, for he had charge of the work. What additional knowledge did he need to possess?

But it is said that Watt expressly authorized the other two parties to the contract to execute the mortgage, and that when it was signed his name was attached by one of them only, and for that reason the power which he gave to mortgage the property was not lawfully exercised, and his interest in the dredger was never subjected to the mortgage. This argument ignores the nature of the contract under which the mortgage was given. That contract was not a simple power of attorney to the other parties thereto to act for Watt. It was the grant of an express power to the bridge company to incumber the property as their own act to effectuate a right vested in them—a power coupled with an interest. They were to borrow the money to build the dredger and to mortgage it. It was a power not subject to revocation. It was not a personal right, to be exercised only by the particular persons who were then parties to the contract; but it was a right which belonged to the copartnership, which owned an interest in the vessel, and there is nothing to show that Watt ever questioned the validity of the mortgage, or objected to the manner in which the power was executed. It would have been good between the parties, and binding upon Watt, if his signature had not been attached at all.

The paid-up capital stock of the bank was but $150,000, and under section 5200 of the Revised Statutes (U. S. Comp. St. 1901, p. 3494) the bank was forbidden to loan to a single borrower an amount greater than one-tenth of the capital stock actually paid in. It is not contended that because, in violation of this statute, the bank loaned to the bridge company an amount greater than $15,000, the debt was not enforceable against the borrower; but it is contended that Watt had the right to assume that the bank would loan the bridge company no more than was permissible under the statute, and that therefore the appellee should be limited in its participation in the fund in the registry of the court to the amount which the bank was authorized to loan. We do not see upon what principle this proposition can be sustained. The law has imposed no penalty upon a national bank for its failure to obey the restriction, unless it be that its charter thereby becomes subject to forfeiture under section 5239. A court may not inflict penalties other than those which are imposed by statute. The bridge company could have made no defense in the present case on the ground that the bank had violated the statute. Gold Mining Co. v. National Bank, 96 U. S. 640, 24 L. Ed. 648. Wherein is the appellant in a better situation? Watt expressly authorized the bridge company to pledge his interest in the dredger to secure money to build the same and to carry
out the dredging contract. There is positive and direct and uncontra-
dicted testimony in the record that Watt knew that the bank was finan-
cing the building of the dredger. He must have known that the amount
necessary for that purpose would largely exceed $15,000; for it is
not disputed that it was understood, at the time of entering into the
contract on December 12, 1899, that the cost of building the dredger
then contemplated would be $60,000, and that the plans were subse-
quently changed, and a larger and more expensive dredger was con-
structed. From the very nature of the circumstances, if there were no
other proof, knowledge must be imputed to Watt of the extent of the
indebtedness incurred under his contract with the bridge company
and of the bank to which it was owing.

The principal question is whether the appellee's mortgage shall be
held to cover advances made by the bank after the date of the appel-
licant's mortgage. The mortgage to the bank is in the form of a bill of
sale, and is given "in consideration of the money heretofore advanced
* * * for the construction of the dredge hereinafter mentioned,
and such further advances as may hereafter be made." Neither the
amount so advanced, nor the amount thereafter to be advanced, is
stated in the instrument. If Watt had not been a party to that bill of
sale, and were not chargeable with full notice of the sum which had
been advanced by the bank, very different questions might be present-
ed; but he is to be charged with notice that at that date the bank had
advanced $50,517.35, and, although the limit of future advances was
not fixed, there can be no question that, so far as the rights of Watt
as a second incumbrancer are concerned, the mortgage was sufficiently
definite to protect the bank on its account with the bridge company, on
which, from time to time, credits and debits were made, up to the
amount which was due the bank at the time when the mortgage was
made. Except in one or two states, where it is prohibited, a mort-
gage may be made to secure future advances to the mortgagor, which
shall become a first lien for the amount actually loaned, although
a part or all thereof be not advanced until after a subsequent lien
shall have attached; and such is the law in the state of Wash-
940. But where, by the terms of the first mortgage, as in this case, it
is made optional with the mortgagor whether to make or refuse future
advances, there is some diversity of decision on the question whether
he will be protected beyond the sum which he shall have actually loan-
ed or advanced at the date when a junior lien is placed of record. By
the decided weight of authority, however, and we so hold, such future
advances, although optional, are within the lien of the mortgage, and
prior to that of a second mortgage, if they were made without actual
notice of the second incumbrance, and the recording of a second mort-
gage does not import notice to the first mortgagor. Ackerman v. Hun-
sicker, 85 N. Y. 43, 39 Am. Rep. 621; Shirras v. Caig, 7 Cranch, 34, 3
Davis v. Carlisle, 142 Fed. 106, 73 C. C. A. 330; Heintze v. Bentley, 31
N. J. Eq. 562; Rowan v. Sharp's Rifle Mfg. Co., 29 Conn. 282; Mc-
Daniels v. Colvin, 16 Vt. 300, 42 Am. Dec. 512; Frye v. Bank of Il-
linois, 11 Ill. 367; Ripley v. Harris, 3 Biss. 199, Fed. Cas. No. 11,853; Anderson v. Liston, 69 Minn. 82, 72 N. W. 52; Schmidt et al. v. Zahrndt, 148 Ind. 447, 452, 47 N. E. 335, and cases there cited.

There is no proof in the record, and it is not claimed by the appellant, that the bank ever had actual notice of the mortgage to Watt. The record shows, moreover, that when the appellant purchased his mortgage he had actual knowledge of the first incumbrance. In view of these facts, and the law applicable thereto, we find no error in the decree of the court below.

The decree is affirmed.

McNEIL v. McNEIL et al.

(Circuit Court of Appeals, Ninth Circuit. May 31, 1909.)

No. 1,433.

1. Abatement and Revival (§ 71*)—Death of Defendant—Revisor Against Administrator.

Rev. St. § 555 (U. S. Comp. St. 1901, p. 697), provides that the executor or administrator of a deceased party, if the cause of action survives, may prosecute or defend to final judgment, and if the executor or administrator neglects or refuses, after being served with scire facias, for 20 days to become a party, the court may render judgment as if he were a party. After the sustaining of a demurrer to a bill to set aside a divorce decree, with leave to amend, complainant elected to stand by her bill, after which defendant died. Held, that it was improper, without revisor, for the court, on suggestion of defendant's alleged surviving wife, who had not previously been a party to the proceeding, to render judgment of dismissal nunc pro tunc as of the day following the expiration of the time allowed complainant to amend, and, complainant's prayer for appeal having been allowed, to direct service of citation on defendant's administrator and such alleged surviving wife.

[Ed. Note.—For other cases, see Abatement and Revival, Dec. Dig. § 71.*]

2. Estoppel (§ 68*)—Parties—Voluntary Appearance.

Where dismissal of a suit to set aside a divorce decree was rendered at the request of the defendant's alleged surviving wife, she was estopped to deny that she was a party.

[Ed. Note.—For other cases, see Estoppel, Dec. Dig. § 68.*]

3. Appeal and Error (§ 4*)—Irregularities Reviewable—Mode of Review.

Irregularity in treating the alleged surviving wife of the defendant in a suit to set aside a divorce decree as a quasi party could be corrected only on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 4.*]

4. Abatement and Revival (§ 88*)—Want of Revisor—Estoppel.

A person who proceeds in a suit and takes an order or decree therein without revisor is estopped to object for want of revisor.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. § 512; Dec. Dig. § 88.*]

5. Appeal and Error (§ 435*)—Appearance by Administrator—Revisor.

Where an administrator appeared generally in the Circuit Court of Appeals without objecting that he had not been properly joined by bill of revisor, and argued and submitted the case on its merits, he thereby ratified the decree as if he were a party, and could not object for want of re-

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep't Indexes.
vivor, but should be formally substituted as a respondent in the appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 435.*]

6. Divorce (§ 165*)—Decree—Application to Vacate—Laches.
Where complainant in a suit to set aside a divorce decree for fraud did not file her bill until 18 months after discovering the decree and alleged no facts to excuse or explain the delay, injury from the delay would be presumed, to establish that claimant was guilty of laches, especially where there was another woman claiming to be the wife of the defendant by virtue of the decree.

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

7. Equity (§ 72*)—Laches—Prejudicial Delay—Presumptions.
While only prejudicial delay will constitute laches, yet prejudice need not always be affirmatively shown, but will be presumed, where the interests of innocent third persons might be affected by the delay, which in such cases claimant must satisfactorily explain or excuse.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 207, 210–220, 225, 226; Dec. Dig. § 72.*]

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

For opinion below, see 78 Fed. 834.

Sullivan & Sullivan and Theo. J. Roche, for appellant.
D. M. Delmas, Benj. K. Knight, Henry C. McPike, and Joseph H. Skirm, for appellees.

Before GILBERT and ROSS, Circuit Judges, and VAN FLEET, District Judge.

VAN FLEET, District Judge. This is a bill in equity to declare void a certain decree of divorce obtained in a California state court and to enjoin its enforcement on account of actual fraud in its procurement. A demurrer to the bill was sustained, and the bill dismissed. The complainant appeals.

The appellees present a motion to dismiss the appeal, which raises the question of the jurisdiction of the court to entertain it, and this motion will therefore be considered first. The motion grows out of the following facts: The demurrer (which was to an amended bill) was sustained January 11, 1897, with leave to the complainant to amend. Complainant elected to stand upon her bill, without amendment. The defendant died April 1, 1906. On July 5, 1906, after his death, on the motion of Louise R. McNeil, claiming to be his surviving wife, the court entered a decree of dismissal nunc pro tunc as of January 22, 1897, the day after the expiration of the time allowed to complainant to amend. On December 15, 1906, complainant presented her petition for appeal, which was allowed on the same day. On December 17, 1906, the court, upon suggestion by affidavit of the death of the defendant and the issuance of letters of administration upon his estate, ordered that the citation be addressed to and served upon the administrator and upon the said Louise R. McNeil, and the same was issued and served accordingly. The administrator and the said Louise R. McNeil now join in a motion to dismiss the appeal on the ground that the suit became defective on the death of the defendant, that it was

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
never revived in the Circuit Court, either by bill or upon motion, and
that neither the administrator nor the alleged surviving wife had ever
been substituted as a defendant.

We think the motion should not be granted. Under Rev. St. §
955 (U. S. Comp. St. 1901, p. 697), the executor or administrator of
a deceased party may, in case the cause of action survives, by law pros-
ecute or defend the suit to final judgment. It is further provided that
if the executor or administrator, after being served with a scire facias
to appear, neglects or refuses for 20 days to become party to the suit,
the court may render judgment as if he had become a party. The pro-
ceedings in question were, therefore, unquestionably irregular. The
administrator never became a party and was never served with scire
facias to do so. The court, therefore, should not have rendered the
judgment; but it does not now lie in the mouth of Louise R. McNeil
to object to a judgment made upon her request, and she cannot be heard
to say that she was not a party, and, however irregular it may have
been to treat her as a quasi party, such irregularity could be corrected
only upon appeal. Moreover, it is settled that a person who proceeds
in a suit, and takes an order or decree therein without revivor, is es-
topped to object for want of revivor.

The administrator appeared generally in this court on this appeal,
and, without making any objection, argued and submitted the case on
the merits. He has therefore ratified and adopted the decree, as if
he had been a party to it, and is therefore in no better position than
Mrs. McNeil, with whom he joined in the motion. He should, how-
ever, be formally substituted as respondent in this court, and, as appel-
ellant has moved for such a substitution, it may be done accordingly.

As to the merits: The bill alleges that through certain frauds of
the defendant (the husband) a decree of absolute divorce was rendered
against the wife (complainant and appellant here) without her knowl-
edge, and without any opportunity to her to defend. She alleges that
she first learned of the decree about 20 months after its rendition; but
the original bill was not filed until 18 months after such discovery.
The court sustained a demurrer to the original bill on the ground of
laches, and gave to complainant leave to amend. Seven months after-
wards the complainant filed an amended bill. Neither in the amend-
ed bill nor in the original bill was any explanation offered of the delay
in bringing the suit, nor any excuse suggested for that delay. A de-
murrer to the amended bill was sustained on the same ground; the
court remarking that, although a delay of 18 months does not always
necessarily constitute laches yet under the circumstances of the case
it might amount to laches, and at least called for explanation. On sus-
(taining the demurrer the court gave the complainant another oppor-
tunity to amend, but she did not avail herself of it.

It is contended by appellant that no delay short of the period fixed
by the analogous statute of limitations can constitute laches, unless it
affirmatively appears that the delay has prejudiced the defendant.
We do not so understand the law. It is true that it is only prejudicial
delay which constitutes laches; but it does not follow that such prej-
udice must always be affirmatively shown. At least in some cases any
unnecessary delay is presumed to have caused injury; and it is in-
cumbent upon the complainant to make a satisfactory showing or excuse for the delay. Such, for example, is the rule where the interests of innocent third persons might be affected by the delay; and we think that cases of divorce are of that character. The safety of society imperatively demands that one who seeks to overthrow an apparently valid decree of divorce should proceed with the utmost promptness upon discovery of the facts claimed to show its invalidity. It must be apprehended that a man who has secured a decree of divorce, valid on its face, may endeavor to marry again, thus entangling some innocent woman in most intolerable difficulties, should the divorce be afterwards annulled. In such a case, one who seeks the aid of equity should, in limine, make it appear that she has proceeded in good faith and with reasonable diligence.

As we have said, this bill does not even attempt to suggest any reason, much less any excuse, for this failure to proceed promptly; and, in fact, there is now before the court a woman claiming to be the surviving wife of the deceased defendant. Moreover, the allegations of the bill at least make the good faith of the complainant questionable; and her counsel, though challenged to do so, have not enlightened the court as to any substantial benefit to her to result from a decree in her favor. These considerations are fortified by her extreme dilatoriness in the prosecution of this suit since it was commenced, and her inexcusable unwillingness to explain the delay in beginning the suit, though she has been afforded several opportunities to do so. We think the demurrer was properly sustained.

F. E. Morgan, as special administrator of the estate of James McNeil, deceased, is substituted as appellee herein in the place and stead of said James McNeil, deceased. The motion to dismiss the appeal is denied. The decree dismissing the bill is affirmed.

OMAHA COOPERAGE CO. v. ARMOUR & CO.

(Circuit Court of Appeals, Eighth Circuit. April 26, 1909.)
No. 2,804.

SALES (§ 52)—EVIDENCE OF AGREEMENT—PRESUMPTION FROM REDUCTION TO WRITING.

Plaintiff claimed to have a parol contract to furnish all the cooperage required at defendant's packing plant for one year, the prices to be subject to adjustment between the parties at intervals of about two months, and sued for its breach. The only testimony as to such contract was that of plaintiff's president who testified that at an interview with defendant's purchasing agent the latter said he wished a contract for a year or longer; that witness then prepared a written contract "in pursuance of the understanding" between them, which was signed by the parties and provided for the supplying of cooperage for a term of about two months at prices therein stated. Shortly before such contract expired another was made and signed for two months longer, after which defendant made no further purchases from plaintiff. Held, that the rights of the parties were measured by the written contracts, which, in the absence of fraud or mistake, must be presumed to embody the agreement of the parties in full; that the testimony did not in any event establish any further bind-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
In agreement between them, because it did not show that plaintiff as-

[Ed. Note.—For other cases, see Sales, Dec. Dlg. § 52.*]

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

C. J. Smyth and E. P. Smith, for plaintiff in error.

T. J. Mahoney (J. A. C. Kennedy, on the brief), for defendant in error.

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

RINER, District Judge. This action, brought in the district court of Douglas county, Neb., on the 16th day of December, 1905, was removed to the Circuit Court of the United States for the District of Nebraska by the defendant. The parties are here arranged as they were in the Circuit Court; the plaintiff in error being the plaintiff in that court and the defendant in error being the defendant in that court, and for convenience will be hereafter referred to as "plaintiff" and "defendant," respectively.

The plaintiff, in its petition, alleges that on or about the 10th of September, 1904, plaintiff and defendant entered into an oral agree-

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep't Indexes.
vided the advance or decline of labor and material affected the price then prevailing at least one cent per barrel.

The defendant answered, admitting that it sold certain cooperage material to the plaintiff in September, 1904; that this material was all settled for between the parties. It denied that defendant ever entered into any contract for the purchase of cooperage from the plaintiff, except the cooperage provided for in the two written contracts, set out in its answer, dated, respectively, September 14, 1904, and October 25, 1904, as follows:

"South Omaha, Neb., Sept. 14th, 1904.

"Jno. N. Duke, P. A., Armour & Company,
"South Omaha, Nebr. In Duplicate.

"Dear Sir: We submit the following proposition for furnishing you with slack cooperage from this day to November 1st, delivered at your plant in South Omaha in car loads, from time to time, as required by you:
Sugar barrels, 6 hoops, 2 heads, No. 2 stock.................... 34
Provisions barrels, 6 hoops, 1 head, No. 2 stock.................. 28 1/2
Glue barrels, 8 hoops, 2 heads, mill run stock.................. 42
Stearine ticers, 8 hoops, 2 heads, " " .......................... 57
Stearine ticers, 10 " 2 " ................................. 60

"If the above meets your approval, please sign your name under the word 'Accepted,' on one of the sheets and return to us, and that will be the contract between us.

"Yours truly,

Omaha Cooperage Company,
"M. D. Welch, Manager.

"Accepted:

"South Omaha, Neb., Oct. 25th, 1904.

"Armour & Company,
"South Omaha, Nebr. In Duplicate.

"Gentlemen: Referring to my interview yesterday with your purchasing agent, Mr. Davis, it is agreed between us that we are to furnish you all the slack cooperage you may require for use at your plant in South Omaha from Nov. 1st, prox., to Jan. 1st, 1905, at the following prices delivered at our plant:
Sugar barrels, 6 hoops, 2 heads, No. 2 stock.................... 34c + 31
Provision barrels, 6 hoops, 1 head, No. 2 stock.................. 28 1/4c + 27
Glue barrels, 8 hoops, 2 heads, M. R. stock.................. 42c + 39 1/2
Stearine ticers, 8 hoops, 2 heads, M. R. stock.................. 57 + 53 1/2
Stearine ticers, 10 hoops, 2 heads, M. R. stock.................. 60c + 50 1/2

"Delivery subject to fires, strikes, and car supply.

"Your acceptance hereon to be the contract between us.

"Yours truly,

Omaha Cooperage Company,
"M. D. Welch, Manager.

"Accepted:
"Armour & Co., J. A. Davis."

The testimony of Mr. Welch, manager for the plaintiff, the only witness who testified for the plaintiff, shows that on the 10th of September, 1904, he had a conversation with Mr. Duke, the purchasing agent for the defendant, relative to the purchase by the plaintiff of defendant's cooperage material then on hand and the purchase by the defendant from the plaintiff of a supply of manufactured cooperage. His testimony shows that the material purchased from the defendant by the plaintiff could not all be used, for the reason that some of it was defective; that after some negotiations the parties agreed upon a price, and the material was settled for—his statement being:
"We made a settlement with the defendant on the subject of discrepancy in
the stock, and they paid us the amount agreed upon in that settlement."

He further testified that on the 10th of September, 1904, the date
of the alleged oral agreement, he had a conversation with Mr. Duke,
in which they discussed the subject of supplying the defendant with
slack cooperage, that the defendant was to buy and the plaintiff to
sell, how long the contract was to be in effect, the manner of delivery
of the goods, and the price to be paid. After this interview, and on
September 14, 1904, Mr. Welch prepared in duplicate the contract
first above referred to, bearing that date. He further testified that
in October he had another conversation with Mr. Duke and Mr. Davis
(Mr. Davis having succeeded Mr. Duke as the purchasing agent for
the defendant); that subsequent to the conversation with Mr. Duke
and Mr. Davis, and on the 25th of October, 1904, he prepared in dup-
licate the second of the contracts above referred to.

It will be noticed that the words "and car supply," in the contract
as originally prepared, were struck out by drawing a line through
them. The witness explains that, after he had sent this paper to the
defendant for its signature, the defendant objected to having these
words in the contract, and that they were struck out for that reason;
that he then received the contract from the defendant bearing its ac-
ceptance. The testimony shows that after the 1st of January, 1905,
the defendant ceased to purchase cooperage from the plaintiff, and
this is the only breach of contract complained of.

The plaintiff contends that the oral agreement of September was a
continuing contract for the period of one year, or, as alleged in the
petition, for a period of at least one year, and bases its contention upon
the testimony of Mr. Welch to the effect that Mr. Duke, in the conversa-
tion had with him prior to the first written contract, said, "I want
a contract with you for a year;" that thereupon the witness inquired
as to the quantity of cooperage that would be used in a year by the
defendant; that Mr. Duke gave as an estimate of the quantity 100,000
packages; and that then they proceeded to discuss the price. He then
testified that at the close of the interview:

"I asked him (referring to Mr. Duke) how long he wanted a contract for,
and he replied: 'For one year or over. We will always want to buy cooperage
from you.'"

On cross-examination he testified that, at the close of the discussion
or interview with Mr. Duke, he said to Mr. Duke that he would
go back to his office and write up a memorandum on the question of
prices, and:

"I went back and wrote up in duplicate the paper, Exhibit A (referring to
the first contract). That was in pursuance of the understanding between my-
self and Mr. Duke, which we reached at the interview I have mentioned. I
sent them over to Mr. Duke, and afterward received one of them back bear-
ing his signature."

He further testified on cross-examination in relation to his inter-
view with Mr. Duke and Mr. Davis, in which something was said
about the sliding scale of prices, as follows:

"That conversation ended with the understanding that I would go to my
office and prepare an agreement which would be in accordance with what we
had been discussing, and in pursuance of that understanding I did prepare Exhibit B in duplicate (referring to the second contract). I then brought it back to Armour & Co., where it was signed by Mr. Davis."

At the conclusion of the evidence the court directed a verdict for the defendant, and this action of the court is assigned for error.

The contract for the purchase of material by the plaintiff from the defendant, whatever it was, was allowed to rest in parol. The parties acted upon it, and the material was settled and paid for. But, when it came to the cooperage to be furnished by the plaintiff to the defendant, Mr. Welch, manager for the plaintiff, insisted upon the agreement being in writing, and he prepared the first contract, as he testified, "in pursuance of the understanding between myself and Mr. Duke, which we reached at the interview I have mentioned," and the second one, "in accordance with what we had been discussing." Counsel for the plaintiff, in their brief, say:

"All other terms and conditions of the contract were definite, certain, and would remain unchanged during the year. The price alone might fluctuate. The price which Armour & Co. was to pay might change many times during the year. That was a matter to be adjusted between the parties from time to time. The contract itself contemplated subsequent negotiations and adjustments of this one element of the contract. In other words, the contract of September 10th, while complete within itself, contemplated future conferences, negotiations, and agreements between the parties as to the prices that were from time to time to be paid."

The trouble with this suggestion is that the prices were not based on anything ascertained or ascertainable without the consent or agreement of both parties. It contemplated, as counsel say, "future conferences, negotiations, and agreements." It is not contended that the fluctuations in the cost of material or labor were subject to such accurate ascertaining as to avoid the necessity of further negotiations. Neither party was bound to accept the price proposed by the other, no matter how reasonable it was, and until an agreement was reached as to prices, clearly, there could be no contract.

An examination of Mr. Welch's testimony discloses no promise whatever made by him to furnish all the cooperage the defendant required for the period of a year, or for any other specified time, except as fixed by the written contracts of September 14th and October 25th. He does testify that at the first interview with Mr. Duke, Mr. Duke said: "I want to buy as cheap as I can. I want a contract with you for a year"—and that at the close of the interview he again asked Mr. Duke how long he wanted a contract for, and Mr. Duke replied: "For one year or over. We will always want to buy cooperage from you." But to this statement by Mr. Duke Mr. Welch made no response whatsoever, except he stated that he would go to his office and prepare the memorandum. He made no promises, either to enter into a contract for a year or to furnish the cooperage required by the defendant for that length of time; hence it appears by his own testimony that there was lacking the one thing essential to a completed contract of this character, viz., mutuality of obligation. His acts also are inconsistent with the idea that the parties understood that there was a contract between them, on the one hand to furnish, and on the other to receive and pay for, all of the cooperage required by the defendant for a year.
He testified that in pursuance of the understanding between the parties he prepared the two contracts in writing set out in the record. And he was careful to add at the close of each: "Your acceptance hereon to be the contract between us."

There is no proof of fraud, accident, or mistake, and we think it must be conclusively presumed that the whole engagement of the parties and the extent and manner of their undertaking was contained in these two written contracts. The case comes within the rule announced in Union Selling Co. v. Jones, 128 Fed. 672, 63 C. C. A. 224, and cases there cited. In that case this court, speaking by Judge Van Devanter, said:

"Where, without fraud, accident, or mistake, the written contract purports to be a memorial of the transaction, it supersedes all prior representations, proposals, and negotiations, and is conclusive evidence that it embodies such of these as were ultimately intended to become parts of the agreement, and that all others were rejected as not expressing the final intention of the parties."

And in Thompson v. Libby, 34 Minn. 374, 26 N. W. 1, where Judge Mitchell, speaking for the court, said:

"The only criterion of the completeness of the written contract as a full expression of the agreement of the parties is the writing itself. If it imports on its face to be a complete expression of the whole agreement—that is, contains such language as imports a complete legal obligation—it is to be presumed that the parties have introduced into it every material item and term; and parol evidence cannot be admitted to add another term to the agreement, although the writing contains nothing on the particular one to which the parol evidence is directed."

The rule is again clearly expressed by Judge Sanborn, in the case of New York Life Insurance Co. v. McMaster, 87 Fed. 63, 30 C. C. A. 532, as follows:

"No representation, promise, or agreement made, or opinion expressed, in the previous parol negotiations as to the terms or legal effect of the resulting written agreement, can be permitted to prevail, either at law or in equity, over the plain provisions and just interpretation of the contract, in the absence of some artifice or fraud which concealed its terms."

We do not deem it necessary to review the authorities upon this proposition more at length. They are many and uniform to the effect that the writing must be held to embody the entire contract obligation of the parties. It is true that surrounding circumstances may be considered in some cases where there is uncertainty or ambiguity in the terms of the contract; but, as said by Judge Van Devanter, in Union Selling Co. v. Jones:

"It does not include the prior representations, proposals, and negotiations of a promissory character leading up to, and superseded by, the written agreement."

When these written contracts were entered into, no reference whatever was made in them to any oral agreement, and, as there was nothing doubtful or uncertain in their terms, we think the judgment of the Circuit Court was right, and it is affirmed.
STERNBERG MFG. CO. v. MILLER, DU BRUL & PETERS MFG. CO.
(Circuit Court of Appeals, Eighth Circuit. May 8, 1909.)
No. 2,816.

1. Libel and Slander (§ 71*)—Actions—Defenses.
   It is no defense to an action for libel that plaintiff had previously libeled defendant.
   [Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 173; Dec. Dig. § 71.*]

2. Libel and Slander (§ 9*)—Actionable Words—Words Imputing Illegal Conduct of Business.
   An article published by defendant, in which plaintiff was charged with being a "trust" and with wrongfully conducting its business, by falsely claiming to have valid patents protecting an article of its manufacture and attempting to monopolize the business by resorting to the courts for injunctions against its competitors, was libelous per se, and in an action based thereon it was not necessary to allege special damages.
   [Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 86; Dec. Dig. § 9.*]

3. Libel and Slander (§ 124*)—Actions—Instructions.
   In an action for libel, where the publication by defendant of the article complained of was not denied, and it was libelous on its face, it was not error to refuse an instruction which in effect submitted the question whether or not it was libelous to the jury.
   [Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 366; Dec. Dig. § 124.*]

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

W. J. Roberts and Louis Block, for plaintiff in error.
William C. Howell (Hervey S. Knight, on the brief), for defendant in error.

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

ADAMS, Circuit Judge. This was an action to recover damages for the publication of an alleged libelous article. The plaintiff, the Miller, Du Brul & Peters Manufacturing Company, a competitor of the defendant in the business of manufacturing and selling cigar molds, claimed in its amended and substituted complaint, upon which the cause went to trial, that the defendant published of and concerning plaintiff's business and its method of conducting it two certain defamatory articles, which formed the occasion for two separate counts in the complaint. The verdict and judgment in favor of plaintiff being general, only one of these articles will be specifically considered. It is as follows:

"Please Hang Up.
"Important Notice.
"Please Read.

"A recent threatening circular sent out to the cigar makers of the country by the Miller, Du Brul & Peters Manufacturing Company is a remarkable document. A valid patent secures an inventor a monopoly for seventeen years.

*For other cases see same topic & § Number in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
For that time a valid patent is better than a trust, because it is lawful. The gentlemen composing said company claim in their circular that beginning thirty years ago they have taken out 149 patents, but they don't state how many of the 149 are now alive. A patent issued 30 years ago has been dead for 18 years. We made the same style of molds ten years ago that we are making to-day. Why do they resort to lawsuits at this late date? The answer is easy. Simply because their patents are no longer a protection. Congress gives an inventor a monopoly for seventeen years. But only in return for his promise to let the public have free use of his invention at the end of that time. Another trust. The Miller, Du Brul & Peters Manufacturing Company has no live valid patent to-day, and it does not want to keep its promise made to the people through Congress over 17 years ago. It has no lawful monopoly, and so it is now hungry to be a trust. After a 'live and let live' career of thirty years, it now proposes to kill off competition by using the courts as a club. It wants to use injunctions and in this way gain the power of a trust. The cigar makers know the class of people who resort to injunctions. The trust will push the price away up and force you to pay it. No injunction will be issued against us. We have made the best cigar mold on the market for years. have infringed no patent, and won't be bluffed out of business. We are in business to stay, and will fight any suit brought against us. And we will protect all users of our molds. We have employed the best talent to protect us and to save the public from the forming of this trust, and we propose to see that Messrs. Miller, Du Brul & Peters keep the promise they made to the people at the time their patents were granted. To our customers we say: Stand pat. Don't worry. Send all threatening notices you receive, to us, and we will put them to good use. The Sternberg Mfg. Co., 1702-1712 W. Locust St., Davenport, Iowa, U. S. A."

The defendant in its answer admits the publication of the article, but avers that it was published to counteract the effect of two certain articles published by plaintiff, representing itself to be the sole owner of all patents for making cigar molds known as the "vertical top," alleging that it had brought a line of suits against all manufacturers of that particular mold and warning all persons against infringement. The two articles so alleged to have been published by plaintiff contained much laudation and puffing of the value of its patents and of its manufactured product, strong assertion of exclusive right to manufacture the vertical top mold, and a precautionary warning of danger to all who should attempt to infringe its rights. The foregoing facts are pleaded by defendant in a double aspect: First, as a justification of the publication complained of by plaintiff; and, second, by way of mitigation of damages.

No question of law is preserved for our consideration concerning the effect of the articles published by plaintiff in mitigation of damages, and we refrain from further reference to that aspect of the defense. The present writ of error challenges the judgment for several reasons which will be soon considered, but chiefly because of the contention that the article published by defendant was not libelous per se, and because there was no allegation or proof of special damages such as would have been necessary if it were not so libelous. The trial court charged the jury in part as follows:

"Defendant was wrong when it said that Du Brul Company had no live, valid patents, because Du Brul Company had live, valid patents relating to the manufacture of cigars."

To this an exception was duly saved by defendant. The court also told the jury in effect that if plaintiff had theretofore published ar-
articles offensive to the defendant, while the latter had the right to issue circulars fairly refuting the offensive matter, it did not have the right by way of counteracting the effect of the offensive articles to libel the plaintiff; that if plaintiff libeled the defendant, the defendant's remedy was an action at law, rather than a libelous retort. To this last feature the defendant also saved due exception. These two were the only exceptions to the charge, and they, in our opinion, were not well taken. The charge first referred to appears to have been well warranted by the facts, and, even if it were not, it is not apparent how it could prejudice defendant's rights on the only material issue of the case. The charge that defendant could not libel the plaintiff in retaliation for its offenses was clearly right. One can no more take the law into his own hand, and counteract the effect of one libel with another, than he can take satisfaction for a past physical assault by administering one to the assailant.

The defendant requested the court to instruct the jury to find a verdict in its favor on the ground that the published article was not libelous per se and that there was no allegation or proof of special damages. The article by direct averment and by necessary and ineluctable implication accused the plaintiff of being a trust, with all the opprobrium that term implies, and thereby of violating the laws of the United States in so far as interstate business was concerned, as well as the laws of the state of Iowa, where both parties did business. Act July 1, 1890, c. 647, 26 Stat. 809 (U. S. Comp. St. 1901, p. 3200) Code Iowa 1897, §§ 5060, 5062. It also accused the plaintiff of falsely pretending to be the owner of valid and subsisting patents entitled to monopolize the manufacture of a certain kind of cigar molds, of misusing and deceiving the courts in order to secure unwarranted protection to its business, of preventing competition, and raising the price of manufactured articles to the consumer.

Analysis or discussion of this article cannot make its meaning more certain than is plainly disclosed by the language employed. It charges the defendant with committing an offense punishable both by the laws of the United States and of the state of Iowa. Its reference to plaintiff's business of manufacturing and dealing in cigar molds is undeniable. It contains a distinct and emphatic charge of wrongful and improper conduct of that business. It is a charge, too, of that peculiar misconduct which naturally and directly brings down upon the offender's business the disapprobation of the public and necessarily entails injurious consequences. It is, therefore, according to well-recognized law, actionable per se. Morawetz on Private Corporations, § 358; Victor Safe & Lock Co. v. Deright, 77 C. C. A. 437, 147 Fed. 211; Ohio & M. Ry. Co. v. Press Pub. Co. (C. C.) 48 Fed. 206; Trenton Mutual Life and Fire Ins. Co. v. Perrine, 23 N. J. Law, 403, 67 Am. Dec. 400; Boogher v. Life Association of America, 75 Mo. 319, 322, 42 Am. Rep. 413. Being so actionable, damages ensued as a necessary consequence; and it was not necessary to plead special damages to constitute a cause of action. Newell on Slander & Libel (2d Ed.) p. 181; Townshend on Slander and Libel, § 146 et seq.; Victor Safe & Lock Co. v. Deright, supra.
It is next contended that the trial court erred in refusing to give to the jury the following instruction requested by the defendant:

"The defendant had the right or privilege to defend itself against the charge made by the Miller, Du Brul & Peters Manufacturing Company that it was infringing the patent for an improvement in cigar molds alleged in the patent infringement suit; said charge having been made in the paper filed by the Miller, Du Brul & Peters Mfg. Co. in the United States Circuit Court, the warning published in the Tobacco Leaf newspaper, and the circular that has been offered in evidence. It had the right to do so by an answer filed in court and by a counter circular. The only limit upon the defendant's right to issue a circular in self-defense was that it must not injure the Miller, Du Brul & Peters Manufacturing Company in respect to its business, so far as the issue in this case is concerned. Defendant had a right to consider the effect of plaintiff's acts upon its business, and so long as it did not injure the plaintiff in its business, and only protected its own, the plaintiff had no cause for complaint. If the jury finds that the circular issued by the defendant, of which complaint is made, did not directly and necessarily injure the plaintiff in its business as the manufacturer and seller of its own products, and only preserved to defendant its business and customers, then your verdict must be for the defendant."

We think the court committed no error in refusing to give this instruction. In view of defendant's claim, asserted in its pleading and proof, that it was justified in publishing the article complained of in order to counteract the alleged injurious effect of plaintiff's prior publications, the first part of the instruction was at least misleading. The jury might well have regarded it as a declaration that the defendant's libel was justifiable in view of plaintiff's prior wrong. As already seen this is not the law. The latter part of the instruction was also faulty. It declares that:

"So long as it [the libelous article] did not injure the plaintiff in its business, and only protected its own, the plaintiff had no cause for complaint."

This not only contains the insidious suggestion that defendant might protect its own business by a counter libel, but it ignores the fact that the article was libelous as a matter of law, and seeks to submit to the jury the legal question which the court of its own motion might well have disposed of peremptorily.

There are some other assignments of error predicated upon the admission of evidence and the refusal to further charge the jury as requested by the defendant; but as counsel for the defendant have not deemed them worthy of consideration in their "propositions of fact and law," and as they, in our opinion, are necessarily ruled by the views we have expressed concerning the character of the article complained of, we do not deem it necessary to take them up for special consideration. We have, however, sufficiently considered them to assure ourselves that no prejudicial error was committed against the defendant.

The judgment must be affirmed; and it is so ordered.
WOODBURY v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. May 3, 1909.)

No. 2,798.

INDIANS (§ 18)—LANDS—DEATH BEFORE TIME FOR ALLOTMENTS—PREMATURE APPLICATION AND SELECTION.

An Indian entitled to an allotment of land on the White Earth reservation in Minnesota under the Steenerson act (Act April 28, 1904, c. 1785, 33 Stat. 539 [U. S. Comp. St. Supp. 1907, p. 579]), providing for allotments to all Chippewa Indians residing on the reservation, who left with the agent his selection and application for an allotment before the preliminary work necessary to determine the size of the allotments was completed and notice given that applications might be filed in accordance with the instructions and practice of the department, but who died before such notice was given, acquired no vested right in the land selected which could pass to his heirs or legal representatives, his right being in the nature of a float which was terminated by his death before the time when in the orderly administration of the act he could lawfully make his application and selection.

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

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

Harvey S. Clapp (C. B. Miller, on the brief), for appellant.

Charles C. Houpt, for the United States.

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

AMIDON, District Judge. The complainant here and below claims that she has been unlawfully denied an allotment of land on the White Earth Indian reservation, and brings this suit under the act of February 6, 1901, c. 217, 31 Stat. 760, to have her right established and enforced. The facts out of which the controversy arises are as follows:

By treaty with the Chippewa Indians, bearing date March 19, 1867 (16 Stat. 719), the White Earth Indian reservation was set apart for their exclusive occupancy, and provision was also made that, whenever any member of the tribe should have 10 acres of land under cultivation, he should be entitled to a certificate granting to him the 40 acres of which the tract under cultivation was a part; and that, for each additional 10 acres so cultivated, an additional tract of 40 acres should be granted until he should have received in all 160 acres. January 14, 1889, a statute was passed commonly known as the “Nelson Act” (85 Stat. 642, c. 24), providing for the allotment of lands of the White Earth reservation to the Chippewa Indians in severalty. Every head of a family was to receive 160 acres. Others were to receive various quantities, either 40 or 80 acres. Under the treaty and this statute, title to numerous tracts was acquired. April 28, 1904, an act was passed commonly known as the “Steenerson Act” (33 Stat. 539, c. 1785 [U. S. Comp. St. Supp. 1907, p. 579]), which authorized the President to allot 160 acres of land to each Chippewa Indian residing on the White Earth reservation. It directed that, where any allot-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep’t Indexes*
ment of less than 160 acres had theretofore been made, the allottee should be allowed to take an additional allotment, which, together with the land already allotted, should not exceed 160 acres. It was further provided "that if there is not sufficient land in said White Earth diminished reservation subject to allotment, each Indian entitled to allotment under the provisions of this act, shall receive a pro rata allotment." The President was authorized to make needful rules and regulations for the just execution of the act.

It is manifest that, for the making of allotments under the Steenerson act, considerable preliminary work was required. It was necessary for the agent first to ascertain the number of Indians entitled to its benefits, and then to compute the amount of unappropriated lands remaining on the reservation, and learn whether there was sufficient to make full allotments, or whether the land would need to be divided pro rata. Under date of June 7, 1904, the Secretary of the Interior gave direction to the Indian agent in charge of the White Earth reservation to proceed with the work of making allotments under the statute. In his letter of instructions he specified several bands of Indians residing, some of them on the reservation, and some of them in other parts of the state, who would be entitled to allotments, and directed that no member should receive an allotment unless he removed to, and took up his actual residence upon, the reservation. Under the previous statutes, rolls of the members of the tribe had already been made, and it was supposed that from these rolls it would be possible, in the main, for the agent to ascertain the Indians who were entitled to share in the benefits of the act. The direction contained also the following specific rule for the guidance of the agent:

"But in making these additional allotments, the usual rule and practice of this office must be observed, namely, the Indian must be in being at the time the allotment is made or assigned to him; in other words, no allotment can be made to a dead Indian."

The instructions further stated:

"It will be necessary for you to first determine so far as you can, by computation, whether there will be land enough on the diminished reservation to give each Indian entitled thereto an allotment of 160 acres."

Directions were then given for the making up of separate rolls for the additional allotments, and the letter closed with the following language:

"Should you need additional instructions upon any feature of the work, you should make request for the same."

The agent promptly entered upon the preliminary work necessary for carrying out the instructions. Within a few days, however, June 27, 1904, he received a letter from the Indian Department stating that the Otter Tail band of the Chippewa Indians had made a claim of right to allotments under the Steenerson act, and the agent was directed to submit the question of their right to a council of the Chippewa Indians. This he did, and reported the result, when the whole subject was referred to the Attorney General for his advice. In November or December following, this matter was settled by the department, and the agent then renewed the work of preparing the rolls and computing
the lands for the execution of the act. During all this time it is manifest that no application could be entertained from any member of the tribe for his selection of any specific tract, for two reasons: (1) Such a practice would have given the applicant an unjust advantage over the other members of the tribe, and would have been contrary to the established custom of the department in such cases. (2) Until the rights of the Otter Tail Band were determined, neither the number of Indians who were entitled to participate in the allotment, nor the amount of the individual allotments, could be known.

Turning now to the facts upon which the complainant bases her right, Joseph Woodbury, her husband, was a Chippewa Indian, and, while living, possessed the qualifications of an allottee on the White Earth reservation. On August 20, 1904, he presented to the agent in charge of the reservation, in writing, a selection of a specific tract for an additional allotment of about 80 acres. He was informed by the agent that the application could not be received, as the preliminary work necessary for making the allotments had not been completed. He was permitted, however, to leave the paper on file in the office. On September 2, 1904, Woodbury died. The preliminary work for making the allotments was completed in the month of April, 1905, and public notice was then given that applications would be received on and after April 24th of that year. So far as the record shows, no application was made on behalf of Woodbury at this time. Under date of November 8, 1905, a letter was written to the agent by the Commissioner of Indian Affairs, stating that complaint had been made to him by an attorney, purporting to act on behalf of Woodbury, that the allotment had not been made pursuant to Woodbury's application on August 20, 1904, and the commissioner directed that an allotment be made upon this application, notwithstanding Woodbury's death. When the agent came to comply with this direction, he discovered that the land selected by Woodbury had already been allotted to another Indian. The attorney purporting to act for Woodbury thereupon selected the tract of land here in controversy, and asked that it be allotted in lieu of the first tract selected. Such an allotment was thereupon made. Under the statute, allotments did not take effect until they were approved by the Secretary of the Interior. Under date of August 1, 1906, the Secretary of the Interior, acting upon advice from the Attorney General, decided that the allotment to Woodbury was invalid upon two grounds: (1) That at the time it was made, Woodbury was dead. (2) That, at the time the original application was filed, the work of allotment had not commenced, and the application was therefore premature and insufficient to initiate any right in the land. Under date of September 5, 1906, the Commissioner of Indian Affairs reported this decision to the agent, and directed him to cancel the allotment, which he promptly did. Thereafter the complainant, Edith Woodbury, acting both as widow of Woodbury, and administratrix of his estate, made a further application for the allotment of the land to her for her own use and the use of the heirs of the deceased. This application was denied, and the present suit was then brought.

The trial court dismissed the bill. We think its action was clearly
right. The argument of counsel for appellant proceeds upon the theory that as soon as the agent received the letter of instructions bearing date June 7, 1904, directing him to proceed with the work of allotment, the several members of the tribe were immediately entitled to present their selections for lands in severality. The foregoing statement of facts and the instructions themselves show this contention to be unsound. The allotting of lands to the members of this tribe had been in progress, when the Steenerson act was passed, for nearly 40 years. The situation which had arisen was a complicated one. It was uncertain whether the reservation contained sufficient unappropriated lands to make the full allotments for which it provided. It was likewise true that the Indians who were to share in its benefits were not ascertained, and were scattered upon various reservations in the state of Minnesota; and, before the allotment could begin, they must be individually identified and brought to take up their residence on the reservation. The general practice of the Indian Department, as well as the letter of instructions in this case, required that all this preliminary work should be done in advance, and that public notice should then be given of a time at which the Indians would be entitled to present their applications. Any other procedure would have led to confusion, and would have been clearly unjust. While this work was in progress, no application could properly be received. It results that Woodbury's original application was made at a time when he had no right to make it, and was ineffectual to create any interest in the land selected, or any right thereto. This being the case, no right or interest in the land passed to his heirs or legal representatives upon his death by reason of the selection.

Counsel for complainant further contends that as Woodbury at the time of his death was a member of the tribe, and possessed of all the qualifications entitling him to an additional allotment, and as the only reason why his right had not ripened into an actual allotment was the preliminary administrative work necessary to carry out the project, this, being no fault of his, ought not to impair his right. The difficulty with this argument is that the delay was nobody's fault. It must have been contemplated by Congress. Until the allotment was made, Woodbury's right was personal—a mere float—giving him no right to any specific property. This right, from its nature, would not descend to his heirs. They, as members of the tribe, were severally entitled to their allotments in their own right. To grant them the right of their ancestor, in addition to their personal right, would give them an unfair share of the tribal lands. The motive underlying such statutes forbids such a construction. As the learned United States attorney says, in his able brief:

"It is well to remember that these Indian laws were not enacted merely to create property rights for the enrichment of Indian families. They were designed to operate on the individual Indian in his lifetime, to the end that they might mold and shape his life and habits somewhat after the manner and ways of civilization."

The instructions for making the allotments approved by the President required that "the Indian must be in being at the time the allotment is made or assigned to him; in other words, no allotment can
be made to a dead Indian." Woodbury's failure to secure his allotment in his lifetime was not the fault of anybody. If the preliminary work had been completed, and the allotting of lands actually commenced, and Woodbury's selection had then been refused or postponed by the administrative officers in charge of the work, his failure to receive his allotment would have been attributable to them, and the law would have given him every right which he would have obtained if they had performed their duty. That is the principle underlying the case of Smith v. Bonifer (C. C.) 132 Fed. 889. This appears clearly from the quotation made by the court from Lytle v. State of Arkansas, 9 How. 333, 13 L. Ed. 153, as follows:

"It is a well-established principle that when an individual, in the prosecution of a right, does everything which the law requires him to do, and he fails to attain his right by the misconduct or neglect of a public officer, the law will protect him."

That principle, however, cannot be applied to the present case, because here there was no "misconduct or neglect of a public officer" which defeated Woodbury's right. Hy-yu-tsi-mil-kin v. Smith, 194 U. S. 401, 24 Sup. Ct. 676, 48 L. Ed. 1039, presents another branch of the same controversy. From the opinion of the Supreme Court it appears clearly that the complainant's right was there defeated by the wrongful act of the commissioners charged with the duty of making the allotments, and their misconduct is the very ground of granting relief to the complainant.

The decree of the trial court was clearly right, and it should be affirmed.

THE TUGBOAT NO. 6.
(Circuit Court of Appeals, Second Circuit. April 13, 1900.)
No. 222.

COLLISION (§ 102*)—STEAM VESSELS—BOTH VESSELS IN FAULT.

A decree of the District Court affirmed, which held a tug proceeding with a carfloat on her side from Jersey City to East River chargeable with contributory fault for a collision with an outbound steamer from her pier in North River in the daytime, upon the evidence showing that her lookout was negligent in not seeing and reporting the steamer in time, and that she continued to swing toward the steamer from a nearly parallel course without an exchange of signals.

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

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

The decree (148 Fed. 1007) held both vessels in fault for a collision between the steamer Nord America and the tug Transfer No. 6, which occurred in the harbor of New York at 1:45 p. m. November 23, 1904. The tug alone appeals.

William Greenough (Wm. S. Montgomery, of counsel), for appellant.

Wallace, Butler & Brown (Frederick M. Brown, of counsel), for appellee.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. We have examined the record with care, and are not satisfied that the District Judge was in error in holding both vessels in fault for what he correctly terms a "very careless collision." Occurring as it did in broad daylight, with nothing in the elements to prevent safe navigation, it might almost be asserted that the presumption is that it required the carelessness of both vessels to produce a result so indefensible. If the tug had seen the steamer before she was almost in the jaws of collision, and had taken ordinary precautions thereafter, we are convinced that the accident might have been avoided. It is, however, enough to say that the District Judge, who heard all the witnesses for the tug, found against her upon the facts as follows:

First. Her lookout was negligent in not seeing and reporting the steamer in time.

Second. The tug was not on a crossing course, but continued to swing towards the steamer without an exchange of signals.

Under the well-known rule of this court that, in such circumstances, the findings of the District Court should not be disturbed, we think the decree should be affirmed, with interest and costs.

NOTE.—The following is the opinion of Adams, District Judge, in the court below:

ADAMS, District Judge. The libellant, La Veloce Navigazioni Italiana a Vapore, was the owner of the steamship Nord America, which was in collision about 1:45 o'clock P. M. on the 23d of November, 1904, with a carfloat, 250 feet long, in tow on the port side of the New York, New Haven & Hartford tug No. 6. The sterns of the tug and float were about even and the float projected about 100 feet ahead of the tug. The steamer was bound from her pier, at the foot of 34th Street, North River, to sea. The tug and float were bound from a pier below the Communipaw Ferry Jersey City, to the Harlem River through the East River. The collision occurred in the channel 200 or 300 feet south and east of the white buoy marking the northeasterly corner of the anchorage ground in that vicinity, the eastern side of which is defined by a line running south-southwest from said white buoy. The collision occurred, a little to the southward of the buoy and a few hundred feet to the eastward of the said line, by the port corner of the float striking the starboard side of the steamer forward of the stern. Both vessels were moving ahead at the time and the consequence of the blow was damage to the steamer, said to amount to $26,000.

The steamer alleges that the collision was occasioned by the fault of the tug (1) in having no proper lookout, (2) in proceeding across the anchorage grounds and coming out of the same without giving any signal, (3) in boarding her wheel without giving any signal thereof, (4) in not continuing under a starboard wheel so as to pass under the stern of the steamer, (5) in maintaining undue speed and in not avoiding the collision by stopping and backing.

The tug alleges that the collision was caused by the steamer (1) in that having the tug and float on her starboard hand she failed to keep out of the way, (2) that she failed to stop and back in time, (3) that she failed to observe the tow in time to comply with her obligation under the starboard hand rule, (4) that she did not have a proper lookout and (5) that she failed to sound any warning signal of her approach or intended movements.

The testimony shows that the steamer left her pier under the charge of a Sandy Hook pilot and proceeded down the river. Her movements were adapted to the contingencies of navigation, which gradually brought her to the starboard side of the channel opposite the anchorage grounds. About the time it became necessary to observe the tug and float on her starboard side, the atten-
tion of those on her were absorbed by the movements of a schooner just ahead, which was apparently being towed to an anchorage across the steamer's bow. The steamer reduced her speed to allow such a manœuvre on the schooner's part and failed to see the approach of the tug and float until shortly before the collision. The pilot did not see them until the steamer was on a line with the white buoy. The pilot said that they were then not taking a course across the river to the East River but were on a course of S.E., exposing the whole port side of the float broad on the steamer's bow, about 5 points, and might have been bound down to the Baltimore & Ohio Railroad Company's yards on Staten Island, or to some place in that vicinity. When, almost immediately thereafter, he saw they were swinging to the port and creating danger of collision, he rung up full speed on the engines, with a view of escaping in that way but it was too late and the collision occurred. The steamer had a lookout but he was apparently too much engaged in observing the movements of the schooner to see the approach of the tug and float.

The tug made fast to the float heading in towards New Jersey, backed out and allowed the sterns to swing down the river. They then went ahead turning eastward, but did not pursue a straight course for the East River. They turned to the southward so much that at one time they were on a course nearly parallel with that of the steamer. They sagged down the river and reached a point to the southward of the white buoy and were going over the anchorage ground. By this time the tow was getting headed more around and then the steamer was first seen by the pilot, 800 to 1,000 feet away, bearing 4 or 5 points on the tug's port bow. The tug continued to turn and shortly afterwards the collision took place. A floatman on the float was requested by the master of the tug to keep a lookout and he did so, but inefficiently. He said in one place that he first saw the steamer when she was about two float lengths away; that up to that time his view was obstructed by the ferry boat Bound Brook, which came out from her slip, above the pier where the tug started from, bound across the river. In another place he said that he knew the steamer was coming because he had seen her when they were backing out, before the ferryboat partially obstructed his view. It is not claimed that a report of the steamer was made at any time. As the tug was intending to cross the channel, it was incumbent upon her to notice vessels going either way and for her lookout to report them. Such a precaution would probably have avoided this very careless collision.

The steamer candidly admits that she was in fault and only asks for half damages. The tug urges that there was no fault on her part under the starboard hand rule and Inspectors' Navigation Rule 2, the steamer was bound to avoid her and give the necessary signals.

The starboard hand rule does not apply to this case, though the tug and float were on the starboard hand of the steamer, because the tug had no definite course. The failure of the steamer to see and signal the tow was undoubtedly a fault on her part without regard to the rule, but the fact that the tow swung so far down as to be navigating over the anchorage ground and her uncertain course give a somewhat different aspect to the matter from that which would prevail if both vessels were in ordinarily navigable waters, where others vessels would naturally be encountered, and the starboard hand rule was observed by one of them. It seems that the tug was in fault for failing to see, or receive a report of the steamer, until a collision was imminent. The tug's continued swing toward the steamer's course in the absence of the exchange of signals was clearly contributory to the collision. It was a case where both vessels were negligent with respect to lookout duty and signals, and both should be condemned.

Decree for the libellant for half damages, with an order of reference.
SALES (§ 35*)—VALIDITY OF CONTRACT—ASSENT OF PARTIES.

A memorandum of sale by defendant to plaintiff at a price and on terms therein stated of 25,000 bushels of No. 1 standard malt, to be delivered as ordered during the season of 1906 and 1907, "subject trial car," and signed by both parties, constituted a binding contract which entitled plaintiff to delivery of the malt on his order made in the spring of 1907, the provision for a trial car being one for his benefit solely, and which he could waive.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 62; Dec. Dig. § 35.*]

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

On writ of error to the Circuit Court for the Southern District of New York to review a judgment entered upon the verdict of a jury in favor of the defendant in error, plaintiff below, for $11,690.

Keneson, Emley & Rubino (Thaddeus D. Keneson, of counsel), for plaintiff in error.

James S. Lehmaier (James S. Lehmaier and William W. Pellet, of counsel), for defendant in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. The plaintiff below, as assignee of Michael Winter, brought this action to recover damages for the breach of a contract entered into between Winter and the defendant whereby the latter agreed to deliver to the former 25,000 bushels of malt.

The contract was evidenced by the following writings:

The Columbia Malting Company.
Chicago, Ill.
Memorandum of Sale.
Date Oct. 5th, 1906.
Sold to M. Winter.
P. O. Address, Orange, N. J.
Quantity 25,000 bushels.
Quality No. 1 Standard Malt.
Price sixty-one (61c) per bus.
F. O. B. Orange, N. J.
Terms of payment As usual.
When to be shipped During season of 1906 & 1907, as ordered.
In Bags or Bulk Bags.
Shipping Directions, Via D., L. & W. R. R.
To Orange, N. J.
Remarks Subject trial car.

The Columbia Malting Company,
per F. Schwarz, Seller
Correct Orange Brewing Wm. F. Wurster.
Supt. Purchaser.

On or about the 10th of October, 1906, the Orange Brewery (i. e., Michael Winter) received a letter from the defendant dated October 8th, as follows:

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
"We are in receipt of your order, through our Mr. Fred Schwarz, for 25,000 bushels of our New Standard Malt, which we enter in accordance with price, terms and conditions stated in written contract. Thanking you and assuring you of satisfactory deliveries, we remain."

On April 24, 1907, Winter telegraphed the defendant "ship car of malt at once" and in reply received a letter of same date as follows:

"We are in receipt of your wire this morning, saying 'Ship car of Malt at once.' We presume from this wire that you are under the impression that you have a contract with us, but on referring to our books we find that we have none with you, but do find that there was a memorandum for 25,000 bushels, dated Oct. 5th, 1906, at 61c. subject to a trial car. As six months is over and past since this date, and you have not ordered a trial car, we, of course, do not consider this a contract at all.

"If you are in the market, however, we will be very glad to sell you at prevailing prices and would suggest that in that case you communicate with our Mr. Fred Schwarz, 388 Produce Exchange, New York, N. Y."

The matter was then placed in the hands of counsel on both sides and their respective views were stated in writing, the contention of the defendant being that there was no contract as the quality of the malt was to be determined by the acceptance of the trial car.

On May 18, 1907, the attorneys for Winter wrote the defendants as follows:

"We are authorized by Michael Winter, trading as Orange Brewery, to direct you to ship them 25,000 bushels of No. 1 Standard malt, as per contract of October 5th, 1906, beginning at once, and shipping one car every ten (10) days.

"The trial car is waived by Mr. Winter, but the malt is required to be No. 1 Standard malt as per contract."

The malt was not delivered. Winter went into the open market to purchase the malt and has recovered the difference between the contract price and the market price.

The agreement to sell on the one side and to buy on the other was made between business men who unquestionably intended that their negotiations should culminate in a contract having some commercial value, a contract binding upon both parties and capable of being enforced if repudiated by either. The construction placed upon the contract by the defendant is too technical for practical everyday experience. Business could not be carried on if such interpretations are to prevail. The provision for the trial car was solely for the benefit of the purchaser; he could demand it or waive it as he saw fit. Waiving this obligation was entirely in the interest of the defendant, it was then free to furnish any No. 1 Standard malt it chose, even an inferior grade, and the purchaser was obliged to receive it. The theory of the defendant that the "memorandum of sale" of October 5th was merely an unaccepted offer of sale is untenable, in view of the fact that it states on its face that "25,000 bushels of No. 1 Standard malt were sold to M. Winter for 61 cents per bushel, to be shipped as ordered during the seasons of 1906 and 1907" and that these terms were accepted by Winter. If formal ratification were necessary the defendant's letter of October 8th furnishes such ratification, no other reasonable interpretation can be given it. The defendant there says that it has received the order and has entered it "in accordance with price, terms and conditions stated in the written contract."
Winter is thanked and assured that "satisfactory deliveries" will be made. If all this did not bind the defendant it is difficult to understand what language could have been used which would have had that effect. The trial court submitted to the jury the question whether the offer to sell the 25,000 bushels of malt was accepted within a reasonable time.

In view of the fact that by the terms of the agreement the malt was to be shipped "during the season of 1906 and 1907 as ordered" by Winter and that he did order it during the season of 1907, this ruling was surely as favorable to the defendant as it had a right to expect.

We find no reversible error in the record and the judgment is therefore affirmed with costs.

MANUFACTURERS' COMMERCIAL CO. v. KLOTS THROWING CO.
(Circuit Court of Appeals, Second Circuit. April 13, 1909.)
No. 203.

1. Bills and Notes ($468*)—Actions—Complaint.
In an action on a note reciting that it was "subject to terms of a contract between maker and payee" of a certain date, it is not necessary that the complaint allege performance of such contract by the payee; any failure of performance available to defeat recovery being matter of defense.
[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1463; Dec. Dig. § 468.*]

2. Action ($22*)—Cause of Action—Legal or Equitable.
An action at law cannot be maintained in a federal court by an assignee of a written instrument for the payment of money on an oral promise by the maker to pay the amount called for by such instrument, made to the payee after its assignment, where it is not alleged that the defendant, when the promise was made, knew of the assignment or intended the promise for the benefit of any third party.
[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 124-145; Dec. Dig. § 22.*]

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


Learned Hand and Harold B. Elgar, for defendant in error.

NOYES, Circuit Judge. The amended complaint states two causes of action of which is a summary of the first:
(1) The defendant made and delivered to the Regenerated Cold Air Company this instrument:

"$3,166.00/100.
Six months after date we promise to pay to the order of Regenerated Cold Air Co. thirty-one hundred and sixty-six $00/100 dollars at 487 Broadway, N. Y. City, with interest at 6% per annum. Value received, subject to terms of contract between maker and payee of Oct. 25th, 1905. No. ———. Due July 15th/06. Klots Throwing Co., "H. D. Klots, Prest."

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
The Regenerated Cold Air Company, for value, before maturity, indorsed, assigned, transferred, and delivered said instrument to the plaintiff, which continues to own and hold the same unpaid.

The defendant demurs upon the ground that sufficient facts are not stated to constitute a cause of action.

The demurrer to this cause, in the opinion of the majority of the court, is not well founded. Whether the instrument in question is negotiable is not very material here. Indeed, it is not of especial importance whether it is, strictly speaking, a promissory note at all. It is an instrument for the payment of money for value received at a fixed time. It has—according to the complaint—been assigned for value to the plaintiff, and consequently the plaintiff has the right to recover upon it. Moreover, in suing upon the instrument, it is not necessary to allege performance of the contract referred to in it. Performance of the contract was not, either by the contract itself or by the instrument, made a condition precedent to the payment of the money stipulated in the instrument. Failure of performance in whole or in part was available, if at all, as a matter of defense or counterclaim.

The following is a summary of the second cause of action:

(1) The defendant executed and delivered the instrument described in the first cause of action to the Regenerated Cold Air Company, and it was duly transferred to the plaintiff.

(2) Before the maturity of said instrument, and while it was in the hands of the plaintiff, the defendant, for certain considerations received from the Regenerated Cold Air Company, promised to pay said instrument.

The defendant demurs to the second cause of action upon these grounds:

"(a) That there is a defect in the parties defendant, because the corporation Regenerated Cold Air Company has not been made a party defendant, though to it alone was made the only promise of the defendant.

(b) That the cause of action set forth is one of equitable cognizance solely, and cannot be heard by the law side of this court, where it now is.

(c) That the said causes of action are improperly united, because the first is necessarily triable at law, and the second is solely cognizable in equity.

(d) That the complaint in the said cause of action does not state facts sufficient to constitute a cause of action."

We think this demurrer to this cause of action well founded. Without passing upon the question whether an action at law can be maintained in the federal courts by a third person upon a promise made and intended for his benefit, or for the benefit of a class of persons to which he belongs, we are of the opinion that such an action cannot be maintained when it does not appear that the party promising knew that any third person was interested in or affected by his promise. Thus in the present case it is not alleged that the defendant, when it promised to pay the instrument, knew that it was in the hands of the plaintiff. For all that appears, the defendant supposed that it was dealing with, and intended to deal with, the Regenerated Cold Air Company alone. The plaintiff, as the holder of the note, may succeed to the rights of that company; but we think it the better view that it should look to equity for the enforcement of such rights.
The judgment of the Circuit Court, in so far as it sustained the demurrer to the first cause of action, is reversed, and, in so far as it sustained the demurrer to the second cause of action, is affirmed.

GILLETTE et al. v. HODGE et al.
(Circuit Court of Appeals, Eighth Circuit. May 3, 1909.)

No. 2,784.

1. Bills and Notes (§ 173*)—Time of Maturity—Maturity on Nonpayment of Interest.

A provision in a promissory note that it shall become due and payable at once on default in the payment of interest is not self-executory, but merely gives the holder an option to declare the note due, and unless such option is exercised a default in the payment of the interest does not affect the negotiability of the note.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 173.*]

2. Bills and Notes (§ 369*)—Defenses as Against Bona Fide Purchaser—Conditional Delivery.

That a negotiable note was delivered to the payee subject to a condition which has not been fulfilled is not a defense to the note in the hands of a bona fide indorsee for value before maturity.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 951; Dec. Dig. § 369.*]

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

James R. Bennett, Jr. (W. N. M. Crawford, on the brief), for plaintiffs in error.

R. M. Barnes (Jay H. Magoon and Charles S. Cairns, on the brief), for defendants in error.

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

AMIDON, District Judge. This was an action brought by Hodge Bros., the defendants in error, against the plaintiffs in error, on three promissory notes, dated April 13, 1903, payable to Robert Burgess & Son, or order, respectively, July 1, 1904, 1905, and 1906, with interest payable annually. The notes contained a provision that default in the payment of interest should cause the whole note to become immediately due. The plaintiffs are private bankers, who discounted the notes at the rate of 10 per cent. on June 2, 1904, passing the proceeds to the credit of the payees, who afterwards drew the same in full. The answer interposes two defenses: First, that the notes were given as the purchase price of a stallion, and that the horse failed to comply with the warranties made by the vendors; second, that the notes were handed to the payees by the defendants upon an express agreement that they should not be treated as delivered until the signature of four other persons named in the answer should be obtained, and that, unless such signatures should be obtained, the notes should

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
be of no effect. To make these defenses available, the defendants first sought to show that the notes were dishonored at the time they were acquired by the plaintiffs. Their main reliance for establishing this fact is the provision in the notes that they should become immediately due if there was default in the payment of interest. The first year's interest was due April 13, 1904. This installment of interest was, therefore, past due on June 2d, when plaintiffs acquired the notes; and it is urged that this fact, when combined with the clause of the note just referred to, caused the notes to mature April 13th, and that they were, therefore, dishonored at the time of the indorsement. The difficulty with this contention is that the provision of the notes upon which it is based is not self-executory. It simply gave to the holder an option to declare the notes due for default in the payment of interest. There is some conflict in judicial decisions as to the effect of such a provision (Hodge Bros. v. Wallace, 129 Wis. 84, 108 N. W. 212, 116 Am. St. Rep. 938); but it was expressly ruled by the Supreme Court of the United States in the case of Chicago Railroad Equipment Co. v. Merchants' National Bank, 136 U. S. 268, 10 Sup. Ct. 999, 34 L. Ed. 349, that a similar provision did not of itself cause the notes to mature upon default in the payment of interest. See, also, Keene Five Cent. Savings Bank v. Reid, 123 Fed. 221, 224, 59 C. C. A. 225; Crissey v. Morrill, 125 Fed. 878, 884, 60 C. C. A. 460. There being no statute in the state of Minnesota, where the notes were given and payable, affecting the subject, the decision of the Supreme Court is controlling in federal courts, as the question relates to a matter of general commercial law.

An effort was also made at the trial to prove the agreement relating to the conditional delivery of the notes. Defendants, however, did not offer to prove that the plaintiffs had any notice of this agreement at the time they became indorses of the paper, and for this reason the evidence was excluded. As between the original parties, the agreement would have constituted a valid defense. Burke v. Dulaney, 153 U. S. 228, 14 Sup. Ct. 816, 38 L. Ed. 698. But it could not be available as against an indorsee in good faith. Signers of negotiable paper cannot place it in the hands of the payee conditionally so as to affect subsequent bona fide holders. This is now elementary law. 1 Randolph on Commercial Paper, 411; Daniel on Negotiable Instruments, § 68. The conditional agreement gave rise to a mere "equity," which was cut off by transfer of the paper to a party taking without notice. Chase National Bank v. Faurot, 149 N. Y. 532, 44 N. E. 164, 35 L. R. A. 605; Cooper v. Merchants' & Manufacturers' National Bank, 25 Ind. App. 341, 57 N. E. 569; First National Bank of Freeport v. Compo-Board Mfg. Co., 61 Minn. 274, 63 N. W. 731.

On quite elementary principles, the judgment in this case was right, and should be affirmed.
ALLEN V. LIQUID CARBONIC CO.

ALLEN, Internal Revenue Collector, v. LIQUID CARBONIC CO.

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

No. 2,850.

INTERNAL REVENUE (§ 9*)—SPECIAL TAX ON RECTIFIERS AND LIQUOR DEALERS—MANUFACTURERS OF EXTRACTS—“BEVERAGES”—“LIQUORS.”

Flavoring extracts, composed of from 40 to 50 per cent. alcohol, 3 per cent. flavoring principle, and the remainder water, the quantity of alcohol being no greater than is required to hold the flavoring principle in solution, which are not made, sold, nor used, nor capable of being used, as a beverage, but which are chiefly used in flavoring soda water syrups, the quantity of extract used in each glass of the beverage being about 3 or 4 drops, are not “beverages,” nor “liquors,” within the meaning of Rev. St. § 3244 (U. S. Comp. St. 1901, p. 2006), and the manufacturer is not subject to special tax thereunder as a rectifier or wholesale or retail dealer in liquors.

[Ed. Note.—For other cases; see Internal Revenue, Dec. Dig. § 9.*] For other definitions, see Words and Phrases, vol. 1, p. 769; vol. 5, pp. 4180–4182.]

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

Truman P. Young (Henry W. Blodgett, on the brief), for plaintiff in error.

Thomas E. Lannen, for defendant in error.

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

RINER, District Judge. This action was originally brought in the circuit court of the city of St. Louis and removed to the Circuit Court of the United States for the Eastern Division of the Eastern District of Missouri. The action sought to recover certain taxes and penalties paid under protest by the defendant in error, hereafter called the "company," to the plaintiff in error, United States collector of internal revenue for the First district of Missouri, hereafter called the "collector."

Three causes of action are set out in the petition. By the first cause of action it is sought to recover a tax charged to and paid by the company, under protest, as a rectifier of distilled spirits, in the sum of $100 and $50 penalty; by the second cause of action it is sought to recover a tax charged to and paid by the company, under protest, as a wholesale liquor dealer, in the sum of $100 and $50 penalty; and by the third cause of action it is sought to recover a tax charged to and paid by the company, under protest, as a retail liquor dealer, in the sum of $25 and $12.50 penalty. No question is raised as to the company's liability for the penalty, if the tax itself was properly assessed by the collector.

The case was tried to the court without a jury, a written stipulation having been filed waiving a jury, and the court made and entered the following findings of fact and conclusions of law:

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
"(1) That plaintiff from the 30th day of June, 1905, to the 2d day of July, 1906, was engaged in the manufacture and sale of certain extracts within the city of St. Louis and in the First collection district of Missouri; that said extracts were sold by the plaintiff at times in quantities of more than five gallons at the same time, and at times in quantities of less than five gallons at the same time; that said extracts were the only product containing alcohol manufactured, handled, or sold by plaintiff during said time.

"(2) That said extracts were manufactured in such a way that they contained from 47 to 57 per cent. water and from 40 to 50 per cent. of alcohol and about 3 per cent. of flavoring principle; that fruit juice was used as flavoring principle when the juice of the particular fruit was sufficiently strong to produce a concentrated extract; that because of the lack of flavoring strength in a large majority of the natural fruit juices it is impossible to produce an extract from such fruit; that plaintiff produced the natural extracts when possible, but, where no natural extract could be made, plaintiff produced an artificial extract by using as a flavoring principle about 3 per cent. of certain ethers, the proportions of alcohol and water remaining the same as in the natural extracts. These extracts are known as 'etherial extracts.'

"(3) That these extracts are manufactured in the same general way and contain substantially the same amount of alcohol as extracts manufactured and sold for similar uses and purposes, and commonly known as 'soda water extracts.'

"(4) The court further finds that said extracts cannot be made or manufactured without the use of alcohol in approximately the strength used by plaintiff; such per cent. of alcohol being necessary to hold the flavoring principles in solution.

"(5) The court further finds that said extracts could not be drunk as a beverage in their original and full strength because of the strength of the flavoring principle, but were susceptible of use only in imparting flavor to some drink or food intended for human consumption.

"(6) The court further finds that said extracts were never manufactured or used or sold by plaintiff as a beverage, but that plaintiff manufactured and sold such extracts as a flavor only; that no one with the knowledge or consent of plaintiff ever sold or used said extracts for any other than flavoring purposes.

"(7) That plaintiff manufactured and sold said extracts almost entirely as soda water flavors, to be used in flavoring the syrup which goes into soda water. A small amount of the extract was placed in the syrup, and this syrup was placed in the glass to which carbonated water was added, so that in one glass of soda water there were about three or four drops of said extract. Such extracts, sold to the soda water trade, bore labels which gave directions for the use of said extracts for flavoring soda water in the manner above set out.

"(8) That plaintiff also manufactured very small quantities of extracts which were used by saloon keepers and others to flavor mixed drinks. These extracts were labeled 'bar use,' and contained substantially the same ingredients as the extracts used to flavor soda water, except that the bar use extracts were somewhat lower in alcoholic content. Plaintiff at long intervals sold very small amounts of the bar use extracts, and these sales were made only in bottles provided with squirt tops. Such extracts were simply used to flavor mixed drinks by adding a few drops of some extract from the squirt top bottle, or, as it has been expressed, by adding a dash of said extracts to the mixed drink before it is drunk by the purchaser.

"(9) The court further finds that all the other material allegations of plaintiff's petition, not covered by the foregoing special findings, are true.

"And the court rules as a matter of law, upon the facts as above found, that plaintiff between said dates, to wit, the 30th day of June, 1905, and the 2d day of July, 1906, was not carrying on the business of a rectifier of distilled spirits, or a wholesale liquor dealer, or a retail liquor dealer within the First collection district of Missouri."

A judgment was entered in favor of the company and against the collector, for the sum of $366.28, and the collector brings the case here by writ of error.
The extracts manufactured by the company were principally used to flavor soda water syrup, and most of it was sold for that purpose. A small quantity of the extract was placed in the syrup, the syrup placed in a glass, and then carbonated water added until the glass was filled, so that in a glass of soda water there would be three or four drops of the extract. These extracts contained from 40 to 50 per cent. alcohol and were mixed with fruit juices, and, where the natural flavor of the fruit juice produced an essence sufficiently strong, no other ingredients were used; when they did not, ether was used. In addition to manufacturing these extracts for soda fountains, the company also manufactured and sold, on special orders, extracts to saloon keepers. These extracts, as the testimony shows and the court below found, were just the same as the soda water extracts, except that they were somewhat lower in alcoholic content, and were sold in squirt top bottles and labeled "bar use," and were used to flavor mixed drinks by squirting a drop or two of the extract through the squirt top bottle into the mixed drink.

The court below found that the extracts were never manufactured, used, or sold by the company as a beverage, and that they could not be drunk as a beverage in their original and full strength because of the strength of the flavoring principle, but were susceptible of use only in imparting flavor to drink or food intended for human consumption. We think the testimony supports this finding of the court and that these extracts are not spurious imitations or compound liquor, within the meaning of section 3244 of the Revised Statutes (U. S. Comp. St. 1901, p. 2096).

The case is altogether different from the case of United States v. Stafford (D. C.) 20 Fed. 720. In that case the defendant was selling what was known as brandy cherries; but the evidence disclosed that as a matter of fact the bottles so labeled contained nothing but whisky and a few cherries, and was sold over a bar, that persons purchasing it would frequently open the bottle right at the bar and drink the contents, leaving the bottle and cherries, and that they became drunk from its use. It was perfectly apparent in that case that putting cherries in the bottles was a mere device for dealing in spirituous liquor without the payment of the special tax. In this case, however, the court below found that these extracts were not sold to be used as a beverage, nor could they be used as a beverage, and that the amount of alcohol employed in their manufacture was not greater than was necessary to hold the other ingredients entering into the composition of the extract in solution.

As already indicated, we think this finding is supported by the testimony, and that these extracts are not beverages or liquor, within the meaning of the section of the statute above referred to. United States v. Stubblefield (D. C.) 40 Fed. 454; United States v. Wilson (D. C.) 69 Fed. 144; United States v. Calhoun (D. C.) 39 Fed. 604.

The judgment of the Circuit Court is affirmed.
UNITED STATES v. CAMPBELL et al.
(Circuit Court of Appeals, Eighth Circuit. May 1, 1909.)
No. 2,740.

1. United States (§ 51*)—Bond of Officer—Liability of Sureties—Defense of Laches.

The right of the United States to recover on the bond of an officer for a defalcation cannot be affected by the laches of its other officers or agents in permitting such officer to remain in office after knowledge of prior defalcations.

[Ed. Note.—For other cases, see United States, Dec. Dig. § 51.*]

2. United States (§ 51*)—Bond of Officer—Discharge of Sureties.

Sureties on the official bond of a federal officer cannot withdraw from such bond without the consent of the United States, and notice to the appropriate department that they will no longer bound is ineffective to relieve them from liability for subsequent defalcations of their principal.

[Ed. Note.—For other cases, see United States, Dec. Dig. § 51.*]

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


Charles J. Hughes, Jr. (Gerald Hughes and Barnwell S. Stuart, on the brief), for defendants in error.

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

HOOK, Circuit Judge. This was an action against the sureties on the official bond of a receiver of public moneys at a local land office of the United States. The sureties denied liability upon the ground that they gave seasonable notice of the misconduct in office of their principal and of existing defalcations and that they would no longer be held responsible upon the bond, but that the government failed to require a new bond with other security and failed to remove him, and so gave him an opportunity to commit the additional defalcations for which the action was brought. The trial court, having found the facts, held as conclusion of law that the sureties were released from liability and entered judgment accordingly. The government prosecuted this writ of error.

In United States v. Kirkpatrick, 9 Wheat. 720, 6 L. Ed. 199, the sureties upon the bond of a collector of revenue urged that they were exonerated by the laches of the officers of the government in failing to require the collector to make settlements at short and stated periods as required by law. It was held that the requirements of the law constituted no part of the contract of the sureties, but, on the contrary, were by way of additional protection to the government and for the regulation of the conduct of its own officers. Upon the subject of laches the court said:

"Then, as to the point of laches, we are of opinion that the charge of the court below, which supposes that laches will discharge the bond, cannot be

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1897 to date, & Rep't Indexes
maintained as law. The general principle is that laches is not imputable to
the government; and this maxim is founded, not in the notion of extraordi-
nary prerogative, but upon a great public policy. The government can trans-
act its business only through its agents; and its fiscal operations are so vari-
os, and its agencies so numerous and scattered, that the utmost vigilance
would not save the public from the most serious losses, if the doctrine of
laches can be applied to its transactions. It would, in effect, work a repeal
of all its securities."

In United States v. Vanzandt, 11 Wheat. 184, 6 L. Ed. 448, it was
held that the intrusting of additional funds to a paymaster in the
army after knowledge of prior and existing defaults and neglects
did not release the surety upon his bond from liability for the addi-
tional funds, and that this was so though the act of Congress pro-
vided that in case of such defaults the paymaster "shall be recalled
and another appointed in his place." An attempt was made to dis-
tinguish the case from that of Kirkpatrick upon the ground that the
latter was purely a case of laches, whereas in the former there was
an unauthorized intrusting of funds to a public defaulter whom the
government was bound by law to have dismissed from office; but the
court said:

"The neglect in the one case and in the other imputes laches to the officer
whose duty it was to perform the acts which the law required; but in a legal
point of view the rights of the government cannot be affected by these laches.
The provisions in both laws are merely directory to the officers, and intended
for the security and protection of government, by insuring punctuality and
responsibility; but they form no part of the contract with the surety."

In Dox v. Postmaster General, 1 Pet. 318, 7 L. Ed. 160, which in-
volved the liability of sureties upon the bond of a postmaster. Chief
Justice Marshall said of the Kirkpatrick and Vanzandt Cases:

"These two cases seem to fix the principle that the laches of the officers of
the government, however gross, do not of themselves discharge the sureties in
an official bond from the obligation it creates as firmly as the decisions of
this court can fix it."

Jones v. United States, 18 Wall. 662, 21 L. Ed. 867, also involved
the official bond of a postmaster. The defense was that the Auditor
of the Treasury of the Post Office Department, with full notice of a
prior defalcation and embezzlement of funds, negligently permitted
the postmaster to remain in office, whereby he was enabled to commit
the default in question. The defense was briefly disposed of by refer-
cence to the prior cases.

The doctrine of these cases was again affirmed in Hart v. United
States, 95 U. S. 316, 24 L. Ed. 479. The court, after observing that
the government is not responsible for the laches or the wrongful acts
of its officers, said:

"Every surety upon an official bond to the government is presumed to enter
into his contract with a full knowledge of this principle of law, and to consent
to be dealt with accordingly. The government enters into no contract with
him that its officers shall perform their duties. A government may be a
loser by the negligence of its officers, but it never becomes bound to others
for the consequences of such neglect, unless it be by express agreement to
that effect."

The case at bar is not distinguishable from those reviewed save in a single point. Here the sureties gave notice to the officers of the
government of existing defalcations, and they requested that action be taken, and declared they would no longer be held responsible upon the bond. It is not important that knowledge of the situation was conveyed by such a notice, instead of being acquired in the first instance through official supervision and inspection. Nor, as we have seen from the above cases, is it a sufficient defense that action was not immediately taken to make it impossible for the faithless official to continue in his misconduct. So all that remains is the assertion of the sureties that they would be no longer obligated. The bond executed by them was conditioned for the faithful performance by their principal of the duties of his position “at all times during his holding and remaining in said office.” We are not aware of any rule that would authorize the sureties to terminate their obligation by notice. Doubtless they would have been permitted to retire upon the furnishing of another bond with sufficient sureties; but as long as their contract subsisted according to its terms they remained liable thereon. The consent of the government was essential to their release. Were it otherwise, its operations might be greatly impeded and embarrassed by notices from sureties upon both sufficient and insufficient grounds. If the rule contended for should be sustained, the risk of failure to investigate the actions of public officers, to investigate them promptly, and promptly to discharge the officers from the service, would fall upon the government, and there would likely be much confusion and uncertainty in its securities.

The settled rule seems to be that, in the absence of a statute authorizing it, sureties cannot withdraw from a bond executed by them, except with the consent of the obligee. Barnard v. Darling, 11 Wend. (N. Y.) 29; Andrus v. Beals, 9 Cow. (N. Y.) 693; Crane v. Newell, 2 Pick. (Mass.) 612, 13 Am. Dec. 461. In the last case, Parker, Chief Justice, said that, while it would seem proper that a surety should have an opportunity, where the officer misbehaves himself, of getting released from liability for subsequent misconduct, yet it was for the Legislature to make provision for it in case they should deem it expedient. To the same effect is McGeehey v. Gewin, 25 Ala. 176.

In State of Florida v. Smith, 16 Fla. 175, the sureties on the bond of a collector of revenue notified the Governor of the official misconduct of their principal and demanded that he be suspended and another be appointed to perform his duties. The Governor refused to remove the collector, and the default for which action was brought occurred subsequently. It was held this was not a sufficient defense to the action.

There is nothing in Williams v. Lyman, 88 Fed. 237, 31 C. C. A. 511, decided by this court, inconsistent with the foregoing conclusions. Although the bond sued on in that case related to the performance of public duties, it was between individuals, and did not run to the government. Bonds running to the government to secure the performance of public duties are controlled by considerations which do not apply to conventions between private individuals.

The judgment of the District Court is reversed, and the cause is remanded, with direction to enter judgment in favor of the government upon the facts found.
Daly v. United States.

(Circuit Court of Appeals, First Circuit. May 19, 1909.)

No. 824.

Conspiracy (§ 43*)—Indictment—Overt Acts.

In an indictment under Rev. St. § 5440 (U. S. Comp. St. 1901, p. 3676), for conspiracy to commit an offense against the United States by bringing Chinenma into the country from Mexico in violation of the statute by means of a certain vessel, the provisioning of such vessel for the outward voyage and the sailing of such vessel from an American port to Mexico for the purpose of accomplishing the purpose of the conspiracy may be averred as overt acts.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 89; Dec. Dig. § 43.*]

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

John J. Coady (Harvey H. Pratt, on the brief), for plaintiff in error.


Before COLT, PUTNAM, and LOWELL, Circuit Judges.

PUTNAM, Circuit Judge. This indictment was framed under section 5440 of the Revised Statutes (U. S. Comp. St. 1901, p. 3676), as follows:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not more than ten thousand dollars or to imprisonment for not more than two years, or to both fine and imprisonment, in the discretion of the court."

The substantial allegations of the indictment were that Daly, with one Springer, conspired to smuggle into the United States Chinese persons in violation of the statute. This was to be done with the aid of a vessel called the Freddie W. Alton, by voyage from Mexico to one of our ports. The overt acts alleged are that, first, Daly and Springer purchased at Boston certain provisions for the provisioning of the vessel on her outward voyage; second, that they sailed the vessel from Boston on the voyage to Mexico for the purpose of accomplishing a return voyage; and, third, that a certain telegram was sent containing instructions about the return voyage. There was a general verdict of guilty, upon which sentence was imposed against both Springer and Daly. Daly sued out a separate writ of error, as he had a right to do.

The only error relied on is that each of the alleged overt acts is too remote to be an "act" within the purview of the statute. If either one of them satisfies the statute, it is sufficient to sustain the judgment; the verdict having been a general one, as we have said. At least the provisioning of the vessel and the sailing of her to Mexico

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 170 F.—21
are within the natural reading of the statute, and we know of no reason why we should not give that reading full effect. Neither of them is so remote as the overt acts which we held in Alkon v. United States to be sufficient in an opinion passed down on August 13, 1908, reported in 163 Fed. 810. In that case the alleged conspiracy was the storing away of goods with the intention that one of the conspirators, who owned the goods, should afterwards go into bankruptcy, and conceal them from his trustee. There not only the subsequent filing of the petition in bankruptcy, but also the concealing of the goods before the petition was filed, were alleged as overt acts and held sufficient, although, at the time the goods were stored away, the mere act of concealing would not have been criminal under the statute. Mr. Justice Woods, speaking for the court in United States v. Britton, 108 U. S. 199, 204, 2 Sup. Ct. 531, 534, 37 L. Ed. 698, referring to a conspiracy under the statute in question, said:

"This offense does not consist of both the conspiracy and the acts done to effect the object of the conspiracy, but of the conspiracy alone. The provision of the statute, that there must be an act done to effect the object of the conspiracy, merely affords a locus penitentiae, so that before the act done either one or all of the parties may abandon their design, and thus avoid the penalty prescribed by the statute."

As well said by him, the conspiracy is the essence of the crime. The act done is a mere concrete indication of what lies behind it. We have no doubt the conviction was correct.

The judgment of the District Court is affirmed.

CONTINENTAL CASUALTY CO. v. SPRADLIN.

(Circuit Court of Appeals, Fourth Circuit. February 18, 1900.)

No. 752.

1. Appearance (§ 20)—Effect—Want of Service.
   Where defendant enters a general appearance in an action, want of service of process is cured.
   [Ed. Note.—For other cases, see Appearance, Cent. Dig. § 91; Dec. Dig. § 29.*]

   Where defendant refused to pay the amount due on an accident policy providing for payment of $2,000 in case of assured's accidental death, and there was no contract for interest in the policy, interest was not a mere incident or accessory to the matter in dispute in an action in a federal court in assumpsit for $3,000 damages for defendant's failure to perform, but constituted, with the amount of the policy, aggregate damages for the breach; and hence the action involved a sum in excess of $2,000, exclusive of interest and costs, and was within federal jurisdiction.
   [Ed. Note.—For other cases, see Courts, Cent. Dig. § 806; Dec. Dig. § 328.*

Jurisdiction of Circuit Courts as determined by amount in controversy, see notes to Eber v. Lombard, 19 C. C. A. 75; Tennent-Stribling Shoe Co. v. Roper, 36 C. C. A. 459.]

In Error to the Circuit Court of the United States for the Western District of Virginia, at Lynchburg.

*For other cases see same topic & & number in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
CONTINENTAL CASUALTY CO. V. SPRADLIN. 323

Lucian H. Cocke and John M. Hart (Menton Maverick, on the brief), for plaintiff in error.
M. H. Altizer and R. E. Scott, for defendant in error.

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

PER CURIAM. This case presents two points: The one upon motion to dismiss for want of service of process to bring the plaintiff in error—the defendant below—into court; the other a plea to the jurisdiction, because of the amount involved in the controversy, it being insisted by the plaintiff in error that said amount, as appears by the declaration, does not exceed $2,000, exclusive of interest and costs.

As to the first point, the record shows that before the same was raised the plaintiff in error, by its attorney, had entered a general appearance to the action. By such appearance want of service was waived, and there is no merit in the assignment of error in this respect.

As to the other point, we are also of opinion that the Circuit Court committed no error in entertaining jurisdiction. The action is in assumpsit for breach of contract of assurance, and defendant in error—plaintiff below—lays her damages in $3,000, and demands judgment for this sum. The cause of action is a policy of insurance issued by the plaintiff in error contracting to pay the defendant in error, the beneficiary in said policy, the sum of $2,000 in case her son, R. D. Spradlin, should receive personal bodily injuries purely from accidental causes within a year from the date of the issuance of the policy, which injuries should solely and independently of all other causes result in the death of the said R. D. Spradlin within 90 days from the date of the accident. The declaration alleges accidental bodily injuries to the assured and his death therefrom within the time specified. There is further allegation of proof of death made to the plaintiff in error as required by the terms of the policy, and refusal of plaintiff in error to pay. This suit was then brought in the Circuit Court, demanding, as stated, damages in the sum of $3,000 for the breach. On the trial the jury rendered a verdict for $2,438.

The exception of the plaintiff in error is upon the ground that the declaration discloses $2,000 as the principal demand, and that this should oust the jurisdiction; the further proposition being that amount alleged and recovered above $2,000 was interest. We do not agree to this proposition. There was no contract for interest in this policy. The action is in assumpsit for damages for failure to perform. The interest, therefore, was not a mere incident or accessory to the amount demanded, but constituted, together with the amount set out in the policy, aggregate damages for the breach. We think Brown v. Webster, 156 U. S. 328, 15 Sup. Ct. 377, 39 L. Ed. 440, settles this point.

There is no error, and the judgment of the Circuit Court is affirmed. Affirmed.
CRIER v. INNES et al.

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

No. 69.

1. PATENTS (§ 327*)—SUIT FOR INFRINGEMENT—EFFECT OF PRIOR DECISION.

As a general rule, which may be subject to exception in particular cases, when a patent after full hearing has been declared valid by a Circuit Court and its decree has been affirmed by the Circuit Court of Appeals, such decision will be followed by the latter court in a subsequent case involving the same patent, and not presenting any essentially different evidence, even though the claim of invalidity was not urged on such court on the prior appeal.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 622; Dec. Dig. § 327.*


2. PATENTS (§ 28*)—DESIGNS FOR “MANUFACTURE”—MONUMENT.

A sarcophagus monument is a “manufacture” within the meaning of Rev. St. § 4929 (U. S. Comp. St. 1901, p. 3398), and a proper subject for a design patent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 33; Dec. Dig. § 28.*

For other definitions, see Words and Phrases, vol. 5, pp. 4344-4346; vol. 8, p. 7716.]

3. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—DESIGN FOR MONUMENT.

The Young design patent, No. 27,115, for a design for a sarcophagus monument, discloses novelty and invention, and is valid; also held infringed.

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

4. PATENTS (§ 317*)—SUIT FOR INFRINGEMENT—PERMANENT INJUNCTION.

The fact that a defendant has ceased to infringe, and has promised not to infringe in the future, does not necessarily prevent the granting of an injunction against him; but, as an injunction is only granted to prevent threatened injury, it should not issue if it is clear that no further infringement is to be anticipated.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 561; Dec. Dig. § 317.*]

5. PATENTS (§ 224*)—SUITS FOR INFRINGEMENT—PENALTY FOR INFRINGEMENT OF DESIGN PATENT.

To entitle the owner of a design patent to recover the statutory penalty for its infringement provided by Act Feb. 4, 1887, c. 105, 24 Stat. 387, Supp. Rev. St. 533 (U. S. Comp. St. 1901, p. 3398), he must have duly marked the patented articles made or sold by him, where there is no proof of infringement by defendant after notice.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 354, 355; Dec. Dig. § 224.*]

6. PATENTS (§ 325*)—SUITS FOR INFRINGEMENT—COSTS.

Where the complainant in a suit for infringement established the validity of his patent and its infringement, but, owing to the peculiar circumstances of the case, was not entitled to any of the relief prayed for, the costs may be divided as deemed equitable by the court.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 607, 609, 610; Dec. Dig. § 325.*]
Appeal from the Circuit Court of the United States for the District of Vermont.
For opinion below, see 160 Fed. 103.
Frank C. Curtis, for appellant.
John W. Gordon (Richard A. Hoar and Streeter & Hollis, of counsel), for appellees.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

NOYES, Circuit Judge. This is a suit in equity charging the infringement of design patent No. 27,115 issued May 25, 1897, to William H. Young for a design for a sarcophagus monument, and claiming an injunction and damages. Assuming that the patent is valid, infringement is obvious. Consequently the question of validity is the one of primary importance.

The defendants first contend that the patent is invalid for want of invention. But, in considering this contention, we are met at the outset with a decree of the Circuit Court for the Northern District of New York holding in a contested case where the same claim was made, and much evidence of the prior art presented, that this identical patent was valid. Young v. Daley (decree filed February 25, 1902). Upon appeal the decree was affirmed by this court (120 Fed. 1023, 56 C. C. A. 686), although it appears that the particular errors assigned by the appellant related to other points than the validity of the patent. This decree, being between other parties, does not constitute res adjudicata. We are not constrained to follow it upon any principle of stare decisis. Still we think an orderly administration of justice in patent causes requires, as a general rule (to which this case does not constitute an exception), that when a patent, after full hearing, has been declared by the Circuit Court to be valid and such decree has been affirmed by this court, we should follow the decision in a subsequent case involving the validity of the same patent, and not presenting any essentially different evidence, notwithstanding the claim of invalidity was not urged upon this court upon the prior appeal.

The defendants, however, insist that the testimony presented in this case is essentially different from that appearing in the earlier case. It is true that the witnesses are different, and that many new drawings are shown in this record. But, after a comparison of the exhibits in the two cases, we cannot say that the conclusions to be drawn with respect to them are materially different. In neither case was precise anticipation shown. In both cases drawings were produced containing parts similar to parts of the patented design, and it was claimed that the association of such parts in such design called for mere mechanical skill, and not invention. The scope of the former inquiry seems to have been substantially the same as that of the present, and the drawings of several of the patents shown therein are quite as like the design of the patent as any of the drawings here.

We, therefore, think that we should follow the decision in the prior case, and hold that the patent possesses patentable novelty. And it is also proper to say that, considering this case without regard to the
other, we think it distinctly the better view that the patentee, while availing himself of parts old in the art, so united them in his design as to produce a completed whole having a new and pleasing effect distinct from the effect of the separate parts—that he obtained a new result, and consequently a valid patent.

It is next contended that the patent is invalid because it relates to a monument which is not "a manufacture" within the meaning of the design patent statute. Rev. St. § 4929 (U. S. Comp. St. 1901, p. 3398). We think this contention not well founded. A monument is manufactured, and in our opinion is a "manufacture," and not—as urged by the defendants—a species of architecture. It comes within the dictionary definition of the former term, and, if we go beyond that and look at trade usage, we find in the present record the defendants' own witnesses describing themselves as monument "manufacturers" and speaking of "manufacturing" monuments. For these reasons we hold the patent valid and infringed. The remaining questions relate to the relief to be granted.

The complainant claims to recover by way of damages the statutory penalty of $250 for each infringing monument. Act Feb. 4, 1887, c. 105, 24 Stat. 387, Supp. Rev. St. 553 (U. S. Comp. St. 1901, p. 3398). In order to so recover, however, it is incumbent upon the complainant to show—there being no proof of infringement after actual notice—that the patentee duly marked the patented articles (the monuments) which he sold. Rev. St. § 4900 (U. S. Comp. St. 1901, p. 3388). This obligation the complainant in our opinion has failed to fulfill. The testimony is unpersuasive that all the monuments sold by Young, the patentee, were marked. Indeed, the evidence with respect to several—the Coon monument, for example—is convincing that they were not marked. The complainant has failed to establish a case in which damages can be recovered.

The final question is whether an injunction should be granted. The fact that a defendant has ceased to infringe and promised not to infringe in the future does not necessarily prevent an injunction issuing against him. Indeed, under such conditions, an injunction would ordinarily issue. But still an injunction is only granted to prevent threatened injury. If it is clear that no injury is threatened, it should not issue.

The infringing monuments were made by the firm of Innes & Cruikshank. Cruikshank died before the commencement of the suit, and the defendant Marr is his administrator. An injunction cannot run against the former, nor against the latter as administrator on account of his intestate's infringing act. The administrator threatens no wrong. Innes, the other partner, gave up the business of manufacturing monuments upon the death of Cruikshank, has not engaged in it since, was not engaged in it at the commencement of the suit, and manufactured no infringing monuments after he was informed that the design was patented. There is nothing to indicate any intention upon his part to re-engage in business, and it is altogether improbable that, if he did, he would use this particular patented design. Under all the circumstances, it seems to us clear that Innes is neither threatening nor contemplating infringement. We cannot see that an injunction against
him would accomplish anything, is necessary for the protection of the complainant's rights, or would serve any useful purpose. And, if the complainant is neither entitled to damages nor to an injunction, the bill should be dismissed, and the decree of the Circuit Court to that extent affirmed.

The only question remaining relates to costs. The complainant has established that he has a valid patent which has been infringed. On account of the unusual circumstances of the case, he is not entitled to any of the relief prayed for. We think it equitable that he should have one-half costs in this court, and that neither party should recover in the Circuit Court.

The decree of the Circuit Court is modified by striking out the provisions with respect to costs, and, as so modified, is affirmed, with one-half the costs of this court to the appellant.

AMERICAN GRAPHOPHONE CO. v. LEEDS & CATLIN CO. et al.

(Circuit Court of Appeals, Second Circuit. April 31, 1909.)

No. 181.

1. PATENTS (§ 30*)—INVENTION—ANTICIPATION.

In contemplation of law an invention does not exist until the inventor's ideas have been reduced to practical form, either as the basis for a patent or an anticipation of another's invention.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 34; Dec. Dig. § 30.*]

2. PATENTS (§ 69*)—ANTICIPATION.

The naked assertion that a certain result has been accomplished, without describing the means which produced it, is insufficient as an anticipation.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 84; Dec. Dig. § 69.*]

3. PATENTS (§ 328*)—ANTICIPATION AND INFRINGEMENT—PROCESS OF MAKING COMMERCIAL SOUND-RECORDS.

The Jones patent No. 688,739, for a process of producing commercial sound-records, was not anticipated by the Adams-Randall British patent No. 9,906 of 1888, and is valid. Also held 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.

On appeal by the complainant from a decree dismissing the bill which alleges infringement of letters patent No. 688,739 granted to J. W. Jones for an improved production of sound-records.

See, also, 140 Fed. 981; 155 Fed. 427; 170 Fed. 332.

Philip Mauro, C. A. L. Massie, and Ralph L. Scott, for appellant.

Louis Hicks, for appellees.

Waldo G. Morse, as amicus curiae on behalf of defendants similarly situated.

Before COXE, WARD, and NOYES, Circuit Judges.

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
COXE, Circuit Judge. The Jones patent relates to the commercial production of sound-records from an original record characterized by lateral undulations of substantially uniform depth. The inventor avoids the difficulties existing prior to the date of his invention by producing in the first instance a fully finished original record whose grooves are of the final depth required; thus doing away with the necessity for etching and subsequent smoothing. The original records made by this process are electroplated and the electroplate matrix is used as a die.

In carrying out the invention the inventor employs a disk of suitable recording material upon the surface of which he forms a spiral groove of practically uniform depth, containing lateral sinuosities or irregularities corresponding to the sound waves recorded. The copy to be used for reproducing is an exact copy of the record so formed which is complete and finished, its grooves being in slight but appreciable depth requiring no deepening or retouching by an etching fluid or otherwise. The original record is prepared for receiving the electroplate deposit by coating its surface with an electric conducting medium and is then placed in an electroplating bath and a layer of metal is deposited thereon. The thin matrix thus formed is readily separated from the original record which may be used repeatedly to form other matrices. The completed matrix which is reinforced by a supporting plate constitutes a die, the record appearing upon it in the form of a raised ridge, being the exact counterpart of the original sound groove. The die is then pressed into a disk of suitable material to receive and retain an accurate impression of the record on the face of the die. The stamped record thus produced is the finished commercial article, being a faithful copy of the original path traced by the recording stylus. The invention is limited to sound-records characterized by lateral undulations of practically uniform depth and is not claimed in connection with sound-records having vertical irregularities.

The claims are as follows:

"(1) The herein-described method of producing sound-records, which consists in cutting or engraving upon a tablet of suitable material, by means of the lateral vibrations of a suitable stylus, a record-groove of appreciable and practically uniform depth and having lateral undulations corresponding to the sound-waves, next coating the same with a conducting material, then forming a matrix thereon by electrolysis, and finally separating this matrix and pressing the same into a tablet of suitable material, substantially as described.

"(2) The process of producing commercial sound-records of the type indicated, which consists of first preparing a flat tablet or disk of soft waxlike material, then engraving thereon by means of the lateral vibrations of a suitable stylus a record-groove of appreciable and uniform depth and having lateral undulations, corresponding to sound-waves, next rendering the surface thereof electrically conductive, then forming a matrix thereon by electrolysis, next separating the matrix from the original record-disk without the use of heat, and finally impressing said matrix into a disk of suitable material to form the ultimate record, substantially as described."

The process of the invention is sufficiently disclosed by the claims and is as follows:
First. Engraving upon a tablet of soft waxlike material by means of lateral vibrations a record-groove of uniform depth and having lateral undulations corresponding to the sound-waves.

Second. Coating the tablet with a conducting material.

Third. Forming a matrix thereon by electrolysis.

Fourth. Separating the matrix from the original record-disk without the use of heat and pressing it into a tablet of suitable material to form the ultimate commercial record. It will be observed that the patent relates to disk and not cylindrical records, to soft and not hard recording materials, to record-grooves having lateral and not vertical undulations and to the multiplication of hard copies from the soft original and not a plurality of hard originals. Speaking broadly, it is these distinctions which separate the method of Jones from the prior art.

The patent has been bitterly contested but was sustained by this court in two causes, which were argued together, against the Universal Talking Machine Mfg. Company and the American Record Company, 151 Fed. 595, 81 C. C. A. 139. Upon a record presenting, we think, the essential facts upon which defendants rely as fully as in the case at bar, the court, after considering the prior achievements of Young, Bell & Tainter, Berliner and Edison said:

"It is shown that it did not occur to any one before Jones that the old use of the varying depth process on cylindrical records could be adapted to a new use with a uniform depth process on flat records with a useful and practical result. • • • The disk produced by the patented process responds to the test of success where others have failed. But, in addition to this inventive success, it is also a commercial success."

It is hardly necessary to say that unless the present record discloses new facts which materially change the issues involved we cannot alter our former decision; every question there determined is stare decisis. Even patent litigation must end somewhere.

The Circuit Court decided that the patent was anticipated by the Adams-Randall British patent, No. 9,996 of July 10, 1888. The court also decided that the first method admitted by the defendants, viz.: "Copying, or reproducing and multiplying by familiar electro-metallurgical process, records bought in foreign countries and lawfully imported into the United States" did not constitute infringement but that disks made by the second method adopted by the defendants did infringe. It may, perhaps, be urged that the finding of infringement, in view of the decision that the patent is invalid, was obiter, but we anticipate this objection by saying that we are satisfied that the judge of the Circuit Court was correct in holding that the method adopted by the defendants in the manufacture of their so-called "gold records" constitutes infringement and we deem it unnecessary to add to what he has said on that subject.

The only debatable question, therefore, left for decision is whether or not the Jones patent is anticipated by the Adams-Randall disclosures. In his provisional specification Adams-Randall states that the invention consists:

"Fourthly: In forming in a solid resisting material, such as lead, zinc, copper, wood, ivory, hard rubber, or similar materials, a channel or groove
of uniform depth preferably, the side or sides of which represent a phonautographic record or phonogram.

"Fifthly: In forming in a semiresisting material like wax, paraffin or similar materials, or compounds, a groove or channel preferably, of uniform depth, the side or sides having formed therein, a phonautographic record or phonogram.

"Sixthly: In producing such or similar record, in a solid resisting material, like lead, or semiresisting material like wax, and electroplating or obtaining electrotypes therefrom, in nickel, platinum, aluminum, phosphorbronze, or like material for the purpose of procuring a permanent and durable record."

In his complete specification he states the invention to consist:

"Fifthly.—In forming in a semiresisting material like wax, paraffin, or other like compound, by means operative independently of the primary vibrator, but acting in unison therewith, a groove, cut, or channel, which represents a phonautographic record or phonogram.

"Sixthly.—In obtaining two or more phonautographic records simultaneously.

"Seventhly.—In obtaining a phonautographic record, directly in a solid resisting material like lead, wood or similar materials, and electroplating, or obtaining electrotypes from the same, in nickel, platinum, or like materials, for the purpose of obtaining durable records in duplicates."

The seventh claim is as follows:

"The method of making a durable phonautographic record of sound vibrations, which consists in cutting the record in solid resisting material such as wood, lead, etc., and then electroplating the same with copper, nickel or other tenacious metal, substantially as described."

Can it be said that all this describes the Jones invention in such full, clear and concise terms as to enable a person skilled in the art to produce a commercial sound-record by the Jones method? We think not, and this conclusion is confirmed by an examination of the drawings and other portions of the Adams-Randall patent.

It may be conceded that when Adams-Randall wrote the language quoted he was possessed of an idea of some kind, but neither an idea nor a thought is patentable, and neither can anticipate a patent. Assuming the existence of the idea, what was it, how was it to be carried out, and what was the result produced? The patent fails to answer with any degree of definiteness. A valid patent should not be destroyed by a vague, confused, indeterminate document.

If to-day a skilled artisan, who had never heard of the Jones or Adams-Randall patents, were given a Jones disk and the Adams-Randall patent and directed, after reading the patent, to construct similar disks, we doubt whether, even with such information, he would be able to do so. It must be remembered that the English patent was granted in 1888, nine years before the Jones application, and in the interval Bell, Tainter, Berliner, Edison and many other accomplished inventors were striving to produce commercial record-disks, but it never occurred to any of them, not even to Adams-Randall himself, to follow what is now said to be the obvious direction of the Adams-Randall patent.

Is not the fact that the patent was never heard of until it was resurrected for the purpose of this litigation, persuasive evidence that it contained nothing of value to the art? It deals with cylindrical, laterally grooved sound-records made by a revolving cutter or burr vi-
brating in hard material, so hard indeed that sound, it is said, can be reproduced from the originals. The patent does not suggest the use of the electro-plate matrix as a die but provides for coating the cylin-
der with copper, nickel or other tenacious metal to make it durable.

In short, we are unable to see that Adams-Randall's contribution to the art advanced it a single step. His patents abound in tentative, indeterminate and infeasible suggestions too nebulous to anticipate a patent which has actually shown the art how to make the thing needed. In contemplation of law an invention does not exist until the inventor's ideas have been reduced to practical form. As was said in Standard Cartridge Co. v. Peters Co., 77 Fed. 630, 645, 23 C. C. A. 367, 381:

"The mere existence of an intellectual notion that a certain thing could be done, and, if done, might be a practical utility, does not furnish a basis for a patent, or estop others from developing practically the same idea."

The burden of proving anticipation by clear and convincing evi-
dence rests heavily upon the defendants. We cannot avoid the conclusion that the sanguine and optimistic view taken by the defendants of the Adams-Randall patents is not justified by anything found in the patents themselves. The patent upon which the chief reliance is placed fails to give a clear statement of the method of producing the Jones disk. The naked assertion that a certain result has been accomplished without stating how, without describing the means which produce the result is insufficient as an anticipation. Hanifen v. Godshalk Co., 84 Fed. 649, 28 C. C. A. 507.

The most favorable view for the defendants is that the question of anticipation by the Adams-Randall patents is involved in doubt, and this is fatal to their contention. "If the process pursued for its de-
velopment failed to reach the point of consummation, it cannot avail
to defeat a patent founded upon a discovery or invention which was completed. * * * The law requires not conjecture but certainty." Coffin v. Ogden, 18 Wall. 120-124, 21 L. Ed. 821; Badische v. Kalle, 104 Fed. 802, 44 C. C. A. 201.

It is unnecessary to discuss the other alleged anticipating patents and articles said to appear for the first time in the present record. They add nothing of importance to the controversy. In other words if the references discussed by this court upon the former appeal plus the Adams-Randall patents are insufficient to destroy the patent in suit it is manifest that the alleged new references are equally ine-
ffectual.

As before stated we hold that the second method adopted by the defendants and admitted by them in their stipulation to have been practiced prior to the commencement of the suit constituted an in-
fringement of the claims of the complainant's patent. It would seem that nothing further is required. Where a patent has been declared valid and infringed a decree follows as a matter of course. As the Circuit Court has twice decided, once on a motion for a preliminary injunction, as we understand it (155 Fed. 427), and again at final hear-
ing, that the first process employed by the defendants does not in-
fringe, we should hesitate long before reaching a different conclusion. It is, however, for present purposes sufficient to say that the com-
plainant's proofs and the defendants' stipulation as to their second process amply sustain the charge of infringement.

The decree is reversed with costs of this court and the cause is remanded to the Circuit Court with instructions to enter the usual decree in favor of the plainant.

AMERICAN GRAPPHONE CO. v. LEEDS & CATLIN CO. et al.
(Circuit Court of Appeals, Second Circuit. May 3, 1909.)
No. 181.

On Motion to Vacate Stay of Mandate.
C. A. L. Massie, for the motion.
Louis Hicks, opposed.
Before COXE, WARD, and NOYES, Circuit Judges.

PER CURIAM. The motion to vacate the stay of the mandate in this case is denied, and the stay continued until the adjournment of the Supreme Court upon the defendants' giving a bond in the sum of $5,000 conditioned to pay all profits and damages earned by the defendants or sustained by the complainant because of the stay, with leave, in case the Supreme Court adjourn without having denied the writ of certiorari, to apply to this court or any Judge thereof for a further stay.

TEN MILE COAL & COKE CO. v. BURT et al.
(Circuit Court, N. D. West Virginia. May 10, 1909.)

CANCELLATION OF INSTRUMENTS ($ 37*)—RIGHT OF CANCELLATION—VIOLATION OF TRUST—PLEADING.
A bill, alleging that defendant secured a conveyance from complainant of valuable property on his promise to procure a third party to build a line of railroad and operate it for 20 years as an independent and competing road, and to afford to complainant facilities for shipping coal from its lands on such line, and that he did not intend to fulfill such promise, and did not, the road having been built and turned over to a rival company, states a cause of action for the cancellation of the conveyance on the ground that defendant obtained the same by fraud and deceit, in violation of a relationship of trust or agency against which he cannot set up the defense of laches or acquiescence.

[Ed. Note.—For other cases, see Cancellation of Instruments, Dec. Dig. § 37.]

In Equity. On demurrer to bill.

Plaintiff has filed its bill, in substance alleging itself, prior to 1896, to have been the owner of about 2,500 acres of coal on Ten Mile creek, in Harrison county, W. Va.; that T. M. Jackson, its president and the owner of substantially all its stock, conceived the idea of building a railroad from New Martinsville, on the Ohio river, to Clarksburg, and thence to Belington, in said state, by and through and for the purpose of developing plaintiff's coal property and like properties adjacent, owned by said Jackson personally; that to this end he secured a charter for such road, known as the "Short Line Railroad," surveyed the line, procured rights of way, filed the maps and profiles at his own expense, and turned all over to the railroad corporation; that Jackson was made president of this railroad company, as also of plaintiff; that plaintiff, *For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
by power of attorney executed November 21, 1896, authorized him to sell and dispose of its property rights and franchises upon conditions that he might deem best and to whom he might see fit; that in January, 1897, he entered into a contract with one Machen for the construction of the railroad upon terms and conditions set forth, but not deemed material to state; that in this state of affairs interviews were sought with him by defendant George A. Burt, in person and by agents, and he was informed that the Ohio River Railroad wanted to construct for him this Short Line Railroad; that these interviews resulted in his being introduced to H. H. Rogers, then president of the Ohio River Railroad (while Burt was its general manager), and the result was Jackson bought from Machen for $500 the release of the latter’s construction contract and entered into one with Rogers for the construction of the road; that this agreement was made with the express understanding that Rogers, through his agent, Burt, should construct the road at his own expense and operate and maintain it as an independent and competing line, and especially as to the Baltimore & Ohio Railroad, from whose exactions and oppression the said Jackson as a coal shipper had aforetime suffered; that it should not only be built and operated as an independent line, but it was expressly agreed it was not to be sold to any other railroad company within 20 years from its construction; said Jackson was to remain its president, and every facility for the development and shipping of coal should be given the plaintiff and other coal owners along its line. It is then charged that Burt, the agent of Rogers, very soon after this agreement made in his presence, and after the fulfillment of it in detail had been turned over to him by Rogers, demanded from Jackson for his services, performed and to be performed in securing the construction of this road and the maintenance and operation thereof for at least 20 years as an independent line, and which he would cause to construct tipples at its Ohio River terminus for the handling and shipping of coal, including that of plaintiff, that he should be compensated, and, this being communicated by Jackson to it, it, in order to accomplish the construction of the road upon the terms agreed to, to accomplish the development of its coal, and to secure shipping facilities as agreed upon, for these considerations, and these only, conveyed, at the instance of Burt, to Ella T. Burt, his wife, 1,000 acres of its coal, alleged to be worth $400,000. This conveyance, it is charged, was consummated by a written agreement to convey, dated June 6, 1899, and by three deeds, dated July 10, 1901, November 30, 1901, and February 22, 1902. It is then charged that the Ohio River Railroad, substantially owned by Rogers and Burt, was not a paying road, having no coal along its line, and that its only chance to be profitably operated depended upon its building or securing a branch line into coal territory like that along the proposed Short Line, dominated or controlled by the Baltimore & Ohio Railroad; that Rogers and Burt never undertook the construction of the Short Line Railroad with any purpose or intention to perform their promises and agreement with Jackson, but, on the contrary, fraudulently and deceitfully resorted to such promises and agreements in order to secure its rights and franchises and with the fixed purpose and intention, from the start, by its construction to enable them to unload upon the Baltimore & Ohio Railroad their unprofitable Ohio River line upon the strength of the Short Line’s value. This unloading upon and sale to the Baltimore & Ohio Company it is charged of the two lines, the Ohio River and the Short Line, was made almost before the Short Line was completed, and in utter disregard of the agreement made by Rogers and Burt, whereby the opportunity for the profitable development of plaintiff’s property was dissipated, no shipping facilities were furnished, no tipples erected, and it was compelled to sell and dispose of the remainder of its property. Burt, it is charged, however, caused side tracks to be built by the railroad company into the 1,000 acres so conveyed to his wife, whereby its development was secured, and then leased it, so as to receive a royalty of 6 cents per ton for the coal. The bill charges Ella T. Burt to have had full knowledge of the false and deceitful promises and agreements whereby the conveyances of the coal were made to her, that she took such conveyances knowing that it was not intended to fulfill the agreements by which it was obtained; that such conveyances were made without consideration either good or valuable in law, and a cancellation thereof as clouds upon
plaintiff's title is prayed. To this bill the defendants George A. and Elia T. Burt have filed a written demurrer, alleging (a) that the plaintiff has not made or stated a case entitling it to relief in equity; (b) that the bill shows on its face plaintiff to have been guilty of laches in instituting its suit, whereby its claim is stale; (c) that the allegations of the bill show acquiescence on the part of plaintiff in the sale of the Short Line Railroad to the Baltimore & Ohio Company, and in the fraud of Burt. If any, and ratification of the same; and (d) that the plaintiff has a full and complete remedy at law.

John H. Holt, H. C. Duncan, M. G. Sperry, and George W. Johnson, for plaintiff.

Vinson & Thompson and W. E. Chilton, for defendants.

DAYTON, District Judge (after stating the facts as above). After long and patient study of the many authorities cited in the able briefs filed by counsel on both sides touching the application to this case of the equitable doctrines of laches and acquiescence, I have felt constrained to reason the true solution to be reached from a somewhat different standpoint from either of those taken by contending counsel. Giving the broadest and most liberal construction to the allegations of the bill in favor of the plaintiff, as I must do upon this demurrer, which admits them to be true, it seems to me that I may epitomize the case to be that in consideration of the undertaking on the part of Burt to secure Rogers to build the Short Line Railroad, maintain and operate it as an independent line for at least 20 years, secure him to build tipples at the Ohio River terminus, furnish track and shipping facilities whereby the plaintiff could develop and mine its coal, and have Jackson, its substantial owner, retained as its president, by reason of all which the plaintiff would be assured, not only of full and complete shipping facilities, but also of much-desired carrying competition, the plaintiff agreed to and did convey, as compensation for these things to be accomplished by Burt in its behalf, the 1,000 acres of coal. This being true, a relation in the nature of a trust, an agency, at least, was created. It seems to me that the allegations of the bill are ample to establish (a) that Burt himself had no means with which to build, and was not expected to build, the railroad; (b) that his connection with it was solely as the agent of Rogers, who was the man of means; (c) that he did not undertake to pay a direct consideration for the coal, but only to perform certain services, to the end that certain advantages should accrue to the plaintiff, which, if he accomplished, he was to receive this 1,000 acres of coal in compensation. If this contract had been made direct with the principal, Rogers, and the conveyances had been made to Rogers in express consideration of his contract to expend the money necessary to build the road, to maintain its 20-year independence, to furnish shipping facilities, etc., no possible trust relation could be assumed. The building of the road would have been at least part performance, and to that extent a valuable consideration, and after long delay equity would assume acquiescence in the change of conditions. If, however, one undertakes as trustee to do for a consideration certain things, is paid for it in advance, does not do it, but in fact never intended to do so, but by false promises has secured his principal's property by fraud and deceit, equity will not, in my judgment, allow him to plead laches in order that he may
retain his illgotten gains. As well establish the doctrine that if a
man rob me on the highway of my purse, and I do not sue for its re-
cover at once, that I am guilty of laches and have acquiesced in his
right to it!

Assuming that the allegations of this bill are true, as I must, Burt
secured from this coal company $400,000 in value of its property upon
promises of what he would secure Rogers to do, knowing at the time
that the things contemplated would not be done by Rogers, and no
practical good, but, on the contrary, evil, would inure to the company
in fact. However, if Burt cannot be held in trust relation to plaintiff
in this transaction, nor as its agent to secure these benefits for it, I
am nevertheless satisfied that allegations of the bill are sufficient to
charge that the consideration has wholly failed, and that no good or
valuable consideration can be relied upon by Burt and wife to retain
this property. The deeds are sought to be removed as clouds upon
title, and as having wholly failed in consideration. Near 100 cases
have been cited by counsel, pro and con, touching this subject, most
of which I have examined, but refrain from discussing now. If the
evidence upon final hearing is not sufficient to sustain the allegations
of this bill, then no discussion of these principles will be necessary.
If, however, such evidence is sufficient, I am well satisfied these same
defenses will be relied upon at final hearing, when the legal principles
can be much better applied to and illustrated by the facts as they shall
then be developed.

Let the demurrer be overruled.

PENNSYLVANIA STEEL CO. v. NEW YORK CITY RY. CO.
MORTON TRUST CO. v. METROPOLITAN ST. RY. CO.
GUARANTY TRUST CO. v. SAME.
(Circuit Court, S. D. New York. May 5, 1909.)

Receivers (§ 108)—Successive Receiverships Representing Different In-
terests—Accounting Between Receivers.

Suggestions made as to the settlement of accounts by a master between
receivers appointed for the lessee of a street railroad system, and by
whom it was operated for a time with the consent of the lessor and its
mortgages, and receivers subsequently appointed in foreclosure suits
brought by the latter, to whom on their appointment the property was
turned over, together with equipment, supplies, etc., purchased by the
former receivers and remaining on hand; the accounting being in part
for the purpose of determining to which estate various items of expendi-
ture by the receivers for the lessee, such as those for equipment, repairs,
and betterments, should be charged.

[Ed. Note.—For other cases, see Receivers, Dec. Dig. § 108.*]

In Equity. Memorandum as to accounting between receivers.
Byrne & Cutcheon, for Pennsylvania Steel Co.
Dexter, Osborne & Fleming, for receiver of New York City Ry. Co.
Bronson Winthrop, for Morton Trust Co.
Masten & Nichols, for receivers of Metropolitan St. Ry. Co.
Davies, Stone & Auerbach, for Guaranty Trust Co.

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
LACOMBE, Circuit Judge. In the opinion filed July 16, 1908 (165 Fed. 463), in the above-named suits, it was suggested that at the proper time the receiver of the New York City Railway Company would initiate such accounting before the special master, of which all parties to any of these suits should have notice and opportunity to be heard. The trial of two of the suits and the constant presentation in one form or another of controverted questions, which can be disposed of only after the facts are presented, strongly indicates the importance of now proceeding with this inquiry. In the opinion referred to some illustrations were given indicating the method of accounting; but it may be desirable to make some further suggestions, since it is expected that on this proceeding very many of the controverted questions above referred to will be settled finally, so as to be reviewable on appeal by any one dissatisfied with their disposition.

In one sense an accounting has already been had. At stated periods the receivers have appeared before the special master and proved their receipts and disbursements. Of course, that need not be repeated. What is now to be done is to take up the various items already passed and decide which receiver should pay it; against which estate it should be charged. To illustrate: The first item may be a pay roll for operating force; the next, a coal bill; the next, supplies for ordinary repair and operating. All these would presumably be charged to the New York City receiver. The next items may be for materials and labor rebuilding a burned car barn. Perhaps the aggregate of these items has been reduced by reimbursement of the New York receiver through moneys collected by Metropolitan receivers from insurance companies. Presumably the new building has cost more than the insurance, and the balance has been paid by New York receiver out of the income he received from operating the road. As to this, no doubt, there will be a controversy, on which the master may take testimony and hear argument, and will report whether it should be charged to New York City or Metropolitan. The next item may be for new cars, and will probably present similar questions.

While the total number of items involved is large, they will probably readily classify into groups, which present closely similar questions, and which should not take long to present and dispose of.

MORTON TRUST CO. v. METROPOLITAN ST. RY. CO. et al.

(Circuit Court, S. D. New York. May 6, 1909.)

1. STREET RAILROADS (§ 55*)—INSOLVENCY—SUITS TO ENFORCE RIGHTS OF CREDITORS—PROCEDURE.

In consolidated suits involving the administering of the property of an extensive street railway system and the respective rights of creditors of a lessee and the lessor, both insolvent, technicalities of pleading and practice will not be nicely considered; but the court will adopt such practice as seems best calculated to substantially secure and protect the equities of all parties.

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

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.
2. **Street Railroads (§ 55)**—Foreclosure of Mortgages—Apportionment of Receivership Expenses.

On the separate foreclosure of two mortgages on property of a street railroad system, the first mortgage covering a part only of the property, where receivers appointed under both mortgages have made expenditures and incurred obligations for betterments on various parts of the property, the decree of foreclosure and sale in each case will reserve the right to the court to impose a lien on the property covered thereby for its equitable share of such expenditures when determined.

[Ed. Note.—For other cases, see Street Railroads, Dec. Digs. § 55.*]

In Equity. On motion to dismiss cross-bill.

Bronson Winthrop, for Morton Trust Co.

Masten & Nichols, for receivers of Metropolitan St. Ry. Co.

LACOMBE, Circuit Judge. This is a motion made by complainant to dismiss the cross-bill of the Guaranty Company for technical reasons, and also on the ground that it has not been supported by proof. In a situation so complicated as this one, with so many conflicting interests and different suits, the court is not inclined to be over technical as to pleading and practice. If some way can be found in which the equities of all may be substantially secured, it will be adopted, although some novel practice may be thereby pursued. It seems to me that the cross-complainant has an equity which should be protected in some way, and which, quite possibly, may be secured in the manner proposed without working inequity to those represented by the complainant.

Briefly stated, the situation since August 1, 1908, is this: The receivers appointed by the court, under both mortgages, held possession of the entire property, managing and operating it as a unitary system devoted to a public service. In order to render that service, and to hold the property together, expenditures were incurred in excess of the gross receipts. There resulted a deficit, which no one disputes should be made good out of the corpus of the property which the receivers administered. Had there been but one mortgage, and that one covering the entire property, the matter would be easily disposed of by a clause in the decree of foreclosure and sale, such as will be found in the decree of March 18, 1909, in the Guaranty Trust Company suit. 168 Fed. 937. Under the terms of such a clause, a lien for the deficit would be imposed upon the whole property, and in the redemption of that property from such lien all its parts would ratably contribute. But such is not the situation. The first mortgage does not cover the whole property, and the second mortgage is a second mortgage only as to the property covered by the first, and is a first mortgage on the additional parcels, in which the bondholders secured by the Guaranty mortgage have no interest whatever. If the outcome of all this litigation were to be what it was hoped it would be, namely, a consolidation of both foreclosure actions and a sale of the whole property under both mortgages, there would be no difficulty; but such has not been the course of events. We have had to enter a decree under one mortgage, and are now proceeding with the foreclosure suit under the other mortgage. In the decree already entered a lien

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep’t Indexes

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for the entire deficit was imposed upon the property ordered to be sold under that decree. The logical course would be to impose a like lien upon the property to be sold under this decree; it being quite certain that, if offered for sale as a whole, the property offered under the decree in the second suit would be bought by the purchaser of the property sold under the decree in the first suit, because, without these additional parcels, or at least without most of them, the purchaser would not be able to continue the operation of the road as a unitary system.

Early in the trial of this suit, however, it was suggested that a sale might be had under more advantageous circumstances if the property were offered in separate parcels. This suggestion commended itself to the court, and the trial has progressed in the expectation that this could be done; but that question has not been decided finally by the court, and if such a sale could not be had, without working injustice to one interest or the other, a different conclusion may be reached. If the parcels now being foreclosed are sold separately, without reservation of any lien upon them or upon the proceeds, it would come to pass that expenditures which were made with money practically borrowed on the credit of the whole property would be borne solely by the bondholders of a part of the property, while the bondholders of the other parcels, whose value was increased by such expenditures, would contribute nothing towards the repayment. This would certainly be inequitable. It is proposed to provide against such a result by imposing upon the proceeds of each parcel sold a lien for the expenditures made since August 1, 1908, upon such parcel, for its betterment and improvement, which betterment and improvement, it must be presumed, has added to its value, at least as a piece of property adapted for railway purposes.

As the testimony now stands, it may not be practicable to state in dollars and cents precisely how much of these expenditures have been for betterment; but there is sufficient in the record to indicate that it is a substantial sum, and in view of that fact the cross-bill should not be now dismissed, and the motion is therefore denied.

LUCAS COUNTY v. JAMISON (and 11 similar cases),

(Circuit Court, S. D. Iowa, S. D. November 4, 1908.)

No. 15.

1. BANKS AND BANKING (§ 288*)—NATIONAL BANKS—INSOLVENCY—DISTRIBUTION OF ASSETS—PrioritY.

The fact alone that a deposit of public funds in a national bank by a public officer was wrongful, and known to be so by the bank, does not entitle a claim therefor to priority of payment over those of general creditors on the insolvency of the bank.

[Ed. Note.—For other cases, see Banks and Banking. Dec. Dig. § 288.*]

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

†Received for publication June 3, 1909.

In all cases where an insolvent national bank held funds as trustee, to entitle a claim therefor to a preference over those of general creditors in the distribution of the bank's assets, it must be shown that such funds have not been dissipated, but that they remain in the estate and can be identified, not by earmarks, but by being traced into the estate and there now found, to its augmentation.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 288.*]

In Equity.
Mitchell & Hunter, for complainant.
Bartholomew & Bartholomew, for defendant.

SMITH McPHerson, District Judge. The first National Bank of Chariton, Iowa, as the name implies, was a national bank organized and doing business for a good many years at Chariton, Iowa, under the national banking laws of the United States. Its capital stock was $50,000, of which S. H. Mallory, now deceased, owned at the time of his death, and for many years, had owned, $49,000; the remaining $1,000 being owned by Frank R. Crocker, the cashier. S. H. Mallory died on or about March, 1903, leaving his widow, Annie L. Mallory, and his daughter, Jessie M. Thayer, likewise a widow, as his only heirs and beneficiaries. On the night of October 30, 1907, the cashier, Frank R. Crocker, died by suicide. The Comptroller of the Currency, through a bank examiner, Mr. H. M. Bostwick, took possession of the bank the following morning, and the bank was found to be utterly insolvent. The bank had a fine reputation, and was believed by all to be solvent, earning good dividends, and was believed in all respects to be conducted and carried on in accordance with the law and good business principles. For just what length of time the bank had been insolvent has not been definitely disclosed; but there is testimony before the court tending to show that the bank had been insolvent for three years preceding the time it was closed by the Comptroller. Be this as it may, Mr. Crocker, by his peculations and mismanagement and embezzlements, made the bank insolvent beyond all question, leaving as undisputed and valid claims against the bank in the aggregate about $1,400,000, with assets of about $600,000. These statements are general, and no attempt is made to be precise or definite as to amounts.

Of these cases now under consideration, some were brought in the first instance in this court, and others were brought in the district court of Lucas county, Iowa, and transferred to this court, and were all heard at one and the same time on oral testimony, reduced to writing as shown by one volume of testimony, with documentary and written evidence and agreements of parties. Each of the plaintiffs in these several cases claims to be a preferred creditor and should be paid in full, and the question now for decision is: Are they preferred creditors? A statement is now made as to each case.

In the case above entitled of Lucas County v. Receiver Jamison, No. 15 Equity, the facts, briefly stated, are as follows:
The case is in equity. Section 1437 of the Iowa Code of 1897 as

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep’t Indexes
amended by chapter 36, p. 26, Acts 27th Gen. Assem., in the year 1898, provides in a general way, to be noticed more particularly later on, that the board of supervisors of a county may designate banks as depositories of the public funds received and paid out by the county treasurer. The statute provides for the taking of a bond of such banks, conditioned as provided by statute, and with surety to be approved by the board of supervisors. The evidence before the court does not show what took place between the treasurer and the bank prior to January 6, 1907; but on that day the treasurer had overdrawn, and on the following day, January 7, 1907, the county treasurer commenced to make deposits there, from which time on for many months he had a credit with the bank. April 6, 1907, the board of supervisors adopted a resolution reciting that the treasurer is permitted to deposit in that, as well as other designated banks, and providing that such banks shall have filed a bond with the county auditor of Lucas county, to be approved by the treasurer and the board of supervisors, in double the maximum amount that he may deposit with them, as provided by law, and that such portion of the public funds as may not be required for public use may be deposited on time certificates of deposit bearing interest at the rate of 3 per cent. per annum if such sum is left on deposit for six months, and with a rate of 2 per cent. per annum if such sum is on deposit for three months.

The bank through Crocker, cashier, presented a bond to the treasurer and board of supervisors, which bond is of date April 5, 1907, and filed April 6, 1907, and approved by the board of supervisors April 27, 1907. The signature of the bank, by Crocker, cashier, and of Crocker as security, and C. W. Ramsey and G. W. Larimer, are genuine signatures affixed by the parties. But the signatures of A. L. Mallory and J. M. Thayer, sureties to said bond, were and are forgeries, placed there by Crocker, cashier, by the aid of a rubber stamp, unauthorized by and unknown to Mrs. Mallory and Mrs. Thayer, and without believing that said signatures were genuine the said board of supervisors never would have accepted or approved said bond. Both Mrs. Mallory and Mrs. Thayer were directors of the bank, and had been since the death of Mr. Mallory. May 1, 1907, the treasurer had accumulated more than $30,000 in said bank, on which day the treasurer checked against said funds and in lieu thereof took three time certificates of deposit for $10,000 each, two of which were afterwards paid, leaving one certificate for $10,000 unpaid. The certificate was in the usual form, and was to bear interest at the rate of 3 per cent. if not cashed within six months. When the bank closed there was cash on hand in the bank $42,969.57. Of this $29,000 was in the reserve fund and in a box or vault kept for that purpose, which had been there during all of that year, and consisted of $23,000 in gold and $6,000 silver. This reserve fund parts of the year had been $40,000, and should have been kept at that. The county has a just claim against the bank of $47,116.22, which includes the certificate of deposit of $10,000 above referred to.

On August 14, 1907, the checking account of the treasurer was overdrawn $205.05. From the time the treasurer was overdrawn as to his checking account to the close of the bank the bank never shipped
any currency out to other banks, but did bring in from a Chicago bank $30,000; and from the time he was overdrawn to the close of the bank the treasurer deposited in cash in the bank $16,255.90, the balance of his deposit being by checks and drafts on other banks, and at once sent out by the bank. The drafts and checks amounted to $38,174.45, during which time he checked on said account $10,620.88, plus $700 the day before the bank closed, but which did not go on the books of the bank. From the time the treasurer took office, January 7, 1907, until the adoption of the resolution designating the bank as a depository, the county treasurer deposited with the bank in cash $35,385, not counting drafts and checks received by the bank from the county treasurer.

In the case of Sir William Mosher v. Receiver of the First National Bank of Chariton, Iowa, the facts are:

That October 25, 1907, one I. M. Wood bought of the said bank a draft for $1,550, drawn against the National Bank of the Republic of Chicago, Ill. The said draft was indorsed in due course of business by him, the said Wood, to the complainant herein. When presented to said National Bank of the Republic, payment thereon was refused for lack of funds. Wood purchased said draft with two checks, namely, one, dated October 19th, drawn by Luther Miller on the Cambria Savings Bank, Cambria, Iowa, for $1,500, and the other, dated October 24th, drawn by Curtis Mosher on the Humeston Bank of Humeston, Iowa, for $90; the balance evidently taken in cash from the First National Bank of Chariton, Iowa. These two checks were remitted in the usual course of business to the National Bank of the Republic for collection.

The case of Thomas J. Lovett, Trustee, v. James H. Jamison, Receiver of the First National Bank of Chariton, Iowa, is on the following facts:

Complainant is trustee of the estate of Kemp & Wright, bankrupts. The said bank, by an order of court something like two years, ago, was designated under the bankrupt statute as a depository for bankrupt funds; the order requiring said bank to give bond in the penalty of $10,000, with surety. A bond in due form was presented to the judge of the United States District Court, purporting to be signed by Annie L. Mallory and Jessie M. Thayer as sureties; and the judge, believing said bond to be genuine, approved the same. The names of said sureties were forged by Frank R. Crocker, the cashier of the bank, a fact not known until after the bank closed. Plaintiff, as trustee in bankruptcy, deposited the funds of the estate in said bank, aggregating $3,427.30, of which amount he checked out $2,289.52, which checks were paid; the last deposit being July 10, 1907, and the last check being October 2, 1907, leaving a balance due complainant as said trustee of $1,137.78.

The case of Samuel H. Moore, Trustee, v. Jamison, Receiver, is on the following facts:

Samuel H. Moore is trustee in bankruptcy of the estate of Wm. W. Rumble, bankrupt. The case presents precisely the same facts, except dates and amounts, as are presented in the Lovett Case. In this case complainant, as trustee, July 13, 1907, deposited $4,100.80, and later on a small amount, and made his last deposit October 22, 1907, of
§455; and from said funds he checked out moneys, the last being October 20, 1907, leaving a balance of $2,018.78 now due the complainant.

The case of Packers' National Bank of South Omaha v. Jamison, Receiver, is on the following facts:

On October 28, 1907, E. A. Brown, administrator of the estate of a decedent, sent to complainant a check on the First National Bank of Chariton, Iowa, for $855.35. Upon receipt of said check the Packers' National Bank of South Omaha sent said check by mail to the First National Bank of Chariton, Iowa, on which bank the check was drawn, for collection. On receipt thereof the First National Bank of Chariton, Iowa, marked said check as paid and charged the same against the account of Brown, administrator, and sent the Packers' National Bank a draft for the amount on the National Bank of the Republic of Chicago. On receipt of said draft the Packers' National Bank sent said draft to the Corn Exchange National Bank of Chicago for collection, which bank on the following day presented said draft to the National Bank of the Republic for payment, and payment was refused for lack of funds.

The case of E. H. Emery v. Jamison, Receiver, is on the following facts:

October 22, 1907, plaintiff, doing business at Ottumwa, Iowa, drew a sight draft with the bill of lading annexed on Gray, Von Behern & Co., of Chariton, Iowa, on account of a car load of potatoes, for $345. The First National Bank of Chariton, Iowa, presented the sight draft for payment, whereupon Gray, Von Behern & Co. gave its check on the First National Bank of Chariton, Iowa, for the amount, and, said concern having on deposit a sum greater than the amount of the check, said check was marked "Paid," and the amount thereof charged to Gray, Von Behern & Co., all of which was done October 29th. On that day the First National Bank of Chariton issued its draft, payable to the complainant herein for the amount, on the National Bank of the Republic of Chicago and transmitted said draft to the complainant at Ottumwa. On October 30, 1907, complainant deposited said draft in the National Bank of Ottumwa, Iowa, and on the same day the National Bank of Ottumwa, Iowa, sent the draft to the Continental National Bank of Chicago, and October 31, 1907, the Continental National Bank presented said draft to the National Bank of the Republic for payment, and payment was refused for lack of funds.

The case of Chandler Bros. v. Jamison, Receiver, is on the following facts:

Complainants do business at Chariton, Iowa, engaged in buying and selling sheep and importing sheep from Europe. October 28, 1907, plaintiffs had an account with the First National Bank of Chariton, Iowa, and on that day deposited a number of checks and drafts, amounting to $1,003.40; and on that day they bought from the First National Bank of Chariton, Iowa, a draft on the London City Midland Bank of London, England, for £1000, or $4,870, and paid thereof by check on the First National Bank of Chariton, Iowa, which check was charged to their account, leaving them owing an over-draft of some small amount, which was made good the next day. Be-
fore said draft came around the bank was closed, and, of course, payment refused.

The case of Joseph A. Brown v. Jamison, Receiver, is on the following facts:

On the 30th day of October, 1907, plaintiff deposited $2,310.35 in drafts with the First National Bank of Chariton, Iowa, one of $75.35 on the Citizens' Bank of Promise City, Iowa, payable to J. A. Brown, and this draft was sent to the Des Moines Savings Bank, and the First National Bank of Chariton, Iowa, took credit for it. Another draft of $25, dated October 28, 1907, was drawn by the Farmers' Bank of Grand River on the Continental National Bank of Chicago in favor of J. A. Brown, and was remitted by the First National Bank of Chariton to the First National Bank of the Republic on October 30, 1907, and credit was given to the First National Bank of Chariton, Iowa. The third was a draft of $2,200, dated October 28, 1907, drawn by the First National Bank of Creston, Iowa, on the Commercial National Bank, Chicago, payable to J. A. Brown. This draft was remitted to the Merchants' National Bank of Burlington, and placed there to the credit of the First National Bank of Chariton, Iowa. When the $75 check was sent to the Des Moines Savings Bank, and credit taken, the First National Bank had a credit of more than $2,000 in the Savings Bank. When the check of $35 was sent to the National Bank of the Republic, there was a balance due in said bank of about $56,000. When the draft of $2,200 was sent to the Merchants' National Bank of Burlington, the First National Bank of Chariton, Iowa, was overdrawn in the amount of $1,155.09; and the draft of $2,200 was taken to pay the overdraft, and the balance left to the credit of the First National Bank of Chariton, Iowa, which balance was $1,157.36, which the defendant, as receiver, received in cash.

The case of Guy Patterson v. Jamison, Receiver, is on the following facts:

One Paine had sold some real estate to plaintiff, Patterson. Paine executed a deed, and left the same with the cashier, Crocker. The deed was to be delivered to Patterson when an abstract of title was furnished showing a good title to the land bought. Patterson was to pay Paine $1,000 when the abstract was furnished and $1,350 at a later time, when the deed was to be delivered and possession of the real estate to be taken by Patterson. Patterson deposited certificates of deposit on the First National Bank of Chariton, Iowa, with Crocker, the certificates aggregating $385, and certificates of deposit on other banks aggregating $420. He may have deposited a small amount in money. At all events he lacked $115 of leaving the $1,000. He gave his note to Crocker's bank for $115, and for this note and the deposits thus made he took a certificate of deposit of Crocker's bank for $1,000, payable on the face thereof to Paine. These transactions all occurred October 26, 1907. Before anything further was done the bank closed.

The case of J. H. Wood v. Jamison, Receiver, is on the following facts:

September 18, 1907, plaintiff sent from Kansas to Crocker's bank a note for $170.45 on a party for collection. Later on, but just when does not appear, the bank presented the note to the maker, who took
up the note by giving his check therefor on some bank, and Crocker's bank obtained the proceeds of the check, but never remitted to plaintiff. None of these dates appear, other than when the note was sent for collection.

The case of William Sones v. Jamison, Receiver, is on the following facts:

Plaintiff had bought a piece of land subject to a mortgage of $1,200 and interest thereon. The note and mortgage were payable at the First National Bank of Chariton, Iowa, due and payable October 26, 1907. October 24, 1907, plaintiff left with the bank in Lacona, Iowa, the sum of $1,260 for the purpose of discharging said mortgage. That bank and the Chariton bank had business relations with each other, and the Lacona bank, instead of remitting the money for the payment of the mortgage, gave the Chariton bank credit therefor and sent to the Chariton bank a credit slip, but which was not entered upon the books of the Chariton bank. The bank obtained no part of said money, nor any benefit therefrom, other than by taking credit on the books of the Lacona bank for the amount.

The case of McKlveen & Eikenberry v. Jamison, Receiver, is on the following facts:

October 30, 1907, plaintiff deposited a check of $11.84 and one of $27.14, given by William Baxter to Eikenberry & Co., said checks being on the First National Bank of Chariton; and plaintiff was given credit therefor, and the maker of the checks charged therewith. On the same date plaintiff deposited with the First National Bank of Chariton, Iowa, a draft of $319.24 on the Continental National Bank of Chicago, drawn by the Ottumwa National Bank and payable to McKlveen & Eikenberry. Said draft was sent by the First National Bank of Chariton, Iowa, to the National Bank of the Republic of Chicago, and credit was given the First National Bank of Chariton, Iowa, on October 30, 1907.

As applicable to several of the foregoing cases, the following facts are to be considered:

August 9, 1907, the defendant bank issued its certificates of deposit for $75,000, payable to the National Bank of the Republic, Chicago, the same being in the usual form, which certificates the National Bank of the Republic held and received payment thereon as hereinafter stated. When the Chariton bank closed its doors, it had on deposit, subject to check or draft, with the National Bank of the Republic, $54,408.50. October 31, 1907, the day following the closing of the bank, the National Bank of the Republic wiped out said credit of the Chariton bank and applied said amount of $54,408.50 on said certificate of deposit and indorsed the amount thereon. On the following day, November 1, 1907, another draft came in that had been remitted by the Chariton bank of $2,041.54, and the National Bank of the Republic credited that amount on the said certificate of deposit and made the credit thereon. When the Chariton bank borrowed money from the National Bank of the Republic and gave its certificate of deposit therefor, it put up as collateral security $75,000 face value of bonds, owned by the Chariton bank, given by the Michigan City & La Porte Traction Railway Company, having certain interest coupons thereto
annexed. January 6, 1908, the National Bank of the Republic collected coupons of said bonds amounting to $1,875, and credited said amount on said certificate of deposit. January 20, 1908, the defendant bank, through its receiver, paid the balance of said certificate of deposit of $19,170.10, thereby extinguishing said certificate of deposit, and took up said collaterals of $75,000, which the receiver still holds as assets of the bank.

As between the First National Bank of Chariton, and the National Bank of the Republic, Chicago, there had been many transactions for quite a period of time; the Chicago bank being a correspondent of the First National Bank of Chariton. It will serve no purpose by going back of August 9, 1907, and perhaps that date is not very material. But August 9, 1907, the Chariton bank had to its credit with the National Bank of the Republic $9,787.10. On that day the certificate of deposit above alluded to was given, and by the time it was received by the bank at Chicago a day or two had elapsed, when the bank at Chicago gave the Chariton bank credit for the amount of the certificate, thereby increasing the deposit so that on August 12, 1907, the Chariton bank had to its credit $888,090.76; and from that time on until the bank closed its doors it never had a credit with the bank at Chicago exceeding that amount, with the exception of for a day or two, when it was increased slightly, but at once dropped back to an amount less than the amount last stated, until, when the bank closed its doors, it had on deposit $56,000 as above stated, which was extinguished by the application of said amount on said certificate of deposit.

It will be kept in mind that the court is dealing with a national bank, and that such a bank is a part of the general government's financial system, as was held in the case of Easton v. Iowa, 188 U. S. 220, 23 Sup. Ct. 288, 47 L. Ed. 452, reversing the Iowa Supreme Court. It was there held that the Iowa statutes relating to banks do not and cannot in any sense control national banks, for the reason that they are government agencies. If the Iowa statutes do not cover nor control national banks, it can be said with equal force that the decisions of the Iowa courts are in no way controlling, but are persuasive only to the extent of considering them in connection with the views of the other courts of the country. However, a brief review of some cases will show what the Iowa courts have decided.

Independent District v. King, 80 Iowa, 497, 45 N. W. 908, held that a school treasurer was a preferential creditor for public funds, the bank knowing the fact that the deposits were public moneys and deposited in violation of law, and that when the bank failed there was more money on hand than the public moneys thus deposited. That decision was made in the year 1890.

Davenport Plow Company v. Lamp (decided the same year) 80 Iowa, 722, 45 N. W. 1049, 20 Am. St. Rep. 442, is largely to the same effect, holding in effect that the relation of debtor and creditor did not exist, but that by reason of the wrongful acts a trust was created.

Brook v. King, 104 Iowa, 713, 74 N. W. 683, holds that one who deposits money in a bank for the sale of land is entitled to a preference.
Officer v. Officer, 120 Iowa, 389, 94 N. W. 947, 98 Am. St. Rep. 365, was in relation to deposits made by an executor. The gist of the opinion is to the effect that if the deposit was wrongful, "and the bank had notice of the character of the funds, there is no doubt that the claim should be given a preference."

Officer v. Officer, 127 Iowa, 347, 101 N. W. 484, need only be cited, as it was grounded on a contract.

Page County v. Rose, 130 Iowa, 296, 106 N. W. 744, 5 L. R. A. (N. S.) 886, was a case wherein taxpayers gave their checks on the bank for the amount of their taxes. The bank debited the taxpayers and credited the county treasurer with the amounts of the checks, and later on tax receipts were sent by the county treasurer to the taxpayers, pursuant to a custom or practice. The bank was not a designated depository. It was held that the county was to be preferred as against other creditors.

That the foregoing Iowa cases are in conflict with the great weight of authority and are wrong in principle I have no doubt. The more recent case of Hansen v. Roush, 116 N. W. 1061, by the Iowa Supreme Court, comes much nearer that which I believe to be the correct rule. There it was held that, before a preference would arise for enforcement, the following facts must exist: (1) There must be an express trust; (2) or by reason of the trust character of the deposit; (3) as money has no earmarks, it must appear that the assets have been increased by such trust deposits, and that they may be taken without prejudice to the rights of other creditors.

Since the argument of the cases at bar, the Iowa Supreme Court has decided the case of Brown v. Sheldon Bank, 117 N. W. 289. That was a case involving many alleged preferences, some of which were allowed, and others denied. One claim was thus allowed wherein the proceeds passed into the hands of the receiver. Another claim was denied; the holding being that a deposit by a school treasurer in his name as such did not entitle him to a preference. Another claim was given a preference as to the county by reason of the county treasurer making the deposit when the bank had not been designated as a depository by the county board, but denied the treasurer such preference. By the opinion the test does not seem to be as to whether the deposits could be traced through the bank to the receiver as to amounts so deposited, and that it is not material if the money has been dissipated.

It is said in one of the Iowa cases that to deposit public funds in a bank not designated as a depository is an indictable offense. That cannot be so, because there is no statute denouncing such acts, and a crime never exists by intentment. But in my opinion the Iowa rule is not the correct one, although other courts have made like holdings. But the weight of authority and the better reasons are to the contrary. It is not enough to show that the deposit was a wrongful act upon the part of either the depositor or the bank. Nor is it enough to show that the bank knew the deposit to be of public funds. These things must exist, with the further fact that the estate has been enlarged, with the still further fact that the money can be traced and shown to be part of the funds or assets at the time of the distribution. Lowe v. Jones,
"There is a conflict of opinion among the authorities as to whether, in the absence of statute, there exists in any political subdivision a common-law right to have its debts paid to it in preference to other creditors when the debtor is insolvent. But, as applied to insolvent banks in which deposits of public money have been made, the better rule seems to be that, in the absence of statute or a showing of facts sufficient to create a trust, a claim for public money has no preference over the claims of the general creditors, but stands on the same footing with them."

In Chosen Freeholders v. State Bank, 29 N. J. Eq. 268, affirmed in 30 N. J. Eq. 311, it is held that the prerogative of the English crown to have the debts due the crown first paid out of an insolvent estate is antagonistic to the cardinal objects of a free government. But the courts of Maryland, Georgia, Wyoming, and perhaps some others, hold otherwise. But if the facts are such as to show that the relation of creditor and debtor did not exist, but that of a trust, then there is a preference, and then the question is that of identity of moneys with the receiver. If the funds have been dissipated, so that it cannot be traced, then there can be no preference ordered.


"In the federal courts it is the generally accepted rule that the trust property must be clearly traced and shown to reside in the assets at the time when they are being distributed. Illinois Trust, etc., Bank v. Smith (C. C.) 15 Fed. 858, 21 Blatchf. (U. S.) 275; Peters v. Bain, 133 U. S. 693, 10 Sup. Ct. 354, 33 L. Ed. 696; San Diego County v. California Nat. Bank (C. C.) 52 Fed. 59; Spokane County v. Clark (C. C.) 61 Fed. 538; Multnomah County v. Oregon Nat. Bank (C. C.) 61 Fed. 912; Spokane County v. Spokane First Nat. Bank, 68 Fed. 979, 29 U. S. App. 707, 16 C. C. A. 81; Quin v. Earle (C. C.) 95 Fed. 728; Richardson v. New Orleans Debenture Redemption Co., 102 Fed. 789, 42 C. C. A. 619, 52 L. R. A. 67; In re Marsh (D. C.) 116 Fed. 306; In re Gaskill (D. C.) 130 Fed. 235. In Freilighuysen v. Nugent (C. C.) 36 Fed. 229, the rule was stated and applied in the following language: 'Formerly the equitable right of following misappropriated claims or other property into the hands of the parties receiving it depended upon the ability of identifying it; the equity attaching only to the very property misappropriated. The right was first extended to the proceeds of the property, namely, to that which was procured in place of it by exchange, purchase, or sale. But if it became confused with other property of the same kind, so as not to be distinguishable, without any fault on the part of the possessor, the equity was lost. Finally, however, it has been held as the better doctrine that confusion does not destroy the equity entirely, but converts it into a charge upon the entire mass, giving to the party injured by the unlawful diversion a priority of right over the other creditors of the possessor. This is as far as the rule has been carried. The difficulty of sustaining the claim in the present case is that it does not appear that the goods claimed—that is to say, the stock on hand, finished and unfinished (manufacturing materials)—were either in whole or in part the proceeds of any money unlawfully abstracted from the bank.'
In Philadelphia Nat. Bank v. Dowd (C. C.) 59 Fed. 172, 2 L. R. A. 480, it was held that trust funds held by a bank as trustee must be traced into some specific investment or fund, and that if they have been commingled with the general assets, so they cannot be distinguished, there can be no preference. But that holding was disapproved of in Massey v. Fisher (C. C.) 62 Fed. 568, where it was held that if the money can be traced into the vaults of the bank, and an equal or greater amount remains there, it is a sufficient identification.

Where a bank is acting as a trustee, it has been held that in paying out funds it will be presumed to have paid out funds other than those which it held in trust, and that, if the cash on hand in the bank has ever fallen below the amount of the trust fund, the minimum amount which it held at any time was the amount to be applied to the trust. Boone County Nat. Bank v. Latimer (C. C.) 67 Fed. 27; In re Dunning, 94 Fed. 709, 36 C. C. A. 437. And the rule has been applied in a case other than where a bank is trustee. Metropolitan Nat. Bank v. Campbell Commission Co. (C. C.) 77 Fed. 705. But a later decision holds that the rule has no proper application except in the capacity of a trustee. In re Mulligan (D. C.) 116 Fed. 715. See, also, Moreland v. Brown, 86 Fed. 722, 30 C. C. A. 23.

In Crawford County v. Patterson (C. C.) 149 Fed. 229, it appeared that the cashier of a bank was made deputy county treasurer, and proceeded to collect taxes at the bank and mingle the funds generally with those of the bank. The bank became insolvent, and the county attempted to establish a preferred claim against its assets for the amount of taxes held by the bank; it being shown that the bank was a trustee. Further, it appeared that from the beginning of the period during which the taxes were collected until the bank closed its doors no money had been paid out on obligations owing by it, but that a large amount had been paid out on discounts. On this state of facts the court held that the county could claim as trust money a sum equal to the minimum cash balance in the hands of the bank at any time during the period during which the collections of taxes were made and to the proceeds of all loans which were made during the same period.

It is not practical, nor within reasonable limits can the scores of cases cited by counsel be reviewed. Holding, as I do, that the deposits must have been wrongful and a trust created, I still further hold that the funds must be identified, not by “earmarks,” but traced into the estate, and there now found by an augmentation of the estate. If the alleged trust funds have been dissipated, then the cases are at an end; and with but one single exception such are the facts. In the case of Joseph A. Brown against the receiver it is shown by the evidence that the receiver received and now has $1,157.36 of such a deposit. This should be paid back to him in full, and by so doing the other creditors suffer nothing by the entire transaction; but as to all other cases the claimants have no right to be paid in full at the expense of other creditors. Any conclusion that may be reached works a hardship. But the hardship comes from the insolvency of the bank, and not from the holding of this court. All the creditors became such by reason of their confidence in the bank and its managing officer, in whom they believed and upon whom they relied. They believed him an honest man and a man of sagacity in business affairs. They thought they knew him, but they did not. In fact he was an embezzler and defaulter and a forger innumerable often. He wronged them and wronged the stockholders. But the other creditors never wronged these plaintiffs, who now ask to be paid in full; and, if they are paid in full, the other creditors must pay them by having their own dividends diminished. But this is not equity nor fair dealing,
and in my opinion neither law nor equity jurisprudence requires other creditors to pay them.

Here are 12 cases; but the court knows that there is still another on its docket, in which a preference of more than $100,000 is asked. And so it will be seen that, if preferences could be allowed in these cases, then the other case, involving so large an amount, might cover the same funds. But that is only mentioned to show where the preferences could be carried if the argument of plaintiff's counsel is sound. But the truth is that these credits of claimants went into the general business, and what were not stolen and embezzled, and thrown on the Stock Exchange, went into the Chicago bank, resulting in that large transaction; and that bank had the right to, and did, apply the balance in its hands on its indebtedness.

The result is that the decrees will be that of confirming claimants as general creditors, and general creditors only. The one exception is that of Joseph A. Brown, who will be given a preference to the extent of $1,157.36. Complainants will pay the costs, except in the one case, and in that the receiver will pay them.

WEST v. CINCINNATI, N. O. & T. P. RY. CO.

(Circuit Court, N. D. Georgia. May 15, 1900.)

1. COURTS (§ 374*)—FEDERAL COURTS—RULES OF DECISION—SERVICE.

Where a case is removed from a state court, and the defendant, a foreign corporation, appears specially, for the purpose of removal only, and objects to the sufficiency of the service, the Circuit Court must determine such objection for itself, and will not necessarily be controlled by the state law.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 374.*
State laws as rules of decision in federal courts, see notes to Wilson v. Perrin, 11 C. C. A. 71; Hill v. Hite, 29 C. C. A. 553.]

2. REMOVAL OF CAUSES (§ 115*)—SERVICE—SUFFICIENCY.

Where service on a foreign corporation is objected to after removal to the federal Circuit Court, the same rule should be applied in determining the sufficiency of the service as in a case originally brought in the Circuit Court.

[Ed. Note.—For other cases, see Removal of Causes, Dec. Dig. § 115.*]

3. COURTS (§ 374*)—FEDERAL COURTS—CONFORMITY TO STATE LAWS—PROCESS.

Defendant, an Ohio railroad corporation, was sued in Georgia on a transitory cause of action arising in Kentucky. Defendant had no tracks in Georgia and did no business in that state, except that it had a commercial agent, whose only duty was to solicit freight and passenger business, without authority to issue bills of lading, sell passenger tickets, or make contracts. Held, that defendant was not doing business in Georgia, so that service on such commercial agent would confer jurisdiction over the corporation so far as the federal courts were concerned, though the state courts had decided the contrary.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 374.*]

S. D. Hewlett and Smith & Hastings, for complainant.
Dorsey, Brewster, Howell & Heyman, for defendant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
NEWMAN, District Judge. The question now before the court in this case is on the sufficiency of the service. The suit was brought in the city court of Atlanta, and removed by the defendant corporation to this court. The defendant was served by serving Paul A. Wright, its commercial agent here. The language of the service is as follows:

"Georgia, Fulton County:

"Served the defendant, Cincinnati, New Orleans & Texas Pacific Railway Company, a corporation, by serving Paul A. Wright, its commercial agent, by leaving a copy of the within writ and process with him, in person, at the office and place of doing business of said corporation in Fulton county, Georgia, This August 4th, 1908. [Signed] J. T. Jones, Deputy Sheriff."

In removing the case from the state court to this court, and in its petition for removal, the defendant said:

"Your petitioner further shows that its appearance through its attorneys, to remove this suit, is a special appearance, and does not waive its objection to the jurisdiction of the court—it being solely for the purpose of removal of said Circuit Court of the United States for the Northern District of Georgia."

The original plea in abatement makes the question that Paul A. Wright does not in any sense represent the defendant in this state in such a way as to be an agent upon whom service can be perfected, and that the defendant does not do any such business in the state of Georgia as to give it a residence in the state of Georgia for the purpose of serving it, nor does Paul A. Wright represent it in such way as to make him an agent of the company upon whom service can be perfected, nor does he as such agent do any business for said company as to make said company do any business in the state of Georgia, so that it may be served by the processes of the courts of this state.

The defendant states that it makes this special appearance for the express purpose of objecting to the service and for no other purpose whatsoever. The plea makes the sheriff of Fulton county a party and asks that he be served.

The plea makes the question that the attempt to serve it is not due process of law. An amendment to the plea in abatement is as follows:

"And now comes defendant, and appearing specially for the purpose of this proceeding only, by leave of the court first had and obtained, and amends its plea in abatement and to the jurisdiction previously filed, and for such amendment says:

"Defendant has never been served with any notice or process in the above-stated suit, and the service attempted to be had upon it by serving Paul A. Wright, commercial agent, did not give jurisdiction of this defendant, for that the said defendant is not doing business in the state of Georgia, nor is the said Paul A. Wright its agent in the sense that service upon him would be service upon the company.

"Defendant, in common with the Alabama Great Southern Railway Company, a corporation of Alabama, maintains an office in the city of Atlanta, for the said Paul A. Wright, and pays him a monthly salary for his services as commercial agent only. As such, the said Wright has no authority on behalf of defendant to issue bills of lading for said defendant, nor make contracts of affreightment, nor to sell passenger tickets, nor to make contracts of carriage with passengers, but is solely a soliciting agent, and his duties and authority are to endeavor to have freight, moving from the Southern territory, or into the Southern territory, pass over the lines of defendant, such lines being wholly without the state of Georgia."
The Georgia statute (Civil Code of 1895) on the subject of service of corporations is as follows:

"Sec. 1899. Service of all subpoenas, writs, attachments, and other process necessary to the commencement of any suit against any corporation in any court, except as hereinafter provided, may be perfected by serving any officer or agent of such corporation, or by leaving the same at the place of transacting the usual and ordinary public business of such corporation, if any such place of business then shall be within the jurisdiction of the court in which said suit may be commenced. The officer shall specify the mode of service in his return."

The Court of Appeals of Georgia have had before it in Bell v. N. O. & N. E. Ry. Co., 2 Ga. App. 812, 59 S. E. 102, the question presented here, and has decided in practically the same kind of a case, where a commercial agent is served, that the service is good under the statute. In the opinion by Powell, J., he says:

"We are satisfied that the Legislature of this state intended that service upon an agent bearing such relation to a corporation as Knight does to the defendant in this case should be sufficient under the broad language of section 1899 of the Civil Code of 1895. * * * To this legislative intent it is our duty to give effect, and we will let the federal question take care of itself. See Southern Bell Telephone Company v. Parker, 119 Ga. 727, 47 S. E. 194."

In this case of Southern Bell Telephone Company v. Parker, 119 Ga. 727, 47 S. E. 194, a different kind of agent was served. It appears that in the Telephone Company Case the company had never established a telephone exchange or had an operator at Oglethorpe, Ga., but had a long-distance telephone located in the drug store of Dr. Crumley, who was authorized to receive toll from customers using the telephone placed in his store, and who was paid a commission on the tolls received at that station. Dr. Crumley was served in that case, and, while it is conceded in the opinion that the question was a close one as to whether he was such an agent as was contemplated by the statute, the court held the service sufficient.

It can hardly be doubted from the decision in the Bell Telephone Case that the service of the present suit in the city court of Atlanta would have been sustained in the state courts. The question for determination, then, is whether, the state court having acquired jurisdiction of the case under the law of the state, the Circuit Court should, when the case is removed here by special appearance for that purpose, and the defendant specially appearing to file a plea in abatement, adopt a different rule in view of federal authorities.

The Supreme Court of the United States has held that where a case is removed from the state court to this court, and the defendant, a foreign corporation appearing specially for the purpose of removal only, and the question of the sufficiency of the service is raised, the Circuit Court must determine for itself whether the service was good, and will not necessarily be controlled by the state law on the subject. The principal authority to this effect is Goldey v. Morning News, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517. In that case, in the opinion by Mr. Justice Gray, discussing this question it is said:

"As the defendant's right of removal into the Circuit Court of the United States can only be exercised by filing the petition for removal in the state court before or at the time when he is required to plead in that court to the
jurisdiction or in abatement, it necessarily follows that, whether the petition for removal and such a plea are filed together at that time in the state court, or the petition for removal is filed before that time in the state court, and that the plea is seasonably filed in the Circuit Court of the United States, after the removal, the plea to the jurisdiction or in abatement can only be tried and determined in the Circuit Court of the United States.

"Although the suit must be actually pending in the state court before it can be removed, its removal into the Circuit Court of the United States does not admit that it was rightfully pending in the state court, or that the defendant could have been compelled to answer therein, but enables the defendant to avail himself, in the Circuit Court of the United States, of any and every defense, duly and seasonably reserved and pleaded, to the action, 'in the same manner as if it had been originally commenced in said Circuit Court.'"

The same right would appear to exist under subsequent decisions of the Supreme Court, even without the special appearance for the purpose of removal only. In Wabash Western Railway v. Brow, 164 U. S. 271, 278, 17 Sup. Ct. 126, 41 L. Ed. 431, in the opinion by the Chief Justice, this feature of the question is discussed in this way:

"Want of jurisdiction over the person is one of these defenses, and, to use language of Judge Drummond in Atchison v. Morris (C. C.) 11 Fed. 582, we regard it as not open to doubt that 'the party has a right to the opinion of the federal court on every question that may arise in the case, not only in relation to the pleadings and merits, but to the service of process; and it would be contrary to the manifest intent of Congress to hold that a party, who has the right to remove a cause, is foreclosed as to any question which the federal court can be called upon, under the law, to decide.'

"An appearance which waives the objection of jurisdiction over the person is a voluntary appearance, and this may be effected in many ways, and sometimes may result from the act of the defendant even when not in fact intended. But the right of the defendant to a removal is a statutory one, and he is obliged to pursue the course pointed out, and, when he confines himself to the enforcement of that right in the manner prescribed, he ought not to be held thereby to have voluntarily waived any other right he possesses. An acknowledged right cannot be forfeited by pursuit of the means the law affords of asserting that right. Bank v. Slocomb, 14 Pet. 60, 65, 10 L. Ed. 354. The statute does not require the removing party to raise the question of jurisdiction over his person in the state court before removing the cause, or to reserve that question in respect of a court which is to lose any power to deal with it; and to decide that the presentation of the petition and bond is a waiver of the objection would be to place a limitation upon the jurisdiction of the Circuit Court inconsistent with the act, and inconsistent with the act.

"Moreover, the petition does not invoke the aid of the court touching relief only granted in the exercise of jurisdiction of the person. The statute imposes the duty on the state court, on the filing of the petition and bond, 'to accept such petition and bond and proceed no further in such suit,' and, if the cause be removable, an order of the state court denying the application is ineffectual, for the petitioning party, notwithstanding, file a copy of the record in the Circuit Court and that court must proceed in the cause.

"In this aspect the conclusion is impossible that the party submits to the jurisdiction of the state court by availing himself of a right to which he is entitled under the act of Congress, and which the state court is by that act required to recognize.

"It is conceded that, if defendant had stated that it appeared specially for the purpose of making the application, that would have been sufficient; and yet when the purpose for which the applicant comes into the state court is the single purpose of removing the cause, and what he does has no relation to anything else, it is not apparent why he should be called on to repeat that this is his sole purpose; and when removal is had before any step is taken in the case, as the statute provides that 'the cause shall then proceed in the same manner as if it had been originally commenced in said Circuit Court,' it seems
to us that it cannot be successfully denied that every question is open for determination in the Circuit Court, as we have, indeed, already decided.

"The Circuit Court of Appeals held that a petition to remove, without more, was tantamount to a general appearance, but that this result could be avoided by a special appearance accompanying or made part of, the petition, which would not be waived by or be inconsistent with the general appearance because the application was analogous to an objection to jurisdiction over the subject-matter. We do not concur in this view. By the exercise of the right of removal, the petitioner refuses to permit the state court to deal with the case in any way, because he prefers another forum to which the law gives him the right to resort. This may be said to challenge the jurisdiction of the state court, in the sense of declining to submit to it, and not necessarily otherwise."

I have quoted somewhat at length from this decision, notwithstanding the fact that in the present case the appearance was specially for the purpose of removal, because it discusses, not only the matter of the right of the defendant in the Circuit Court to object to the sufficiency of the service notwithstanding the fact that it removed without stating that it appeared specially for that purpose, but also generally the rights of a defendant after removal to raise the question of jurisdiction and of service.

In Conley v. Mathieson Alkali Works, 190 U. S. 406, 23 Sup. Ct. 728, 47 L. Ed. 1113, the case was originally brought in the state court and removed to the Circuit Court by the defendant corporation. After removal a motion was made in the Circuit Court to set aside the summons and service as null and void. Reference to a master was made. After taking testimony the master made a report to the effect that the defendant was not at the time of the service of the summons doing business within the state of New York. Exceptions were filed to the report, and the objections overruled, and the report confirmed. This ruling was assigned as error, and the case went by writ of error to the Supreme Court of the United States. In the opinion by Mr. Justice McKenna, after stating the facts and quoting the statute of New York, the opinion proceeds as follows:

"These sections, it is insisted, gave the state court jurisdiction, and that it follows that the Circuit Court had jurisdiction. But, granting the existence of a cause of action, it is not every service upon an officer of a corporation which will give the state court jurisdiction of a foreign corporation. This was declared in Goldey v. Morning News, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517. The case arose in New York, and the question presented was 'whether, in a personal action against a corporation which neither is incorporated nor does business within the state, nor has any agent or property therein, service of the summons upon its president, temporarily within the jurisdiction, is sufficient service upon the corporation.'

"As there was a difference between the rulings of the state court of New York and the Circuit Courts of the United States on the question, it was elaborately considered 'upon principle and in the light of previous decisions of this court.' The decisions were examined and the question was answered in the negative, and it was announced, as 'an elementary principle of jurisprudence, that a court of justice cannot acquire jurisdiction over the person of one who has no residence within its territorial jurisdiction, except by actual service of notice within the jurisdiction upon him or upon some one authorized to accept service in his behalf, or by his waiver, by general appearance or otherwise, of the want of due service. Whatever effect a constructive service may be allowed in the courts of the same government, it cannot be recognized as valid by the courts of any other government.' It was also held that the defendant by filing a petition for removal did not waive defense in the service of summons, and that objection could be made to such service in the Circuit Court.
Court of the United States in the same manner as if the action had been originally commenced there. Goldey v. Morning News was affirmed in Wabash Western Railway Co. v. Brow, 164 U. S. 271, 17 Sup. Ct. 126, 41 L. Ed. 451."

So I think it may be taken as settled law that the same rule would be applied in a removed case as would be in a case originally brought in the Circuit Court. This being true, the right of the Circuit Court of the United States to decide for itself on the sufficiency of the service, irrespective of what would be recognized as sufficient under the statutes or judicial decisions of the state, is fully established by the decisions of the Supreme Court and in many circuits.

In Barrow Steamship Company v. Kane, 170 U. S. 100, 111, 18 Sup. Ct. 526, 530, 42 L. Ed. 964, the rule to be adopted in the Circuit Court on this subject is stated in this way:

"On the other hand, upon the fundamental principle that no one shall be condemned unheard, it is well settled that in a suit against a corporation of one state, brought in a court of the United States held within another state, in which the corporation neither does business, nor has authorized any person to represent it, service upon one of its officers or employes found within the state will not support the jurisdiction, notwithstanding that such service is recognized as sufficient by the statutes of the Judicial decisions of the state."

Among a number of decisions in the Circuit Court that might be cited is a recent one by Judge Ward in the Circuit Court of the United States for the Southern District of New York. Craig v. Welch Motor Car Co., 165 Fed. 554. From the brief opinion in the case I extract the following:

"As the cause of action arose here, the service was good in the courts of this state under section 432, Code of Civil Procedure. But the rule in the federal courts is different. Goldey v. Morning News, 163 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517. The affidavits satisfy me that Swart was not acting for the defendant while in this state, and, if he were, a single transaction would not be enough to make service on him as a nonresident director good service on the defendant in the federal courts. Conley v. Mathieson Co., 190 U. S. 406, 23 Sup. Ct. 728, 47 L. Ed. 1113; Pennsylvania Lumbermen's Ins. Co. v. Meyer, 197 U. S. 407, 25 Sup. Ct. 483, 49 L. Ed. 810; Good Hope Co. v. Railway Co. (C. C.) 22 Fed. 635; Boardman v. S. S. McClure Co. (C. C.) 123 Fed. 614; Louden Co. v. American Co. (C. C.) 127 Fed. 1003; New Haven Pulp Co. v. Manufacturing Co. (C. C.) 130 Fed. 605; Buffalo Glass Co. v. Manufacturers' Glass Co. (C. C.) 142 Fed. 273."


It being thus well settled both as to removed cases and cases originally brought in the Circuit Court, this court will determine for itself as to the sufficiency of the service, and as to whether a foreign corporation is doing business in the state where the suit is brought, the question is whether in this case the person served was such an agent and doing such business in the state as to make the corporation subject to suit and to service here.

In the recent case of Green v. Chicago, Burlington & Quincy Railway, 205 U. S. 530, 27 Sup. Ct. 595, 51 L. Ed. 916, the Supreme Court decided that service on a commercial agent of a foreign corporation was not a sufficient service. The headnote of that case pertinent to this service is as follows:
"A railroad company which has no tracks within the district is not doing business therein, in the sense that liability for service is incurred, because it hires an office and employs an agent for the merely incidental business of solicitation of freight and passenger traffic."

In the opinion by Mr. Justice Moody this is said:

"The question here is whether service upon the agent was sufficient, and one element of its sufficiency is whether facts show that the defendant corporation was doing business within the district. It is obvious that the defendant was doing there a considerable business of a certain kind, although there was no carriage of freight or passengers. In support of his contention that the defendant was doing business within the district in such a sense that it was liable to service there, the plaintiff cites Denver & R. G. R. Co. v. Roller, 100 Fed. 738, 41 C. C. A. 22, 49 L. R. A. 77, and Tuchband v. Chicago, etc., Railroad Co., 115 N. Y. 437, 22 N. E. 360. The facts in those cases were similar to those in the present case. But in both cases the action was brought in the state courts, and the question was of the interpretation of a state statute and the jurisdiction of the state courts.

"The business shown in his case was in substance nothing more than that of solicitation. Without undertaking to formulate any general rule defining what transactions will constitute 'doing business' in the sense that liability to service is incurred, we think that this is not enough to serve the defendant within the district so that process can be served upon it."

It is insisted that the qualifying expression in the foregoing extract as to Denver & R. G. R. Co. v. Roller and Tuchband v. Chicago, etc., Railroad to the effect that "in both cases the action was brought in the state courts, and the question was the interpretation of the state statute and the jurisdiction of the state courts," should be taken as a suggestion by the Supreme Court, at least, if not a direct holding, that the question of the sufficiency of the service was one to be controlled by state statutes and decisions. It could hardly be supposed that by a mere suggestion such as this the Supreme Court would reverse all its previous decisions on this subject. After having held in a number of cases that the Circuit Court will decide for itself as to the sufficiency of the service and as to whether the corporation was doing business in the state where sued, it would hardly in this way reverse all of its former rulings. As a matter of fact the Tuchband Case was a case in the state courts, and was never in the federal courts at all. In the Roller Case the person served was a general agent in San Francisco of the defendant foreign corporation, and it would appear that both the Circuit Court and the Circuit Court of Appeals decided that he was such an agent and doing such business for the company in California as made it subject to suit in that state, and that the general agent was a person upon whom service could be properly perfected, and this decision was without reference of any ruling in the state court, but was made upon the facts there appearing as to the character of the agent and his business.

In the present case it appears that the defendant is a foreign railway corporation, has no tracks in Georgia, and does no business in this state, except that it has this commercial agent, Paul A. Wright, who is in the state simply for the purpose of soliciting freight and passenger business; that this agent issues no bills of lading, sells no passenger tickets, and makes no contracts of any kind. Under the conceded facts he is simply and solely a representative of the company for the purpose
of soliciting business. It cannot be true, therefore, under the decisions referred to and under many others which might be cited, that he is such an agent of the company in Georgia as that service can be perfected upon him, or that what he is authorized to do and does is such as that the company can be fairly said to be doing business in Georgia.

The defendant is an Ohio corporation, the cause of action arose in Kentucky, and, while this is a transitory action, the fact that the corporation is doing business in this state should be reasonably clear, at least, before it is required to litigate here, away from its home, and away from the place where the wrong, if any, was inflicted.

I have endeavored, by going very carefully over the matter, to reconcile the decision in the federal court with that of the Court of Appeals in Bell v. N. O. & N. E. Ry. Co., supra; but I am unable to do so. It is perfectly manifest to me that the service in this case cannot be upheld.

It results that the plea in abatement may be sustained, and it is so ordered.

In re MAXSON.
(District Court, N. D. Iowa, E. D. May 22, 1909.)

No. 603.

1. Bankruptcy (§ 399*) — Homestead Exemption — Failure to Claim in Schedule—Amendment of Schedule.

The failure of a bankrupt through oversight to make a claim to a homestead exemption in his schedule does not deprive him of the exemption allowed to himself and his family by the laws of the state, where timely application is otherwise made to the court of bankruptcy therefor, and such application, although not such in form, may properly be treated as an amendment of the schedule.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 669; Dec. Dig. § 399.*]

2. Bankruptcy (§ 399*) — Homestead Exemption — Right of Husband or Wife of Bankrupt to Claim—Iowa Statute.

Under Code Iowa 1897, § 2972, which provides that "the homestead of every family, whether owned by the husband or wife, is exempt from judicial sale," and section 2974, providing that no conveyance of the homestead shall be valid unless both husband and wife join therein, that a husband or wife who holds the title to the property occupied by the family as a homestead is adjudged a bankrupt does not deprive the other of the right to have the homestead set apart, even if not claimed by the bankrupt, and he or she may intervene in the bankruptcy proceedings for that purpose.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 669; Dec. Dig. § 399.*]

In Bankruptcy. On review of decision of referee.

On petitions of the bankrupt and her husband, Larnard Maxson, for review of the orders of the referee denying their claims to a homestead exemption in real estate scheduled by the bankrupt, Ethel Maxson, and of the trustee for review of an order denying his application to have the homestead of the bankrupt adjudged liable for the debts scheduled by her.

*For other cases see same topic & § number in Dec. & Ann. Diggs. 1907 to date, & Rep't Indexes
IN RE MAXSON.

E. E. Hasner, for the bankrupt and her husband.
Cook & Cook, for the trustee.

REED, District Judge. March 26, 1908, Ethel Maxson was adjudged bankrupt by this court on her own petition. In her schedule of assets she listed 120 acres of land in Buchanan county, this state, as held by her under a contract of purchase thereof, and for which she would be entitled to a deed upon payment of $5,615 and interest as provided in the contract of purchase. She scheduled no other property and made no claim for any exemption, and in Schedule "B (5)" the word "None" is written.

May 5, 1908, she filed with the referee a paper duly verified by her, in which she states:

"That she scheduled as an asset a certain contract or bond for a deed made by C. W. Van Orsod, with said bankrupt, of the following described property (describing the 120 acres of land above referred to).

"That she is in possession of said land, and is a married woman, and the head of family, and she has been in possession of said land as the head of a family ever since the contract was made with said C. W. Van Orsod, and that, before she became the owner of said property by virtue of said contract, it was the property and the home of Larnard Maxson, her husband, and had been such for a good many years.

"Wherefore she prays that her homestead interest in and to said premises be set off to her so as to include the ordinary dwelling house and outbuildings pertaining to said homestead tract, and that the trustee be compelled to exhaust her interest in and to the other property described in said contract after the homestead shall have been set apart to her, and she prays the court to fully protect all her rights in the premises."

October 24, 1908, the trustee not having set apart the homestead claimed by the bankrupt, and the referee not having acted upon her application of May 5th, Larnard Maxson, husband of the bankrupt, filed with the referee a petition as follows:

"Comes now Larnard Maxson and states to the court that prior to the 2d day of November, 1907, he was the owner in fee simple of the (describing the land scheduled by the bankrupt). That on said date last mentioned he conveyed the same to C. W. Van Orsod. That on the same date, November 2, 1907, C. W. Van Orsod executed and delivered to his wife, Ethel Maxson, a bond for a deed for said premises, conditioned that he would convey the same to the said Ethel Maxson upon her paying to him the sum set forth in said bond. That for a number of years prior to his conveying the same to the said C. W. Van Orsod, he was a married man, the head of a family, and was living upon the premises described herein, with his family, and occupying it as a homestead. That the family never removed from said premises, and are still living on said premises. That as husband of said Ethel Maxson he claims a homestead interest in said premises, and a homestead right in her equitable title to said premises which she acquired by virtue of the bond for a deed from said C. W. Van Orsod. That he prays the court that in the further progress of these proceedings that his homestead rights be fully protected, and so set off under the laws of the state of Iowa as not to render them liable for any debts of his own or those of his wife."

On the same day (October 24th) the bankrupt and her husband, Larnard Maxson, appeared before the referee by attorney and asked that a time be fixed for the hearing of their application to have the homestead set apart to them from the realty scheduled by the bankrupt, and to prescribe the notice that should be given thereof. A day was ac-
cordingly fixed by the referee and notice thereof given to the trustee, who appeared and filed written objections to the applications of the bankrupt and her husband upon the grounds: First. That the debts scheduled by the bankrupt as owing by her were all contracted prior to the date of the contract under which she claimed to own the land, and that neither she nor her husband is entitled under the Iowa statute to a homestead exemption in such lands as against such debts. Second. That the bankrupt in the schedules attached to her petition made no claim for exemptions, but stated that she claimed none. Third. That the bankrupt was granted a discharge in September, 1908. He also asked the referee to enter an order that the homestead rights of the bankrupt be subject to the debts scheduled by her. The referee, upon a hearing, denied the applications of the bankrupt and her husband, and the request of the trustee, and each severally petitions for a review of such orders.

Upon the hearing before the referee it was made to appear that on and prior to November 8, 1907, Larnard Maxson was a resident of Iowa, the head of a family, and the owner of 120 acres of land scheduled by the bankrupt, upon which he and the bankrupt with their family had lived for many years, 40 acres thereof being their homestead and exempt to them as such under the statute of Iowa. At that time the land was incumbered for some $5,500, and on that date they, Larnard Maxson and his wife, the bankrupt, made a warranty deed of said 120 acres to C. W. Van Orsdol, who in consideration thereof assumed and agreed to pay the incumbrances thereon and discharge some small debts owing to him by Larnard Maxson, in all amounting to $5,615, and on the same date, and as a part of the same transaction, Van Orsdol made and delivered to the bankrupt a written contract whereby he agrees to convey said land to her upon payment of said $5,615 and interest thereon at 6 per cent., upon terms stated in the contract, the bankrupt to have the use and possession of the property thereafter. No money or other consideration was paid by Van Orsdol for the land, and none was paid or promised to be paid to him by the bankrupt therefor other than the agreements made by her in said contract. The bankrupt and her husband continued to live upon the land thereafter, and to occupy the homestead the same as they had done for many years before. This transaction was in effect but a mortgage of the land to secure Van Orsdol for the amount that he should pay upon the incumbrances upon the land and the indebtedness owing him by Larnard Maxson. It also satisfactorily appeared that the failure of the bankrupt to claim a homestead exemption in the schedules attached to the petition was an oversight on the part of the attorney in preparing them, and, as soon as this was discovered, the paper of May 5th was prepared and filed with the referee for the purpose of correcting such oversight and to claim the homestead exemption. It does not appear that the trustee or any creditor of the bankrupt has been prejudiced, or that either has in any respect changed his position because of the failure to sooner claim the exemption, unless the discharge granted to her can be said to work such prejudice.

The single question for determination, therefore, is, Does the failure
of the bankrupt to claim the exemption in her petition in bankruptcy, or the writing of the word "None" in Schedule "B (5)," deprive her or her husband of the homestead exemption accorded to them and their family by the Iowa statute? The referee held that because the bankrupt had failed to claim the homestead exemption in the schedules filed by her, and did not formerly apply for leave to amend the schedule and claim the same therein, she thereby waived her right to the exemption. It is true that section 7 of the bankruptcy act of July 1, 1898, c. 541, 30 Stat. 548 (U. S. Comp. St. 1901, p. 3425), requires a bankrupt to make and file a schedule of his property and to claim therein such exemption as he may be entitled to. But it cannot be that a failure, through oversight in preparing the schedules, to therein make such claim, will deprive the bankrupt of the exemption allowed by the law of the state, when timely application is otherwise made to the court of bankruptcy therefor. Bankruptcy proceedings are proceedings in equity, and the estate of the bankrupt is to be awarded by the court of bankruptcy administering it upon equitable principles to those who may be justly entitled thereto. The manner in which the claim for exemption shall be made is a mere matter of procedure, and, as in other cases, amendments may be allowed to effect justice between the parties and accomplish the purpose of the proceedings. Section 954 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 696) is sufficiently broad to permit of such amendments in all cases pending in any court of the United States. The paper filed by the bankrupt with the referee on May 5th is not labeled as an amendment to the bankrupt's petition or to any schedule thereof, but it is a specific claim for a homestead exemption in the real property scheduled by her as an asset in which she claims an equitable interest, and is in fact an amendment to her petition claiming a homestead exemption in such property under the Iowa statute. The nature of the paper should be determined from its contents rather than its name, even when it is given one. October 24th, the trustee not having set apart the exemption thus claimed, the bankrupt applied to the referee to fix a time for the hearing of her application therefor, which time was fixed by the referee, and to deny that application because it was not formally named as an amendment to the petition or the proper schedule thereof would be to sacrifice substance to mere matter of form. The filing of the paper with the referee was sufficient to apprise him and the trustee that the bankrupt claimed a homestead exemption in the property scheduled by her, and was in sufficient time to enable the trustee or any creditor of the bankrupt to interpose any objections that either might have, if any, to the discharge of the bankrupt because of making such claim.

But if it should be held that the bankrupt has thus waived her right to the homestead, does this prevent the husband, who was one of the family occupying the homestead with her, from claiming it? On October 24th he also filed with the referee a petition in which he set forth that he was the husband of the bankrupt, a resident of Iowa, and as such was entitled to a homestead under the laws of that state in the real estate scheduled by the bankrupt. This was in effect an
intervening petition by him claiming an interest in property in the custody of the court of bankruptcy, and is the proper method of making such claim. Krippendorf v. Hyde, 110 U. S. 276–281, 4 Sup. Ct. 27, 28 L. Ed. 145.

Section 6 of the bankruptcy act provides:

"This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition in the state wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition."

The Code of Iowa 1897 provides:

"Sec. 2972. The homestead of every family, whether owned by the husband or wife, is exempt from judicial sale, where there is no special declaration of statute to the contrary."

"Sec. 2974. No conveyance or incumbrance of or contract to convey or incumber the homestead, if the owner is married is valid, unless the husband and wife join in the execution of the same joint instrument, whether the homestead is exclusively the subject of the contract or not, but such contracts may be enforced as to real estate other than the homestead at the option of the purchaser or incumbrancer."

"Sec. 2976. The homestead may be sold on execution for debts contracted prior to its acquisition, but in such case it shall not be sold except to supply any deficiency remaining after exhausting the other property of the debtor liable to execution. It may also be sold for debts created by written contract, executed by the persons having the power to convey, and expressly stipulating that it is liable therefor, but then only for a deficiency remaining after exhausting all other property pledged by the same contract for the payment of the debt."

Section 2972 is different from those statutes which allow an exemption to the head of a family only, and decisions under such statutes are not in point here. Reeseman v. Davenport, 96 Iowa, 330, 65 N. W. 301.

It is the public policy of the state of Iowa, as declared by its Legislature and decreed by its courts, that the homestead of every family, whether the legal title is held by the husband or wife, shall be beyond the stress of financial storms and the reach of creditors whose debts have been contracted subsequent to its acquisition; and any member of such family who continues to occupy the homestead as a home may assert his or her right thereto whenever it is sought to deprive him or her thereof by any form of judicial process or procedure. Parsons v. Livingston, 11 Iowa, 104, 77 Am. Dec. 135; Lunt v. Neeley, 67 Iowa, 97, 24 N. W. 739; Adams v. Beale, 19 Iowa, 61–68; Reeseman v. Davenport, 96 Iowa, 330, 65 N. W. 301; Foster v. Rice, 126 Iowa, 190, 101 N. W. 771; In re Rafferty (D. C.) 112 Fed. 512.

And the homestead right attaches to property, when occupied as a home, held under a contract for the purchase or lease thereof. Pelan v. De Bevard, 13 Iowa, 53; Stinson v. Richardson, 44 Iowa, 373; Lessell v. Goodman, 97 Iowa, 681, 66 N. W. 917, 59 Am. St. Rep. 432.

And in the last-named case the plaintiff had entered into a written contract with Joseph Goodman to sell to him a city lot to be paid for in installments, under which contract Goodman took possession of the lot, erected a house thereon, and occupied the same with his family as their home. A short time prior to the maturity of the second pay-
ment Goodman abandoned his wife, and thereafter lived separate and apart from her, while she with her daughter continued to occupy the place as their home. The plaintiff declared the contract forfeited for failure to make the payments as provided therein, and Goodman in writing acknowledged such forfeiture to be valid and binding. The plaintiff thereupon sought to dispossess the wife and recover the property from her because of such forfeiture and the acknowledgment thereof by the husband, but it was held that the acknowledgment of, the forfeiture by the husband and waiver by him of the homestead right was void, and that the wife was entitled to make the payments under the contract and receive a deed for the property.

In Re Rafferty (D. C.) 112 Fed. 512, Judge Shiras held that the children of the owners of a homestead continuing to occupy the same as their home after the death of the parents, who held the legal title, were entitled to hold the same as exempt from their own debts contracted after the death of the parents, and that upon the bankruptcy of such children the homestead so occupied by them should be set apart to them as exempt under the Iowa statute.

It seems clear, therefore, that under the Iowa statute, the homestead right of the husband or wife in property occupied by either as a home cannot be defeated by any act of the other in whose name the legal title may be held. If the bankrupt in this case, therefore, had declared in her petition that she expressly waived the right to the homestead in the property scheduled by her, and thereafter made no effort to have the property set apart to her as exempt, this would not defeat the right of the husband to have the homestead set apart to him, so long as he continued to occupy the same as such. If this be not so, then the spouse who happens to hold the legal title to the home may deprive the other, and other members of the family, thereof by proceedings in bankruptcy, and thus directly evade the provisions of the Iowa statute. Surely it was not intended that the bankruptcy act should have any such effect.

It is urged by the trustee that, though the wife may have a homestead right in this property, it is subject to debts contracted by her prior to its acquisition, and that the husband has no greater rights to the property than she has. But see Foster v. Rice, 126 Iowa, 190, 101 N. W. 771. While the homestead is exempt from debts generally, it may be liable for those contracted prior to its acquisition, or for those secured thereon by written contract executed as provided by the Iowa statute. But this does not destroy its character as a homestead nor defeat the general exemption thereof, and whether or not it may be subjected to certain specified debts will not be determined by the court of bankruptcy, for its jurisdiction over exempt property when it determines it to be such is to set it apart to the bankrupt, and, if it is liable for specific debts, the creditor to whom it is so liable must proceed to subject it to the payment thereof by proper proceedings in the state court. Lockwood v. Exchange Bank, 190 U. S. 294, 23 Sup. Ct. 751, 47 L. Ed. 1061.

If it is said that the discharge of the bankrupt will prevent the creditors from so proceeding in the state court, the answer is that
they should have made timely request of the court of bankruptcy to withhold the discharge for a reasonable time that they might do this; or, if the discharge was fraudulently procured, it might have been revoked in proper time. Section 15, Bankr. Act. But having taken no action in either direction, they are not in position to complain.

The conclusion, therefore, is, that the referee should have set apart to the bankrupt and her husband the property occupied by them as a homestead at the time the petition in bankruptcy was filed, and the matter is referred back to him with directions to do so. The order denying the request of the trustee is approved. It is ordered accordingly.

THOMAS v. MATTHIESSEN.

(Circuit Court, S. D. New York. March 12, 1909.)

CORPORATIONS (§ 263*)—STOCKHOLDERS—LIABILITY FOR CORPORATE DEBTS—SUCH TO ENFORCE IN OTHER JURISDICTIONS.

Defendant, a citizen and resident of New York, was a stockholder in an Arizona corporation which contracted an indebtedness to complainant while doing business in California. Const. Cal. art. 12, §§ 3, 15, and Civ. Code Cal. § 322, provide that each stockholder of a corporation shall be personally liable, in the same proportion that his stock bears to the entire stock, for all debts of the corporation contracted while he is a stockholder, and that no foreign corporation shall be allowed to transact business in the state on more favorable conditions than are prescribed for domestic corporations. Held, that there was no contractual relation between defendant and complainant which would support a suit in New York to enforce the personal liability imposed on stockholders by the Constitution and statutes of California.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 831, 1065; Dec. Dig. § 263.]

Stockholders' liability to creditors in equity, see notes to Rickerson Roller-Mill Co. v. Farrell Foundry & Machine Co., 23 C. C. A. 315; Scott v. Latimer, 33 C. C. A. 23.]

In Equity. On demurrer to answer.

Rollins & Rollins, for plaintiff.

Steele, Otis & Hall, for defendant.

MARTIN, District Judge. This action is brought to enforce the individual liability of the defendant as a stockholder in the Wentworth Hotel Company, a corporation organized under the laws of the territory of Arizona, which corporation constructed a hotel in the state of California and incurred an indebtedness which is now due from the corporation to the plaintiff.

Sections 3 and 15, art. 12, of the Constitution of the state of California read as follows:

"Sec. 3. Each stockholder of a corporation, or joint-stock association, shall be individually and personally liable for such proportion of all its debts and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes.
liabilities contracted or incurred, during the time he was a stockholder, as
the amount of stock or shares owned by him bears to the whole of the sub-
scribed capital stock, or shares of the corporation or association."

"Sec. 15. No corporation organized outside the limits of this state shall be
allowed to transact business within this state on more favorable condi-
tions than are prescribed by law to similar corporations organized under the laws
of this state."

Section 322 of the Civil Code of California makes definite provi-
sions for the enforcement of the two sections above quoted.

The complainant alleges that the indebtedness of said corporation
to him was incurred in and about the construction of said hotel, which
indebtedness, though demanded, the corporation has not paid, and that
by virtue of said provisions of the Constitution and Code of Cali-
forlia the defendant is liable in proportion to his stock. The de-
fendant, in his answer, denies all liability by virtue of the Constitution
and Code of California, and avers that, the corporation being incor-
porated under the laws of the territory of Arizona, a stockholder who
has made full payment for his stock cannot be assessed or made liable
for any indebtedness of the corporation simply by virtue of being a
stockholder, under said Constitution and Code of California, and that
he was at the time of the organization of the corporation, and ever
since has been, a citizen of the state of New York. He also avers
that it is provided in the charter of said corporation that there shall
be no personal liability of stockholders for the indebtedness of the
 CORPORATION, that the defendant had no knowledge of said provisions
of said Constitution and Code of California, and that his stock was
fully paid up, and therefore contends that there is no contractual rela-
tion between him, as a stockholder, and this plaintiff, as a creditor, of
the corporation, whereby the aid of this court can be invoked to en-
force upon him, as such stockholder, any part of the indebtedness
incurred by said corporation. To this answer the plaintiff demurs.

While a corporation is an intangible thing,—"it hath no soul, it
speaketh not, it doeth not," except through the officers who manage
it—yet in the eyes of the law it is a person. The shareholder and the
 corporation are different entities. The corporation transacts the busi-
ness, and in most cases it is done without the knowledge of the stock-
holder, and may be done against his protest. This defendant is a
resident of New York. The California Constitution and Code cannot
reach him without the jurisdiction of California, unless a contractual
relation exists between the parties. To my mind, the only theory un-
der which this defendant can be held liable is by construing the acts
of the corporation, in doing business in the state of California, as set
up in the answer, as an affirmative act on his part whereby he volun-
tarily became a contracting party, as no state can exercise direct juris-
diction and authority over persons or property without its territory.
The jurisdiction of sister states may be invoked to enforce the per-
formance of a contract.

As I read the facts set forth in this answer, no contractual relation
between these parties can fairly be implied. The case was ably argued
by counsel, and they fully appreciate its importance. They have indi-
cated to this court that they desire that the questions involved in
the pleadings may be speedily and squarely raised and heard in the appellate court. That can be best accomplished by sustaining the demurrer.

It is therefore ordered pro forma that the demurrer be sustained.

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MORNING v. CRAMP & CO.
(Circuit Court, E. D. Pennsylvania. May 20, 1909.)
No. 456.

MASTER AND SERVANT (§ 316*) — LIABILITY FOR INJURIES TO THIRD PERSONS — ACTS OF INDEPENDENT CONTRACTOR.

A contract between a general contractor for a building and a subcontractor, by which the latter was to take all the required structural steel work from the cars, and haul and erect the same in place as required by the principal contract, and to assume the responsibility of and pay for any damage to persons and property during the fulfillment of the contract, rendered the subcontractor an independent contractor, for whose negligence in piling material in the street, whereby a person was injured, the principal contractor was not responsible.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1242, 1243; Dec. Dig. § 316.*]

Who are independent contractors, see note to Atlantic Transport Co. v. Coney, 28 C. C. A. 392.]

At Law. On motion by defendant for judgment notwithstanding the verdict.

James J. Breen, for plaintiff.
W. W. Smithers, for defendant.

J. B. McPHERSON, District Judge. The defendants, Cramp & Co., had a contract with the city of Philadelphia to erect a school building at the corner where the plaintiff was injured. Some steel girders were piled upon the street in a negligent manner, and the injury was done while the plaintiff was alighting from a street car; her conduct having been free from contributory negligence. A recovery was had, and the question now is whether the jury should have been instructed that the defense set up at the trial must be sustained, namely, that the negligent piling of the girders was not the act of Cramp & Co., but the act of Etter & Co., an independent subcontractor. After a careful review of the testimony, my opinion is that the defense was valid, and that the defendants cannot be held liable for the regrettable injury suffered by the plaintiff.

The agreement between the defendants and Etter & Co. is in writing, and its construction is for the court. The relevant paragraphs are as follows:

"The said party of the second part [Etter & Co.] agree to furnish the necessary plant, labor, fittings, appurtenances, etc., to haul and erect, and the material and labor required to paint, all of the structural steel work, including all suspended ceilings, in accordance with the plans and specifications of the architect, J. Horace Cook.

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
"It is agreed that the steel work in this contract will be delivered f. o. b. cars Philadelphia, and that the said party of the second part is to furnish all labor, materials, and appurtenances that may be required to take the steel work from the cars, haul the same to the building, and erect the same in place as hereinbefore set forth.

"The said party of the second part agree to carry on the work as directed by Cramp & Co. and with such speed as not to delay the said Cramp & Co. in any manner whatsoever, either during the construction or in the final completion of the building by August 1, 1909. • • •

"The said party of the second part will, at their own cost and expense, supply all said materials and do all said work according to the requirements of said contract, and will push the same with such speed that the said Cramp & Co. and their subcontractors shall be enabled, so far as the assistance of said party of the second part is requisite, to complete the said building in the time stipulated by their contract with the city of Philadelphia. The materials and workmanship are to be of the best quality and shall be furnished to the fullest extent that said Cramp & Co. under their contract can be obliged to furnish them. • • •

"That the party of the second part shall assume the responsibility of and pay for any damage to persons or property during the fulfillment of this contract."

Clearly, as it seems to me, under the cases discussed and the others that are cited in the very complete note to Richmond v. Sitterding, 65 L. R. A. 445, and Coal Co. v. Grider, Id. 455, especially in section IX, pages 475 to 484, the effect of the foregoing provisions was to make Etter & Co. an independent contractor; and this relation was not changed by the clause providing that "the said party of the second part agree to carry on the work as directed by Cramp & Co." Neither is there in the evidence more than a mere scintilla at the most to show that the relation was changed, and that the defendants did actually use a full power of control over Etter & Co., and thereby made them in fact the servants of the defendants in spite of the written agreement. The notes of testimony show clearly, I think, that the suit has been brought against the wrong party, and that the verdict against Cramp & Co. cannot be allowed to stand.

Judgment may, therefore, be entered in favor of the defendants notwithstanding the verdict, and to the entry of such judgment an exception is sealed in behalf of the plaintiff.

SLEICHER v. PULLMAN CO. et al.

(Circuit Court, S. D. New York. May 4, 1909.)

1. REMOVAL OF CAUSES (§ 114*) — PROCEEDINGS AFTER REMOVAL — PROCESS IN STATE COURT.

Where a foreign corporation is doing some substantial business in a state, and a suit commenced in a state court by service of process valid under the state statute is removed into a federal court, such court will not set aside the service.

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

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
2. REMOVAL OF CAUSES (§ 114*) — PROCEEDINGS AFTER REMOVAL — PROCESS IN STATE COURT.

A foreign railroad corporation, which maintains offices in New York and there employs freight and passenger agents to solicit business, which also holds directors’ meetings, disburses dividends, and keeps an office for the transfer of its stock there, with an assistant secretary, is doing some substantial business in the state, and is subject to service of process under the New York statute, and such service will not be set aside by a federal court, in a suit brought in a state court, after its removal.

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

On Motion of Chicago, Burlington & Quincy Railroad Company to Set Aside Service of Summons.

Joseph G. Fenster, for plaintiff.
Alexander & Green, for defendants.

NOYES, Circuit Judge. The following facts upon the question whether the defendant railroad company, a foreign corporation, is doing business in the state of New York, may be regarded as established by the affidavits: (1) Said defendant leases and maintains offices in the state of New York, and employs freight and passenger agents who solicit business therein and negotiate with intending shippers and passengers. In some instances the passenger agent sends out and procures tickets for a prospective passenger from the initial carrier. (2) Said defendant has an assistant secretary in said state, whose special duty is to attend and give notice of directors’ meetings held in said state. (3) The directors of said defendant company sometimes hold meetings and transact business in said state. (4) Said defendant owns the office furniture, stationery, etc., in said offices in said state. (5) Said defendant, for the convenience of its security holders, remits money to fiscal agents in said state for disbursement among its bondholders and stockholders. (6) Said defendant has transfer agents in said state, who occasionally make transfers of its stock.

Upon these facts it is conceded that the service of the process in this action upon the assistant secretary was valid service under the statutes of the state of New York. Manifestly the defendant was doing some substantial business in the state, and came within the purview of its statutes relating to the service of process upon foreign corporations. It is true that these statutes are so broad that they may in terms authorize the service of process upon the officers of corporations doing no business whatever in the state. In such a case the service would be set aside upon removal to the Circuit Court. Goldey v. Morning News Co., 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517. But when it appears that such a corporation does some substantial business in a state, and the suit is commenced in a state court, and the service is valid under the state statutes, I do not understand that it should be set aside after removal, even though such action would be taken, had the case been commenced in the Circuit Court.

The facts in this case are stronger in favor of the plaintiff than in Denver, etc., R. Co. v. Roller, 100 Fed. 738, 41 C. C. A. 22, 49 L. R.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
A. 77, and Tuchband v. Chicago, etc., R. Co., 115 N. Y. 437, 22 N. E. 360, which the Supreme Court, in a case brought against the present defendant in the Circuit Court for the Eastern District of Pennsylvania (Green v. Chicago, etc., R. Co., 205 U. S. 530, 27 Sup. Ct. 595, 51 L. Ed. 916), although holding that the solicitation of business did not constitute doing business within the federal rule, distinguished upon the ground that they were cases in which the action was brought in the state court and the question related to the interpretation of state statutes and the jurisdiction of state courts. In the Denver Case the question was raised, as in the present case, in the Circuit Court after removal.

Although not necessary to the decision, I may add that I am not at all certain that, had this case been commenced in the Circuit Court, the principles of the Green Case, in view of the additional facts, would require the setting aside of the service.

The motion to set aside the summons and the service thereof is denied.

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COLLINS et al. v. EDWARD B. SMITH & CO.

(Circuit Court, E. D. Pennsylvania. May 19, 1909.)

No. 24.

APPEAL AND ERROR (§ 1213*)—REVERSAL—EFFECT ON SECOND TRIAL.

Evidence held not to differ so materially from that on a former trial of the case as to justify the court in entering a judgment notwithstanding the verdict under the Pennsylvania statute; the appellate court having held, in reversing a former judgment on a directed verdict, that there was an issue of fact which should be submitted to the jury.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dlg. § 1213.*]

At Law. On motions by plaintiff for a new trial and for judgment notwithstanding the verdict.

See, also, 158 Fed. 872.

Burr, Brown & Lloyd, for plaintiff.

Henry C. Boyer and Wm. A. Glasgow, Jr., for defendant.

J. B. McPHERSON, District Judge. The Pennsylvania act of April 22, 1905 (P. L. 286), is as follows:

"That, whenever upon the trial of any issue a point requesting binding instructions has been reserved or declined, the party presenting the point may, within the time prescribed for moving for a new trial, or within such other or further time as the court shall allow, move the court to have all the evidence taken upon the trial duly certified and filed so as to become part of the record, and for judgment non obstante veredicto upon the whole record; whereupon it shall be the duty of the court, if it does not grant a new trial, to so certify the evidence, and to enter such judgment as should have been entered upon that evidence, at the same time granting to the party against whom the decision is rendered an exception to the action of the court in that regard. From the judgment thus entered either party may appeal to the Supreme or Superior Court, as in other cases, which shall review the action of the court below, and enter such judgment as shall be warranted by the evidence taken in that court."

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
The argument of these motions presented the questions (1) whether under the foregoing statute the court would be justified in entering a judgment for the use plaintiff upon the whole record (his claim being capable of easy liquidation) in spite of the verdict in favor of the defendant; or—a question that is not materially different in effect—(2) whether a new trial should be granted in order that a binding instruction in favor of the plaintiff should be given to another jury. Assuming that the act of 1905 is applicable in the federal courts, both motions may be briefly considered together. Upon a former trial I had already given a binding instruction in favor of the plaintiff for reasons that are explained in 158 Fed. 872; and, as the Court of Appeals afterwards pronounced this instruction to be wrong, and decided that the question of ratification or acquiescence ought to have been submitted to the jury ([C. C. A.] 165 Fed. 148), it is apparent that neither of the pending motions should be granted, unless the evidence offered on the trial now under consideration differed so materially from the evidence offered on the first trial that the conclusion follows with reasonable certainty that the Court of Appeals would now approve an instruction in favor of the plaintiff.

Understanding this to be the proposition that is urged upon my attention, I have examined the notes of testimony taken at each trial, and in my opinion they do not differ so importantly that I can declare with any confidence what impression such differences as may exist would produce upon the minds of the appellate judges. I think, therefore, that my duty is simply to follow their instructions, leaving them to decide for themselves how far, if at all, the situation has been changed.

The motions are refused, and an exception is sealed to the refusal to enter judgment in favor of the plaintiff notwithstanding the verdict.
CUBA R. CO. v. CROSBY.

(Circuit Court of Appeals, Third Circuit. May 15, 1909. Dissenting opinion, May 17, 1909.)

No. 19, October Term, 1908.

EVIDENCE (§ 81*)—ACTION FOR NEGLIGENCE—MASTER AND SERVANT—PRESUMPTIONS—FOREIGN LAW.

In an action in a federal court by a servant against the master to recover for a personal injury received by plaintiff while in the employ of defendant in a foreign country, by reason, as alleged, of the failure of defendant to furnish plaintiff with reasonably safe machinery with which to work, the action being one cognizable at common law, the plaintiff will not be denied a recovery because the law of the foreign country is not pleaded or proved, but, in the absence of such proof, the court will apply the law of the forum, which will be presumed to be that also of the country where the injury was received. Slater v. Mexican Nat. R. R., 194 U. S. 120, 24 Sup. Ct. 581, 48 L. Ed. 900, Mexican Cent. R. R. v. Eckman, 205 U. S. 538, 27 Sup. Ct. 791, 51 L. Ed. 920, and Mexican Cent. R. R. v. Chantry, 136 Fed. 316, 69 C. C. A. 454, distinguished.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 102; Dec. Dig. § 81.*]

Contra, per Gray, Circuit Judge, dissenting, that it was essential to plaintiff's case to allege and prove that the acts of defendant complained of gave him a right of action under the laws of the county where they occurred, which was in this case a Latin country, where the common law was not in force.

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

For opinion below on rule for a new trial, see 158 Fed. 144.

Howard Mansfield, for plaintiff in error.

Benjamin M. Weinberg, for defendant in error.

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

ARCHBALD, District Judge. The plaintiff is a citizen of Tennessee, and the defendant a corporation and citizen of New Jersey, in the Circuit Court of which this suit was brought. The action is for personal injuries received by the plaintiff while at work for the defendant in the capacity of stationary engineer in a planing mill, in the Island of Cuba. The negligence charged is the failure to provide reasonably safe machinery and appliances; and the defense set up, in addition to denying the charge so made, was that the negligence, if any, was that of a fellow servant, or, if there was a defect in the machinery, that it was obvious, and the plaintiff therefore assumed the risk. The parties went to trial on these familiar issues, and the jury gave a verdict for $6,000, on which judgment was duly entered, a motion for a new trial being overruled.

The complaint here is that the court should have directed a verdict; the law of Cuba on the subject of negligence and the relative duties of master and servant not having been shown, the plaintiff, as it is claimed, being called upon to allege and prove what that

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

170 F.—24
law was, in order to make out a case. To this we are unable to agree. The cause of action is not one unknown to the common law, and so dependent upon statute, as in the case of negligence causing death. Neither is it, as in Slater v. Mexican Nat. R. R., 194 U. S. 180, 24 Sup. Ct. 581, 48 L. Ed. 900, expressly brought to enforce a liability of that character arising abroad, the foreign statute—that of Mexico—being declared on and proved, and the damages, by way of annuity or pension thereby given, being sued for and claimed. It may be conceded, also, that, having arisen in a foreign state, it is to be decided according to the law which there prevails, once it has been proved. But the question here is whether, a case having been established in all respects consonant with our ideas of right and justice, by which the plaintiff is thereby entitled to recover, according to the law as we understand it, we must stay our hands until the foreign law is shown. The question is not one peculiar to the federal courts, nor to be disposed of by any special rule prevailing there. Neither is it confined to the subject of torts. It may arise as well in a suit with regard to a note or bond, a policy of insurance, an inheritance, or a deed; and in each must receive similar treatment. However perfect in any such instance, therefore, the obligation may seem to be, no case is made out on which a verdict can stand, according to the doctrine which is contended for, unless at the same time the law of the foreign country where the obligation arose or the transaction took place is first made to appear. It might be a great hardship, amounting to a denial of justice, to compel this in some instances that we can conceive of, as in case of Senegambia or Thibet. Nor can a distinction be made that it shall apply to civilized countries that have a system of laws, while to countries that are uncivilized it shall not. The rule, as advocated, is that no relief can be given and that no case in fact exists, as there possibly would be if judged by the law of the forum, but that everything must be referred to the law where the transaction took place; according to which, if it was an uncivilized country and had no laws, there would be no right nor any wrong to redress. This is not our understanding of the law. The correct rule, as to which all the authorities, as we read them agree, is that, in the absence of proof of the foreign law, the court will apply the law as it conceives it to be, according to its own idea of right and justice, or, in other words, according to the law of the forum. That is the case between the different states of the Union, which in this respect are foreign to each other, where the presumption is freely, if not universally, indulged, that the law, except as it may be controlled by or dependent upon statute, is the same. That, also, is the rule as to countries strictly foreign; nor is it confined to those where the common law prevails. It is only another way of stating that, in the absence of proof, the law prima facie to be applied is the law of the place where the case comes up for trial. The authorities to this effect are so numerous as almost to be burdensome, but they are challenged by the argument, and it will not be out of the way, therefore, to go through them. It will simplify matters, however, and be more directly to the point, to cite only those which cover the case where the country is strictly foreign.
The law is thus laid down in Jones on Evidence (2d Ed.) § 84:

"Where the rights of litigants are to be determined in this country, although those rights may be affected by proof of the law of a foreign country where the contract was made or the right acquired, in the absence of any such proof the law of the forum must furnish the rule of decision."

Or, as it is put in 2 Whart. Conflict of Laws, § 778, p. 1531:

"Where there is no evidence as to the character of a foreign law, the courts will presume it to be the same as the domestic law; in other words, in lack of such evidence, the courts will presume the law governing the case before them to be the same as the lex fori."

In 13 Am. & Eng. Encycl. Law (2d Ed.) pp. 1060, 1061, after stating that it is a general rule throughout the United States that, in the absence of proof as to the laws of a sister state, they will be presumed to be the same as the lex fori, and that this has been extended so as to apply to the laws of foreign countries, and also that, while this is ordinarily limited to the common law and according to the weight of authority, no presumption arises that other countries or states have adopted the statute law of the domestic forum, it is added that:

"In the absence of proof of the foreign law, the court will of necessity proceed according to the law of the forum."

And in 9 Encycl. Plead. & Prac. 543, it is said:

"Where a foreign law is not properly pleaded and proved, the presumption is that it is the same as that of the state in which the action is brought."

Nowhere is the rule better or more clearly given than in Monroe v. Douglass, 5 N. Y. 447, where it is said by Foot, J.:

"It is a well-settled rule, founded on reason and authority, that the lex fori, or, in other words, the laws of the country to whose courts a party appeals for redress, furnish in all cases, prima facie, the rule of decision; and if either party wishes the benefit of a different rule or law, as, for instance, the lex domicilii, lex loci contractus, or lex rei sitae, he must aver and prove it."

Or, as it is succinctly put in Linton v. Moorehead, 209 Pa. 646, 59 Atl. 264:

"The law of any foreign state, if material, is a fact to be proved, and, in the absence of such proof, it is presumed to be the same as the law of this state."

This rule will be found to be abundantly sustained by an analysis of the cases.

Thus in Brown v. Gracey, Dow. & Ry. N. P. 41, 16 Eng. Com. Law, 426, note, action was brought on a promissory note, and there was a verdict for the plaintiff. Defendant moved for a new trial on the ground that the contract was made in Scotland, and that the plaintiff should have proved what the Scotch law was, and that the defendant was made liable thereby. But Abbott, C. J., said that, if the law of Scotland differed from the law of England as to liability, it lay on the defendant and not the plaintiff to prove it, and a rule was therefore refused. This case is cited with approval by Willes, J., speaking for the Exchequer Chamber in Lloyd v. Guibert, L. R. 1 Q. B. 115, 129, where it is said:

"A party who relies upon a right or an exemption by foreign law is bound to bring such law properly before the court, and to establish it by proof.
Otherwise, the court, not being entitled to notice such law without judicial proof, must proceed according to the law of England."

In Scott v. Lord Seymour, 1 Hurls. & Colt. 219, action was brought by one British subject against another for an assault and battery committed in Italy, and it was held by the court of Exchequer, as well as the Exchequer Chamber, that objection that by the law of Italy damages could not be recovered until certain penal proceedings which had been there commenced were determined was a matter of procedure only and no bar to an action in England. And Wightman, J., was of opinion that, if an action would lie by the English law for a particular wrong, the English courts would give redress, although it was committed in a country by the laws of which no redress was granted, if the parties were both British subjects.

In The Halley, L. R. 2 P. C. 193, it is said by Selwyn, Lord Justice:

"It is true that in many cases the courts of England inquire into and act upon the law of foreign countries, as in the case of a contract entered into in a foreign country, where by express reference, or by necessary implication, the foreign law is incorporated with the contract, and proof and consideration of the foreign law, therefore, become necessary to the construction of the contract itself; and as in the case of a collision on an ordinary road in a foreign country, where the rule of the road in force at the place of collision may be a necessary ingredient in the determination of the question by whose fault or negligence the alleged tort was committed. But in these and similar cases the English court admits the proof of the foreign law as part of the circumstances attending the execution of the contract, or as one of the facts upon which the existence of the tort, or the right to damages, may depend, and it then applies and enforces its own law so far as it is applicable to the case thus established"

—adding that in their lordships' opinion it was alike contrary to principle and to authority to hold that an English court would enforce a foreign municipal law, and give a remedy in the shape of damages in respect of an act, which according to its own principles imposed no liability on the parties from whom damages were claimed; thus showing how far, even when proved, the foreign law is limited.

The question seems to have arisen more often than anywhere in the New York courts, where the rule is uniformly and consistently enforced. Thus in Monroe v. Douglass, 5 N. Y. 447, already referred to, the court was called upon to construe and carry out a testamentary settlement executed by Sir William Douglass, probated and disposing of estates in Scotland. There was no proof of what the law of Scotland was, but the court did not hesitate to entertain and dispose of the case on that account, which it proceeded to do, holding that in the absence of proof it was to be determined according to the New York law.

In Whitford v. Panama R. R., 23 N. Y. 465, plaintiff brought suit as administrator for the death of his intestate, caused by the negligence of defendant company in the operation of its railroad on the Isthmus of Panama, in the then republic of New Granada. It did not appear that a right of action was given in such cases by the laws of that country, and the action, therefore, failed; but in disposing of that question, it is said that, while the courts do not in general take note of the laws of a foreign country except as they are proved, in the absence of proof they indulge in certain presumptions, as, for
instance, that a man is entitled to personal freedom and the absence of bodily restraint, as well as to be exempt from physical violence; for violation of which, committed abroad, if action be brought, the party need not in the first instance offer proof of their being unlawful in the place where they occurred, the courts not presuming the existence of a state of law not consonant with reason and natural justice in any country, whereby compensation is not given.

In Savage v. O'Neill, 44 N. Y. 298, trespass was brought for taking in execution, as the property of the husband, goods which were claimed by the wife. The wife testified that she loaned to her husband money which she got from her mother in Russia, for which her husband, by bill of sale, transferred to her the goods in question. The case turned on what her rights were to the money as against her husband under the Russian law. There was no proof of that law, but, in the absence of it, it was held that the law of New York furnished the rule.

In Hynes v. McDermott, 82 N. Y. 41, 37 Am. Rep. 538, which was an ejectment, the right of the plaintiffs to recover depended on their establishing relationship to one Hynes, which in turn depended on whether he had contracted a valid marriage. The evidence as to this was such that it would warrant an inference of marriage by the laws of New York, where suit was brought. But the acts and circumstances on which this was predicated took place, a part on English soil, a part on a vessel crossing the channel to France, and a part in France, where the parties subsequently lived. It was conceded that the acts in England did not make out a valid marriage according to the English law, and the French law was not proved. But it was held that enough was shown as to what occurred in crossing the channel and in France to establish a marriage according to the New York law, and that a verdict for the plaintiff was therefore properly entered.

In Mackey v. Mexican Central R. R. (City Ct. N. Y.) 78 N. Y. Supp. 966, which cannot be distinguished in principle from the present case, it was declared that, where suit is brought by a resident of the state against a foreign corporation to recover damages for personal injuries, sustained through the negligence of the defendant as a common carrier, in Mexico, it is not necessary to state the Mexican law in the complaint. If the law of Mexico denies the plaintiff's right to compensation, this is a matter of defense; for the court will not presume the existence of a state of law in any country by which compensation for such injuries is not provided.

In Pratt v. Roman Catholic Orphanage Asylum, 20 App. Div. 352, 46 N. Y. Supp. 1035, affirmed 166 N. Y. 593, 59 N. E. 1120, a bequest to St. Patrick's Church, Soho, England, was objected to on the ground that it did not appear that the legatee was an incorporated association competent to take. There was an effort made to prove that by the laws of England such an unincorporated association may take for charitable purposes, but it failed. And it was held that, a bequest to such an association being void by the laws of New York, it must, in the absence of proof, be held void in England too. "Whenever the question is presented," says Rumsey, J., "as to what is the
law of a foreign country in any given case, it must be established as a fact; and, if there is no evidence given upon the question, the court will either make no presumption at all, or will presume that the foreign law is the same as the law of this state."

Nor is there anything at variance with this in Crashley v. Press Publishing Company, 179 N. Y. 27, 71 N. E. 258, relied on by defendant's counsel. If it stood for what it is so cited, it would run counter to the current of the cases in that state which have been referred to. But the fact is it does not. The action there was libel for the publication in the New York World of an article reflecting on the conduct of the plaintiff, with regard to certain happenings, while he was a resident of Rio Janeiro, Brazil; the libelous charge in substance being that the plaintiff was engaged in a conspiracy to bring about a revolution in that country, the publication of the article having caused his arrest by the police of Rio Janeiro, and his being put in jail there for several days. The complaint was dismissed at the trial, and this was affirmed on appeal, it being held that no libel was shown, the article not being libelous per se, and there being nothing to show that by the law of Brazil the plaintiff was charged with crime. The ground of this decision, if carefully observed, will remove all question as to its purport. The article not otherwise reflecting on the plaintiff, it had somehow to appear that, by the laws of the land where the occurrence with which he was said to have been connected took place, an offense was committed which made him amenable thereto, which could only be shown by proof of what those laws were, as to which no presumption could be indulged, the frequent revolutions in South American countries, as it is somewhat gratuitously suggested, not warranting the inference that the fomenting of them there was derogatory to him. This goes a good ways. But however that may be, the mistake made is in identifying this in principle with a case where, independent of local law, and however it may be qualified thereby when it is shown, the plaintiff has a good case on its face, and does not have to invoke the local law to make it out.

In Sokel v. People, 212 Ill. 238, 72 N. E. 382, the defendant was indicted for bigamy, it being charged that he had been married before at Safed, in Palestine, Turkey, to prove which it was shown that a marriage ceremony had been performed there by a rabbi, the defendant being of the Jewish faith, and celebrated by the defendant's family and friends. He was at that time but 14 years old, and, coming to this country, he later married another woman in New York, with whom he was living when indicted in Illinois. It was essential, of course, to a conviction, to establish that the first marriage was valid, and it was contended by the defendant that it was necessary, in order to do so, to prove that he was authorized by the laws of Turkey to contract a marriage at his then early age, and that what took place in fact constituted a marriage. But it was held that a public ceremony conducted by one in holy orders, purporting to marry the parties, followed by cohabitation, having been shown, the presumption was that the marriage, so apparently contracted, was valid by the Turkish laws, and that, if it was not, the laws of Turkey, relied
on to show the contrary, should have been proved by him. This case is a most significant one, because in a criminal prosecution, where the rules of evidence, if anywhere, are strictly held, the presumption was indulged that, in the absence of proof to the contrary, that which constituted a valid marriage in Illinois made out a valid marriage in Turkey, unless the opposite was shown.

In Carpenter v. Grand Trunk R. R., 72 Me. 388, 39 Am. Rep. 340, plaintiff bought a ticket at Portland, Me., for a through trip to Montreal. By its terms, it was only good for a continuous passage, entered upon within two days from its date. Plaintiff started on his journey but stopped off at several places on the way, within the state, relying on a Maine statute which gives the holder of such a ticket the right to stop off as he chooses, and makes it good for six years. He finally boarded a train in Canada for Montreal, but was ejected by the conductor because his ticket by its terms was not good, and thereupon he brought suit against the railroad in Maine. But it was held that the action could not be maintained, the act relied upon having no extraterritorial force, and the statute law of Canada not being presumed to be the same. The significance of this decision here lies in the recognition that in the absence of proof the case was to be decided according to the local law, the common law, however, and not the statute law of the state, being applied, by the former of which the plaintiff had no case; and it is of peculiar interest and importance because of the distinction so drawn, which all the more confirms the rule.

In Woodrow v. O'Connor, 28 Vt. 776, the parties, who were then residents of Canada, submitted their differences to arbitrators, each executing a note to the other and depositing it with the arbitrators, to be delivered to the one in whose favor the award should be made. The plaintiff, having got the award, brought suit in Vermont on the defendant's note; and it was held that while the transaction was governed by the Canadian law, where the occurrence took place, there being no evidence as to what that law was, it would be assumed to be the same as that of Vermont, by which the plaintiff was entitled to recover.

In McLeod v. Conn. R. R., 58 Vt. 727, 6 Atl. 648, the plaintiff sued for personal injuries sustained in the province of Quebec, through the defendant's neglect to construct and maintain its railway at a point where it crossed a public highway there, as it should, according to the requirements of the statute law of the province. This statute was not set out in the declaration, which was demurred to on the ground that the action so shown was local and not transitory, and was not able to be brought in Vermont. But this view was not sustained. The right of action there, it is to be noted, depended on the Canadian statute, the same as where suit is brought on a foreign statute giving an action for death, as to which no presumption can be indulged; and this is to be kept in mind in order not to misconstrue what is said. That there was no intention to lay down anything other or different than the prevailing rule is shown by the decision last cited from the same state, as well as by the later one immediately following.

In State v. Morrill, 68 Vt. 60, 33 Atl. 1070, 54 Am. St. Rep. 870,
the defendant was indicted for larceny. The proof was that he stole a team in Canada and brought it into Vermont, the law of that state being that one who steals property in another jurisdiction and brings it into Vermont may be held there for larceny. The law of Canada showing that the act of the defendant in taking the team amounted to larceny in that dominion was not proved, in view of which it was contended that no conviction could be had. But the court applied the presumption that the law of Canada in the premises was the same as that of Vermont, and, as the taking of the team under the circumstances shown amounted to larceny by the Vermont law, the conviction was sustained. Here again, the same as in Sokel v. People, 212 Ill. 238, 72 N. E. 382, above, we have the presumption applied in a criminal case. The observations of Rowell, J., in this case, on the general subject under discussion, are too long to quote, but may be consulted with profit in this connection.

In Loaiza v. Superior Court, 85 Cal. 11, 14 Pac. 707, 9 L. R. A. 376, 20 Am. St. Rep. 197, it was sought to enjoin proceedings which had been instituted to set aside a sale of mining property in Mexico, on the ground of fraud; and it was, among other things, objected that the law of Mexico upon the subject had not been shown. But it was held that, until the contrary appeared, it would be presumed that the law of Mexico, on which the validity of the contract depended, was the same as that of California. And this doctrine was reiterated in Wickersham v. Johnston, 104 Cal. 407, 38 Pac. 89, 43 Am. St. Rep. 118, where, according to the first headnote, it is declared that, where there is no evidence tending to show what is the law of a foreign country touching the question raised, it must be presumed that it is the same as the law of the state where suit is brought.

In Chase v. Alliance Insurance Company, 9 Allen (Mass.) 311, suit was brought on a policy of marine insurance, and the case turned on the construction to be given to the charter party, which, having been executed in Scotland, was to be governed by the law there. There was no proof, however, of what the Scotch law was, and judgment was thereupon given to the plaintiff in accordance with the law of Massachusetts. "The law of Scotland upon a question of commercial law," as it is put in the headnote, "will be presumed to be the same as our law, in the absence of Scottish adjudications or evidence to the contrary." So in Aslanian v. Dostumian, 174 Mass. 328, 54 N. E. 845, 47 L. R. A. 495, 75 Am. St. Rep. 343, where the plaintiff sued to recover the money represented by a draft, drawn in Massachusetts on a party in Harpoot, Turkey, it was held that whether the law of negotiable paper was known in Turkey requiring the protection by protest of such an instrument was to be proved by the party who wished to profit thereby. And in Mittenthal v. Mascagni, 183 Mass. 19, 66 N. E. 425, 60 L. R. A. 812, 97 Am. St. Rep. 494, where the court was called upon to interpret a contract made in Italy, which by special stipulation was to be construed according to Italian law, it was declared that it would be assumed that "the law of Italy is like our own."

These cases taken at random from the reports, and by no means exhausting the list, conclusively show the law as it is administered in
the state and in the English courts. Nor in the federal courts is a
different rule in any respect applied.

Thus in Dainese v. Hale, 91 U. S. 13, 23 L. Ed. 190, suit was brought
to recover the value of certain personal property which it was charg-
ed that the defendant, when consul general of the United States in
Egypt, had unlawfully and maliciously attached. The defendant set
up that what he did he did in his official capacity, being invested with
judicial functions over citizens of the United States residing in Egypt,
as the plaintiff then was. His authority in the premises depended,
however, on the powers given him by the Turkish law; and it was
held that this he was bound to plead and prove. The significance of
this case consists not only in what it decides, but in what it assumes
and recognizes. The alleged trespass occurred in Egypt, and it was
thus, of course, controlled by the local law, once that was shown.
No question was made, however, of the right of the plaintiff, hav-
ing proved what amounted to a trespass as we apprehend it, in this
country, to recover without showing what that law was; while the
defendant, who sought to justify his acts under it, which were oth-
erwise unauthorized, was required to prove that he was exempt from
liability thereby. This was altogether unnecessary, however, it is
to be observed, if the rule which is now contended for were to pre-
vail, it being incumbent on the plaintiff, according to that, as the first
step in his case—the transaction having occurred in a foreign coun-
try—to show what the law of that land is and that he has a right to
recover under it.

But the question is set at rest, as it seems to us, by what is said
by Mr. Justice Bradley, speaking for the court in The Scotland, 105
U. S. 24, 26 L. Ed. 1001:

"In administering justice between parties," says that eminent judge, "it is
essential to know by what law, or code, or system of laws, their mutual rights
are to be determined. When they arise in a particular country or state, they
are generally to be determined by the laws of that state. Those pervade all
transactions which take place where they prevail, and give them color and
legal effect. Hence if a collision should occur in British waters, at least be-
tween British ships, and the injured party should seek relief in our courts, we
would administer justice according to the British law, so far as the rights and
liabilities of the parties were concerned, provided it were shown what that
law was. If not shown, we would apply our own law to the case. In the
French or Dutch tribunals they would do the same. But if a collision occurs
on the high seas, where the law of no particular state has exclusive force, but
all are equal, any forum, called upon to settle the rights of the parties, would,
prima facie, determine them by its own law, as presumptively expressing the
rules of justice; but if the contesting vessels belong to some foreign nationali-
ty, the court would assume that they were subject to the law of their nation,
carried under their common flag, and would determine the controversy ac-
cordingly. If they belonged to different nationalities, having different laws,
since it would be unjust to apply the laws of either to the exclusion of the
other, the law of the forum—that is, the maritime law as received and prac-
ticed therein—would properly furnish the law of decision. In all other cases,
each nationality will administer justice according to its own laws."

In line with these views, in Davison v. Gibson, 56 Fed. 443, 5 C.
C. A. 543, it was held by the Circuit Court of Appeals of the Eighth
Circuit that where the rights of the parties depended on the laws
of the Creek Nation, while the court would not take judicial notice
of what those laws were, and neither would it presume that they were regulated by the common law, yet, in the absence of proof as to what they actually were, the law to be applied was the law of the forum, and the court below was reversed for not doing so.

There is nothing counter to this doctrine in Slater v. Mexican National R. R., 194 U. S. 120, 24 Sup. Ct. 581, 48 L. Ed. 900, upon which much reliance is placed. The action there was to recover for the death of an employé, a switchman, who was killed in Mexico by the negligence of the defendant company, operating there. The right to recover was based on the Mexican law, which was set out and proved, as it had to be, there being no right of action otherwise. The compensation provided by that law, where death has been wrongfully caused, looks to the support of the dependent family by periodical payments, enforced by a decree, analogous, as it is said, to a decree for alimony, and subject to modification from time to time as circumstances vary. This measures the liability and inhere in and gives character to the relief given by that law, and, the courts of this country having no means for entering or enforcing a judgment of that kind, it was held that an action here could not be sustained. That is the whole of the decision, and, if it is kept in mind, no confusion can arise over what is said or what it stands for. In no respect was the question involved, which is here mooted, whether, on proof of a case otherwise good by the law as it is apprthended in this country, the plaintiff is entitled to recover, or is to be nonsuited, on its being shown that it arose abroad, if the foreign law is not proved in the same connection. What is said in the case is to be construed in the light of what was decided; not what was decided by what was said.

Neither is there anything which touches the question in Mexican Central R. R. v. Eckman, 205 U. S. 538, 27 Sup. Ct. 791, 51 L. Ed. 920, which was ruled on the strength of the Slater Case; the question there certified and passed upon being simply whether the plaintiff, who had been injured while in defendant’s service in Mexico, could recover without regard to the laws of that country, those laws having been put in evidence and proved, and showing the same character of liability discussed in the Slater Case.

Nor is the Court of Appeals of the Fifth Circuit to be regarded as having laid down any different rule. In Mexican Central R. R. v. Marshal, 91 Fed. 933, 34 C. C. A. 133, in that court, the plaintiff brought suit for injuries received while in the defendant's employ as a freight conductor in Mexico. He did not prove the laws of that country, and the defendant, while supplying them in part, stopped short of proving all of them, the article regulating the operation of railroads being omitted. But it was held that the failure to prove this article was not fatal, "because," as it is said, "in the absence of proof, it is to be presumed that, in the matter of liability of an employer for his negligence, resulting in injuries to an employé, the law of Mexico is the same as the law of Texas, in both of which the civil law originally prevailed." And this declaration was repeated in Mexican Central Railroad v. Glover, 107 Fed. 356, 46 C. C. A. 334, where the facts were substantially the same, except
that there was no proof whatever of the Mexican laws, and the defendant, on the strength of this, moved that a verdict be directed, which was refused. It is true that the presumption as to the laws of Mexico was indulged because of the common origin with those of Texas. But the contention here is that there can be no presumption whatever in any such case, the foreign law having to be alleged and proved, which these two decisions effectively refute.

Nor is the case of Mexican Central Railroad v. Chantry, 136 Fed. 316, 69 C. C. A. 454, in the same court, at variance with this. There, as in the others, the action was for personal injuries suffered by the plaintiff while employed by the defendant company as a railroad conductor in Mexico. But, differing from the others, the laws of that country were pleaded and proved, both those which gave the plaintiff a right of action, and those set up by the defendant, by which it was sought to be established in bar that, by legal proceedings held in Mexico, it had been decided that there was no liability by reason of the accident, and that the plaintiff had thus no cause of action. It was with a case of that character that the court had to deal, and to it whatever was said was necessarily addressed. There is nothing, as we view it, which bears, one way or the other, on that which is involved here. But if there is, it is to be taken with the facts of the case in mind. It cannot be assumed that there was any intention of qualifying the law as it had been laid down by the same court in the cases which had gone before, where the question here in issue came squarely up and was decided.

Having thus demonstrated, as we feel that we have from this review of the authorities, that, in the absence of proof as to what the foreign law is, a cause of action, good as to the law of the forum, unaffected by statute, is entitled to prevail, the judgment in the court below must stand. It is not as though there was a divergence of authorities, some holding one way and some another, as to which a difference of opinion might thus be indulged, and, whichever way they preponderated, the court would be entitled to choose those which suited it best. As we regard them, they are all one way, without a variant note, the contrary rule, which we are asked to lay down, whatever be said of its logic, having nothing by way of authority on which to stand. The plaintiff, as already stated, made out a complete case under our law based on the established duty of the master to his servant to exercise due care to supply him with reasonably safe machinery and appliances with which to work. This duty is not one imposed by statute, however it may be increasingly regulated or controlled thereby. It is one which has been evolved by the courts out of the character of the relation as a matter of right and justice, which may thus be well assumed to be the law of every civilized land, until something different is shown, particularly where, as here, the rights of citizens of the same nationality are involved. And on this theory the case was tried; the plaintiff proving that which would ordinarily be regarded as sufficient to make out a case of negligence by which the defendant would be liable, and the defendant denying and endeavoring to meet this by charging the accident to the negligence of a fellow workman, and setting up the plaintiff's knowledge of the de-
fect and assumption of the risk. Both parties thus planted them-
selves squarely on their respective rights at common law, recognizing,
if not conceding, that they were to be so determined. It is true that
at the close of the plaintiff's case, and again when the evidence on
both sides was in, a motion was made to dismiss the case on the
ground which is now urged. But that does not change the fact that,
as it was actually tried, it was treated as depending on and governed
by the law as ordinarily understood. Not only because of that, but,
above all, because of the rule which uniformly prevails that, in the
absence of proof to the contrary and until the foreign law has been
actually shown, the law of the land is to be applied, the case in our
opinion was correctly ruled at the trial, and should now be affirmed.

GRAY, Circuit Judge (dissenting). The writ of error in this case
brings up for review a judgment rendered in the Circuit Court of the
United States for the District of New Jersey. The action in which
said judgment was rendered, was brought by the defendant in error
(hereinafter called the plaintiff) against the plaintiff in error (herein-
after called the defendant), for personal injuries alleged to have
been received while the plaintiff was an employé of the defendant,
in a planing mill conducted by said defendant in the republic of Cuba.
These injuries were alleged by the plaintiff to have been the result
of defendant's negligence in not maintaining a certain stationary en-
gine, at which plaintiff was employed by defendant as an engineer,
in a reasonably safe, stable, and proper condition, so as not to en-
danger the safety of those of its employés who were compelled to
work near and about the same.

The defendant was a corporation of the state of New Jersey, and
the plaintiff proved that he was a citizen of the state of Tennessee.
The general jurisdiction of the Circuit Court, therefore, attached, by
reason of the diversity of citizenship. Plaintiff's declaration stated
the ordinary case of negligence of the employer, in not using due
care under the circumstances to provide for its employés safe tools,
machines, and appliances with which to work.

If the negligent acts, as charged in the declaration, had been com-
mitted in the state of New Jersey, it is not questioned that, by the
laws of that state, the laws of the forum, a right of action would
have accrued to the plaintiff. The declaration, however, charges that
these negligent acts were committed at Camaguey, in the republic
of Cuba, and the case was therefore justiciable in the Circuit Court
of the United States for the District of New Jersey only in case the
injury complained of constituted an actionable wrong under the laws
of Cuba, and imposed upon the wrongdoer an obligation to make
reparation. There is nothing, however, in the plaintiff's declaration
to indicate what right of action accrued to him, or what obligation
was imposed upon the defendant in the premises, by such laws.
Those laws were in no wise referred to, and the case was presented
to the court below on the theory that the plaintiff's right to recover
was established by the law of the forum, or else upon the theory that,
the law of the place where the alleged wrong was committed was to
be presumed to be the same as that of the law of the forum. The
theory first mentioned is, of course, untenable, and we think the latter is equally so.

It is well settled that, though the act be wrongful by the foreign law, if it is not wrongful by the law of the forum, no action will lie comity of the courts not extending, either in this country or in England, to the enforcement of liabilities not recognized by the law or policy of their own state or country. Macdade v. Fontes, L. R. 2 Q B. 281; Phillips v. Eyre, L. R. 6 Q. B. 1. The theory upon which such liabilities may be recognized and enforced is clearly stated by the Supreme Court in the late case of Slater v. Mexican Natl. R. R Co., 194 U. S. 120, 126, 24 Sup. Ct. 581, 48 L. Ed. 900. An action had been brought in the United States Circuit Court of Texas by the widow and children of William H. Slater, against a Colorado corporation operating a railroad in the republic of Mexico, to recover damages for the death of the said husband and father, who was employed by defendant company as a switchman on its road, and was killed, as alleged, through defendant's negligence, while coupling two freight cars in Mexico. The laws of Mexico, conferring a right of action, were set forth in plaintiff's petition. The defendant, by plea, set forth additional sections of the Mexican statute, by reason of which, as it contended, the action given by the Mexican laws was not transitory. A demurrer to this plea was sustained by the court below. The case was then taken to the Circuit Court of Appeals, where the judgment was reversed and the action ordered to be dismissed. This judgment of the Court of Appeals came before the Supreme Court, on certiorari, Mr. Justice Holmes, in delivering the opinion of the Supreme Court, said:

"We assume for the moment that it was sufficiently alleged and proved that the killing of Slater was a negligent crime within the definition of article 11 of the Penal Code, and, therefore, if the above sections were the only law bearing on the matter, that they created a civil liability to make reparation to any one whose rights were infringed.

"As Texas has statutes which give an action for wrongfully causing of death, of course there is no general objection of policy to enforcing such a liability there, although it arose in another jurisdiction. Stewart v. Baltimore & Ohio R. R., 168 U. S. 445, 18 Sup. Ct. 105, 42 L. Ed. 537. But when such a liability is enforced in a jurisdiction foreign to the place of the wrongful act, obviously that does not mean that the act in any degree is subject to the lex fori, with regard to either its quality or its consequences. On the other hand, it equally little means that the law of the place of the act is operative outside its own territory. The theory of the foreign suit is that although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an obligation which, like other obligations, follows the person, and may be enforced wherever the person may be found. Stout v. Wood, 1 Blackf. (Ind.) 71; Dennick v. Railroad Co., 103 U. S. 11, 18, 26 L. Ed. 439. But as the only source of this obligation is the law of the place of the act, it follows that that law determines not merely the existence of the obligation (Smith v. Condry, 1 How. 28, 11 L. Ed. 33), but equally determines its extent. It seems to us unjust to allow a plaintiff to come here absolutely depending on the foreign law for the foundation of his case, and yet to deny the defendant the benefit of whatever limitations on his liability that law would impose."

In Cooley on Torts (3d Ed.) p. 900, it is said:

"But it is agreed that to support an action (for a foreign tort) the act must have been wrongful or punishable where it took place, and that whatever
would be a good defense to the action, if brought there, must be a good defense everywhere."

See, also, Herrick v. Minn. & St. Louis Ry., 31 Minn. 11, 16 N. W. 413, 47 Am. Rep. 771.

It is clear, therefore, that the existence of an obligation, and the right to its enforcement by the foreign law, is essential to a valid cause of action in the trial forum, and the general rule in this country and in England undoubtedly is the one which flows logically from the premises, viz., that the existence of such obligation under the foreign law must be alleged and proved in the domestic forum; otherwise, no valid cause of action is made to appear to the court. In such cases, the foreign law must be proved as a fact; otherwise, the plaintiff fails to make out his cause of action, which is the obligation imposed on the defendant by that law, and by that law alone.

It must be noted that, in Slater v. Mexican Natl. R. R. Co., supra, the court, in the beginning of the statement which we have extracted from the opinion, say:

"We assume for the moment that it was sufficiently alleged and proved that the killing of Slater was a negligent crime, within the definition of article 11 of the Penal Code."

So also, in the case of Mexican Cent. Ry. Co. v. Chantry, 136 Fed. 316, 69 C. C. A. 454, which was not a case of death, but a suit brought in the Circuit Court of the United States, for injuries received by the plaintiff in Mexico. The petition set forth the laws of Mexico, which created the obligation sued upon, and the Circuit Court of Appeals for the Fifth Circuit said:

"To recover in this transitory action for the alleged personal injuries, it must be shown that the laws of Mexico give a right of action. Foreign laws are matters of facts, and, like other facts, must be pleaded and proved. Liverpool & G. W. S. Co. v. Phenix Ins. Co., 129 U. S. 397, 9 Sup. Ct. 469, 82 L. Ed. 788. Assuming that in this case it had been sufficiently pleaded and proved that under the laws of Mexico the plaintiff is given a civil right of action to recover from the defendant company for the injuries in question, we still meet the proposition that," the right of action was extinguished under the same laws.

The court then say:

"After much consideration, we conclude, on principle and authority, that the rule declared in McLeod v. Connecticut & P. R. Co., 58 Vt. 727, 6 Atl. 648, as follows: 'Although a civil right of action acquired or a liability incurred in one state or country for a personal injury may be enforced in another to which the party in fault may have removed or where he may be found, yet the right of action must exist under the laws of the place where the act was done or neglect accrued. If no cause or right of action for which redress may be had exists in the country where the personal injury was received, then there is no cause of action to travel with the person claimed to be in fault, which may be enforced in the state where he may be found—is a correct statement of the law of the case,'"

However it may be in cases where the alleged injury was committed in one of the other states of the Union, or in other places where the English common law prevails, there is clearly no presumption in the plaintiff's favor in the case under consideration. The court will take judicial notice of the fact that Cuba is one of the Latin countries, where the common law, as we understood it, is not in force.
As we have said, there is here no allegation of a cause of action under the laws of Cuba, or any reference to such laws. The plaintiff testified as to the facts as they occurred in that republic, and as he had not alleged, neither did he prove, that under the laws of Cuba any obligation was imposed by reason of said laws on the defendant. At the conclusion of plaintiff's testimony, defendant's counsel moved that the case be dismissed, on the ground that it clearly appeared that plaintiff had made out no cause of action justiciable in the forum in which his suit was being tried. The court overruled the motion as one for a nonsuit, saying that it would entertain a motion later. When the case closed, defendant's counsel moved to instruct the jury in favor of defendant, on the ground that the court had no jurisdiction, because it had not been proved that the law of Cuba gave any right of action on the facts in evidence. This motion was denied and exception was duly taken and allowed. After verdict in favor of the plaintiff, defendant's counsel, on the same ground, moved to set aside the same and enter judgment for defendant, notwithstanding the verdict. In denying this last motion, the learned judge of the court below delivered an interesting opinion. The part pertinent to our present purpose, we quote, as follows:

"An action brought in one of our states for damages resulting from a common-law tort committed in another of our states may doubtless be maintained without proof of the lex loci. But where an action to recover damages for a wrongful act committed in another state is maintainable solely under some statutory authority of that state, and not under the common law, there the statutes of the state conferring the right of action must be both pleaded and proven by him who asserts the right. See Wooden v. N. Y. & P. R. R. Co., 126 N. Y. 10, 26 N. E. 1050, 13 L. R. A. 438, 22 Am. St. Rep. 803, and Keep v. Natl. Tube Co. (C. C.) 154 Fed. 121. In the present case the right of action is not based on any statute of Cuba, and the defendant insists that the common law cannot be presumed to exist in Cuba, insomuch as that country was formerly a Spanish colony.

"But, as above stated, the defendant has filed the plea of the general issue only. The declaration alleges what, according to the lex fori, is actionable negligence on the part of the defendant. The defendant by pleading the general issue has not denied the legal sufficiency of the allegations of the declaration. If the lex loci delicti does not give to the plaintiff a right of action, that defense should have been presented by a special plea and supported by proofs offered by the defendant. I do not think it was obligatory on the part of the plaintiff to set forth in his declaration in express terms what the special law of the republic of Cuba on the subject of actionable negligence may be. He had the right to set forth a cause of action which, according to the law of the forum, would be complete, and in the event of a conflict between the lex loci and the lex fori, the defendant ought to have shown by a proper plea that under the lex loci the plaintiff acquired no right of action."

I cannot take this view of the rights of the defendant in this case. In the first place, there is nothing in either pleadings or proofs to show that the plaintiff was clothed with a right of action under any law of the republic of Cuba. In the next place, how are we to know, if there is any right of action at all, that it is not conferred by a statute whose limitations may be such as to render it not transitory, as was the case in Slater v. Mexican Natl. Railroad Co., supra? There is nothing upon which to found the statement of the learned judge of the court below, that "in the present case, the right of action is not based on any statute of Cuba." If presumption were allowable
as to this, the only reasonable one would be, that whatever right of action the plaintiff was clothed with, would be, as in Mexico and other Latin countries, derived from the written law of a civil code. As we have already said, there could be no presumption that the common law, as enforced in the federal court for the district of New Jersey, was in force in Cuba, where the accident happened, and we cannot see how the plea of the general issue could relieve plaintiff from fully establishing the cause of action upon which he had brought suit. It would, indeed, be a hard rule that would compel the defendant, by affirmative plea and testimony, to assume the burden of proving a negative, by showing that there was no law justifying the action in Cuba. If it is to be considered a question of jurisdiction, that question can always be raised in any form and at any stage of the trial. But the term 'jurisdiction' is somewhat vague and elusive. Courts may have general jurisdiction of the parties and subject-matter of a suit, and yet will not further entertain it when no cause of action is shown, and the word 'jurisdiction' is sometimes loosely applied in that sense.

It is not necessary, therefore, to deal with this case as one technically of jurisdiction, or to consider how it should be questioned, whether by demurrer or plea. The plaintiff comes into the court below, in New Jersey, declaring that he had suffered damage by reason of certain alleged negligent acts committed by the defendant in Cuba. Under a plea of the general issue, he produces testimony, tending to prove the acts alleged, but offers no proof that said alleged negligent acts constituted a cause of action in Cuba. Why should not the defendant have the right to require that he should complete his proof, by fully establishing his cause of action, and where he has failed to do so, to demand either that the case be dismissed, as in an ordinary case of failure of proof, or, that peremptory instructions upon all the evidence be given to the jury? The lex fori cannot help the plaintiff, as the right of the plaintiff and the obligation of the defendant must exist under the lex loci, or not at all.

As the federal courts will take judicial notice of the laws of the several states composing the Union, it would not be necessary, in a case like the present, to allege or prove the law of a state different from that of the forum, and it will be presumed, in the absence of proof to the contrary, that, in countries where the common law of England prevails, the lex loci is the same as the lex fori. Such a presumption, however, takes the place of proof, is a kind of proof, and is founded upon known probabilities, and is very unlike a legal fiction which exists independently of all probability and even of known facts. Here, outside the region of recognized probability upon which to found a presumption, the proposal is to presume the plaintiff's whole case—its entire foundation—as if, in an action upon an express contract, the existence of the contract itself were asked to be presumed—something quite different from indulging a presumption merely for an incidental purpose in the course of, and for the advancement of, a trial. It is true that we may presume that in all civilized countries, negligence is unlawful, but it is another and quite different thing to presume that the "law of negligence" is in all respects identical in all of them. No other subject is so fruitful of litigation or more prolific
of nice distinctions. While it is very likely that harmful negligence is held to be culpable wherever legal wrongs are redressed, it is very unlikely that the law in respect to torts, in states governed by the civil code, coincides with, and is without variance from, that where the common law prevails. Presumptions are resorted to for convenience in the administration of law, and in any case and for any purpose it is only the probable, and never the improbable, which the law ventures to assume. I know of no authority questioning these propositions and of no decision binding upon this court that controverts the logical conclusion therefrom.

There is no reason of public policy or comity which requires the courts of this country to relax their rules of procedure, so as to encourage or invite those who suppose themselves clothed with rights of action under foreign laws to litigate them in our courts. Nor is there any hardship, in a case like the present, where the plaintiff omits or declines to fully allege or prove his cause of action, in remitting him to the country by whose laws, and by whose laws alone, his right of action exists. Nor can the plaintiff complain, who seeks to enforce in the courts of this country, in an action of tort, an obligation which if it exists at all, depends absolutely for its existence upon a foreign law, that he should be required to so equip himself as to be able to allege and prove what that foreign law may be.

I think that, in the rulings of the court below upon these questions, there was error, and that the judgment below should be reversed.

HARPER v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. April 30, 1909.)

No. 2,741.

1. Indictment and Information (§ 71*)—Sufficiency of Accusation—Certainty and Particularity.

In determining the sufficiency of an indictment, the question is not whether it might have been made more certain, but whether it contains every element of the offense intended to be charged, and sufficiently apprised the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 193; Dec. Dig. § 71.*]

2. Banks and Banking (§ 257*)—National Banks—False Entry by Officers—Sufficiency of Indictment.

An indictment under Rev. St. § 5209 (U. S. Comp. St. 1901, p. 3497), which charges the defendant as cashier of a national bank with having made a false entry in a report with intent to deceive an officer of the association, need not describe the report with technical accuracy, and an averment of the date when made, and that it was a report made to the Comptroller of the Currency showing the resources and liabilities of the bank on a certain date, is sufficient to authorize the presumption that it was a report made by the association under section 5211.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 971; Dec. Dig. § 257.*]

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

Rev. St. § 5209 (U. S. Comp. St. 1901, p. 3497), which makes it a criminal offense for any officer or agent of a national bank to make any false entry in any report of the association with intent to deceive any officer of the association, etc., includes a report voluntarily made as well as one required by law, if the false entry was made with the requisite unlawful intent.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 960; Dec. Dig. § 256.*]


On the trial of a defendant charged with making a false entry in a report of a national bank of which he was cashier, where witnesses were allowed to testify as to his reputation for truthfulness and honesty, it was not error to exclude testimony as to his reputation for morality and sobriety as irrelevant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 836, 840; Dec. Dig. § 377.*]


Instructions given on the trial of a defendant charged with having, while cashier of a national bank, made false entries in a report of the bank, with intent to deceive the president thereof, considered, and, taken together, held not erroneous.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 257.*]

Sanborn, Circuit Judge, dissenting.

In Error to the United States Court of Appeals in the Indian Territory.

For opinion below, see 7 Ind. T. 437, 104 S. W. 673.

Charles B. Rogers and James S. Davenport, for plaintiff in error.

William J. Gregg, U. S. Atty.

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

RINER, District Judge. At the October term of the United States Court for the Northern District of Indian Territory, sitting at Vinita, the plaintiff in error, hereafter called the defendant, was indicted for making a false entry in a report to the Comptroller of the Currency, showing the resources and liabilities of the First National Bank of Miami, Ind. T.

The statute upon which this indictment is based is section 5209 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 3497), being a portion of the national banking act, and, so far as it applies to this case, the section is as follows:

"Sec. 5209. Every president, director, cashier, teller, clerk or agent of any association * * * who makes any false entry in any book, report, or statement of the association, with intent in either case, to injure or defraud the association * * * or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association * * * shall be deemed guilty of a misdemeanor * * *.*"

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
The indictment contains but one count, and is in the following words:

"United States of America, Indian Territory, Northern District—ss.:

"In the United States Court for the Northern District of the Indian Territory, sitting at Vinita, October Term, 1904.

"United States vs. S. D. Harper. Indictment for violation of Section 5209, R. S. U. S.

"The grand jurors of the United States of America, duly selected, impaneled, sworn and charged to inquire within and for the body of the Northern district of the Indian Territory, in the name and by the authority of the United States of America, upon their oaths do find, present, and charge that on the 14th day of February, A. D. 1903, and within the Northern district of the Indian Territory, one S. D. Harper, being then and there the duly elected, qualified, and acting cashier of the First National Bank of Miami, Indian Territory, a corporation duly organized and existing under and by virtue of the laws of the United States in force in the Indian Territory, unlawfully and feloniously, and with the unlawful and felonious intent in him, the said S. D. Harper, then and there to deceive one E. B. Frayer, the said E. B. Frayer being then and there the duly elected, qualified, and acting president of the said First National Bank, did make a certain false entry in a certain report showing the resources and liabilities of said First National Bank on the 6th day of February, A. D. 1903, to the Comptroller of the Currency by then and there stating in said report that the liability of him, the said S. D. Harper, as payer to the said First National Bank, was the sum of thirty-four hundred and seventy (3,470) dollars, whereas, in truth and in fact, the liability of him, the said S. D. Harper, as aforesaid, was in the sum of fifty-four hundred and ninety-five (5,495) dollars; and the grand jurors aforesaid, upon their oaths aforesaid, do find, present and charge that he, the said S. D. Harper, then and there well knew and believed the said liability of him, the said S. D. Harper, as payer to the said First National Bank, on said 6th day of February, A. D. 1903, as aforesaid, was then and there in the amount of fifty-four hundred and ninety-five dollars; contrary to the form of statute in such case made and provided, and against the peace and dignity of the United States of America."

To this indictment the defendant demurred; the demurrer was overruled, an exception taken, and on the same day the case proceeded to trial, resulting in a verdict finding the defendant guilty. The case was then appealed to the Court of Appeals in the Indian Territory, where the judgment was affirmed, and the case is here for our consideration upon a writ of error to that court.

Fourteen errors are assigned, but counsel in their brief group assignments 1, 2, 3, 6, 7, 8, 9, 10, 11, 12, and 13 and argued them together. They all relate to the one general subject—the sufficiency of the indictment, and the rulings of the court upon objections thereto.

It must be conceded that the indictment is rather loosely and carelessly drawn, and we cannot forego the suggestion, at the outset, that in all cases of this character it is safer and better in the preparation of indictments to follow approved forms and precedents. But the question here is not whether the indictment, as was said by the Court of Appeals for the Ninth Circuit, in Peters v. United States, 94 Fed. 187, 36 C. C. A. 105, "might possibly have been made more certain, but whether it contains every element of the offense intended to be charged, and sufficiently apprised the defendant of what he must be prepared to meet; and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction." United

It is undoubtedly a well-established rule in criminal pleading that the indictment must be sufficient to fully apprise the defendant of the charge made against him, and that no statute could make valid an indictment that deprived him of such right. But it must, as was said by the Supreme Court in Evans v. United States, 153 U. S. 584, 14 Sup. Ct. 934, 38 L. Ed. 830, “be borne in mind that the object of criminal proceedings is to convict the guilty, as well as to shield the innocent, and no impracticable standards of particularity should be set up, whereby the government may be entrapped into making allegations which it would be impossible to prove.”

The indictment sets out the fact that the defendant, on the 14th of February, 1903, was then and there the duly elected, qualified, and acting cashier of the First National Bank of Miami, Ind. T., a corporation duly organized and existing under and by virtue of the laws of the United States. It then proceeds to charge that he unlawfully and feloniously, and with the unlawful and felonious intent to deceive the duly elected, qualified, and acting president of the bank, “did make a certain false entry in a certain report showing the resources and liabilities of the said First National Bank on the 6th day of February, A. D. 1903, to the Comptroller of the Currency.” It is objected that this statement is not sufficient to show that the defendant was the cashier of the First National Bank of Miami, a national banking association which was carrying on a banking business, or that the report in which the false entry is charged to have been made was a report made by the association. These objections, we think, are without merit.

The indictment charged that the defendant was the duly elected, qualified, and acting cashier, and that the president was the duly elected, qualified, and acting president. It seems to us that it is rather far-fetched to say that this does not sufficiently show that the bank was carrying on a banking business, and that the averment that the report was made to the Comptroller does not necessarily imply that it was made by the association. However that may be, the charge in the indictment is not the making or the failure to make a report required by section 5211 (page 3498), but it is the making of a false entry in a report under section 5209. The failure to make the report or reports required by section 5211 subjects the association to a penalty under section 5213 (page 3499), whereas the penalty for the offense charged in this indictment is fixed by section 5209, which makes it a misdemeanor for a president, director, cashier, teller, clerk, or agent of an association to make a false entry in any report, with intent to injure or defraud the association or to deceive any officer of the association. Had the indictment been against the association for a failure to make the report required by section 5211, it would then have been necessary to aver that the report was one required to be made by the association, but as the report mentioned in the indictment
is referred to "only for the purpose of showing that it was made to the Comptroller, the person authorized by law to call for such a report, it need not be described with technical accuracy." Cochran & Sayre v. United States, 187 U. S. 286, 15 Sup. Ct. 628, 39 L. Ed. 704.

The date when the report was made, the date as to which the condition of the bank is given, and the fact that the report was made to the Comptroller of the Currency, are all set out in the indictment with sufficient accuracy, so that we think there is no possibility that any mistake or misapprehension could arise as to the offense charged, or that the defendant could in any way be misled or prejudiced in his defense. Some things may be presumed even in criminal pleading. Where a report is referred to in an indictment, giving its date and the person to whom made, it certainly cannot be necessary to require it to contain the minute conditions as to the time of sending, that it was sent pursuant to a call of the Comptroller, and the contents of the report specifically, as required by another section of the law. The fact that the report in this case was made to the Comptroller of the Currency by the cashier of the bank, stating the condition of the bank upon a certain day, authorizes, we think, the presumption that it was a report made by the association under section 5211.

But irrespective of these considerations, it has been decided by this court that an offense is not confined to reports made to the Comptroller of the Currency, pursuant to the requirements of section 5211. In Bacon v. United States, 97 Fed. 35, 38 C. C. A. 37, Judge Thayer, in the course of the opinion, said:

"It will be observed that section 5209, in defining the offense of making a false report, contains no such limitation as that sought to be imposed. The language of the law is general that "every president, director, cashier, teller, clerk or agent of any association who makes any false entry in any book, report or statement of the association, with intent," etc., 'shall be deemed guilty of a misdemeanor,' which language may as well include a false report voluntarily made by a bank official to the Comptroller of the Currency to influence his action, and accomplish some fraudulent purpose, as a false report made in pursuance of a call or request from that officer. We perceive no reason why a false report or statement made voluntarily to the Comptroller of the Currency in relation to the condition of a national bank for the purpose of inducing some action on the Comptroller's part, or of forestalling certain action which he contemplates taking, should not be deemed an offense, as well as the making of a false report pursuant to a call or request from that officer, provided the act is done with the intent specified in the statute. The law was designed, we think, to prevent bank officials and employees from making any false entry in the books of the bank, and from making any false representations concerning its financial condition and resources in any report or statement which they may see fit to make in behalf of the bank to the Comptroller of the Currency, or to persons appointed to examine its condition, for the purpose of influencing their action"—citing with approval the case of United States v. Booker (D. C.) 80 Fed. 576, to the same effect.

And in United States v. Hughitt (D. C.) 45 Fed. 47, it was said:

"The statute makes no provision for the keeping of books or the making of statements co nomine. And yet it was clearly the intention of the law-makers to punish the making of false entries, not only in books, but in statements of the condition of the bank, if such entries were made with intent to deceive. Section 5211 provides for five reports annually, but if the association sees fit to volunteer other reports containing false entries made with the express purpose of deceiving the officers of the law as to the true
condition of the bank, can it be doubted that such reports would be within the provisions of section 5209? A construction that they would not be, defeats the obvious intent and purpose of the law. By sending a false report to the Comptroller or an examiner, at a critical period, suspicion might be allayed and an unfounded confidence created, under cover of which the bank could be plundered and the grossest frauds perpetrated with impunity. It cannot be doubted that a report, whether called for by the Comptroller or not, which is a report, in the usual form, of the condition of the association, made by its president in his official capacity and transmitted to the Comptroller, is within the section in question, provided it contains false entries made with intent to deceive. A bank officer who has made such a report cannot escape punishment by showing that the fraud was voluntarily committed, and at a time when he was under no obligation to furnish any report or statement whatever. The statute does not confine the crime of making false entries to a report made to the Comptroller under the provisions of section 5211 and pursuant to his request; it covers 'any report or statement.'"

In this connection, reference may be made to section 1025 of the Revised Statutes (U. S. Comp. St. 1901, p. 720), which provides that no indictment shall be deemed insufficient by reason of any defect or imperfection in the matter of form only which shall not tend to prejudice the defendant. This section of the statutes, while it is not to be construed as permitting the omission of any matter of substance, we think, is properly applicable to an indictment where the only defect complained of is that some element of the offense is stated loosely and without technical accuracy.

As already indicated, the indictment would be more satisfactory if it gave more full information in some of the respects suggested by counsel for the defendant, but still we think, when tested by the rules already suggested, that as it stands it must be held to be sufficient.

The fourth error assigned is that the trial court erred in not permitting W. P. Gatewood, a witness for the defendant, to testify to the moral character of the defendant. The witness was permitted to testify that he had known defendant for about six years; that he knew his reputation for honesty during the time he resided at Vinita, and that it was good, but that he did not know his reputation for honesty during the time he had resided at Miami. The question which the court declined to permit him to answer was: "Are you acquainted with his general reputation in the neighborhood, during the time he resided here, for morality and sobriety?" Objection was made to this question, and the objection sustained. Gatewood and three other witnesses were allowed to testify to the general reputation of the defendant, in the neighborhood in which he lived, for truthfulness, veracity, and honesty, and, within the rule stated by Greenleaf, vol. 3, § 25, "Evidence, when admissible, ought to be restricted to the trait of character which is in issue; or, as it is elsewhere expressed, ought to bear some analogy and reference to the nature of the charge; it being obviously irrelevant and absurd, on a charge of stealing, to inquire into the prisoner's loyalty; or, on a trial for treason, to inquire into his character for honesty in his private dealings"—we think the court committed no error in ruling out the answer to this question.

The fifth and fourteenth assignments of error relate to the following instruction given by the court to the jury:
"The court instructs you that every sane man is presumed to intend the consequences of each act; that this defendant is presumed to have intended the consequences of his signing this statement and swearing to it; that he is presumed to have intended to deceive the officers of the bank, including Mr. Frayser, its president, as well as the Comptroller of the Currency; that, by reason of his making this report and of swearing to this report, he is presumed, if that report were untrue, to publish to Frayser and to the world, and to the Comptroller of the Currency, an untrue report; and it is his duty to show to this jury why it was, and under what circumstances he was justified in issuing such a report. If he has come into this court and shown you that there is a reason for his producing that report other than to deceive; if he has given a reasonable explanation how he came to make that report false, if it is false, then it is your duty, if you believe his explanation, and it is a reasonable explanation, or if a reasonable doubt arises by reason of his explanation, to acquit him; but if this evidence convinces your minds to a moral certainty that on that day, with full knowledge of the fact that he owed that bank a larger sum of money than that contained in his statement, he made up that statement and swore to it for the purpose of deceiving the president and the Comptroller and the other officers of the bank, it is your duty to convict that man, because he is presumed to have intended just exactly what the consequences of his acts were if they were a deception upon these people."

It is insisted by counsel that this instruction was misleading, in that the court said, "If he made up that statement and swore to it for the purpose of deceiving the president and the Comptroller and the other officers of the bank, it is your duty to convict that man," whereas the charge in the indictment was that the false report was made by the defendant with intent to deceive Frayser, the president. Standing alone, this instruction might be susceptible of the criticism made by counsel, but when we come to consider the entire charge of the court, which we must do in determining this question, we do not think the jury could have been misled by the portion of the instructions excepted to. The court had already said to the jury in another portion of its charge:

"Before the government can expect conviction in this case it must show to the jury, by evidence which shall satisfy you beyond a reasonable doubt, that within the Northern district of the Indian Territory, and on or about the 14th day of February, 1903, S. D. Harper, the defendant, was the cashier of the First National Bank of Miami; that on the 6th day of February, 1903, he made a report of the condition of the bank to the Comptroller of the Currency, which report contained certain false entries with reference to his personal liabilities to the bank with intent to deceive E. R. Frayser, the president of the bank, by stating in said report that his liabilities to the bank were only $3,470, whereas at the time his liabilities to the bank were $5,435. These allegations must be proven to your satisfaction, by evidence beyond a reasonable doubt."

The court further charged that:

"The defendant is to be presumed innocent of this offense until the government makes out its case as to the crime charged and each ingredient constituting the crime by evidence which satisfies you, beyond a reasonable doubt, of his guilt. This presumption extends with him, in the case, as to this crime and each element of it, until it is overcome by evidence which establishes his guilt beyond a reasonable doubt."

These instructions clearly stated to the jury the issue upon which they were to pass and the degree of proof necessary to warrant a conviction. And, after a careful examination of the entire charge of the court to the jury, we are of opinion that it fairly stated the law ap-
Applicable to the facts as disclosed by the evidence, and that the jury could not have been misled by the short excerpt above quoted, taken from the general charge, to which the exception is directed.

A thorough examination of the entire record discloses no errors which would authorize a reversal of the judgment, and the judgment of affirmance entered by the United States Court of Appeals in the Indian Territory, and the judgment of the United States Court for the Northern district of the Indian Territory, are affirmed.

ADAMS, Circuit Judge (concurring). I agree with what is said by Judge RINER in the foregoing opinion, but desire to add the following:

The ground most earnestly urged for a reversal of this judgment is that the indictment is fatally defective because it does not charge that the false entry was made in a report "of the association," as contemplated by section 5209 of the Revised Statutes.

The rules governing criminal pleadings have become less technical and more practical, but no less protective to the accused, since the Supreme Court in a series of cases beginning in the year 1893, notably Deal v. United States, 152 U. S. 539, 14 Sup. Ct. 680, 38 L. Ed. 545; Evans v. United States, 153 U. S. 584, 14 Sup. Ct. 934, 38 L. Ed. 830; Dunbar v. United States, 156 U. S. 185, 15 Sup. Ct. 325, 39 L. Ed. 390; Cochran & Sayre v. United States, 157 U. S. 286, 15 Sup. Ct. 628, 39 L. Ed. 704; and Rosen v. United States, 161 U. S. 29, 16 Sup. Ct. 434, 480, 40 L. Ed. 606—has under various circumstances declared that allegations in an indictment are sufficient if their meaning is "clear to the common understanding"; that "no impracticable standards of particularity should be set up"; that "few indictments under the national banking law are so skillfully drawn as to be beyond the hypercriticism of astute counsel"; and that "the entire indictment is to be considered in determining whether the offense is fairly stated." The liberal tendency of the doctrine so announced has been followed by this court in Clement v. United States, 79 C. C. A. 243, 149 Fed. 305; Rinker v. United States, 81 C. C. A. 379, 151 Fed. 755; Stearns v. United States, 82 C. C. A. 48, 152 Fed. 900, and Morris v. United States, 88 C. C. A. 532, 161 Fed. 672.

In the Dunbar Case Mr. Justice Brewer, speaking for the court, affords a practical application of the liberal doctrine taught in the foregoing cases. He allowed an indictment to be helped out by reference to certain specific tariff schedules. The indictment charged the "smuggling of prepared opium." It appears that the offense denounced by the statute consisted of smuggling "opium prepared for smoking." He held that by reference to the tariff schedules the words "prepared opium" would be seen to be essentially the equivalent of the words "opium prepared for smoking."

Applying the principles just alluded to, I think we are at liberty to consider the present indictment in the light of the statute which defines the duty of banking associations. Section 5211 enacts that "every" (banking) "association shall make to the comptroller of the currency not less than five reports during each year * * *. Each report shall exhibit in detail and under separate heads the resources
and liabilities of the association at the close of business on any past day. * * * *" What can be plainer to the common understanding than that the reports showing resources and liabilities of the First National Bank on the 6th day of February, A. D. 1903, to the Comptroller of the Currency referred to in the indictment was one which was being furnished to the Comptroller by the association whose duty it was to do so? The report, according to the language of the indictment, undertook to make a showing of the resources and liabilities of the bank exactly as required by section 5211. I think, reading the indictment in the light of the law under which it was drawn makes it perfectly clear that the defendant was charged with making a false entry in a report of the association to the Comptroller. The true test as laid down by all the authorities concerning the particularity of averment required in a criminal indictment is that it should contain such a description of the offense charged as will enable the defendant to make his defense and plead such judgment as may be rendered in the case in bar of any further prosecution for the same offense. I think the defendant would be considerably surprised if we should gravely hold that, by reason of the omission of the words "of the association" from the indictment, he was not sufficiently informed of the nature and cause of the accusation against him within the meaning of the rule just stated.

I am in favor of affirming the judgment.

SANBORN, Circuit Judge (dissenting). Section 5209 of the Revised Statutes under which the plaintiff in error was convicted provides that:

"Every president, director, cashier, teller, clerk or agent of any association, * * * * who embezzles, abstracts or wilfully misapplies any of the moneys, funds or credits of the association; * * * * or who makes any false entry in any book, report or statement of the association, with intent, in either case, * * * * to deceive any officer of the association, * * * * shall be deemed guilty of a misdemeanor and shall be imprisoned not less than five years nor more than ten."

Section 5211 provides that every association shall make to the Comptroller of the Currency not less than five reports in each year verified by the oath or affirmation of the president or cashier of such association. Section 5209 imposes the same severe penalty for the making of false entries in reports, books, or statements of a national banking association as for the willful embezzlement of its funds, a penalty much more appropriate for the latter than for the former offense. And, where the offense is the making of false entries, the statute and the pleadings under it should be strictly construed. No one should be punished for it unless he has been clearly charged with the crime and was placed upon trial for it.

One of the essential ingredients of the offense of which the plaintiff in error was convicted was that the false entry was made in a report, book, or statement of the national banking association described in the indictment. A false entry in a report, book, or statement of any other person or corporation is not an offense under this act of Congress. United States v. Eqe (D. C.) 49 Fed. 852, 853; United
States v. Potter (C. C.) 56 Fed. 83, 102. It is true that Judge Amidon, in United States v. Booker (D. C.) 80 Fed. 376, 378, 379, made some remarks that are not in accord with this view. But they are not persuasive, and they are obiter dicta, for the indictment in that case charged both that the bank made the report in which the false entry was alleged to have been inserted and also that this report was one of the five reports required by the law. In my opinion the proposition cannot be sustained that the officer, teller, or cashier, of a national bank is liable to imprisonment for five or ten years under section 5209 for making a false entry in a report, book, or statement of any other person or corporation than a national banking association.

If the indictment had contained an averment, as in Cochran & Sayre v. United States, 157 U. S. 288, 289, 15 Sup. Ct. 628, 629, 39 L. Ed. 704, that the false entry was inserted in a report “made to the Comptroller of the Currency in accordance with the provisions of section 5211 of the Revised Statutes of the United States,” the allegation would undoubtedly have been sufficient to show that the entry was made in a report of the banking association, because reports of none but the banking association are required by that section.

The question presented in this case was neither in issue nor decided in Bacon v. United States, 97 Fed. 35, 38, 38 C. C. A. 37, for the indictment in that case contained an averment that the “association, on the twenty-eighth day of December, one thousand eight hundred and ninety-three, then and there made, to the then Comptroller of the Currency of the said United States, a report of the condition of the said association at the close of business on the nineteenth day of December, in the year of our Lord one thousand eight hundred and ninety-three, according to a certain form theretofore prescribed by the Comptroller of the Currency of the United States for the time being; the same being a report which it was there and then, to wit, on said twenty-eighth day of December in the same year, by law the duty of the said association to make and transmit to the said Comptroller, to wit, one of the five reports before that time and then required by law to be made in each year by every such association, and being then and there verified by the oath of the said president of the same association and attested by the signatures of three of the then directors thereof”; and that Bacon made the false entries in that report. Nor was the question decided in United States v. Booker (D. C.) 80 Fed. 376, 377, where the averments in the indictment were “that the Grand Forks National Bank on that day made to the Comptroller of the Currency a report of the condition of the association at the close of business on the eighteenth day of July one thousand eight hundred and ninety-four, according to a form theretofore prescribed by the Comptroller. That the report was one which it was the duty of the association by law to make to the Comptroller, being one of the five reports required by law to be made in each year by every such association. That the report was verified by the oath of the defendant, Booker, president of said association, and attested by the signatures of three of the directors,” and that Booker made the false entries in that report. Nor was it presented or decided in United States v. Hughitt (D. C.) 45 Fed. 47, where the averment in the indictment was that the defendant “did
knowingly, wrongfully, and unlawfully make and cause to be made false entries in a report or statement of the First National Bank of Auburn, being a report of the condition of the First National Bank of Auburn at the close of business on the seventh day of December one thousand eight hundred and eighty-seven, made to the Comptroller of the Currency as required by law to be made to the Comptroller of the Currency.” Indeed, I have been unable to discover any decision of any court to the effect that an indictment under section 5209 which does not contain an averment either that the false entry was made in some report, book, or statement of the banking association, or that it was made in a report to the Comptroller in accordance with the provisions of section 5211, which must necessarily have been a report of the association, was sufficient. This indictment contains neither. Evidence that the plaintiff in error made the false entry in a report of his own, or in a report of any other person or corporation than the First National Bank of Miami, would have established the allegations of the indictment as effectually as testimony that he inserted the false entry in a report of that bank.

In Ledbetter v. United States, 170 U. S. 606, at page 610, 18 Sup. Ct. 774, at page 775, 42 L. Ed. 1162, the Supreme Court said:

“We have no disposition to qualify what has already been frequently decided by this court, that where the crime is statutory it must be charged with precision and certainty, and every ingredient of which it is composed must be clearly and accurately set forth, and that even in the cases of misdeemors the indictment must be free from all ambiguity, and leave no doubt in the minds of the accused and the court of the exact offense intended to be charged. United States v. Cook, 17 Wall. 168, 174, 21 L. Ed. 538; United States v. Cruikshank, 92 U. S. 542, 562, 23 L. Ed. 588; United States v. Carroll, 105 U. S. 611, 26 L. Ed. 1135; United States v. Simmons, 96 U. S. 360, 24 L. Ed. 819; United States v. Hess, 124 U. S. 488, 8 Sup. Ct. 571, 31 L. Ed. 516; Pettibone v. United States, 148 U. S. 107, 13 Sup. Ct. 542, 37 L. Ed. 419; Evans v. United States, 153 U. S. 594, 14 Sup. Ct. 934, 38 L. Ed. 830.”

A false entry in a report of the association was an indispensable element of the offense in this case. A false entry in the report of another was not an offense under the act of Congress. There was no averment that the entry was made in a report of the association, or that it was made in a report required under section 5211. Therefore it did not set forth “all the elements necessary to constitute the offense intended to be punished” (Evans v. United States, 153 U. S. 584, 587, 14 Sup. Ct. 934, 936, 38 L. Ed. 830), nor was the crime “charged with precision and certainty and every ingredient of which it is composed * * * clearly and accurately set forth” (Ledbetter v. United States, 170 U. S. 606, 610, 18 Sup. Ct. 774, 42 L. Ed. 1162), and in my opinion the indictment was insufficient and the judgment below should be reversed (United States v. Britton, 107 U. S. 655, 662, 2 Sup. Ct. 512, 27 L. Ed. 520).
PEOPLE'S TOBACCO CO., Limited, v. AMERICAN TOBACCO CO. et al.†

(Circuit Court of Appeals, Fifth Circuit. May 3, 1909.)

No. 1,830.

MONOPOLIES (§ 28*)—CONSPIRACY IN RESTRAINT OF INTERSTATE COMMERCE—ACTION FOR DAMAGES.

A petition to recover threefold damages for injury to plaintiff's business in interstate and foreign commerce, under Anti-Trust Act July 2, 1890, c. 647, § 7, 26 Stat. 230 (U. S. Comp. St. 1901, p. 3202), states a cause of action, where it alleges that plaintiff was a manufacturer of tobacco which it sold in interstate and foreign commerce, and facts showing that defendants conspired to render its business unprofitable and ruin and destroy the same through competing corporations, which they secretly controlled, by enticing away its workmen, by compelling it to pay more than the normal price for leaf tobacco, and to adopt unnecessary and expensive means to sell its products, and that such conspiracy was carried out to the damage of plaintiff in a sum stated; such acts constituting both a conspiracy to restrain interstate commerce and an attempt to monopolize the same, in violation of sections 1 and 2 of the act.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. § 28.*]

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

Omitting the several letters and other exhibits referred to, the following are all the averments and statements of the plaintiff's petition filed in the court below:

"The petition of the People's Tobacco Company, Limited, a corporation organized under and created by the laws of the state of Louisiana, domiciled in the parish of Orleans, state of Louisiana, and a citizen of said state, in the Eastern district thereof, and a resident of said state, through J. Oury, its president, respectfully represents:

"That the American Tobacco Company, a corporation organized under and created by the laws of the state of New Jersey, and a citizen of the state of New Jersey, the Craft Tobacco Company, Limited, a corporation organized under and created by the laws of the state of Louisiana, and a citizen of Louisiana, domiciled and doing business in the parish of Orleans, in said state, and Augustus Craft, a citizen of the state of Louisiana, residing in New Orleans, La., within the Eastern district of the state of Louisiana, are indebted unto your petitioner, in solido, in the sum of $334,999 for this, to wit:

"That your petitioner was organized and created under the laws of the state of Louisiana on June 20, 1899, by an act passed before Edward Dinkelstipel, a notary public for the parish of Orleans, La., for the purposes to be hereinafter set forth:

"That on or about the 7th day of January, 1890, the American Tobacco Company was organized and created under the laws of the state of New Jersey.

"That a corporation known as the American Tobacco Company was organized and created for the purpose of taking over the control and controlling interest in certain corporations and firms and absorbing the business of said concerns; said corporation being formed with a capital stock of $25,000,000, being $10,000,000 of preferred stock and $15,000,000 of common stock, and said corporation taking over the business of the following concerns and distributing its stock therefor as follows:

<table>
<thead>
<tr>
<th>Allen &amp; Ginter</th>
<th>Preferred</th>
<th>$3,000,000</th>
<th>$4,000,000</th>
<th>$7,000,000</th>
</tr>
</thead>
<tbody>
<tr>
<td>W. Dukes' Son &amp; Co.</td>
<td></td>
<td>2,000,000</td>
<td>3,000,000</td>
<td>5,000,000</td>
</tr>
<tr>
<td>Kinney Tobacco Co.</td>
<td></td>
<td>1,000,000</td>
<td>1,500,000</td>
<td>2,500,000</td>
</tr>
<tr>
<td>W. S. Kimball Co.</td>
<td></td>
<td>1,000,000</td>
<td>1,500,000</td>
<td>2,500,000</td>
</tr>
<tr>
<td>Goodwin &amp; Company</td>
<td></td>
<td>1,000,000</td>
<td>1,500,000</td>
<td>2,500,000</td>
</tr>
</tbody>
</table>

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
† Rehearing denied June 7, 1909.
"Your petitioner shows: That the articles of incorporation declare the purpose of the company to be to carry on its operations in all the other states and territories of the United States and in Great Britain and all foreign countries. That the said charter was amended in 1901, and by said amendment the American Tobacco Company was given the power to guarantee the securities of other corporations. That the first board of directors was composed of James B. Duke, B. N. Duke, George Arents, and George W. Watts, who have remained thereon continuously, and William H. Butler, Charles G. Emery, Lewis Ginter, Francis S. Kinney, William S. Kimball, and John Pope. That each of said directors owned an interest and participated in managing one of the acquired concerns. That about 1891 and subsequently the American Tobacco Company began to enter into contracts, combinations, and conspiracies in unlawful restraint of trade in leaf tobacco and manufactured tobacco and cigarettes, oppressing with ferocious competition and unfair trade measures, forcing competitors to sell their manufactories, business, trade brands, and the controlling interest in such rival corporations and good will, and using the names of said corporations for the purpose of organizing more successfully against its remaining competitors, and thus fighting and destroying them. That said American Tobacco Company as then organized, called in this petition the old American Tobacco Company, and the American Tobacco Company as now organized, concealed and conceal its ownership and control of acquired companies and brands for the purpose of crippling existing competitors. That the charges made against the American Tobacco Company in this cause are also true of the Consolidated Tobacco Company, and the Continental Tobacco Company, mentioned hereinafter.

"Your petitioner shows that the Continental Tobacco Company was formed in December, 1896, with a capital of $75,000,000, which capital stock was increased on April 21, 1899, to $100,000,000. That the charter of said corporation recited:

"The objects for which this corporation is formed are to cure leaf tobacco, and to buy, manufacture, and sell tobacco in any and all its forms, and to erect and otherwise acquire factorics and buildings, establish, maintain, and operate factories, warehouses, agencies, and depots for the storing, preparation, cure, and manufacture of its tobacco, and for its sale and distribution, and to transport or cause the same to be transported as an article of commerce, and to do any and all things incidental to the business of trading and manufacturing aforesaid.

"This corporation shall have the power to conduct its business, or any portion of it, in all other states and territories, colonies and dependencies of the United States, and in Great Britain and Canada, and all other foreign countries, to have one or more offices out of the state of New Jersey, and to hold, purchase, lease, mortgage, and convey real and personal property out of the state of New Jersey as well as in said state. That said charter was amended on or about April 20, 1901, and by said amendment the corporation was given the further power to indorse or otherwise guarantee the principal or interest, or both, of and on any bonds, debentures, or promissory notes that may be made, issued, or uttered by any corporation in which said company has a substantial interest as stockholder, provided that authority for such indorsement or guaranty be first obtained from the board of directors by resolution having the favorable vote of at least two-thirds of the whole board. That James B. Duke and John B. Cobb were among the Incorporators with James B. Duke as president.

"That in June, 1901, in pursuance of the general scheme and purposes heretofore described to secure the retirement of competition, hinder and restrain foreign and interstate commerce in tobacco and its products, exclude others therefrom, and acquire therein a monopoly, the directors, officers, and stockholders of the American Tobacco Company, and the Continental Tobacco Company, caused to be organized under the laws of New Jersey the Consolidated Tobacco Company, with a capital stock of $30,000,000, which capital was afterwards increased to $40,000,000.

"The objects for which the said corporation was formed is shown by the charter to be as follows:
"To dry and cure leaf tobacco, to buy, manufacture, sell and otherwise deal in tobacco and the products of tobacco in any and all forms."

"To construct or otherwise acquire and hold, own, maintain and operate warehouses, factories, offices and other buildings, structures and appliances for the drying, curing, storing, manufacture, sale and distribution of tobacco and its products. To purchase or otherwise acquire and hold, sell, assign, transfer, mortgage, pledge or otherwise dispose of the shares of capital stock of, or any bonds, security or other evidences of indebtedness created by any other corporation of this or any other state or government, and to issue its own obligations in payment or in exchange therefor, or for any purpose of its incorporation, and to secure such obligations by pledge or mortgage under deed of trust or otherwise of the shares of capital stock or bonds, securities or other evidences of indebtedness so acquired, or of any other property of the corporation.

"To guarantee dividends on any shares of the capital stock of any corporation in which this corporation has any interest as stockholder, and to indorse or otherwise guarantee the principal and interest, or either, of any bonds, securities or other evidences of indebtedness created by any corporation in which this corporation has such an interest, provided that authority for any such indorsement or guarantee be first given by resolution adopted by at least two-thirds of the whole board of directors of this corporation.

"To carry on any business operation deemed by the corporation to be necessary or advisable in connection with any of the objects of its incorporation or in furtherance of any thereof, or tending to increase the value of its property."

"The said consolidated Tobacco Company was given by its charter the right to do business in all states and territories of the United States and in foreign countries. The stock was subscribed by few individuals closely associated with the management of the old company. James B. Duke was at all times president, Thomas F. Ryan, John R. Cobb, and C. C. Dula were vice presidents, and the board of directors was composed of directors of the old company.

"Your petitioner further shows that on or about September 9, 1904, the management of the said American Tobacco Company, the Consolidated Tobacco Company, and the Continental Tobacco Company formed an agreement by which they were to take over the interest and business of each of the said named companies, and at the same time take over their controlling interests in all subsidiary corporations, the whole to be contained in and owned by a corporation known as the American Tobacco Company, one of the defendants in this case, all of which will more fully and at large appear by reference to a copy of said agreement annexed to this petition and made part hereof, marked 'Exhibit A.'

"That said American Tobacco Company was formed into a corporation in October, 1904, with James B. Duke as president, and John B. Cobb, C. C. Dula, William R. Harris, and Percival S. Hill, vice presidents. That all the property of the merged companies became the property of the American Tobacco Company now operating branches under its own name and in the name of different corporations owned and controlled by it in Richmond, Va., Newport News, Va., New Orleans, La., New York City, Louisville, Ky., and other cities. That said American Tobacco Company, acting in its own name, owns and controls a great number of incorporated institutions and dictates the election of their directors. That defendant and all subsidiary corporations are engaged in interstate and foreign commerce.

"Now your petitioner shows that your petitioner was organized as aforesaid for the purpose of carrying on a general cigar, cigarette, and tobacco business, including manufacturing, buying, selling, and exporting tobacco to foreign countries, and carrying on of said business throughout the world, and since its organization has carried on an extensive interstate and foreign business, selling its products in New York, Texas, Illinois, New Mexico, Arizona, and in the Republic of Mexico.

"Your petitioner further shows: That among its stockholders was Augustus Craft, who owned 50 shares of the capital stock in your petitioner, and was a director of your petitioner, and who afterwards acquired one share of stock from one Grabenheimer, thus becoming the owner of 51 shares, or a controll-
ing interest in your petitioner. That on or about June 9, 1900, said Craft sold to J. Oury 25 shares of the capital stock of the People’s Tobacco Company, Limited, as your petitioner was losing money in getting its enterprise under way, and on or about the 21st day of November, 1902, said Craft having familiarized himself with your petitioner’s business, sold to J. Oury, president of your petitioner, his remaining 26 shares. That shortly after the said Craft had parted with his interest in your petitioner’s business, conspiring with and acting under the advice and controlling management of the Consolidated Tobacco Company, the Continental Tobacco Company, and the old American Tobacco Company, before the consolidation of the said three companies, and for the purpose of defeating your petitioner’s business, and in the interest of the said companies, which were consolidated for the purpose of restraining trade and cutting off competition by every unlawful means and at the suggestion of the said companies and of Caleb C. Duin, who with Percival S. Hill were the principal agents of the said companies for the purpose of destroying rival concerns, organized the Craft Tobacco Company, Limited, which corporation was created on or about the 14th day of May, 1903, under the laws of the state of Louisiana by notarial act before Felix J. Dreyfus, notary public. That the business was to become a going concern when 50 shares were subscribed. That said Craft subscribed for 42 shares of stock; Everett G. Lawrence, 2 shares; Louis P. Rice, 2 shares; Pearl Wight, 1 share; J. Watts Kearney, 1 share; J. A. Blaffer, 1 share; and Luther Sexton, 1 share. That on May 15, 1903, said Craft wrote to Caleb C. Duin that he held $10,000 of the stock and that the whole $30,000 was paid in and in bank.

"Now your petitioner alleges and charges: That the $50,000 or three-fourths thereof was furnished by the Continental Tobacco Company, the Consolidated Tobacco Company, and the old American Tobacco Company, or one or more of them. Your petitioner also shows that the stockholders of said Craft Tobacco Company, Limited, and the directors, except said Craft, were mere figureheads, or persons interposed to deceive the public as to the real ownership of said corporation. That it was provided in the charter of said corporation that the directors could be removed at any time by the stockholders at a meeting called by a majority of said stockholders. "Your petitioner further shows that the stock in said corporation after the signing of said corporation and the payment of the sums of money subscribed therefor was held in the following proportions: Augustus Craft, 25 per cent.; the Consolidated Tobacco Company, the old American Tobacco Company, and the Continental, or one or two of these companies, owning the remaining 75 per cent., but that it is impossible to say exactly how this stock was held, as the American Tobacco Company, the successors of the foregoing three companies, deny under oath knowing how the said stock was and is held, but admit that it was controlled by the American Tobacco Company and the composing companies.

"Now your petitioner shows that after the first three years of its creation, through industry and skillful management and extensive advertising, it built up a large business notwithstanding the expenses incidental to starting such business, and after certain losses succeeded in making in the year ending June 15, 1902, the sum of $19,497.36.

"That in the next year, ending June 15, 1903, owing to your petitioner having established a trade, particularly that part of the laboring class belonging to unions, as your petitioner employed none but union men and catered to that particular class, your petitioner’s net profits for the said year increased to the sum of $40,282.84. That it was then that the Consolidated Tobacco Company, the Continental Tobacco Company, and the old American Tobacco Company, or one or two of them, conspired as aforesaid with said Augustus Craft for destroying said petitioner’s business, and created the said Craft Tobacco Company, Limited. That said companies, or one or two of them, and the said Craft undertook the formation of the said Craft Tobacco Company, Limited, to take away your petitioner’s hands, and on or about May 6, 1903, said Craft communicated with petitioner’s foreman, tobacco cutter, and engineer, and on May 21, 1903, notified Percival S. Hill, in charge of said companies, that he had the head engineer and foreman of the People’s Tobacco Company with him and expected to draw his labor supply from the People’s. That said com-
pany has also attempted and undertook to cause strikes at said time among your petitioner's employees. That said Craft, through the bribery of the labor agent, by giving him a commission upon machinery, undertook to deceive the labor unions of New Orleans into the belief that he was in no wise connected with said companies now consolidated with the American Tobacco Company; the said labor unions at said time having already refused to have anything to do with said companies as being monopolies or trusts in restraint of trade. That at said time your petitioner was the only tobacco company in New Orleans which had the union trade and the union label, and the said three above-mentioned companies, to wit, the old American Tobacco Company, the Continental Tobacco Company, and the Consolidated Tobacco Company, were forbidden the use of the union label.

"Your petitioner shows that it was understood between the American Tobacco Company and the said Augustus Craft that said Craft was not to interfere with the Louisiana Tobacco Company and the Irby Tobacco Company, but was to confine his business to securing your petitioner's customers.

"Your petitioner further shows: That, as soon as the said Craft Tobacco Company had secured the union label and union labor as aforesaid in 1903, the American Tobacco Company, the Continental Tobacco Company, and the Consolidated Tobacco Company, or one or two of them, began to arrange, and did arrange, through their various subsidiary corporations, particularly the Craft Tobacco Company, Limited, for giving rebates to customers by giving a package of cigarettes for the return of 20 covers. That, the said acts of said companies having been forbidden by governmental officials, they put in prize coupons in the cigarettes sold by the said Craft Tobacco Company, Limited, thus holding out a further inducement to your petitioner's customers to buy tobacco from them through the Craft Tobacco Company, Limited, and after all of said acts and other acts hereinafter mentioned on the part of said company, and by reason thereof, your petitioner's business fell off from $40,282.83, net profit from July 3, 1902, to June 1, 1903, to $20,563.40, from June 1, 1903, to June 1, 1904; and to $13,934.91 from June 1, 1904, to June 1, 1905; and to $8,017.59 from June 1, 1905, to June 1, 1906. That on or about December 14, 1904, the American Tobacco Company, through Nathaniel Dorth and others, conspired to destroy and did destroy in same manner your petitioner's black leaf business.

"Your petitioner shows: That in June, 1905, your petitioner, realizing that its business was being driven out by the Craft Tobacco Company, Limited, particularly, and by the Louisiana Tobacco Company and the Irby Tobacco Company, both of said corporations being controlled and owned by defendant American Tobacco Company and its comprising companies, but at that time knowing of the existence of collusion between the said Craft Tobacco Company, Limited, the Continental Tobacco Company, the Consolidated Tobacco Company, and the old and new American Tobacco Companies, began issuing, in self-defense, one-quarter cent coupons in its tobacco packages and half-cent coupons in its cigarettes in June, 1905. That in order to compete with said companies from June, 1905, to December, 1907, your petitioner spent on said coupons the sum of $61,074.00, but that through the use of said coupons, and because of the advocacy of high license by Augustus Craft in the city council, of which he was a member, the business of the Craft Tobacco Company, Limited, began to fall off, and, its usefulness to said American Tobacco Company being at an end, your petitioner is informed and believes and charges that the American Tobacco Company, made defendant in this case, in the latter part of the year of 1907, sold its stock back to Augustus Craft.

"Your petitioner shows: That its expenses for sale, and outside of the cost of manufacturing, amounted during the fiscal year from July, 1902, to July, 1903, to $9,617.18. That said expenses from June 1, 1903, to June 1, 1904, amounted to $7,012.15. That its expenses from June 1, 1904, to June 1, 1905, amounted to $9,948.31. That its expenses from June 1, 1905, to June 1, 1906, amounted to $22,451.90. That its expenses from June 1, 1906, to June 1, 1907, amounted to $24,751.34. That these expenses do not include the expenses of manufacture, among which is included the cost of coupons, already stated.

"Your petitioner shows that the management of the Craft Tobacco Company, Limited, was left by the corporation or corporations owning a controlling in-
terest therein to Caleb C. Dula and Percival S. Hill for the better carrying
into effect their illegal operations, schemes, and combinations against the in-
terstate commerce, and that the acts of said Hill and said Dula were the
acts of the corporation.

"Your petitioner further alleges that, where it is charged in this petition
that said P. S. Hill or C. C. Dula did or performed any act, it is meant and
charged that the said Percival S. Hill and Caleb C. Dula, acting for and in
behalf of the Continental Tobacco Company, the Consolidated Tobacco
Company, or the old American Tobacco Company, or after the month of October,
1904, were acting in behalf of the interest of the American Tobacco Company
made defendant in this case.

"Your petitioner shows: That the Continental Tobacco Company in 1903
secretly bought out the Pinkerton Tobacco Company at Zanesville, Ohio, and
by secret correspondence, letters being addressed by John W. Pinkerton, the
manager of the Pinkerton Tobacco Company, and its president, to the Ameri-
can Tobacco Company under the assumed name of J. E. Williams, Madison
Square, New York. That, in order better to carry out their purposes, often here-
in described, certain companies belonging to the Continental Tobacco Company,
the Consolidated Tobacco Company, and the old and new American Tobacco
Company, among others, the American Snuff Company, the American Cigar
Company, R. J. Reynolds Tobacco Company, R. A. Patterson Tobacco Company,
Standard Snuff Company, Pinkerton Tobacco Company, F. R. Penn Tobacco
Company, Night & Day Tobacco Company, Wells Whittled Tobacco Company,
Nail & Williams Tobacco Company, and others, were made to maintain sep-
arate purchasing and sales departments with agents to purchase and solicit
trade for them in many different states, and through them the said companies
buy supplies of leaf tobacco and sell and distribute their products as a part
of interstate trade and commerce, and that all said companies, either directly
or indirectly, report to the American Tobacco Company, which, under agree-
ments and a general plan of operation chiefly through P. S. Hill and C. C.
Dula, decide how and where said companies may operate and fix prices stifling
interstate competition.

"Your petitioner further shows: That through the said R. J. Reynolds
Tobacco Company, the American Tobacco Company, and its composing com-
panies, particularly the Consolidated Tobacco Company and the Continental
Tobacco Company, have acquired the majority of the capital stock of the Lip-
fert Scales Company, preserving its authorization and corporate name, but
in combination and agreement refrain from competing with said company, re-
straining interstate commerce, and intending to monopolize same. That said
R. J. Reynolds Tobacco Company holds the majority of capital stock of the
Andrews & Forbes Company and of the Amsterdam Supply Company, and oth-
er companies for the same purpose.

"Your petitioner further shows: That in February, 1903, the Continental
Tobacco Company secretly acquired the control of Nail & Williams Tobacco
Company, a Kentucky corporation long engaged in Louisville, Ky., successfully
in interstate commerce and in leaf manufactured tobacco, drying tobacco leaf
in different states, and selling, shipping, and distributing the products manu-
factured therefrom throughout the United States and abroad in competition
with said company and the American Tobacco Company. That the owners and
persons interested agreed with the American Tobacco Company not to engage
in trade and commerce in tobacco or its products. That the separate organiza-
tion of the acquired company has been preserved, but that the directors have
at all times since been selected by the Continental Tobacco Company and the
American Tobacco Company, and its business has been conducted under an
agreement with them not to compete in the purchase of leaf tobacco or in the
sale or distribution of its product and in combination with them and without
competition for the purpose and with the effect of restraining interstate com-
merce and foreign trade and creating a monopoly therein. Said Nail & Wil-
liams Company have concealed and denied, and is now concealing and denying,
its association with the American Tobacco Company, and has been used by the
American Tobacco Company and the Continental Tobacco Company from May,
1903, to the latter part of May, 1907, as agent of supply to destroy competition.
That said company during said time furnished to the Craft Tobacco Company

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certain brands of tobacco at a low rate, lower than said tobacco could be bought elsewhere, for the purpose of destroying your petitioner's business, which not only extended to Louisiana, but to all of the adjoining states and foreign countries, full of which will more fully appear by reference to a copy of an extract of a letter of Augustus Craft to C. C. Dula, dated May 6, 1903, and the extract of a letter from Augustus Craft to Percival S. Hill, dated August 21, 1903, to be hereafter annexed to this petition, and made part hereof for greater certainty.

"Your petitioner shows that the tobacco furnished to the Craft Tobacco Company was furnished by the present American Tobacco Company and Continental Tobacco Company and the Consolidated Tobacco Company, from the Nall & Williams Tobacco Company, their agents as aforesaid at Louisville, Ky., and from other states, at a cheaper rate than your petitioner, who is also engaged in interstate commerce, could buy on the market, said discriminating rate being made for the purpose of injuring your petitioner, who was also engaged in interstate commerce, all of which will more fully and at large appear by reference to a copy of a letter dated August 10, 1903, written by P. S. Hill, vice-president of the American Tobacco Company and managing director of said company and of the Consolidated Tobacco Company and the Continental Tobacco Company, to be hereafter annexed to this petition, said letter being written to Augustus Craft.

"Your petitioner shows: That defendant's schemes and purposes were conducted in secrecy, and even the correspondence between the said Augustus Craft and C. C. Dula and P. S. Hill, in their capacities as vice president and managers aforesaid, being conducted under an assumed name, the said Craft in 1903 going under the name of Mrs. E. G. Craft, and afterwards of Mrs. Elvira Gustine, and the said P. S. Hill assuming the name and address of Helen v. Simmons, at 305 Dolphin street, Baltimore, Md., and said Dula assuming the name and address of D. C. Williams, Madison Square Station, New York, all of which will more fully and at large appear by reference to substantial copies of extracts of said letters dated June 8, 1903, September 2, 18, and 23, 1903, from Augustus Craft to P. S. Hill, as agent of said companies, and a letter of C. C. Dula to Augustus Craft of May 14, 1903, and a letter of P. S. Hill, as agent of the American Tobacco Company to Augustus Craft, dated November 7, 1904, to be hereafter annexed to this petition for greater certainty.

"That the old American Tobacco Company, the Continental Tobacco Company, and the Consolidated Tobacco Company, or one or two of them, on or about June 8, 1903, conspired to procure the same kind of cigarette paper as was used by your petitioner, instead of Rigulax, the better to prevent buyers from connecting said Craft Company with said company, all of which will more fully and at large appear by reference to copies of extracts from letters written by Augustus Craft to Percival S. Hill, June 8, 1903, and July 24, 1903. That, when Rigulax paper was used, said Craft and said Dula, on or about May 16, 1903, and before said date, gave out to the public that any one could buy said paper on the market at a reasonable price, all of which will more fully and at large appear by reference to a letter of Augustus Craft to C. C. Dula, dated May 16, 1903, to be hereafter annexed to this petition for greater certainty.

"That the purchase of tobacco by Augustus Craft for the Craft Tobacco Company, Limited, on or about the 7th of November, 1904, and the latter periods, was partially carried on through a broker to prevent the public from gaining knowledge of true ownership or control of the Craft Tobacco Company. That in July, 1903, Percival S. Hill, in his capacity of vice president and managing director and agent in shipping tobacco to the Craft Tobacco Company and other articles, was requested to destroy the marks contained thereon for the same purpose, all of which will more fully and at large appear by reference to copies of letters written by Augustus Craft to Percival S. Hill, dated July 18 and 24, 1903, to be hereafter annexed for greater certainty.

"Your petitioner shows: That at said time, in order to conceal its objects from the public, to wit, the destruction of petitioner's domestic and interstate business, it was planned to have the Irby Tobacco Company, a well-known branch of the American Tobacco Company, to pretend to be opposed to the Craft Tobacco Company, Limited.
"That your petitioner used union labor exclusively in its factory and store, and, as already stated, the unions had long since refused to buy goods that did not contain the union label and to buy of the corporations which now compose the American Tobacco Company, and that one of the principal objects of the Craft Tobacco Company, by defendant and the companies which compose it, was to fight your petitioner by securing said trade, the object being particularly the destruction of a large business which your petitioner had built up in Louisiana and adjoining states and in foreign countries, all of which will more fully and at large appear by reference to letters of Augustus Craft to P. S. Hill, acting as agent aforesaid, dated June 20, 1903, July 17, 1903, July 24, 1903, August 21, 1903, September 23, 1903, copies of extracts of which to be hereafter annexed for greater certainty.

"Your petitioner shows that under the management of the said Hill and said Dula, conspiring with said Craft, the Louisiana Tobacco Company, Limited, owned by defendant and formerly one or more of the companies composing defendant, and the W. R. Irby Tobacco Company, a branch of the American Tobacco Company, owned by defendant and formerly by the Continental Tobacco Company, were kept in ignorance of the purposes or management of the American Tobacco Company, or at least it was so pretended to said Craft, all of which will more fully and at large appear by reference to copy of extracts from letters of Augustus Craft to Percival S. Hill, dated May 21, 1903, and August 21, 1903, and extract from a letter of Percival S. Hill to Augustus Craft, dated July 23, 1903, to be hereafter annexed to this petition and made part hereof for greater certainty.

"Your petitioner further shows that during the year 1903, up to January 3, 1907, and all during the period in which the controlling interest of the Craft Tobacco Company, Limited, was held by defendant and composing companies, or one or two of them, your petitioner's goods were discriminated against in its Louisiana business as well as in its interstate and foreign commerce. Your petitioner alleges and charges: That August Glaudot and H. Guenard were paid by said company, through one Wackerbarth, up to the year 1901, and through agents unknown to your petitioner after said date, not to advertise or expose for sale your petitioner's goods; the said Glaudot receiving his rent free for that consideration. That A. A. Merrick and one Keith and other peddlers received a bonus from the Continental Tobacco Company not to sell petitioner's goods.

"Your petitioner further shows: That the Louisiana Tobacco Company and the Irby Tobacco Company and other agents of defendant and its composing companies were all employed for the same purpose. That the object of the defendant and the composing companies was to drive out your petitioner as a competitor for its local, interstate, and foreign business, and the American Tobacco Company, and the Consolidated Tobacco Company, the Continental Tobacco Company, and the old American Tobacco Company, or one or two of them, furnished the expenses for this purpose and contributed at least a part of the expenses for this purpose, and paid subsidies on the output of the Craft Tobacco Company, Limited, all of which will more fully and at large appear by reference to letters and extracts from letters from Augustus Craft to P. S. Hill, in his capacity as agent aforesaid, dated August 21, 1903, September 5 and September 23, 1903, and October 6, 1903, to be hereafter annexed to this petition for greater certainty.

"Your petitioner shows that, through all of said acts of the said American Tobacco Company and its composing companies, your petitioner's net profits were reduced in the sum of $78,333, and your petitioner has been damaged and injured through the said unlawful, illegal, and malicious acts of defendant to said sum, and that under the act of Congress of July 2, 1890, known as the 'Sherman act,' your petitioner is entitled to recover threefold damages and the costs of suit, including a reasonable attorney's fee.

"Your petitioner further shows that all of the illegal acts aforesaid of the American Tobacco Company and the composing companies were unknown to your petitioner, and all of the acts of said Augustus Craft and the Craft Tobacco Company, Limited, were unknown to your petitioner, until the 10th day of December, 1907, or some days after said date, when said acts were brought to light in a suit of the United States against the American Tobacco Company and others, now pending in the Circuit Court of the United States for the.
Southern District of New York, and that, until said exposure was made in said litigation, your petitioner was in ignorance of proof against said defendant and unable to protect its rights. Your petitioner shows that its sales fell off as aforesaid from the organization of the Craft Company, Limited, on the 14th day of May, 1903, up to the time that your petitioner began to use the coupons and to incur the extra heavy expense thereof, amounting as aforesaid to $61,000, all of which expense for coupons will more fully appear by reference to an itemized statement annexed to this petition and marked "Exhibit B."

"Your petitioner shows that the American Tobacco Company is represented in the state of Louisiana and is found in said state, and that W. R. Irby is duly appointed the agent of said company."

"Wherefore your petitioner prays that the American Tobacco Company, the Craft Tobacco Company, Limited, and Augustus Craft be cited to answer this petition, and, after all due and legal proceedings had, that said American Tobacco Company, the Craft Tobacco Company, Limited, and Augustus Craft, be ordered, adjudged, and decreed to pay your petitioner the sum of $234,999, being threefold the amount of damages incurred by your petitioner and suffered by him through the acts of defendant, and for a reasonable attorney's fee, and for costs and all general relief."

"Exceptions having been sustained to this petition, the plaintiff filed the following supplemental and amended petition (the exhibits are omitted here):"

"The supplemental and amended petition of the People's Tobacco Company, Limited, filed in this case with leave of court first had and obtained, respectively, represents:

"That your petitioner reiterates and reaffirms the allegations contained in its original petition, and further represents:

"That the American Tobacco Company and the Craft Tobacco Company, Limited, and Augustus Craft are indebted unto your petitioner in the sum of $186,926.85 in solido, as damages, which damages, under the act of Congress known as the 'Sherman act,' should be increased threefold."

"Your petitioner further shows that your petitioner, having enjoyed the large business set out in petitioner's original petition, in the independent trade in New Orleans, in the year 1903, had amassed and built up a trade that netted your petitioner, in its business year from June 15, 1902, until June 15, 1903, the sum of $40,282.43.

"That in the succeeding fiscal year ending June 1, 1904, through the illegal acts of defendants, your petitioner lost the sum of $19,719.43. That of this sum $10,495 was caused by the increase in the price of tobacco by the defendants in the following manner, to wit:

"That the said American Tobacco Company (and the old American Tobacco Company and Consolidated Tobacco Company before the formation of the American Tobacco Company) were practically under the same control and management and conspiring together against all independent companies, and particularly your petitioner.

"That said last-named companies, in 1903, and thereafter, secretly controlled individuals, firms, and corporations, carrying on their conspiracy against interstate and foreign commerce under the names of such individuals, firms, and corporations. That among such firms controlled by said Consolidated, Continental, and old American Tobacco Companies, and afterwards, in October, 1904, by the American Tobacco Company, was the Nall & Williams Company of Louisville, and E. J. O'Brien & Company, also of Louisville, Ky.

"That your petitioner purchased most of its tobacco in Louisville through the Louisville Tobacco Warehouse Companies, and also purchased some tobacco in Cincinnati through the Cincinnati Tobacco Warehouse Companies. That said purchases were commonly and usually made by the independent companies in the tobacco business at auction, or on the 'breaks,' as it is commonly called.

"Now your petitioner shows that at said sales your petitioner's brokers were made to pay high prices for its tobacco by defendants, after the formation of the Craft Tobacco Company, Limited, to carry out the object of destroying your petitioner's business, and every facility was given the Craft Tobacco Company, Limited, to buy at a lower rate and to sell at a lower rate than petitioner by means of discounts, rebates, and larger packages.
"That on May 6, 1903, in furtherance of said schemes, Craft wrote to C. C. Dula, in his capacity set forth in the original petition, that he had stopped in Louisville and secured the Nall & Williams account. That on November 7, 1904, Percival S. Hill, in his capacity set forth in the original petition, wrote Craft showing him how to secure tobacco, and that, for the purpose of deceiving petitioner, said Craft was instructed to buy from independent brokers, and on or about June 16, 1903, did buy from J. B. Spurgin & Co., who were acting as brokers for your petitioner.

"And by such means the old American Tobacco Company, the Continental Tobacco Company, and the Consolidated Tobacco Company, and the American Tobacco Company, or one or two of them, damaged your petitioner by bidding high prices on tobacco and causing your petitioner to buy at an increased rate.

"That in petitioner's fiscal year ending June 1, 1905, your petitioner lost the sum of $26,347.92. That of these losses $10,654.55 were due to the increased prices from the same causes.

"That in the fiscal year ending June 1, 1906, your petitioner lost the sum of $22,265.24, and of this sum $12,778.58 was due to the increased prices caused your petitioner by the defendants in the same manner.

"That in the fiscal year ending June 1, 1907, your petitioner lost the sum of $14,514.85 through the same causes, making a total of $62,957.85, through increased prices forced upon your petitioner by defendants.

"Petitioner further shows that it lost in profits of its trade:

In the year ending June 1, 1904, the sum of .................................................. $ 9,224 43
In the year ending June 1, 1905, the sum of .................................................. 15,883 35
In the year ending June 1, 1906, the sum of .................................................. 19,486 68

Making a total loss of the sum of .................................................. $44,394 44

—caused your petitioner by the organization of the Craft Company, Limited, as stated in your petitioner's original petition, by the taking away of your petitioner's trade through rebates in the form of return covers, selling larger packages of tobacco, and unfairly soliciting your petitioner's trade, all of which will more fully appear by reference to an itemized statement of all of your petitioner's expenses, annexed to this supplemental and amended petition, and all of your petitioner's productions, including tobacco, snuff, and cigarettes, from January 1, 1900, to June 15, 1900; from June 15, 1900, to July 1, 1901; from July 1, 1901, to June 15, 1902; from June 15, 1902, to June 1, 1903; from June 1, 1903, to June 1, 1904; from June 1, 1904, to June 1, 1905; from June 1, 1905, to June 1, 1906; from June 1, 1906, to June 1, 1907—annexed to and made part of this petition for greater certainty, marked 'Exhibit E.'

"Your petitioner further shows that the damages caused to your petitioner, by interference with your petitioner's workmen, amount to the sum of $500.

"Your petitioner further shows that in June, 1905, your petitioner was forced by the Craft Tobacco Company, who began underselling your petitioner by putting in coupons, to put in coupons in the cigarette pack worth one-half cent each, and coupons in tobacco packages worth one-quarter cent each, redeemable in cash by any one presenting same.

"That your petitioner was doing a large and extensive trade without these coupons, until the Craft Tobacco Company, Limited, began to take away from petitioner's business as aforesaid, and was forced, in June, 1905, and afterwards, to spend the sum of $61,074.60, all of which will more fully and at large appear by reference to an itemized statement annexed to petitioner's original petition, marked 'Exhibit B.'

"That your petitioner is entitled to recover from defendants the said sum of $61,074.60.

"Now your petitioner shows: That your petitioner was organized, as stated in its original petition, for the purpose of carrying on a general cigar, cigarette, and tobacco business, including manufacturing, buying, selling, and exporting tobacco to foreign countries and throughout the different states of the United States, and since its organization has carried on an extensive interstate and foreign business, selling its products in New York, Ohio, Illinois, Texas, New Mexico, and in the Republic of Mexico, and many other places.

"That the defendants have been engaged in interstate commerce and in commerce with foreign countries. That all the losses of your petitioner herein
above set forth have been caused by and were the result of conspiracy between
the said American Tobacco Company and the component companies above named, Augustus Craft, and the Craft Tobacco Company, Limited, for the purpose
of injuring your petitioner in his said business, and in violation of the laws of
the United States, and particularly of the act of Congress approved July 2,
1880, and known as the ‘Sherman act.’

"Wherefore your petitioner prays that the defendants, the American To-
bacco Company and the Craft Tobacco Company, Limited, and Augustus Craft,
be cited to appear and answer this petition[er], and after all due and legal
proceedings had, there be judgment in favor of your petitioner, and against
the defendants, in the full sum of $168,926.85, and that the said sum should be
trebled in accordance with the said act of Congress, and the said treble dam-
ages should be allowed your petitioner as against the said defendants, and
each of them; and petitioner prays for reasonable attorney's fees, and for
costs, and for such further and general relief as the court may deem just and
equitable."

The defendants excepted to the supplemental and amended petition on the
following ground:

"That said petition fails to disclose a cause or right of action."

The court sustained the exception, "and decreed that the said exceptions be
maintained, and that the plaintiff's suit be, and the same is hereby, dismissed
at its costs."

The plaintiff brought the case to this court by writ of error. The judgment
sustaining the exception and dismissing the petition (with 20 specifications) is
assigned as error.

Edwin T. Merrick and Ralph J. Schwarz, for plaintiff in error.
George Denegre, Joseph Paxton Blair, and Victor Leovy (Junius
Parker, of counsel), for defendant in error American Tobacco Co.
William S. Parkerson and Bernard Bruenn, for defendants in error
Craft Tobacco Co. and Augustus Craft.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge (after stating the facts as above). This is
an action for threefold damages under section 7, Act July 2, 1890
(chapter 647, 26 Stat. 210 [U. S. Comp. St. 1901, p. 3202]). An
exception of no cause of action was sustained by the court below. The
sole question therefore is whether, on the facts alleged in the petition
and admitted by the exception, this action can be maintained. The
question can only be decided by an examination of the relevant parts
of the act (which we copy in the margin⁴) in connection with the aver-
ments of the petition.

1 An act to protect trade and commerce against unlawful restraints and
monopolies.

Sec. 1. Every contract, combination in the form of trust or otherwise, or
conspiracy, in restraint of trade or commerce among the several states, or with
foreign nations, is hereby declared to be illegal. Every person who shall
make any such contract or engage in any such combination or conspiracy, shall
be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punish-
ed by fine not exceeding five thousand dollars, or by imprisonment not exceed-
ing one year, or by both said punishments, in the discretion of the court.

Sec. 2. Every person who shall monopolize, or attempt to monopolize, or com-
bine or conspire with any other person or persons, to monopolize any part of
the trade or commerce among the several states, or with foreign nations, shall
be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punish-
ed by fine not exceeding five thousand dollars, or by imprisonment not exceed-
ing one year, or by both said punishments, in the discretion of the court.

Sec. 7. Any person who shall be injured in his business or property by any
The first and second sections of the statute describe and condemn certain acts which restrain interstate or foreign commerce, and the seventh section provides that one who is injured in his business or property by another by reason of anything forbidden by the statute may sue for threefold damages. To repeat, the first and second sections condemn certain acts, and punish them as misdemeanors. The seventh section is to the effect that those who do the forbidden things, commit the misdemeanors, may be sued in a civil action for threefold damages by one who is injured in his business or property. It follows therefore that the petition should charge, and that is all that is required: (1) That the defendants have done one or more of the forbidden things; (2) that by such action of the defendants, the plaintiff has been injured in its business or property; and (3) the amount or value of such injury. If the petition contains these essential averments, it is not subject to an exception of no cause of action, although it may contain surplusage and may specify some items of damages which may not be recoverable.

But, before we examine the petition, we must look closer at the statute on which it is framed. Here is the description it gives of the condemned misdemeanors:

"Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor. *

"Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor. *"

Presently we must examine the petition to see whether it charges that the defendants did one or more of these forbidden things. If it does so charge, it will remain to be determined whether there are averments showing that the plaintiff comes within the seventh section, to wit:

"Sec. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor, * and shall recover threefold the damages by him sustained. *"

This more elaborate statement of the statute makes it plain that the petition need only aver, and state facts to show, that the defendants have committed one or more of the offenses condemned by the first and second sections, that the plaintiff is a person injured within the meaning of the seventh section, and the amount of damages it sus-
tained by such injury. Loewe v. Lawlor, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488, was an action like this, brought under section 7 of the act. A demurrer was sustained to the declaration by the lower court, and in reversing the judgment Mr. Chief Justice Fuller, speaking for the court, had occasion to summarize the averments in holding them sufficient:

"We have given the declaration in full in the margin, and it appears therefrom: That it is charged that defendants formed a combination to directly restrain plaintiffs' trade; that the trade to be restrained was Interstate; that certain means to attain such restraint were contrived to be used and employed to that end; that those means were so used and employed by defendants; and that thereby they injured plaintiffs' property and business."

We turn now to the petition to see if it has the necessary allegations to sustain the action, looking at it with the statute before us, aided by the summary of the declaration held to be good by the Supreme Court in Loewe v. Lawlor, supra.

We find an elaborate charge of a combination and conspiracy in restraint of interstate trade or commerce by the three defendants. Other persons, who are not sued, are named as parties to the conspiracy. Such other persons are corporations owned in part and controlled by one or more of the alleged conspirators who are sued. At great length, and with minute details, the petition alleges and describes this combination or conspiracy in restraint of interstate trade or commerce, showing that it is such as is condemned by the first section of the act. With equal fullness, there are allegations of an attempt by the defendants, with other conspirators, to monopolize the trade or commerce in tobacco among the several states, such an attempt and conspiracy as is condemned by the second section of the act. It is then alleged that the plaintiff was engaged in interstate trade or business, such as that engaged in by the defendant companies, and that the described acts of the defendants were done for the purpose of obtaining a monopoly and destroying the business of the plaintiff. It is further alleged that by such conspiracies and combinations of the defendants, and by their efforts to obtain a monopoly, the business of the plaintiff was injured greatly, and that the plaintiff was damaged to the extent of $168,926.85. The full petition is given in the statement of the case. It would serve no useful purpose now to condense and restate the facts alleged. If the averments are true—and the exception of no cause of action admits them to be true—the defendants are guilty of the misdemeanors charged in the first and second sections of the act, and the plaintiff has been injured in its business or property within the meaning of the seventh section.

We are of opinion therefore that the court erred in sustaining the exception of no cause of action.

The judgment of the Circuit Court is reversed, and the cause remanded for a new trial.

In a prosecution under Rev. St. § 3893, as amended in 1888 (U. S. Comp. St. 1901, p. 2658), for depositing an obscene, lewd, or lascivious paper in the mails, there is a preliminary question for the court to determine whether the writing could by any reasonable judgment be held to come within the prohibition of the law, and, whenever reasonable minds might reach different conclusions as to its character, it is the duty of the court to submit the question to the jury. The court cannot properly in any case declare the writing to be within the statute as matter of law.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 88; Dec. Dig. § 50.*

Nonmailable matter, see note to Timmons v. United States, 30 C. C. A. 79.]

2. Post Office (§ 31*)—Offenses Against Postal Laws—Mailing Obscene Matter.

In a prosecution under Rev. St. § 3893, as amended in 1888 (U. S. Comp. St. 1901, p. 2658), for depositing obscene, lewd, or lascivious matter in the mails, the purpose of the defendant is immaterial, and that his motive was good is no defense.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 50; Dec. Dig. § 31.*]


The constitutional guaranties of religious freedom and freedom of the press have no application to Rev. St. § 3893, as amended in 1888 (U. S. Comp. St. 1901, p. 2658), excluding from the mails papers or writings that are obscene, lewd, or lascivious.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. §§ 84, 90.*]

4. Post Office (§ 31*)—Offenses Against Postal Laws—Mailing Obscene Matter—Construction of Statute—“Obscene.”

In Rev. St. § 3893, as amended in 1888 (U. S. Comp. St. 1901, p. 2658), making it a misdemeanor to mail any obscene, lewd, or lascivious paper or writing, the word “obscene” should be given fully as broad a significance as it had at common law.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 50; Dec. Dig. § 31.*

For other definitions, see Words and Phrases, vol. 6, pp. 4887-4889; vol. 8, p. 7735.]

5. Post Office (§ 31*)—Offenses Against Postal Laws—Mailing Obscene Matter.

The true test to determine whether a writing is nonmailable under Rev. St. § 3893, as amended in 1888 (U. S. Comp. St. 1901, p. 2658), as obscene, lewd, or lascivious, is whether its language has a tendency to deprave and corrupt the morals of those whose minds are open to such influences, and into whose hands it may fall, by arousing or implanting in such minds obscene, lewd, or lascivious thoughts or desires.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 50; Dec. Dig. § 31.*]


Whether or not a newspaper article commenting on the death of a young unmarried woman as the result of an attempted abortion, and in

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
effect approving fornication and condemning society for its attitude toward it, was obscene, lewd, or lascivious and rendered the mailing of the paper containing it a criminal offense under Rev. St. § 3893, as amended in 1888 (U. S. Comp. St. 1901, p. 2658) held a question for the jury.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 88; Dec. Dig. § 50.*]

In Error to the District Court of the United States for the District of South Dakota.

The defendant was indicted for a violation of section 3893 of the Revised Statutes (U. S. Comp. St. 1901, p. 2658), as amended, which prohibits the use of the mails for the circulation of obscene writings. He publishes at Deadwood, S. D., a weekly paper called "The Lantern." The issue of March 30, 1907, contained the following article, written by him:

"A good illustration of the beauties of our social system was recently given when 'society' in Lead and Deadwood was convulsed by the news that a most sweet and amiable young woman had died at Denver from the effects of an operation performed upon her to hide what society calls her 'shame.' And what was this thing which society blasphemously brands as 'shame'? Why, simply that an unmarried girl having disregarded the sanctions of some priest or magistrate, had made the discovery that God had worked in her the wonderful miracle of motherhood. So this poor girl, having been taught from infancy that such a thing constituted 'shame,' killed her unborn child and in so doing kills herself. That the father and mother of this murdered child were designed by nature for each other is proven by the fact that they could not resist their mutual attraction, even in the face of great social peril. Love had its way, and God blessed the union with the most stupendous fruit of the universe, a human child; and 'society' steps in and cries 'shame' and causes the mother to kill both herself and her child. It is a well established fact in physics as well as in history that there are no children so likely to be healthy, robust, so mentally and bodily fit to survive as those very 'love children' who are killed in the wombs of foolish mothers driven to do the fiendish deed by 'society' and public opinion. Since the dawn of history, the great army of genius has been largely recruited from the ranks of illegitimates. Love's offerings have filled the earth with art, music, poetry, and wisdom, as if putting to shame those very ones who cry 'shame' and as taunting them with their own inferiority. Society is as guilty of the murder of this girl as though she had been put to death by the public hangman."

The depositing in the post office of the paper containing this article is the offense alleged. The cause was submitted to the jury in a charge to which no exception has been reserved, and resulted in a verdict of guilty. The defendant challenged the sufficiency of the indictment by demurrer and motion in arrest of judgment.

Freeman T. Knowles and Robert C. Hayes, for plaintiff in error.


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

AMIDON, District Judge (after stating the facts as above). Upon this record, the only question before us is whether the article is obscene, lewd, or lascivious, within the meaning of the statute. If it was fairly open to the construction of falling within either of these classes, it was the plain duty of the court to submit the question of its character to the jury. In all indictments under this statute there is a preliminary question for the court to say whether the writing could by any reasonable judgment be held to come within the prohibition of the law. That

*For other cases see same topic & § Number in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
is like the question of law in a case of negligence as to whether there is any substantial evidence of negligence. It leaves a wide field for the sound, practical judgment of the jury to determine the true character of the writing and its probable effect upon the mind of readers. Whenever reasonable minds might fairly reach different conclusions as to the character of the writing, it is the duty of the court to submit the question to the jury. Rosen v. United States, 161 U. S. 29, 16 Sup. Ct. 434, 480, 40 L. Ed. 606; United States v. Bennett, 16 Blatchf. 348, Fed. Cas. No. 14,571; United States v. Davis (C. C.) 38 Fed. 326; United States v. Harmon (D. C.) 45 Fed. 418. Looking at the article in question, we entertain no doubt that its character and effect were questions for the determination of the jury. It glorifies fornication, and places it under the blessing of God. It designates the offspring of such intercourse as “love children,” and declares that the “army of genius has been largely recruited from the ranks of illegitimates.” Whether such language as this when presented to the minds of ardent youths and maidens would have a tendency to arouse impure and lascivious thoughts and desires, we should say was at least a question of fact for the determination of a jury. The defendant urges that his article contains a sincere discussion of an important social question, and that he was actuated only by the highest motives. He argued his case in person, and the impression which he made tended strongly to support this claim as to his motives; but such matters are immaterial in determining the issue here involved. His motive may have been never so pure; if the paper he mailed was obscene, he is guilty. There is no reference in the statute to the design or intent that a man has in depositing nonmailable matter in the mail. He cannot violate the law, even though his purpose be to accomplish good.

Our attention is called to United States v. Moore (D. C.) 104 Fed. 78. We cannot approve of the interpretation which that case puts upon the opinion of the Supreme Court in Swearingen v. United States, 161 U. S. 448, 16 Sup. Ct. 569, 40 L. Ed. 765. The first matter dealt with by the Supreme Court in its opinion is the charge of duplicity. The statute uses the terms “Obscene, lewd or lascivious,” in the disjunctive. Following the usual practice of criminal pleading, the indictment charged the writing to be “obscene, lewd and lascivious,” using the conjunctive form. The court held that this part of the statute defined but a single offense, and for that reason ruled that the indictment was not subject to the charge of duplicity. It is not true, however, as suggested in United States v. Moore (D. C.) 104 Fed. 78, that the opinion holds that a writing to come within the statute must be obscene, lewd, and lascivious. It is an elementary rule of criminal pleading that, where an offense may be committed by the use of either of several means, it is proper to charge those means in the conjunctive form, and the government establishes its case if it proves the defendant guilty as to either of them. Commonwealth v. Curtis, 9 Allen (Mass.) 266; Stevens v. Commonwealth, 6 Metc. (Mass.) 241; State v. Murphy, 17 R. I. 698, 24 Atl. 473, 16 L. R. A. 550.

The constitutional guaranties of religious freedom and freedom of the press have nothing to do with the statute here involved, for two reasons: (1) Those guaranties cannot be made a shield for viola-
tion of criminal laws which are not designed to restrict religious worship or a free press, but to protect society against practices that are clearly immoral and corrupting. Davis v. Beason, 133 U. S. 333, 10 Sup. Ct. 299, 33 L. Ed. 637. (2) The postal service is an agency of the federal government, and that government may exclude from its channels whatever in its judgment would be injurious to public morals. In re Rapier, 143 U. S. 110, 12 Sup. Ct. 374, 36 L. Ed. 93. From time immemorial it was an offense at common law to utter obscene language in public places, near a dwelling house, or in the presence of women. State v. Appling, 25 Mo. 315, 69 Am. Dec. 469; Barker v. Commonwealth, 19 Pa. 412; Rex v. Wilkes, 4 Burr. 2527; Commonwealth v. Holmes, 17 Mass. 336; Willis v. Warren, 1 Hilt. (N. Y.) 590. The purpose underlying this common-law offense was, of course, to protect the innocent and pure against having obscenity intruded upon their notice. The pervasiveness of our present mail system brings it directly within the reasoning of this common-law doctrine. If it may be used by the obscene, no mind or fireside is secure against their corruption. The utterance of obscene language upon the street is a mild offense in comparison with its dissemination by an organized effort through such a secret and pervasive agency as the postal service. The word "obscene," therefore, should be given in this statute fully as broad a significance as it had at common law. Language, of course, may be coarse, profane, and opprobrious without coming within the scope of that term. Shields v. State, 89 Ga. 549, 16 S. E. 66; Swearingen v. United States, 161 U. S. 446, 16 Sup. Ct. 562, 40 L. Ed. 765. The true test to determine whether a writing comes within the meaning of the statute is whether its language has a tendency to deprave and corrupt the morals of those whose minds are open to such influences, and into whose hands it may fall, by arousing or implanting in such minds obscene, lewd, or lascivious thoughts or desires. The judgment must be affirmed.

CHOUTEAU et al. v. ALLEN, Collector of Internal Revenue.
(Circuit Court of Appeals, Eighth Circuit. May 13, 1909.)
No. 2,822.

INTERNAL REVENUE (§ 8*)—INHERITANCE TAX—CONSTRUCTION—RECOVERY OF PAYMENT MADE.

A will bequeathed the residue of testator's estate to trustees, in trust to invest and collect the rents and profits, and after the payment of taxes, etc., to pay one-third of the income to each of testator's daughters for life as her separate property, without the right to dispose of it by will, or to anticipate, mortgage, pledge, or hypothecate, and on the death of each of the daughters, leaving a child or children surviving, the corpus of the estate to go to such child or children on their reaching 21. In default of surviving child or children, or brothers or sisters, then to testator's right heirs, and in case each of the daughters died before testator, leaving a child or children or lineal descendants thereof, such child or children or descendants should take in the same manner and subject to the same trust as provided in respect thereto in case testator had died before the daughters. Held, that the interests created by such will were vested, and not

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
contingent, and, having vested prior to July 1, 1902, the executors were entitled to recover from the United States the inheritance tax paid thereon as authorized by Act Cong. June 27, 1902, c. 1100, § 3, 32 Stat. 406 (U. S. Comp. St. Supp. 1907, p. 652).

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

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

Joseph Wheless and H. T. Newcomb, for plaintiffs in error.

Truman P. Young, for defendant in error.

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

PER CURIAM. The judgment of the Circuit Court in this case is affirmed upon the authority of Westhus v. Union Trust Co. (C. C. A.) 164 Fed. 795, on rehearing 168 Fed. 617.

NOTE.—The following is the opinion of Dyer, District Judge, in the Circuit Court:

DYER, District Judge. This is an action brought by the executors of the last will and testament of Charles P. Chouteau against the collector of Internal revenue for the First collection district of Missouri for moneys alleged to have been paid to the collector (under protest) on an assessment duty made against the executors of the estate of Charles P. Chouteau. Charles P. Chouteau died on the 5th day of January, 1901. At the time of his death, and of the making of the will (hereinafter mentioned) by him, the following statutes of the United States were in force (Act June 13, 1898, c. 448, 30 Stat. 464 [U. S. Comp. St. 1901, p. 2307]):

"Sec. 29. That any person or persons having in charge or trust, as administrators, executors, or trustees, any legacies or distributive shares arising from personal property, where the whole amount of such personal property as aforesaid shall exceed the sum of ten thousand dollars in actual value, passing, after the passage of this act, from any person possessed of such property, either by will or by the intestate laws of any state or territory, or any personal property or interest therein, transferred by deed, grant, bargain, sale or gift, made or intended to take effect in possession or enjoyment after the death of the grantor, or bargainer, to any person or persons, or to any body or bodies, politic or corporate, in trust or otherwise, shall be, and hereby are, made subject to a duty or tax, to be paid to the United States, as follows:

"Sec. 30. That the tax or duty aforesaid shall be a lien and charge upon the property of every person who may die as aforesaid for twenty years, or until the same shall, within that period, be fully paid to and discharged by the United States; and every executor, administrator, or trustee, before payment and distribution to the legatees, or any parties entitled to beneficial interest therein, shall pay to the collector or deputy collector of the district of which the deceased person was a resident the amount of the duty or tax assessed upon such legacy or distributive share, and shall also make and render to the said collector or deputy collector a schedule, list or statement, in duplicate, of the amount of such legacy, or distributive share, together with the amount of duty which has accrued, or shall accrue thereon, verified by his oath or affirmation, to be administered and certified thereon by some magistrate or officer having lawful power to administer such oaths, in such form and manner as may be prescribed by the Commissioner of Internal Revenue, which schedule, list or statement shall contain the names of each and every person entitled to any beneficial interest therein, together with the clear value of such interest, the duplicate of which schedule, list or statement shall be by him immediately delivered, and the tax thereon paid to such collector; and upon such payment and delivery of such schedule, list or state-

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep's Indexes
ment, said collector or deputy collector shall grant to such person paying such duty or tax a receipt or receipts for the same in duplicate, which shall be prepared as hereinafter provided. Such receipt or receipts duly signed and delivered by such collector or deputy collector, shall be sufficient evidence to entitle such executor, administrator or trustee to be credited and allowed such payment by every tribunal which, by the laws of any state or territory is, or may be, empowered to decide upon and settle the accounts of executors and administrators.

The will of Charles P. Chouteau, or so much thereof as is pertinent to the question under consideration, is as follows:

"Section Four (4): All the rest and residue of my estate, excluding the $50,000.00 and any additions thereto embraced in section two, but including the remainder, subject to the life estate bequeathed and devised in section three to my wife, I give, bequeath and devise as follows, that is to say: To my son, Pierre Chouteau and to his heirs and assigns, one-fourth part thereof; and the remaining three-fourths part thereof, including whatever remains at the death of my son Henry of the said principal sum of $50,000.00 (any accumulations which may have been added thereto) mentioned in section two, I give, bequeath and devise to (plaintiffs as trustees and successors in trust of others named) and to their heirs and successors in trust, but in trust and upon the following trust, that is to say: To collect the rents, issues, profits and income thereof and therefrom, and after paying the taxes and other proper and necessary charges thereon and on account thereof, to pay over, in quarterly installments, the net annual balance as follows, viz.: To my daughter Emily A. Henshaw (wife of John M. Henshaw) during and only during her life, one-third of said net balance; to my daughter Anne V. Johnson (wife of D. D. Johnson) during and only during her life, one-third of such net balance; and to my daughter Marie J. Chouteau, during and only during her life, the remaining third of such net balance. And I direct that each of my said three daughters shall receive and hold her portion of said net income, aforesaid, as a sole and separate estate, it being my intention to exclude any husband either of them now has or may hereafter have from any interest in or control over said income, and from any and all rights, interest or estate, as tenants by the curtesy, or otherwise, in said trust property aforesaid, or in any part thereof. And neither of my said daughters shall have any right or power to devise, bequeath, transfer or convey any right or interest or estate in said trust property, or in any part thereof, or in her said portion of said net income, or in any manner to anticipate the same, either by mortgage, pledge, hypothecation, or by any other method or means of incumbrance or disposition, and it is my will and I direct that upon the death of each of my said daughters if she leaves a child or children, surviving her, one-third of the corpus or principal of said trust property in the hands of said trustee shall pass to and vest in her said child or children, and in the descendants (living at the death of my said daughter), such descendant or descendants taking the portion its or their parent would have taken had such parent survived my said daughter; and said trustees shall transfer and convey, in the proportions aforesaid, said one-third of said corpus or principal of said trust property to said child or children, and the descendant or descendants, if any, of such deceased child or children; provided, however, and it is my will and I direct, that if at the death of my said daughter any child of hers be then under the age of twenty-one years, such child's portion of said one-third, aforesaid, of said corpus or principal of said trust property shall be held and managed by said trustees until such child attains the age of twenty-one years, when, and not before such transfer and conveyance shall be made by said trustees to such child; but during and until such child has attained the age of twenty-one years such portion of the net income of such child's share in said trust property, which said trustees may deem proper, may be expended by them for his or her education or maintenance, or both, and also, provided further, and it is my will and I direct, that if any child of my said deceased daughter die before attaining the age of twenty-one years, and without leaving issue surviving him or her, then and in such case, the portion aforesaid of said deceased child in said corpus or principal of said trust property shall pass to and vest in and be conveyed by said trustees to his or her, such child's, surviving brother or brothers, and sister or sisters; but if such de-
ceased child leaves no brother or sister surviving him or her, then, and in
case his or her said portion shall at once vest in and be transferred and
conveyed by said trustees to my right heirs. Also provided further, and it is
my will and I direct that if either of my said three daughters die without
leaving lineal descendants surviving her, then and in that event the said
portion aforesaid of the corpus or principal of said trust property, the net
income of which is above given to her during her life, shall at her decease
pass to and vest in my right heirs and the said trustees shall transfer and
convey the same to them.

"And I authorize and direct said trustees to manage and control said trust
property during the continuance of the trust created by this section, as they
shall deem best, thereby conferring upon them full power to sell, transfer and
convey any of said trust property whenever and as often as they may de-
temine it to be expedient and to invest the proceeds of such sale or sales in
such property, whether real or personal or both, as to them shall seem best
for the interests of said trust, and also to change, whenever and as often as
they may determine, any investment or investments of the funds of said trust,
including in the powers hereby conferred the power to improve, whenever and
as often as they may determine, by the erection of new buildings or recon-
struction of existing buildings or otherwise, any of the real estate which may
at any time belong to said trust. And further confer upon said trustees full
power to make, from time to time, any division of said trust property, which
may become necessary in carrying out the provisions of the trust, and such
division or divisions made by them shall be binding and conclusive upon all
persons or parties interested therein.

"Section Seven. It is also my will and I direct that if either of my said
daughters die before my decease, leaving a child or children, or lineal descen-
dants of a child or children, surviving her, in that event such child or children,
and such lineal descendants, if any, of such deceased child or children, shall
take under this will in the same manner, to the same extent and subject to the
same conditions, restrictions, limitations, powers and trusts, as above, in
Section Four, provided in respect of such child, children and lineal descend-
ants, in the case of my death before the death of such daughter."

Subsequent to the making of this will and the death of Mr. Chouteau, Con-
S. Comp. St. Supp. 1907, p. 662]), as follows:

"Sec. 3. That in all cases where an executor, administrator, or trustee shall
have paid, or shall hereafter pay, any tax upon any legacy or distributive
share of personal property under the provisions of the act approved June thir-
teenth, eighteen hundred and ninety-eight, entitled 'An act to provide ways and
means to meet war expenditures, and for other purposes,' and amendments
thereof, the Secretary of the Treasury be, and he is hereby authorized and
directed to refund, out of any money in the treasury, not otherwise appro-
piated, upon proper application being made to the Commissioner of Internal
Revenue, under such rules and regulations as may be prescribed, so much of
said tax as may have been collected on contingent beneficial interests which
shall not have become vested prior to July first, nineteen hundred and two.
And no tax shall hereafter be assessed or imposed under said act approved
June thirteenth, eighteen hundred and ninety-eight, upon or in respect of any
contingent beneficial interest which shall not become absolutely vested in pos-
session or enjoyment prior to said July 1st, nineteen hundred and two."

The plaintiffs, in pursuance of this statute, made application to the Commiss-
ioner of Internal Revenue to refund to them the taxes collected upon the
assessment. The Commissioner refused the application, and the result of it all
is this suit.

The only question of law arising in this case is: "Are the interests creat-
ed by the will of Mr. Chouteau contingent or vested?" If contingent, the
plaintiffs are entitled to recover back the taxes paid; but, if vested, then they
are not entitled to recover. In my judgment the interests represented here
by the petitioners were vested, and not contingent, under the will of Mr.
Chouteau.

Judgment will be entered for the defendant.
GOOD v. CENTRAL COAL & COKE CO.

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

No. 2,856.

APPEAL AND ERROR (§ 1195*)—EFFECT OF REVERSAL—DECISION AS LAW OF THE CASE ON SECOND TRIAL.

Where the law of a case had been settled in favor of a plaintiff on a material issue by the appellate court, in reversing a prior judgment, on the facts as they then appeared, and on the second trial the evidence was substantially the same and without conflict, it was not error to instruct that plaintiff was entitled to recover on such issue.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4661—
4665; Dec. Dig. § 1195.*]

In Error to the Supreme Court of the State of Oklahoma, Successor of the United States Court of Appeals in the Indian Territory.

For opinion below, see 7 Ind. T. 268, 104 S. W. 613.

George Zabriskie (Zabriskie, Murray, Sage & Kerr and Nagel & Kirby, on the brief), for plaintiff in error.

Ira D. Oglesby, for defendant in error.

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

RINER, District Judge. This is the second appearance of this case in this court. 120 Fed. 793, 57 C. C. A. 161. When the case was first here a new trial was ordered, which resulted in a verdict and judgment for the plaintiff. The case was appealed to the United States Court of Appeals for the Indian Territory, and the judgment is affirmed for the reasons stated in the opinion of that court, set out in the record as follows:

"Statement.

"The original complaint in this cause was filed on the 13th day of October, 1895, at South McAlester. On April 29, 1896, the defendants George S. Good & Co. filed their answer to the complaint. On June 30, 1898, the plaintiff filed its amended complaint, and on the same day the defendant filed its amended answer, a jury was impaneled, and the case proceeded to trial.

"The plaintiff in its amended complaint alleged that on the 15th day of December, A. D. 1894, plaintiff and defendants entered into a written contract in which it was agreed that plaintiff should furnish defendants lumber and piling to be used in the construction of the line of the Choctaw, Oklahoma & Gulf Railroad, and that said defendants should pay plaintiff for such lumber and piling as follows: For all lumber delivered f. o. b. South McAlester, Ind. T., $13.50 per thousand feet, board measure; for all lumber delivered f. o. b. Oklahoma City, Okl. T., $15.50 per thousand feet, board measure; for all piles delivered f. o. b. South McAlester, Ind. T., 13½ cents per linear foot; for all piles delivered f. o. b. Oklahoma City, Okl. T., 16 cents per linear foot.

"Plaintiff alleges that in all things it had complied with said contract, and furnished to defendants a large amount of lumber and piling, a statement of which is attached to said complaint, marked ‘Exhibit B’; that defendants accepted and used the same, but have failed and refused to pay for same, and still refuse so to do, although the same is long past due; that there is due plaintiff from defendants for lumber and piling so furnished the sum of $9,024.-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
42, together with interest at the rate of 6 per cent. from the 20th day of September, 1895, and asks judgment for the same.

"For a second cause of action plaintiff alleges that at the instance and request of defendants it furnished and delivered to defendants, upon said line of the Choctaw, Oklahoma & Gulf Railroad Company, piling as follows, to wit: On May 20, 1895, 12,957 feet; on July 30, 1895, 2,044 feet; on September 30, 1895, 24,177 feet; that said piling so furnished and delivered at the time of its delivery was reasonably worth the sum of 16 cents per foot, making a total value of $6,268.43. Said piling is a part of and included in the account referred to in the foregoing count which is marked 'Exhibit B,' and that defendants have refused to pay for the same; and ask judgment for $6,268.43 as the reasonable value of said piling, with interest at 6 per cent. per annum from the 20th day of September, 1895.

"Defendants in their amended answer, first, deny each and every allegation in the amended complaint filed, and demand strict proof of the same; but defendants admit that they owe the plaintiff the sum of $1,201.04. Defendants further say that they ought not to be held to pay plaintiff any further sum of money, because they have paid M. W. Osborn the very sum of money which the plaintiff sues for in this case, and the same was paid to the said Osborn under and by virtue of a certain contract entered into between the defendants and the said Osborn on the 7th day of December, 1894.

"Second, the defendants by counterclaim ask damages in the sum of $10,000.

"Thereupon the plaintiff filed its reply to paragraph 2 of said amended answer, and denies all damages alleged by defendants. Thereupon the case was tried by a jury, and on July 2, 1898, the jury returned a verdict for plaintiff in the sum of $1,201.04. On August 30, 1898, motion for new trial was presented and overruled by the court, and plaintiff appealed to this court.

"On October 5th, 1901, the judgment in this case in the court below was affirmed by this court, and the plaintiff appealed to the United States Circuit Court of Appeals for the Eighth Circuit, and on April 21, 1903, there was filed with the clerk of this court the mandate of the United States Circuit Court of Appeals for the Eighth Circuit, reversing the judgment of the United States District Court for the Central District of Indian Territory, and ordering a new trial therein in said cause.

"On June 24, 1903, the court below ordered that the venue herein, by agreement of parties, be changed to the Poteau division, and on August 24, 1903, a transcript and all original papers were filed at Poteau, and said cause duly docketed.

"On January 8, 1904, there was filed the third amended answer of the defendants, denying the allegations in plaintiff's complaint, that it has in all things complied with said contract; deny that there is due from defendants to plaintiff $9,024.44, with interest from the 20th day of September, 1905, or any other sum of money; deny that defendants are indebted to plaintiff in the sum of $6,268.43, or any other sum of money whatever, except as may be hereinafter stated; deny that plaintiff furnished the lumber and piling contained in Exhibit B to said complaint; deny that defendants have refused to pay for any part of the same; deny that on the 15th day of December, 1894, defendants entered into a written contract, by the terms of which it was agreed that plaintiff should furnish lumber or piling to be used in the construction of the Choctaw, Oklahoma & Gulf Railroad; deny that defendants obligated themselves to pay for such lumber and piling in the manner stated and set out in plaintiff's amended complaint; deny that the defendants have accepted said lumber and piling as charged in said amended complaint; and defendants say a just account between plaintiff and defendants will show that there is due plaintiff by defendants the sum of $1,201.04, subject, however, to damages hereinafter set forth and claimed by defendants against plaintiff.

"Defendants further say they ought not to be held to pay to plaintiff any further sum of money, because they have already paid to one M. W. Osborn the very sum of which plaintiff sues in this case, and that the same was paid under and by virtue of a contract between the defendants and Osborn, entered into on the 7th day of December, 1894, all of which plaintiff knew and agreed to and acquiesced in, and defendants say that said sum was paid to said Os-
born for the lumber and piling for which plaintiff now sues, and was paid to said Osborn with the full understanding and knowledge of the plaintiff, and with its consent.

"Further answering, defendants say that prior to the 20th day of May, 1895, Osborn furnished to defendants piling to the amount of $10,000; that monthly estimates were furnished Osborn, and he was paid monthly; that plaintiff knew that defendants were receiving the piles as Osborn's piles, and did not notify defendants that they were claiming same; that defendants did not know that plaintiff had any arrangement with Osborn to furnish these piles to defendants until May 20th as aforesaid, as the piles of Osborn, furnished under a contract with said Osborn.

"Second. Further answering, defendants, by way of counterclaim, allege they were damaged in the sum of $10,000 by failure of plaintiff to comply with its contract with defendants.

"On February 2, 1905, plaintiff, for answer to defendants' counterclaim set up in paragraph 2, denies all damages.

"The case was continued until the January term, 1905, and on February 2d, being one of the days of said term, the cause came on for trial before a jury, and on February 3, 1905, the jury returned the following verdict:

"'We, the Jury, duly impaneled, sworn, and charged to try the issues in the above-styled cause, do find for the plaintiff in the sum of $11,712.58. W. W. Isch, Foreman.'

"On February 4th, motion for new trial was filed by the defendants and overruled by the court, and judgment rendered upon the verdict, and defendants prayed an appeal to this court.

"Opinion.

"TOWNSEND, J. The plaintiff in error has filed eight assignments of error, as follows: (1) The verdict of the jury is contrary to law. (2) The verdict of the jury is contrary to the evidence. (3) The verdict of the jury is in excess of the amount sued for by plaintiff. (4) The verdict of the jury is excessive, appearing to have been given under the influence of passion and prejudice. (5) The court erred in overruling defendants' objections to that part of the evidence of the witness M. W. Osborn whereby he testified as to the intent and meaning of the contract entered into between said M. W. Osborn and the defendant, for the reason that said contract was plain and unambiguous in its terms, and parol testimony to explain, vary, or modify its terms was inadmissible. (6) The court erred in giving to the jury the following instructions: 'The court instructs you that the plaintiff is entitled to recover from the defendant the amount sued for, less whatever you may deem the defendant to have been damaged by virtue of an allegation made by it in its answer, that the defendant was delayed in completing its work upon the railroad.' (7) The court erred in holding that it was bound by the decision of the Circuit Court of Appeals for the Eighth Circuit in this case, for the reason that said decision as to the facts of this case was not binding upon this court, and could not deprive the defendant of a trial by jury upon the issues of fact raised in this case. (8) The court erred in refusing to permit the defendant to prove by the witness Hitchcock the universal custom of the chief engineer of the Choctaw, Oklahoma & Gulf Railroad Company in sending out estimates of work and material, for the purpose of showing that said chief engineer did not place upon the estimate offered by plaintiff in this case the price at which said piling was furnished, to wit, 13½ cents.

"Counsel say, while not waiving any of the assignments of error in this cause, we desire to insist on the general proposition, which includes nearly all the assignments of error, and that is, the court erred in its charge to the jury, as shown in the sixth assignment. The sixth assignment is that: 'The court instructs you that the plaintiff is entitled to recover from the defendant the amount sued for, less whatever you may deem the defendant to have been damaged by virtue of the allegation made by it in its answer that the defendant was delayed in completing its work upon the railroad.' It is conceded by counsel upon both sides of this case that the only controversy is with regard to the piles furnished between Oklahoma City and the Canadian river. The damages alleged in defendants' counterclaim, and denied by plaintiff in its
reply thereto, were fully submitted by the court in its charge to the jury, and no exceptions were taken to the charge in that respect. This limits the objections to the charge of the court, in this sixth assignment, to the question whether the court was authorized to direct a finding for the plaintiff upon the evidence introduced upon the trial, that plaintiff had delivered to the defendant the piles sued for in this action. It must be remembered that the only question that can be litigated in this case is the difference between plaintiff and the defendants under the contract of December 15, 1894. Whatever controversy existed between M. W. Osborn and the defendants under the contract entered into between them on December 7, 1894, cannot be settled in this lawsuit. Hence the only material question involved in this case is, Did the plaintiff furnish the piles to the defendants as alleged in its complaint, and were those piles, when accepted by the defendant, used by the defendant in the construction of the railroad?

"The law of this case announced by the Circuit Court of Appeals, and reported in 120 Fed. 795, 57 C. C. A. 163, is very clearly stated, and is binding upon the court. Judge Sanborn, in delivering the opinion of the court in that case, asks this question: 'May one who has knowingly accepted and applied to his own use property of his contractor, furnished by the latter under the agreement between them, escape payment of the contract price or value of the property delivered by proof that when he accepted and used it that he notified his contractor that he refused to receive it as his property, and accepted it as the property of another, and that he paid the third party therefor?'

"The evidence introduced upon the last trial was substantially the same as that introduced at the first trial, and that statement of facts, as set out by the Circuit Court of Appeals in its report of this case, is as applicable to the last trial as to the first; and, in the enumeration of those facts, it is stated: 'At or near the inception of the delivery of this piling, Good & Co. were notified that it was the property of the plaintiff, and was delivered under its contract pursuant to the agreement which it had made with Osborn that he should furnish and deliver the piling for the coke company. During the entire course of the delivery both Osborn and the coke company repeatedly informed Good & Co., and insisted that this piling was the property of the coke company, and that it was delivered under its contract, and that it was paying Osborn for procuring and furnishing the piling pursuant to its contract with him. While Good & Co. protested to Osborn against accepting the piling as the property of the coke company, and informed him that it accepted it as his property under the contract of Good & Co. with him, neither the coke company nor Osborn assented to this view of their property rights, and Good & Co. put the piles into the railroad.'

"Mr. Hitchcock, superintendent for the defendants, in his testimony for the defendants, upon cross-examination, stated as follows: 'Q. Now, you say you did not promise Osborn to rectify the estimates. Didn't he tell you that he was getting that timber under contract with the Central Coal & Coke Company? A. He did not at the time I had the conversation with him. Q. But he did tell you? A. He wrote us letters afterwards about it. Q. How long afterwards? A. I don't know exactly, but I judge in May or June that he started to notify us. Q. Didn't he do it earlier than May or June? A. Not to my recollection. Q. He notified you as early as May that the timber he was furnishing was the plaintiff's timber that he was furnishing under contract with them? A. Yes, sir. Q. Plaintiff also notified you to that effect, did they not? A. Yes, sir, May 20th. Q. So you had notice both from Osborn, who was getting it out and delivering it, and from the plaintiff, that it was not Osborn's piling, but it was the piling that belonged to the plaintiff? A. Yes, sir. Q. With that knowledge you received it from Osborn? A. Yes, sir. Q. And used it in your road? A. Yes, sir. Q. And didn't pay plaintiff for it? A. No, sir, we paid Osborn. Q. Did plaintiff consent to your paying Osborn for it? A. Don't know that they did. Q. Don't know that they didn't? A. I don't suppose that they did consent to it, or anything about it, perhaps. Q. How much of this piling had been furnished up to that time—what proportion of it? A. I don't know what proportion of it.'

"Upon this state of facts the Circuit Court of Appeals, in its report, on page 797 of 120 Fed., on page 165 of 57 C. C. A., say: 'The fact that one who has knowingly received and used the property of his contractor delivered under
the agreement notified the latter when he received the property that he refused to receive it as the contractor’s property, and that he accepted it as the property of another, and the further fact that he paid the third party for it, will not relieve him from liability to the contractor for the purchase price or value of his property which he has received.’

“The contention of counsel for plaintiff in error is that, because defendants were not notified before May, 1895, that the plaintiff was furnished piling through its subcontractor, Osborn, that the defendants would not be responsible for piling furnished prior to that time. But did not the defendants, as a matter of fact, receive notice prior to that time? Osborn testified that, when the estimates for February and March were delivered to him, he made upon those estimates the following indorsement: ‘Gentlemen, as I have stated to you, I do not accept twenty-one cents per foot as any part in payment for piling furnished between Oklahoma City and the South Canadian river, as all I claim of you is my contract price for driving, of eighteen cents per lineal foot. I look to the Central Coal & Coke Company, not you, for my pay for the furnishing of piling, as per contract with them. M. W. Osborn’—and that said estimates, with said indorsement, were delivered to Mr. Walker, the bookkeeper, chief clerk and private secretary of George S. Good & Co. It does not appear that the testimony of Mr. Walker was introduced. It was therefore within the power of the plaintiff in error easily to have shown that the estimates for February and March, with the above indorsement, were not delivered to the plaintiff in error, as stated by Mr. Osborn.

“Osborn further testified as follows: ‘A. On January 18, 1895, I sent a man from Oklahoma City to the South Canadian river to look over the ground. Q. Was he a man who afterwards became a partner of yours? A. Yes, sir, and he came back and reported that the piling could be had. I then went to Mr. Hitchcock, I think—if I remember right, it was on the 18th day of January, 1895—and asked him to let me the contract between Oklahoma City and the South Canadian river. He stated to me that the Central Coal & Coke Company had the contract for furnishing the piling. Q. Give the date of this. A. That was on the 18th day of January, 1895. He stated to me the Central Coal & Coke Company had the contract for furnishing the piling from Oklahoma City to the South Canadian river, and he could not interfere with it, and I said if I could make an arrangement with the Central Coal & Coke Company to furnish those piling would it be satisfactory, and he said to go ahead, “Any arrangement you make with them will be perfectly satisfactory to us.” Now I have some papers here; on the 19th of January I telegraphed Mr. Whittaker to know what he would give me to furnish the piling between Oklahoma City and the South Canadian river. Q. Who was Mr. Whittaker? A. As I understood it, he was then manager for the Central Coal & Coke Company. Q. What sort of a proposition did he make you? A. I made him a proposition I would furnish the piling, I think, for thirteen and one-half cents, and he wired me back, and here is the telegram he sends me. This is dated: “St. Louis, 1-20, 1905. M. W. Osborn: Will accept proposition your message of nineteen cents, thirteen and one-half cents; all piling Canadian River to Oklahoma if satisfactory to Good & Co.” Letter follows. W. L. Whittaker.” Q. Will you attach that telegram to your deposition and make it a part of it? A. Yes, sir. When I got this telegram I started to hunt up Mr. Hitchcock, and met Mr. Hitchcock on the platform as I came out of the railroad office. Q. Was Mr. Hitchcock then manager for Geo. S. Good & Co., the defendants? A. Yes, sir; he was the man I had been doing all the business with. I showed him this telegram, and he read it and made the remark, “Any arrangement you make with the Central Coal & Coke Company will be perfectly satisfactory with us.” Q. Then what did you proceed to do? A. I went to work and sent my man over there and began to get the piling out to deliver them on the road at the bridges. Now this was in January; there was never anything more said then until a pay day in March, and they made me out my estimate, and he figures that piling from Oklahoma City to South Canadian river the same. Q. Who did that? A. George S. Good & Co., at the same figure I had taken the piling from South Canadian river to South McAlester, when I had never put in a bid to furnish all for furnishing that piling. I then notified Mr. Good in writing that I had not figured with him to furnish the piling from the South Canadian river
to Oklahoma City, but I had a contract with him for 18 cents for hauling the piling from the end of the track to the bridges between those points, from the South Canadian river to Oklahoma City. Q. Have you that letter? A. I have that estimate. Q. Now just explain this matter to the notary. A. In receiving these estimates, Mr. Good undertook to figure the piling between South Canadian river and Oklahoma City, the same as between the South Canadian river and South McAlester. I made a notation on the estimate that I returned to Mr. Good, and stated that in accepting this money I did not accept it as any part of payment for piling furnished between Oklahoma City and the South Canadian river; that I had a contract with the Central Coal & Coke Company to furnish the same and looked to them for the same. Q. Now that was January, 1895? A. The first estimate I got. This contract. They first started in to furnish these piling in 1896. This contract was signed December 12, 1894, but I think the first estimate I got was in February or March; I am not quite certain as to that. Q. Now, do you remember of getting any more estimates after that for piling furnished between the South Canadian river and Oklahoma City? A. Yes, sir. Q. What did you do with those estimates? A. I made the same notes and sent Mr. Good a copy of each one. Q. What demand, if any, did you ever make on Good & Co. for pay for furnishing piling between South McAlester and Oklahoma City? A. I never made any. Some time in February, 1895, I had a conversation with Mr. Hitchcock, who was then manager for George S. Good & Co., in regard to the piling furnished between the South Canadian river and Oklahoma City; the conversation was at my shanty on section 24. Q. Who was present at this conversation? A. No one, except Mr. Hitchcock and myself. Q. What was that conversation? A. This was at the time I received the first estimate. I held the estimate, and he came along and I told him the estimate was wrong, that he was figuring the piling the same between South Canadian river and Oklahoma City as he figured between South Canadian river and South McAlester, and he took the estimate and looked it over and promised to rectify it, and when I went over to see them and get them to rectify it the next month they refused to do it. Q. Now, Mr. Osborn, can you state how many piling you furnished under your contract with the Central Coal & Coke Company between the South Canadian river and Oklahoma City? A. I can only through those vouchers. Q. You can just take them and refresh your memory with them and then say how much you furnished. After refreshing your memory by the vouchers, how much piling did you furnish the Central Coal & Coke Company under your contract with them for Geo. S. Good & Co. in their work between the South Canadian river and Oklahoma City? A. 39,178 feet. Q. Between what periods of time was it that the Central Coal & Coke Company furnished you to Good & Co. the piling you have been talking about used between the South Canadian river and Oklahoma City? A. Between January 20, 1895, and September 30, 1895.'

"Mr. Hitchcock, in his testimony, denies the various conversations with Mr. Osborn that were testified to by Mr. Osborn, and also denies that he was ever shown the telegram or any estimates.

"J. C. Sherwood, a witness for the defendant in error, plaintiff below, testified that he was the auditor of the defendant in error during the year 1895, and, further, as follows: 'Q. I will ask you to examine this account rendered and state whether or not there is any piling on that against the firm, and, if so, give date and amount of it? A. May 20th, $2,075.12. Q. On the account rendered for piling? A. Yes, sir. Q. What piling is that? From whom did you get it? A. We bought it from M. W. Osborn. Q. Examine the different vouchers, if you have any, based upon the engineer's report paid Osborn? A. There are three vouchers here. Q. How much is that one? A. $1,749.20. Q. The date? A. May 30th. Q. Give the date of the next one. A. August 23, $275.94. Q. Give the date and amount of next one. A. November 12th, $3,263.90. Q. How much balance do they owe upon account for lumber and piling furnished? Do you know the total amount of it? A. I would have to look at that statement; in the neighborhood of ninety-two hundred; $9,024.42. Q. Now I will ask you to give dates if you can, if you have any data by which you can give the dates of furnishing that piling. Does that account contain the dates of the shipment of piling? I want to get the dates of the ship-
ment of the piling, if you have it, from their estimate, or whatever you base it on. A. There was a bill rendered May 20th for $2,073.12. Q. Give the next one. A. July 30, $227.04. Q. Give the next: A. September 20, $3,598.32. Q. Now explain to the jury whether these respective amounts were furnished at one time, or was it furnished from time to time during the year, and that is the gross amount based upon the engineer's estimate? A. That was the gross amount based upon the engineer's estimate at each inspection. Q. At the end of the month the engineer would make up his estimate and report the gross amount? A. Yes, sir. Q. What date was the account due; when were these estimates due? A. Twentieth of the month following.'

"Counsel for plaintiff in error insists that the January, February, March, and April estimates were all in, and Osborn had been paid for the very piling for those months sued for by plaintiff in this case, but he fails to state who testified to that fact, or upon what page of the record such evidence can be found. From as close an inspection as we have been able to make, the payment for the piling was all made after it is admitted that the plaintiff in error had received notice of these estimates, and after he had received notice that the defendants in error had furnished this piling through Osborn; and, if that be correct, the court in its instruction to the jury to find for the plaintiff, as well as the statement of the Circuit Court of Appeals, were correct. It is nowhere shown that when these notices were received that plaintiff in error had settled with Osborn. On the contrary, no settlement was made with Osborn until after this suit was brought.

"Selvin Douglas, a witness for the plaintiff in error, testified as follows: 'Q. I will ask you whether or not you know a man by the name of M. W. Osborn? A. I know of him; I have no personal acquaintance with him, except to meet him once for a very few moments. Q. Do you know whether or not Osborn made a claim against Good & Co. in Oklahoma for money for work done and material furnished on the road? A. Yes, sir. Q. For how much money? A. Eight thousand dollars. Q. State whether or not that claim was made for a balance due or claimed to be due him by Geo. S. Good & Co.? A. Yes, sir, it was due the firm of Osborn & McGinnis, or M. W. Osborn & Co. It went by different titles. Q. Who asserted that claim for Osborn, if anybody? A. Mr. Carson, the receiver of Osborn. Q. Please state whether that claim, so made by Osborn, was settled and paid by Geo. S. Good & Co.? A. It was. Q. Who paid it? A. The money was sent to me, or rather to the firm of Douglas & Douglas, myself and son, by Geo. S. Good & Co., and we paid it to the receiver. Q. You paid it to Osborn's receiver? A. Yes, sir. Q. When was that settlement made? A. It was pending a long time; it was finally made about a month ago. Q. After this suit was commenced a long time? A. I don't know. Q. The lawsuit was begun on the 17th of September, 1893? A. Yes, and it was not terminated, as far as I have heard, until September 30th, 1894. Q. Good & Co. made no settlement until a month or two ago? A. I think so.'

"It thus appears to be conclusive that a large balance was paid to the receiver of Osborn years after the plaintiff in error had full knowledge of the claim of defendants in error against them.

"The fifth assignment of error is as follows: 'The court erred in overruling defendants' objection to that part of the evidence of the witness M. W. Osborn, whereby he testified as to the intent and meaning of the contract entered into between said M. W. Osborn and the defendant, for the reason that said contract was plain and unambiguous in its terms, and parol testimony to explain, vary, or modify its terms was inadmissible.' The answer to that alleged error was given by the Circuit Court of Appeals, as follows: 'The rule that parol evidence is inadmissible to contradict or vary the terms of a written contract is inapplicable to a case in which the agreement assailed is between strangers to the parties to the suit, because the former cannot by their ignorance, carelessness, or fraud stop the litigants from proving the truth. 1 Green, on Ev. 279; Cunningham v. Milner, 56 Ala. 522; Talbot v. Wilkins, 31 Ark. 411; Hussen v. Wilke, 50 Cal. 250; McMaster v. Ins. Co. of North America, 55 N. Y. 222, 14 Am. Rep. 239; Brown v. Thurber, 77 N. Y. 613, 58 How. Prac. 95; Bell v. Woodman, 60 Me. 465; Tobey v. Leonard, 2 Cliff. 40, Fed. Cas. No. 14,067; Edgerly v. Emerson, 23 N. H. 535, 55 Am. Dec. 207.'
"We are of the opinion that the other assignments of error are not well taken, and that the judgment of the court below was correct, and it is therefore affirmed."

Judgment affirmed.

STORM v. TERRITORY OF ARIZONA.
(Circuit Court of Appeals, Ninth Circuit. May 17, 1909.)
No. 1,690.


While Pen. Code Ariz. 1901, §§ 878, 894, 895, recognize pleas of former acquittal and former jeopardy in criminal cases as raising issues of fact, and require such issues in felony cases to be tried by a jury, yet where the evidence in support of such a plea is wholly documentary and undisputed and is insufficient in law to sustain the plea, although the better practice is to instruct the jury to return a verdict thereon, the refusal of the court to submit the issue to the jury is without prejudice to the defendant and not ground for reversal of the judgment, under Pen. Code Ariz. 1901, § 1174, which provides that a departure from the form or mode prescribed in respect to any pleadings or proceedings shall not render the same invalid unless it shall have actually prejudiced the defendant or tended to his prejudice in respect to a substantial right.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1173.*]

In Error to the Supreme Court of Arizona.
For opinion below, see 94 Pac. 1099, 99 Pac. 275.

A. C. Baker and Alfred Franklin, for plaintiff in error.

Before GILBERT and ROSS, Circuit Judges, and HUNT, District Judge.

HUNT, District Judge. Plaintiff in error, James P. Storm, was treasurer and ex officio tax collector of Yavapai county, Ariz. T., dur-
ing 1901–02, 1903, and until October 9, 1904, when he was suspended from office by order of the board of supervisors of said county. On
November 23, 1904, Storm was indicted, under section 398 of the Penal Code of Arizona of 1901, for unlawfully appropriating to his
own use $15,316.53 of public moneys, the taking being alleged to have been on or about November 9, 1904. He was tried and acquitted.
Thereafter at the November, 1905, term of the district court of Yava-
pai county, Storm was again indicted, under the same section of the Penal Code of Arizona, for unlawfully appropriating $1,000 of pub-
lic moneys, the taking being alleged to have occurred on or about
April 10, 1903, and while Storm was county treasurer as aforesaid.
Upon the second trial defendant pleaded not guilty, that he had been
acquitted of the offense charged by the verdict and judgment given at
the first trial, and that he had once been in jeopardy for the offense
charged. At the second trial the court ruled as a matter of law that,
on the evidence of the record of the trial had under the first indict-
ment, the pleas of former acquittal and once in jeopardy were not sus-
tained, and that the one question for submission to the jury was wheth-
er or not Storm was guilty as charged in the indictment. Accord-
ingly the single issue submitted to the jury for its verdict was the guilt
or innocence of the defendant. He was found guilty, and upon appeal
to the Supreme Court of the territory the judgment was affirmed.
Plaintiff in error then sued out a writ of error from this court to the
Supreme Court of the territory of Arizona.
Counsel for the territory now move to dismiss the writ of error be-
cause of lack of jurisdiction, the contention being that, inasmuch as the
conviction herein was had under the penal laws of the territory, it is
not a case where the judgment of this court is made final, and is not
one arising under the criminal laws as specified in section 6 of the ju-
diciary act of March 3, 1891, c. 517, 26 Stat. 827 (U. S. Comp. St.
1901, p. 549), establishing Circuit Courts of Appeals, and defining and
regulating in certain cases the jurisdiction of courts of the United
States. Section 6 of the act referred to grants to the Circuit Courts
of Appeals jurisdiction to review by appeal or writ of error final
decisions in the District or Circuit Courts in all cases other than those
provided for in section 5 of the act, unless otherwise provided by
law, and makes the judgments of the Circuit Courts of Appeals final
"in all cases arising under the patent laws, under the revenue laws
and under the criminal laws and in admiralty cases." It is argued,
too, that the judgment herein is not one which may be reviewed by
this court under the authority conferred by section 15 of the judiciary
act referred to, which provides that, in cases in which the judgments
of the Circuit Courts of Appeals are made final by the aforesaid act of
1891, the said courts shall have the same appellate jurisdiction by
writ of error or appeal to review the judgments, orders, and decrees
of the Supreme Courts of the several territories as by the act they
may have to review the judgments, orders, and decrees of the District
and Circuit Courts, and for that purpose the several territories shall,
by orders of the Supreme Court, be assigned to particular circuits.
By section 5 of the act, appeals or writs of error may be taken from
the District or Circuit Courts direct to the Supreme Court in cases
of conviction of a capital or otherwise infamous crime, but as amended by act of January 20, 1897, c. 68, 29 Stat. 492 (U. S. Comp. St. 1901, p. 549), the words "or other infamous" were stricken out, so that now the Circuit Courts of Appeal have authority to review final decisions in cases of infamous crimes not capital.

The "same appellate jurisdiction" to review judgments of the Supreme Courts of territories as have the Circuit Courts of Appeals to review judgments of the District and Circuit Courts is power to review judgments under criminal laws as administered by the Supreme Courts of the territories. Limitation is prescribed by the language, which confines the review to cases where the judgments of the Circuit Courts of Appeals are made final by the act of 1891 and the amendment of 1897 already mentioned. We regard the particular words just quoted not as referring entirely to a particular class of cases to be heard, but as primarily conferring the general judicial power, which, as indicated, is to review by appeal or by writ of error final decision. Whether the particular case is one where the power may be exercised is another question, and that is determinable by inquiring whether the judgment, order, or decree sought to be reviewed is one made or given by the Supreme Court of the territory in a case not capital, or is one arising under the patent or admiralty laws, and is one where the judgment of the Circuit Court of Appeals is made final. If it is, then review may be had.

It is a fact, of course, that where a judgment in a criminal case is brought by writ of error to the Circuit Court of Appeals it is usually one arising under the laws of the United States exclusively; but that is incidental, in no wise conflicting with the view that section 15 of the judiciary act of 1891 extends the jurisdiction of Circuit Courts of Appeals to review judgments, orders, and decrees of the Supreme Courts of the territories in cases not capital, whether under federal or territorial statutes.

It being true, then, that the act is broad enough generally to include authority to review the judgments of territorial Supreme Courts, the proper scope to be given to the appellate jurisdiction is to include within the class of judgments made final by the decisions of the Circuit Courts of Appeals judgments in all cases of infamous crimes not capital arising under the criminal laws wherein judgments have been pronounced by territorial Supreme Courts, as well as by District and Circuit Courts. In this way the several provisions of the whole act are harmonized, and we are led to the conclusion that the jurisdiction of the Circuit Courts of Appeals extends to certain criminal cases wherein territories, as well as the United States, are parties.

In Steamer Coquitlam v. United States, 163 U. S. 346, 16 Sup. Ct. 1117, 41 L. Ed. 184, the Supreme Court said of the judiciary act of 1891:

"Looking at the whole scope of the Act of 1891, we do not doubt that Congress contemplated that the final orders and decrees of the courts of last resort in the organized territories of the United States—by whatever name those courts were designated in legislative enactments—should be reviewed by the proper Circuit Court of Appeals, leaving to this court the assignment of the respective territories among the existing territories."
In Miller v. Territory of Oklahoma, 149 Fed. 330, 79 C. C. A. 268, the question now under consideration was considered by the Court of Appeals of the Eighth Circuit, and it was held that there is nothing in the language employed in section 15 of the act referred to, to indicate that a review would not apply to cases arising under the criminal laws of the territory of Oklahoma, as well as those of the United States. Judge Phillips, for the court, points out that the decision in the case of Aztec Mining Company v. Ripley, 151 U. S. 79, 14 Sup. Ct. 236, 38 L. Ed. 80, did not intend to limit the classes of criminal cases that might be reviewed to offenses denounced by federal statutes only. And as we take the same view, the motion to dismiss is denied, and jurisdiction retained.

Upon the merits the principal point relied upon by the plaintiff in error is that the Supreme Court of the territory erred in affirming the judgment of the trial court, in refusing to submit to the trial jury the issues of former acquittal and jeopardy, and by holding as a matter of law that neither of those pleas raised questions to be passed upon by the jury. Section 878 of the Penal Code of Arizona of 1901 recognizes pleas of guilty, not guilty, former judgment of conviction or acquittal, and once in jeopardy, while section 894 of the Code defines issues of fact as arising upon a plea of not guilty, former conviction or acquittal of the same offense, and once in jeopardy. The Code (section 895) also provides that issues of fact in felony cases must be tried by a jury, and section 971 lays down the procedure that, upon a plea of former conviction or acquittal of the same offense, the verdict is either for the territory or for the defendant.

We are in accord with the Supreme Court of the territory in holding that a better practice demanded that the trial court should have instructed the jury to return verdicts upon the special pleas interposed. But as the record shows that the evidence in support of the pleas was undisputed, consisting, as it did, principally of records, the sufficiency of the pleas was resolved into a question of law, which necessarily called upon the court for a declaration of the legal effect of such evidence. The decision was that the pleas were not sustained, because the offense for which the defendant was then on trial was a different one from that for which the defendant had been tried before. This was correct as far as it went, so that the essential point is merely whether the court denied to the defendant a substantial right in omitting the formality of directing a verdict in conformity with its decision.

Certainly, to have called for a verdict would have been obedience to a statutory mode of proceeding upon the trial, but as there was no possible room for any finding by the jury except one conforming to the decision of the court, and which pertained to an ultimate legal effect, the omission to follow the mode of procedure prescribed could not have tended to the prejudice of the defendant, and therefore is within the purview of section 1174 of the Penal Code of Arizona of 1901, which provides that:

"Neither a departure from the form or mode prescribed in respect to any pleadings or proceedings, nor any error or mistake therein, shall render the same invalid, unless it shall have actually prejudiced the defendant or tended to his prejudice in respect to a substantial right."
The Supreme Court of the territory, construing the statute of Arizona, so held, and we see no substantial reason to decide otherwise. Sweeney v. Lomme, 89 U. S. 208, 22 L. Ed. 727; Copper Queen Con. Mining Co. v. Arizona Board, 206 U. S. 474, 27 Sup. Ct. 695, 51 L. Ed. 1143; Lewis v. Herrera, 208 U. S. 309, 28 Sup. Ct. 412, 52 L. Ed. 506.

The judgment is affirmed.

In re J. M. ACHESON CO.

GINSBURG et al. v. MEARS et al.

(Circuit Court of Appeals, Ninth Circuit. May 24, 1900.)

No. 1,693.

Bankruptcy (§ 345)—Claims—Priorities—Trust Funds.

Where a bankrupt sold property consigned to him under a contract which required him to hold the proceeds of sales in trust, separate from his own funds, until paid over to the owner, and in violation of such trust mingled the trust funds with his own and used them in his business, the owner is entitled to recover such trust funds in full, in so far as he can show that they or property into which they were converted came into the hands of the bankrupt’s trustee and have increased the estate, but no further.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 345.]


The J. M. Acheson Company, a mercantile corporation, was, with its expressed consent, duly adjudged a bankrupt on June 2, 1908. Thereafter a receiver was appointed by consent, and all assets of the corporation were turned over to him for the benefit of all the creditors. The receiver was afterwards named as trustee. Among the claims filed against the estate was one by the firm of Ginsburg Bros. of Chicago, who set forth in their petition filed with the referee that the J. M. Acheson Company owed them $2,288.50 on an open account for merchandise delivered by the firm of Ginsburg Bros. to the said J. M. Acheson Company on consignment within two years last past before filing the claim, bills for which were annexed to the petition and made part thereof. Claimants further set forth that “the agreed value of the goods shipped by defendant’s said firm to said bankrupt was $4,212.25, and all of said goods were disposed of by said bankrupt, excepting goods to the value of $1,483.75, which goods were returned by order of this honorable court. Of the moneys received for said goods which were sold, said bankrupt has paid this defendant’s firm the sum of $500 only, leaving said balance of $2,288.50 due this defendant’s firm; that no part of said claim has been paid; that there are no set-offs or counterclaiims to the same; and that this defendant has not, nor has his said firm, nor has any person by their order, or to this defendant’s knowledge or belief, for their use, had or received any manner of security for said claim whatever; that no note has been received for said account nor any judgment rendered thereon; that said items of said claim became due as soon as sales of said goods were made by said bankrupt, and all funds received by said bankrupt from the sales of said goods which were not paid over to this defendant’s firm were to be held in trust by said bankrupt and said funds were trust funds. This defendant is informed and believes and therefore says that said bankrupt failed to keep said trust fund separate and distinct from other funds, but wrongfully mixed and commingled the same with the money of said bankrupt, and said bank-

*For other cases see same topic & § Number in Dec. & Am. Digs. 1907 to date, & Rep’s Indexes
rupt has used said trust fund in payment of its employés and other running expenses, in paying other creditors, and in purchasing sundry other goods, wares, and merchandise which composed the assets of said bankrupt, which assets were taken charge of by the receiver appointed by this court. Said assets were disposed of by said receiver for the sum of ———. Said receiver was thereafter selected and now is the trustee of said bankrupt, and still has in his possession funds received from the sale of said assets more than sufficient in amount to satisfy this claimant’s claim in full.” The prayer was that the claim be allowed in full.

The trustee filed a general demurrer to the petition, and, after hearing, the referee, without formal action upon the demurrer, disallowed the claim of petitioners as a preferred one, but directed that it be filed as a general claim.

Petitioners sought a review of the referee’s order. The District Court affirmed the order of the referee, and allowed the claim as a general one against the estate. Petitioners appealed to this court.

Clarence H. Gilbert and James Cole, for petitioners.

Before GILBERT and ROSS, Circuit Judges, and HUNT, District Judge.

HUNT, District Judge (after stating the facts as above). While the claimants’ petition praying that their claim be allowed as a preferred one is defective in not setting forth with more definiteness facts as to how much of the trust funds alleged to have come into the bankrupt’s hands were used by the bankrupt in payment of its employés and its running expenses, or in paying its other creditors, or in purchasing sundry other goods and merchandise, nevertheless we think the petition is sufficient to show that there was a delivery to the bankrupt by petitioners of certain goods on consignment of the value of $4,212.25, such delivery having been made within two years prior to the filing of claimants’ petition, and that the bankrupt had disposed of the goods so delivered on consignment except goods of the value of $1,483.75, which were returned to petitioners by order of the bankruptcy court. It also sufficiently appears that the bankrupt had only paid $500 of the money received by it from the sales of the goods so delivered to it; that the moneys received by the bankrupt were due as soon as sales of said goods were made; that all funds received by the bankrupt from the sales of said goods which were not paid over to petitioners were to be held in trust and in a fund separate from the other funds of the bankrupt, and that the bankrupt wrongfully mixed the funds so received by it with its own and used the said trust funds to pay its current running expenses, its creditors other than petitioners, and to buy merchandise, which merchandise composed the bankrupt’s assets which passed into the hands of the receiver of the court and were by him sold. It is also to be taken as a fact that the trustee in bankruptcy is the same person who was the receiver, and that as trustee he has in his possession funds received from the sale of said assets more than enough to pay the claimants’ claim in full. The question arising then upon these allegations is, do they constitute a prima facie showing of a charge upon the funds in the trustee’s hands in favor of the owners of the goods? And, if so, to what extent does it reach?
The doctrine of equity as sustained by the Supreme Court in National Bank v. Insurance Co., 104 U. S. 65, 26 L. Ed. 693, approving the rule in Hallett's Estate, 13 Ch. Div. 696, is that if property is intrusted to another to sell and pay over the proceeds, and sale is made, the beneficial owner is entitled to the proceeds, whatever be their form, provided only he can identify them. If the proceeds cannot be identified because the trust money is mingled with the money of the trustee, then the cestui que trust is entitled to a charge upon the new investment to the extent of the trust money traceable into it. Justice Matthews writes of the rule as going far enough to cover not alone express trustees and agents, but bailees, rent collectors, or "anybody else in a fiduciary position," and as making "no difference between investments in the purchase of lands or chattels or bonds or loans or moneys deposited in a bank account," and he shows very clearly that the foundation of the doctrine rests upon the "very idea of trusts," which can only be preserved by a strict enforcement of the principle that one who holds a relationship of trust is not allowed to make private use of trust property. "The rule in equity is 'that, as between cestui que trust and trustee, and all parties claiming under the trustee otherwise than by purchase for a valuable consideration without notice, all property belonging to a trust, however much it may be changed or altered in its nature or character, and all the fruit of such property, whether in its original or altered state, continues to be subject to or affected by the trust. This settled doctrine of equity has its basis in the right of property. * * * But 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.'" Andrews, J., in Cavin v. Gleason, 105 N. Y. 256, 11 N. E. 504." In re Hicks, 170 N. Y. 195, 63 N. E. 276.

Application of the doctrine as stated was made by this court in City of Spokane v. First Nat. Bank, 68 Fed. 988, 16 C. C. A. 85, where it was held that where a trustee had wrongfully mixed and mingled with his own funds moneys known to be trust funds, and thereafter wrongfully invested such funds in securities which remained in his hands, the owner of such funds was entitled to follow the same in the form in which they had been converted, and could impress a trust for his benefit.

In carrying out the rule, when it comes to proof, the owner must assume the burden of ascertaining and tracing the trust funds, showing that the assets which have come into the hands of the trustee have been directly added to or benefited by an amount of money realized from the sales of the specific goods held in trust; and recovery is limited to the extent of this increase or benefit. City Bank of Hopkinsville v. Blackmore, 75 Fed. 771, 21 C. C. A. 514; Cushman v. Goodwin, 95 Me. 353, 50 Atl. 50. If, however, he succeeds in making requisite proof, it then devolves upon the bankrupt, or the trustee who takes the property of the bankrupt in the same relation that it was held by the bankrupt, to distinguish between what is his and that of the cestui que trust. Smith v. Mottlely, 150 Fed. 266, 80 C. C. A. 154; Smith v. Township of Au Gres, 150 Fed. 257, 80 C. C. A. 145, 9 L. R. A. (N. S.) 876.
We do not mean to be understood as holding that equity will grant to a cestui que trust relief against any assets in the hands of a trustee, for it will not go farther than to give a lien when the facts are that there remain in the estate specific funds or property which have increased the assets of the estate, and which represent the proceeds of the specific property intrusted to the bankrupt. Lowe v. Jones, Adm'r, 192 Mass. 94, 78 N. E. 402, 6 L. R. A. (N. S.) 487, 116 Am. St. Rep. 225. Moreover, if there has been expenditure, and the funds are gone, and no specific property or money is found instead of the funds, it is inequitable that some other property found should be applied to pay one creditor in preference to another. So, funds that have been dissipated or that have been used to pay other creditors or that have been spent to pay current business expenses are not recoverable, because they are gone and there is nothing remaining to be the subject of the trust. This qualification of the general rule is to be applied to the facts pleaded in the present case, inasmuch as it is alleged that some of the trust moneys were used by the bankrupt in paying its employés, and in the expenses of running its business, and in paying other creditors. For them there can be no recovery. Slater et al. v. Oriental Mills et al., 18 R. I. 352, 27 Atl. 443; Nonotuck Silk Co. v. Flanders, 87 Wis. 237, 58 N. W. 383. But for the moneys represented by assets which went into the hands of the receiver under the circumstances alleged, and which the petition charges that the receiver had when claimants filed their petition, there appears to be an equitable claim, to support which petitioners should be allowed to introduce evidence.

Our conclusion is that the lower court erred in affirming the order of the referee denying claimants' petition. The order of the District Court is therefore reversed, and the case remanded with directions to send the matter back to the referee with instructions to overrule the demurrer interposed by the trustee and to require an answer.

WESTINGHOUSE MACH. CO. v. ELECTRIC STORAGE BATTERY CO.
(Circuit Court of Appeals, Third Circuit. June 3, 1903.)
No. 36.

1. Courts (§ 262)—Bill to perpetuate testimony—Jurisdiction of Circuit Courts.

The second clause of Rev. St. § 866 (U. S. Comp. St. 1901, p. 663), which provides that "any Circuit Court upon application to it as a court of equity, may, according to the usages of chancery direct depositions to be taken in perpetuum rel memoriam, if they relate to any matters that may be cognizable in any court of the United States," is wholly separate from the first clause authorizing any federal court, where necessary in order to prevent a failure or delay of justice in a pending case, to grant a demimus protestatum to take depositions according to the common usage, and is a recognition and regulation of the general power of the federal courts as courts of chancery under Const. art. 3, § 2, to entertain bills to perpetuate testimony, where the complainant cannot himself bring the matter to which the desired testimony relates into present judicial investigation.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 262.]

*For other cases see same topic & § number in Dec. & Am. Ligs. 1897 to date, & Rep't Indexes
2. DEPOSITIONS (§ 20)—BILL TO PERPETUATE TESTIMONY—FEDERAL COURTS.

A complainant may maintain a bill in equity in a Circuit Court to perpetuate testimony, where it shows that defendant charges that an article manufactured and sold by complainant infringes a patent owned by defendant, and threatens suits against complainant and its customers but refuses to bring such suits, and that complainant can prove that such patent is void by the testimony of certain designated witnesses but not otherwise.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. § 31; Dec. Dig. § 20.]

Appeal from the Circuit Court of the United States for the District of New Jersey.
For opinion below, see 165 Fed. 992.
Melville Church, for appellant.
A. B. Stoughton, for appellee.

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

BUFFINGTON, Circuit Judge. This is an appeal by the Westinghouse Machine Company from a decree of the Circuit Court for the District of New Jersey sustaining a demurrer and dismissing a bill in equity filed by said company against the Electric Storage Battery Company. Such bill alleged the appellant company was making, using, and selling electrical storage batteries which appellee claimed infringed its letters patent No. 875,213; that appellee had so notified appellant and its customers, and threatened, but failed to bring, suit for such infringement; that appellant believed such patent was void, because, while issued as a joint, it was the sole, invention of one of the patentees, and it had also been in public use and on sale for more than two years prior to application. The bill further alleged that these facts could only be effectively established by proof of the highest grade; that it could now be done by available named witnesses; that this testimony might be lost by their death or removal from the country; that appellee did not bring suit in the hope that such testimony might be lost; and that appellant could not bring the matter to judicial determination. The bill therefore prayed leave to perpetuate the testimony of such witnesses in perpetuam rei memoriam.

This bill was filed pursuant to Rev. St. § 866 (U. S. Comp. St. 1901, p. 663), which provides:

"In any case where it is necessary, in order to prevent a failure or delay of justice, any of the courts of the United States may grant a dedimus potestatem to take depositions according to common usage; and any Circuit Court, upon application to it as a court of equity, may, according to the usages of chancery, direct depositions to be taken in perpetuam rei memoriam, if they relate to any matters that may be cognizable in any court of the United States."

Basing its action on the fifth ground of demurrer, viz., "The averments of the bill do not present a case where it is necessary in order to prevent a failure or delay of justice that the depositions be taken in perpetuam rei memoriam," the court below, in an opinion reported at 165 Fed. 992, drew no distinction between an application in a pending case

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
under the first clause for a dedimus "to take depositions according to common usage," and an original bill in perpetuam rei memoriam "according to the usages of chancery" under the second clause, in the "Circuit Court, upon application to it as a court of equity." We, however, are of opinion the two clauses are distinct and independent, contemplate different procedures, and the provisions of the first do not affect the second. And in this view we find support of authority.

Since general chancery jurisdiction was vested in the federal courts by the Constitution itself (article 3, § 2), it follows that the provisions of Rev. St. § 866, in reference to Circuit Courts as courts of equity entertaining bills to perpetuate testimony, are but regulations or extensions of chancery jurisdiction in and to particular federal courts, and not the origin of such jurisdiction in federal courts generally. 2 Bates on Federal Procedure, § 663. Now the provision in that act for a dedimus is not for an original bill, or, indeed, for chancery relief, but for a supplementary proceeding in a case already brought. Thus the statute refers to pending cases by the words, "In any case where it is necessary, in order to prevent a failure or delay of justice," and to federal courts generally in the words, "any of the courts of the United States." Moreover, the power thus granted is not to be exercised "according to the usages of chancery," but "according to common usage." What this latter means is stated by Chief Justice Marshall in Buddicum v. Kirk, 3 Cranch, 295, 2 L. Ed. 444:

"By a subsequent part of the section, depositions may be taken by dedimus potestatem, according to common usage. The laws of Virginia, therefore, are to be referred to on the subject of notice."

The jurisdiction of courts of equity to entertain bills for the perpetuation of testimony is undoubted. In Booker v. Booker, 20 Ga. 780, it is said it dates to the reign of Philip and Mary. It is by original bill, and exists where the complainant has an interest which he cannot make the subject of judicial inquiry and the testimony in support of such interest may be lost before such inquiry is made. In the Equity Draftsman, p. 358, it is said:

"If the party who files the bill can, by no means, bring the matter in question into present investigation, * * * there courts of equity will entertain such a suit, for otherwise the only testimony which could support the plaintiff's title might be lost by the death of the witness."

Daniel’s Chancery, 1573, says:

"A bill to perpetuate testimony must show that the facts to which the testimony of the witnesses proposed to be examined is conceived to relate cannot be investigated in a court of law or equity, or that, before the facts can be adjudicated upon, the evidence of a material witness is likely to be lost by his death or departure from the realm."

Now, while a demurrer to such a bill was sustained in Angell v. Angell, 1 Eng. Ch. Rep. 89, the ground to sustain such bill is thus stated:

"But if the party who files the bill can, by no means, bring the matter in question into present judicial investigation, * * * there courts of equity will entertain such a suit; for, otherwise, the only testimony which would support the plaintiff’s title might be lost by the deaths of his witnesses."
In Ellice v. Roupell, 32 Beav. 303, the Master of the Rolls said:

"The course which the court always adopts, in bills to perpetuate testimony, is very simple and straightforward. Where a person files such a bill raising an issue which can be tried at once at law, this court holds that is not a case for a bill to perpetuate testimony. * * * But where a person in possession of an estate hears that another intends to impeach his title, upon the ground that the title deed by which he holds the estate is a forgery, then, as the person in possession can take no step to establish his title, and as the person out of possession will not bring an ejectment against him until his witnesses are dead, it has always been held that the person in possession may file a bill to perpetuate the testimony of his own witnesses in order to frustrate the design of the person who delays bringing forward his case until the witnesses who can speak to the truth of the defense are no longer in existence."

Equity assumed this jurisdiction in our American courts. Thus in May v. Armstrong, 26 Ky. 261, 20 Am. Dec. 137, it is said:

"The use of the proceeding is to give notice to those who may be waiting for the death or removal of witnesses, and destruction of evidence, to assert claims which might then succeed, but which could not if the testimony in existence is perpetuated, and by such notice to lay the foundation for introducing the testimony taken and preserved by authority of the court, although the witnesses are dead, whenever, thereafter, the defendants may attempt to assert their claims."

Likewise in Georgia, Booker v. Booker, supra, says:

"Where the application is to perpetuate testimony in cases where there is no suit, * * * the applicant must show that the facts to which the testimony of the witnesses proposed to be examined relates cannot be immediately investigated in a court of law, * * * so that, before the investigation can take place, the evidence of a material witness is likely to be lost by his death or departure from the country."

In Hall v. Stout, 4 Del. Ch. R. 272, the Chancellor said:

"The complainant was in the exact situation entitling a party to the relief sought by the bill. * * * Evidence material to his title rested in the exclusive knowledge of two witnesses, and, being himself in possession, it was not in his power to bring the title to a trial at law under immediate judicial investigation, so as to secure evidence against loss by the death of these witnesses. These are the grounds of this sort of relief. * * * To deprive the complainant of this relief, it must appear to rest in his own power, and not at all in the option of his adversary, whether to bring the title to a present judicial investigation. * * * Bills to perpetuate testimony proceed, not on the ground of imminent risk of loss before a pending suit can reach a trial, but on the ground that, the party not being in a situation to bring his title to a trial, his evidence may be lost through lapse of time, a risk affecting all evidence, irrespective of any particular condition of a witness. The right to this relief, therefore, does not depend upon the condition of the witness, but upon the situation of the party, and his power to bring his rights to an immediate investigation."

Such appears also to be the view of American text-book and digest writers: 9 Am. & Eng. Ency. of Law, p. 312; Story's Equity Pleading, § 303; and 1 Foster's Fed. Procedure, § 279, where it is said:

"Such a bill must also show * * * some ground of necessity for perpetuating the evidence, as that the facts to which the testimony of the witnesses proposed to be examined relate cannot be immediately investigated in a court of law or equity, or, if they can be immediately investigated, that the right to commence such a suit or action belongs exclusively to the defendant. It will thus appear that the jurisdiction of a court of equity to entertain a bill to perpetuate testimony is clear, and that Rev. St. § 866, is but
an explicit recognition and regulation of that power as applied to the Circuit Courts than the vesting of original jurisdiction in federal courts."

That the statute is to be liberally construed, and, indeed, that the remedy may be exercised where a suit is pending, is shown in Richter v. Union Trust Company, 115 U. S. 55, 5 Sup. Ct. 1162, 29 L. Ed. 345, where, on denying an application to take testimony in a case pending on appeal to that court, the Supreme Court treated the in perpetuum clause as standing alone (as did also Judge Brown in Green v. Compagnia Co. [D. C.] 82 Fed. 494), and said:

"Under Rev. St. § 866, any Circuit Court, upon application to it as a court of equity, may, according to the usages of chancery, direct depositions to be taken in perpetuum rel memoriam if they relate to any matter that may be cognizable in any court of the United States. There is nothing in the motion papers to indicate that the appellant may not proceed under this statute to take and perpetuate his testimony, if he has reason to fear that it will otherwise be lost."

In the light of this undoubted jurisdiction, under "the usages of chancery," of courts of equity to entertain bills to perpetuate testimony, in situations similar to the appellant's, we are clear this demurrer should have been overruled. The interest of the appellant in the subject-matter, its inability to bring suit or make appellee's patent a subject of judicial inquiry, and the risk that the testimony in its favor may be lost, warranted the relief sought. Such a bill was maintained in a case involving patent rights in N. Y. & Balti. Coffee Polishing Co. v. N. Y. Coffee Polishing Co. (C. C.) 9 Fed. 578.

The decree below is therefore reversed, with directions to reinstate the bill, overrule the demurrer, and enter a decree in favor of complainant.

McDONALD v. LUCKENBACH.

(Circuit Court of Appeals, Third Circuit. April 19, 1900.)

No. 19.

1. BILLS AND NOTES (§ 281*)—INDORSEES—NATURE AND EXTENT OF LIABILITY.

Under Negotiable Instruments Act Pa. May 16, 1901 (P. L. 203) § 63, which provides that "a person placing his signature upon an instrument otherwise than as maker, drawer or acceptor, is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be found in some other capacity," the fact that persons who signed their names in blank upon a note given by a corporation were respectively the president and secretary of such corporation, and as such officers executed the note in its behalf, did not enlarge their individual liability, which was that of Indorsers only, who could not be held, except on presentment, demand, and notice of nonpayment by the principal.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 281.*]

2. CORPORATIONS (§ 306*)—LIABILITY OF OFFICERS—UNAUTHORIZED EXECUTION OF NOTE.

The fact that the president and secretary of a corporation, who as such officers signed a promissory note in its behalf, did so without authority, does not render them individually parties to the note, nor liable thereon as makers; their liability being for breach of their implied warranty.

*For other cases see same topic & § number in Dec. & Am. Digs. 1901 to date, & Rep't Indexes
that they had authority, provided the payee was ignorant of the fact that they did not, and relied on such implied warranty.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1457, 1458; Dec. Dig. § 306.*]


An action to charge a defendant as an indorser of a note of a corporation affirms the validity of the note, and there can be no recovery therein on the ground that the note is void because executed without authority, and that defendant is liable because as an officer he signed the same in its behalf.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 450.*]

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

For opinion below, see 164 Fed. 296.

John G. Johnson, for plaintiff in error.

Charles Biddle, for defendant in error.

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

GRAY, Circuit Judge. The record brought up by the writ of error in this case discloses that Edgar F. Luckenbach, in January, 1908, as executor of Lewis Luckenbach (hereinafter called the plaintiff), brought suit against Frank J. McDonald (hereinafter called the defendant), on a promissory note, bearing date July 2, 1903, for the payment of $10,000, four months after date, with interest. The note was in this form:

"$10,000.

"Four months after date we promise to pay to the order of Lewis Luckenbach ten thousand dollars at 1336 Beach street, Philadelphia, without defalcation, for value received, with interest.


"Henry J. Kunzig, Pres.

"Frank J. McDonald, Secy.

"No. ______. Due ______.

The note was indorsed:

"Henry J. Kunzig.

"Frank J. McDonald.

"Sommers N. Smith."

In the statement of claim, it was averred that this note "was indorsed by the defendant, for the purpose of giving credit to the said the Holden Regaleed Ice & Machine Company, and delivered to the plaintiff's testator," etc. It was further averred:

"The said note was duly presented for payment on the date upon which it fell due, November 2, 1903, at 1336 Beach street, Philadelphia, the place of payment named in the note, and payment was demanded and then and there refused. * * * Notice of dishonor and nonpayment of said note was duly given to the defendant on the same day or on the day following the day on which the default took place, and demand was then and there made upon defendant for payment of the same, which was and has ever since been refused."

At the trial, there was no evidence produced by the plaintiff, or otherwise, that the said note was presented for payment at the office

*For other cases see same topic & § number in Dec. & Am. Diggs. 1907 to date, & Rep't indexes
of the Holden Regealed Ice & Machine Company, at its maturity, or at any other time or place whatever, or that any notice of the non-payment of the note, and the default of the maker in that respect, was ever given to the defendant, as indorser of the same. Indeed it is admitted that neither of these things occurred. The plaintiff, however, contended and now contends: (1) That under the circumstances disclosed by the evidence, the defendant was liable as a maker, and therefore presentment was unnecessary, or (2) if he were to be treated as an indorser, under the circumstances no notice of dishonor was required. The court below, having refused the motion to direct a verdict for defendant, gave peremptory instructions to the jury to find a verdict for the plaintiff. The reasons for doing so are given by the learned judge in his opinion refusing defendant’s motion for a new trial and for judgment non obstante veredicto, as follows:

“At the argument on this motion, it was urged that, under the negotiable instrument act of Pennsylvania of May 16, 1901 (P. L. 203), the defendants could only be held as indorsers under section 63 of the act, which provides: ‘A person placing his signature upon the instrument other than as a maker, drawer or acceptor, is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be found in some other capacity.’ If there was no other evidence in the case except the note itself, with these defendants appearing as they do upon the back of the note as indorsers, of course this section would apply and they could not be held in any other capacity. It would then have been necessary for the plaintiff to prove presentment and notice. But this section has no application, because the uncontradicted evidence, aside from the note, shows that the case falls within sections 80 and 115 of the negotiable instrument act. It is provided in section 80 that ‘presentment for payment is not required in order to charge an indorser where the instrument was made or accepted for his accommodation, and he had no reason to expect that the instrument will be paid if presented,’ and section 115 provides that ‘notice of dishonor is not required to be given to an indorser in either the following cases: * * * (2) Where the indorser is the person to whom the instrument is presented for payment; (3) where the instrument was made or accepted for his accommodation.’

“The evidence shows that the indorsers were the real parties in the transaction and the name of the ice company was only used for the purpose of carrying out the transaction between the indorsers and the lender. The plaintiff, if he had endeavored to present the note at maturity, would necessarily have presented it to either Kunzig or McDonald. These men knew there were no other parties who could pay the note but themselves in any capacity, and they had all the information which they could have received if every formality required by the law had been complied with. For these reasons the motion for judgment non obstante veredicto is overruled.”

We are compelled to differ from the learned judge of the court below, in the view here taken by him of the effect of the evidence, and consequently in the conclusions of law founded thereon. We do not think that the relation of the parties to each other, as disclosed by the testimony, differs from that which appears from the instrument itself. By sections 63 and 64 of the negotiable instrument act of Pennsylvania of 1901, it is provided as follows:

“Sec. 63. A person placing his signature upon an instrument otherwise than as a maker, drawer or acceptor, is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be found in some other capacity.

“Sec. 64. Where a person, not otherwise a party to an instrument, places thereon his signature in blank, before delivery, he is liable as an indorser in accordance with the following rules:
"1. If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties.

"2. If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer.

"3. If he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee."

It is very clear that the requirement of these sections of the statute in this respect is, that one whose signature has thus been attached to a negotiable instrument, can be held to no other or greater liability than that of an indorser, unless he has, in appropriate language used for that express purpose, indicated an intention to be found in some other capacity. This intention is not to be inferred from conduct, or from language that is equivocal, much less from that which is consistent with an intent to assume only the secondary liability of an indorser, and not the primary liability of a maker.

It is true that the defendant and the two other indorsers were officers and stockholders of the company, as was also the decedent and payee of the note; that they were interested in the success of the corporation of which they were directors and stockholders; that they were, so to speak, managing directors, and as such were financing the affairs of the corporation. It appears that at a meeting in Camden for that purpose, held at the office of the company, at which all the directors, including decedent, were said to be present, it was proposed that a loan of $10,000 should be secured, in order to enable the company to finish a certain contract, for which they were to receive $16,000, as well as carry forward other business of the company. Just after the adjournment of this meeting, the payee of the note, Luckenbach, agreed to loan this money, and he afterwards gave a check for the same to one of the directors, upon condition that he should have delivered to him the note of the company, indorsed by the president thereof, and two of the directors, one of whom was the defendant. This check for $10,000 was forthwith deposited to the account and credit of the company, the maker of the note, and it is the uncontradicted evidence that it was used in the prosecution of the company's legitimate manufacturing work.

We think there is no evidence disclosed by the record, tending to show that anything else was contemplated by those who negotiated this loan, than that it was to be a loan to the corporation for the promotion of its business, for which the corporation was to be primarily bound by the promissory note which it made, and that the directors who loaned their credit by indorsement assumed the secondary liability of indorsers, and none other. All the evidence is consistent with this statement of the transaction, and no other interpretation, it seems to us, can be given to it, unless, indeed, directors and officers of a corporation interested in its successful operation cannot, in negotiating a loan for the benefit of the corporation, insure its credit by assuming only the liability of indorsers of its negotiable paper. Such a proposition, of course, can be sustained neither by reason nor authority. In the present case, all the evidence tends to show that the payee of the note had no other thought than that the security he held for his note was what it purported to be on its face, i.e., the primary liability of
the corporation, as maker, and the secondary liability of the defendant and his two colleagues, as indorsers. No apparent eagerness or zeal on the part of these indorsers and the payee, to raise this money for the purposes of the corporation, can obscure or contradict the evident intention that the form of the contract and the liability of the parties thereto, given and taken in security for the loan, should not be other than as indicated on the face of the instrument itself. In no other sense than as active and zealous business managers can they be called, as the learned judge of the court below calls them, the real parties in the transaction, and we cannot agree with him that the evidence shows that the loan was made directly to these three directors, for their own purposes or otherwise. In transactions of this kind, the corporate entity is as distinct from its officers and directors as it is from third persons with whom it transacts business, and stockholders or directors who lend their individual credit to the corporation of which they are members, by indorsement of negotiable paper, or otherwise, are entitled to the same rights and immunities which attach to the status of indorser or surety, where third parties have assumed those liabilities.

In the case before us, under the statute of Pennsylvania, as well as at common law, the contract of the defendant, as indorser of the company's note, was that his liability to pay the same was secondary, and would only become fixed after its maturity, by due presentment to the maker, and in case of refusal or default by the maker, by due notice of such default to him as indorser. In the absence of waiver on his part, no assumption that, by reason of his official position in the corporation, he might have known, or did know, that the company was unable to pay the note at maturity, can deprive the defendant of the protection of his contract, or relieve plaintiff's decedent from the requirement to give due notice of default, in order to fix his liability as indorser. The court below has not placed its decision upon any distinct ground of waiver, but defendant in error contends here that the evidence discloses such a waiver on the part of the defendant. The evidence relied upon for this contention is largely what we have already referred to as the ground upon which the court below concluded that the transaction was really a loan made to the defendant and his colleagues for their own purposes. We find, however, that as there was no express waiver of notice or protest in the instrument itself, so none can be predicated on the language or conduct of the defendant aliunde. The liability of the defendant, therefore, is determined by sections 63 and 64 of the Pennsylvania negotiable instrument act, above quoted, to be that of an indorser, and not of a maker, of the note in question. The rule quoted by defendant in error from Good v. Martin, 95 U. S. 90, 24 L. Ed. 311, that one who puts his name in blank on the back of a note at the time it is made, and before it is indorsed by the payee, must be considered a joint maker of the note, cannot be applied in face of the Pennsylvania statute.

A careful examination of all the testimony convinces us that the real transaction is what, by the face of the instrument, it purports to be, to wit, a loan made by the plaintiff in error's decedent to the corporation, the maker of the note, secured by the indorsement of the
defendant and two other directors of the company lending their credit to the maker of the note, by assuming the usual and ordinary legal liability of indorsers.

After this discussion of the grounds upon which the learned judge of the court below placed his decision, and of the contention of defendant in error in support thereof, we turn to a distinct ground urged by the defendant in error in his argument. It is thus stated in his brief:

"The two defendants were also primarily liable as makers of the note for quite another reason. They had signed the note as officers of the corporation, knowing full well that they had no authority to do so. They therefore made themselves personally responsible to the payee, as any other so-called but unauthorized agent would do."

The real contention of the defendant in error seems to be that the company had never authorized the issue of this note, and so, although it bore the signature of the president and secretary, "it was perfectly worthless as an obligation of the company." It was disclosed in the evidence that the note in question was issued without any direct and formal authorization for so doing by the board of directors, and that there was a by-law of the company reading as follows:

"No agreement, contract, or obligation, other than a check, involving the payment of money or the credit of the company for more than $1,000, shall be made without the order of the board of directors or of the executive committee duly entered in the minutes."

There was no evidence of any such formal authorization of the making of the note in question, although there was evidence tending to show that the negotiation was informally authorized at a meeting of all the directors, in the office at Camden, and also evidence that two years thereafter a formal ratification was made by the board of directors, of the making of said loan. We assume, however, in the consideration of this contention, that the requirement of the by-law referred to was not complied with, and on this assumption the position taken by defendant in error is, that the note was a nullity and worthless as such, and that therefore defendant and his co-indorsers were, to quote from defendant in error's brief, "primarily liable as makers of the note. * * * They had signed the note as officers of a corporation, knowing full well that they had no authority to do so. They therefore made themselves responsible to the payee, as any other so-called, but unauthorized, agent would do." It is apparent that the ground here urged in support of the judgment below, is quite distinct from, and has no relation to, those discussed by the court below. It is a well-settled doctrine of the law of agency which is here invoked. Passing the manifest error of asserting the liability of defendants, as makers of the note, the general proposition stated is a sound one, as applied to the facts upon which it is formulated.

The cases cited by defendant in error in support of his contention, are all in assertion of this well-known doctrine of the law of agency, thus stated in the passage quoted by defendant from Story on Agency:

"As a general rule, whenever a party undertakes to do any act as the agent of another, if he does not possess any authority from the principal therefore, or,
if he exceeds the authority relegated to him, he will be personally liable to the person with whom he is dealing, for or on account of his principal."

It is to be observed that, in the case before us, plaintiff's decedent loaned his money on the faith of what purported to be a promissory note of the company, executed by its proper officers, with full knowledge of what defect in authority, if any, there may have been for the issuance of such a note, as he himself was a co-director with the defendant and Kunzig. It is clear that in such a case, Luckenbach could not hold the indorsers of this note as its makers, as there was nothing in the written terms of the instrument by which they could be charged as such. Their only contract was that of indorsers. Assuming that they can be considered as agents who negotiated the contract between the company and the payee of the note, without authority so to do, "the obligation arising in such a case is well expressed by saying that a person professing to contract as agent for another, impliedly, if not expressly, undertakes to or promises the person who enters into such a contract upon the faith of the professed agent being duly authorized, that the authority which he professes to have does in point of fact exist." Leake on Contracts, 511. If he knows at the time that he does not possess the authority, he will be liable to a claim for the damages caused by the breach of his warranty. It was held in Polhill v. Walter, 3 B. & Ad. 114, cited in Leake, supra, that where a person accepted a bill by "procuration of the drawee, knowing that he had no authority, and the drawee repudiated the acceptance, an indorsee, though he could not charge the pretended agent as acceptor, might maintain an action against him for the false representation that he had authority to accept." Upon this principle, it was held in Weeks v. Propert, L. R. 8 C. P. 427, that the directors of a company, assuming to act on behalf of a company, are held impliedly to warrant that they had in fact the authority they assumed to exercise. And if they borrow money, and their authority depends upon the fact, whether the borrowing powers of the company have been exceeded; if such is the case, they are personally responsible for the breach of the warranty. So, in Richardson v. Williamson, L. R. 6 Q. B. 276, where the directors borrow money and the authority depends upon their obtaining the consent of a meeting of shareholders, or upon a resolution of the company, to enable them to borrow, they were taken to warrant that they were in fact in a position to do so. In the present case, the alleged unauthorized contract was not so drawn as to make the defendant, the alleged agent, a primary contracting party thereto. So, his liability as indorser expressly excluding that of a maker, if he were to be made otherwise responsible at all, it could only be for a breach of the warranty as to his right to procure the contract embodied in the promissory note, and a suit for that purpose could only be maintained on the assumption that the party who entered into the contract with the agent had no knowledge of the defect of the agent's want of authority. It is therefore quite clear that such a cause of action, even if the facts were such as to support it, is distinct and different from that sued upon in the case before us. The plaintiff below has brought his suit expressly upon
the alleged liability of the defendant, as an indorser of the promissory note in question, and has alleged the facts of presentment, demand and notice, necessary to fix his liability as such, and his contention to be allowed to recover for an entirely different cause of action, cannot now be entertained.

Under the law of agency here invoked, there are two ways in which an agent who exceeds his authority in making a contract on behalf of his principal may become personally liable to the other party to the contract, who is ignorant of such lack of authority. The first is, as we have above seen, where a person professes to contract as an agent for a principal, he impliedly warrants to the other contracting party that he in fact possesses the authority he assumes to exercise; and he becomes liable to an action for the breach of such warranty. We have already dealt with this ground of liability, as urged by the defendant in error. The second ground upon which an agent may be charged, is, where the agent signs a contract, as agent, either for an undisclosed principal or on behalf of a named principal, whose authority he exceeds without the knowledge of the third person to the contract, he may be held, under some circumstances, at the option of such third person, liable on the contract, if he have made himself a contracting party. Clearly the plaintiff below could not have availed himself of such a ground of liability, even if his cause of action had been differently stated, and he had charged defendant as a maker of the note. The defendant, in signing the note as secretary, was not signing as agent in the sense of the theory just stated, but was doing what was necessary to make the corporation of which he was an officer the maker of a promissory note. There was no other way in which a promissory note could be made by the corporation. His signature is ex officio, and he is in no sense a party to the note, within the doctrine above stated.

But an absolutely determining factor in this case is that the third party, the payee in the note, is not shown to have been without knowledge, as to the infirmity of the paper, if any. In fact, he had all the information in this respect that the defendant had.

As we said with reference to the supposed liability for a breach of warranty on the agent's part, so as to the supposed liability of defendant as a maker of the note, it is not the cause of action sued upon. The statement of claim is in affiriance of the validity of the contract set out by the note, and the liability charged and sought to be enforced is expressly the secondary liability of an indorser. We are not to be understood by what we have said, as implying that under the evidence the note in question is not to be taken, when delivered, as an existing obligation of the corporation. In the view we have taken of this case, it is unnecessary to decide the question thus raised in the argument.

The judgment below must therefore be reversed.
Baltimore & Boston Barge Co. v. Knickerbocker Steam Towage Co.

(Circuit Court of Appeals, First Circuit. May 25, 1909.)

No. 802.

Towage (§ 15*)—Injury to Tow—Liability of Tug—Evidence.

 Where two tugs charged with being in fault for the grounding of a heavily laden barge which they were towing down the narrow channel of the Kennebec river established by a preponderance of the evidence that the barge took a sudden sheer to starboard which made it necessary for them to maneuver as they did to break such sheer, the fact alone that the barge then swung too far to port and grounded raised no presumption of negligence on the part of the tugs, and to charge them with liability the burden rested on the barge to show that their maneuver was unskillful.

[Ed. Note.—For other cases, see Towage, Cent. Dig. § 34; Dec. Dig. § 15.*]

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

For opinion below, see 159 Fed. 755.

Edward C. Plummer, for appellant.

Benjamin Thompson (Edward S. Dodge, on the brief), for appellee.

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

BROWN, District Judge. This appeal relates to the grounding of the barge Emilie on rocks outside the ship channel, near Goodwin's Point, off the southerly end of Nehumkeag Island, in the Kennebec river, on August 21, 1906. The Emilie was a very long and heavy vessel, 216 feet long and 1,069 gross tons, and loaded with ice. She was in tow of the tug Seguin, which was ahead on a hawser about 20 fathoms in length, and of the tug Charlie Lawrence, made fast to her port quarter.

The testimony of the masters of the barge and the tugs is set forth with much detail in the opinion of the District Court, 159 Fed. 755, 763, et seq.

Upon a careful examination of the record we find nothing of importance in the testimony which was not considered by the District Court. Upon the evidence the District Judge found that the injury was caused by the fact that the barge, when off Nehumkeag Island, took a sudden sheer of about three points to starboard; that in order to break this sheer the Seguin was compelled to go to port and the Lawrence to reverse; that the sheer to starboard being broken the barge sheered to port, and before this sheer could be corrected the barge dragged across the rocks, which inflicted some injury, though the forward movement of the barge was not checked.

We are of the opinion that the District Court was justified in find-
ing that according to the preponderance of the testimony the barge, when in the vicinity of Nhemkeag Island, took a sudden and unusual shear to starboard. The testimony upon this point was in direct conflict; the master of the barge denying that there was any shear to starboard, the masters of the tugs both testifying to a very pronounced shear to starboard, and also to the different movements of the Seguin and the Charlie Lawrence in the attempt to break that shear. The movements testified to by Capt. Blanchard of the Charlie Lawrence are not denied by the master of the barge, and are such as are entirely consistent with the finding that there was a strong shear of the barge to starboard, which the tugs were obliged to maneuver to correct.

The finding of the court that the prime cause of the grounding was a shear to starboard is supported by the testimony of two witnesses, who testified orally before the District Judge not only directly to the fact but also to various maneuvers of both tugs which can be accounted for only on the theory of a starboard shear. Substantially the same account of the maneuvers of the tugs was set up in the answer filed October 8, 1907.

The testimony of Capt. Nordal of the barge Emilie was taken by deposition on March 29, 1907. He was not recalled, nor was any other witness called on behalf of the barge to rebut the very specific statements of the masters of the tugs.

We must confess to considerable doubt as to whether the movements of the barge to the east shore were not due entirely to the movements of the tug Seguin to the port side of the channel, and to the stopping and reversing of the Charlie Lawrence, rather than to any unexpected shear of the barge to port after her starboard shear had been corrected. For the purposes of this appeal we must, in our opinion, consider as proven the fact that the barge took a sudden and decided shear to starboard, and that it was necessary for the tugs to maneuver to check this shear. Our doubt, then, must be confined to the question of the skill and judgment with which these movements of the tugs were made. The defense set up in the answer seems to be supported by the preponderance of proof. Having regard to the intrinsic probabilities, it might be said that it is quite as probable that the barge was swung too far to the easterly side of the channel by the action of the tugs in breaking the shear to starboard as that after the shear was broken the barge took another independent shear to port. But upon an issue of this character, where the tugs have accounted for the grounding by the showing of a special emergency, and have definitely described movements not improbable and not necessarily inconsistent with good seamanship, all presumption of negligence from the mere fact of grounding then disappears, and the burden is cast upon the libelant to establish negligence by a clear preponderance of proof.

Upon the record as it stands, we are of the opinion that the burden was upon the libelant to show that in checking the starboard shear of the barge the tugs were handled unskillfully, and that with better handling the barge could have been kept within the limits of the channel.
It should be remarked that the ship channel at this place is narrow. The barge was 216 feet in length, 35 feet beam, and drew 15 feet 6 inches. The channel navigable for the barge was from 100 to 150 feet wide, and, though of sufficient width for towing a barge of that size safely, there was hardly sufficient room to permit of maneuvers in case of an unexpected and sudden sheer of the barge at that point.

We find ourselves unable to say that there was any inexcusable fault in the handling of the barge by the tugs after the emergency of a sudden sheer in a narrow channel, and upon the whole we agree with the conclusion of the District Judge that the libelant did not sustain its contention that the respondent was at fault.

The decree of the District Court is affirmed, and the appellee recovers costs in this court.

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KNICKERBOCKER STEAM TOWAGE CO. v. BALTIMORE & BOSTON BARGE CO.

(Circuit Court of Appeals, First Circuit. May 25, 1909.)

No. 803.

TOWAGE (§ 15*)—INJURY TO TOW—UNSKILLFUL HANDLING BY TUGS.

The finding of a District Court that the grounding of a barge while being towed down the Kennebec river was due to the unskillful management of the towing tugs affirmed.

[Ed. Note.—For other cases, see Towage, Cent. Dig. § 36; Dec. Dig. § 15.]

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

For opinion below, see 159 Fed. 755.

Benjamin Thompson (Edward S. Dodge, on the brief), for appellant.

Edward C. Plummer, for appellee.

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

BROWN, District Judge. This is an admiralty appeal, and relates to the grounding of the barge Jeannie at Telegraph Point, about two miles above the city of Bath, on the Kennebec river, June 3, 1906, while the barge was in tow of the appellant’s tugs Seguin and Perry.

The facts are fully and accurately reported in the opinion of the learned District Judge in 159 Fed. 755–763.

We entirely agree with the conclusion of the District Court that the appellant did not, in its towage service, exercise such reasonable degree of skill and care as was due under the circumstances. We are of the opinion that the grounding of the Jeannie was due entirely to unskillful management in making the turn at Thorne’s Head, and find no

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep’t Indexes
reason for adding anything to the observations of the District Judge upon this point.

The decree of the District Court is affirmed, and the appellee recovers costs in this court.

FRANCIS v. McNEAL.

(Circuit Court of Appeals, Third Circuit. May 4, 1909.)

No. 37.

BANKRUPTCY ($ 455*—APPEAL—APPEALABLE ORDERS.

An order of a court of bankruptcy adjudging an individual to be a member of a bankrupt partnership and liable for its debts is not appealable, under Bankr. Act July 1, 1898, c. 541, § 25a, 30 Stat. 553 (U. S. Comp. St. 1901, p. 3432).

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dlg. § 455.*

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

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

Henry J. Scott, for appellant.

Edgar J. Pershing and G. W. Pepper, for appellee.

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

PER CURIAM. This is an appeal from an order of the District Court of the United States for the Eastern District of Pennsylvania, confirming a master's report declaring Stanley Francis, the appellant, who has not yet been adjudged a bankrupt, to be a member of a certain copartnership trading as Provident Investment Bureau, and as such individually liable to the copartnership creditors. The proceeding before us cannot be treated as a petition of review. It is not confined to matters of law, but turns on questions of fact. If it can be entertained at all, it must be as an appeal. But an appeal in bankruptcy lies to this court only:

"(1) From a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt or claim of five hundred dollars or over." Act July 1, 1898, c. 541, § 25a, 30 Stat. 553 (U. S. Comp. St. 1901, p. 3432).

This appeal, therefore, must be dismissed for want of jurisdiction; and it is so ordered.

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

William E. Warland, for complainant.
F. Warren Wright, for defendant.

CHATFIELD, District Judge. In the opinion filed April 7, 1909 (169 Fed. 647), the court found claim 4 of the patent in suit to be valid, in so far as it comprises a combination of other elements with a counterbalance, in the exact form of the machine produced by the complainant upon the trial; and in the form in which, with the substitution of a universal joint for a ball and socket, the defendant's machines, as typified by the Day sketch (and including the one machine sold to the defendant by Chase), were made and which have been found to be infringements.

The precise issue on which testimony was taken, and upon which the opinion was based, was limited to the actual machines shown, falling, as has been said, under claim 4 of the patent, and under the language of claim 3, by means of which the swinging arm is carried back through the framework of the supporting uprights. It was assumed that the questions in the case were covered by the issues decided; but it has been pointed out, upon a motion for a reargument, that the broad claims 1, 2, and 3 of the patent were put in issue by the defendant's answer, and that the testimony as to the machines shown was relevant also to the issues of validity on those particular claims. In so far as the defendant did not deny the use of the machines referred to, that admission also affected the issues upon all of the claims, 1 to 8, and not simply claim 4, which described the machine actually produced in court.

Claim 1 of the patent is as follows:

"(1) The combination with means for holding the article to be engraved, and a pattern plate, of a spindle, a tool carried thereby, a bearing or sleeve for the spindle, a universal joint holding the spindle bearing and in which it is movable endwise, an arm connected with the spindle bearing at one end, and a pointer carried at its other end, whereby the engraving tool receives a proportional movement and is lifted off the work by the lifting of the pointer from the pattern, substantially as specified."

Claim 2 is similar, so far as the questions here involved are concerned, while claim 3 brings in the alternative form of the swinging arm, and uses the following language:

"(3) In an engraving machine, the combination with a rotary cutting device and means for holding the work blank, of a supporting standard having an opening in the face thereof, an arm connected directly with the cutter mechanism and adapted to move the same both vertically and laterally, said arm extending down behind the standard and forward through said opening there-
in and terminating in a pointer, a pattern plate located in front of the standard and containing a pattern around which the pointer is to be moved, substantially as set forth."

Claim 4 is the first one to suggest the idea of the counterbalance:

"(4) In an engraving machine, the combination with a pattern plate, a spindle and cutter, means for rotating the same, and a support therefor, of an arm connected to the spindle support and extending downward to a pattern plate and adapted to move the cutter in a decreased ratio, and a counterbalance mechanism for the spindle mechanism and arm, substantially as specified."

Claims 5 and 6 must be disposed of in accordance with the decision upon claim 4, and the other claims need not be particularly specified.

It is shown by the file wrapper that claim 1, as originally filed, did not specify the possibility of vertical movement of the sleeve through the universal joint, and that the Patent Office rejected the claim, upon the Luce and the Engle patents heretofore set forth.

Attention is now called by the defendant to the proposition that, if the broad inventions of claims 1, 2, and 3 be held anticipated by the Luce and Engle patents, or any other patent, and these claims, therefore, declared invalid, the defendant would be entitled to have a decree upon that determination; and that the complainant, inasmuch as no disclaimer had been filed, would not be entitled to costs in the action. Page Machine Co. v. Dow, Jones & Co. (C. C. A.) 168 Fed. 703 (2d Circuit; March 25, 1909), and cases therein cited. It has been pointed out by the defendant that, in admitting infringement by the machines above referred to (assuming the first four claims of the Chase patent to be valid), such supposed infringement was predicated upon the idea that the Chase patent could be distinguished from the prior art and from the Luce and Engle patents, only in the combination of the other features with a shaft moving through a sleeve in the universal joint. The defendant charges that the only feature of the Chase patent which need be attacked, if its invalidity is to be established, is this feature which he claims was shown in the Luce patent in particular. He also contends that, in the Luce patent as well, the spring shown in the drawing, to a certain extent, performs some of the functions of a counterbalance. It is also argued by the defendant that the idea of a counterbalance is shown in the stone engraving and carving patents to Moore, No. 394,710. December 18, 1888, Moore, No. 409,695, August 27, 1899, and Hunzinger, No. 463,836, November 24, 1891, and was not original with Chase. On the other hand, it is suggested by the complainant that the court has found that the combination of the machine actually produced in court, and constructed under claims 3 and 4 of the Chase patent, showed novelty and patentable invention; that claim 4, as well as claim 3, makes use of the broad functions set forth in claims 1 and 2; and that the machines described in claims 1 and 2, illustrated by the specifications and drawings of the Chase patent, are but broader equivalent forms of the machine held valid under claim 4. The complainant argues that even under claims 1, 2, and 3 the use of a counterbalance is clearly and necessarily assumed, although not stated in definite language. For these reasons the complainant urges that the Chase patent should
be held valid as to claims 1, 2, 3, and 4, and that the defendant be held to infringe each of these claims, the infringement being substantially admitted if the validity be established.

An examination of the Luce patent shows that a spring is made use of to hold the pointer or tracing end of the structure against the pattern, and that the pattern is adjusted or screwed down, so that under the pressure of the spring the cutting tool would come in contact with the work. In a sense, by exerting pressure against this spring, the pointer could be removed from the pattern, and the cutting tool swung away from the design. In cutting a closed design, such as the interior of the letter "O," the Luce machine could not be as simply and easily lifted away from the work as in the Chase patent. The actual result would seem to differ from that obtained by the counterbalance and swinging arm in the Chase patent. In fact, even without the counterbalance, but with the mere balanced form of construction, where the cutting tool is above the work, and the pointer is above the pattern, as in all of the Chase claims, the possibility of instant removal of the cutting tool is an important feature of the machine, and the counterbalance simply adds to the efficiency of this feature.

A reference to the opinion will also show that the court, upon page 14, spoke of the Benton patent as including the rotating cutter in the swinging frame. It is true that further on the court spoke of the alternative construction, in which the work could be made stationary and the cutting tool movable; and no confusion actually existed with respect to the functions of the Benton patent. But the complainant is correct in his assertion that a description used by the court, in which the cutting tool was made to swing with the universal joint, was incorrect. Benton's idea, in his principal construction, was to move the work in proportion to the movement of the pointer, and thus to bring different portions of the work in contact with a fixed cutting tool. But he did, as well, claim the alternative construction, in which the cutting tool should be movable. The Chase patent must, therefore, be tested from the disclosures of this alternative construction of the Benton patent, and the court is still of the opinion that a machine constructed in the alternative form of the Benton patent would be much nearer the machine described by Chase, and still more like the machine used by the defendant, than that described in any other of the patents in the testimony.

But as to the general question of novelty and patentability in the Chase claims 1 to 8, as a whole, it does not seem that either Benton or Luce, or any other patent, anticipated the structure shown by Chase; and viewing the Benton patent and the Luce patent from the standpoint of a machine carrying a swinging arm from the end of a shaft, working in a sleeve through the universal joint, sufficient practical and useful, as well as simple and economical, improvement is shown in the Chase patent to justify holding it valid as to all of the claims called in question, and the structures of the defendant seem plainly to infringe.

As to the one machine purchased from Chase, it need only be said further that no injunction or damages will be awarded, if it is satis-
factorily shown that the machine was purchased before the issuance of the patent.

As to the objection that claims 1, 2, and 3 of the Chase patent are so general in terms that they should be held void for indefiniteness and anticipation by a number of the patents shown in the case, it need only be said that the elements pointed out in this additional opinion, when read in connection with the specifications and drawings, seem to show a structure that is not indefinite; that is, it does describe a complete machine, which was not anticipated in the points previously pointed out by any earlier patent.

The claims should, therefore, be held valid, and the complainant may have a decree.

UNITED STATES v. SIXTY-FIVE CASKS LIQUID EXTRACTS.

(District Court, N. D. West Virginia. May 25, 1909.)

1. DRUGGISTS (§ 2*)—FOOD AND DRUGS ACT—CONSTRUCTION AND SCOPE.

Food & Drugs Act June 30, 1906, c. 3915, 34 Stat. 768 (U. S. Comp. St. Supp. 1907, p. 928), not only requires that drugs shipped in interstate commerce and labeled shall not be misbranded, but also requires that they shall be labeled with labels conforming to its requirements.

[Ed. Note.—For other cases, see Druggists, Dec. Dig. § 2.*]

2. DRUGGISTS (§ 11*)—FOOD AND DRUGS ACT—PROCEDURE FOR FORFEITURE OF MISBRANDED ARTICLE—CONDITIONS PRECEDENT.

Under Food & Drugs Act June 30, 1906, c. 3915, 34 Stat. 768 (U. S. Comp. St. Supp. 1907, p. 928), the preliminary examination of an article within its provisions by the Department of Agriculture, and notice to the party from whom the sample is obtained of its adulteration or misbranding, as provided for in section 4, are not conditions precedent to a libel in rem for the forfeiture of articles seized for adulteration or misbranding under section 10.

[Ed. Note.—For other cases, see Druggists, Dec. Dig. § 11.*]

3. COMMERCE (§ 41*)—FOOD AND DRUGS ACT—FORFEITURE FOR MISBRANDING—“ORIGINAL PACKAGE.”

Where a liquid in casks is shipped in interstate commerce in car load lots, the cask and not the car is the “original package” within the meaning of Food & Drugs Act June 30, 1906, c. 3915, § 10, 34 Stat. 771 (U. S. Comp. St. Supp. 1907, p. 984), which authorizes the seizure and forfeiture for adulteration or misbranding of articles so shipped while remaining in “original unbroken packages.” [Citing Words and Phrases, vol. 6, p. 5059.]

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 41.*]

4. COMMERCE (§ 41*)—FOOD AND DRUGS ACT—SCOPE—SHIPMENTS IN INTERSTATE COMMERCE.

Claimant was the owner of a secret formula for a proprietary drug preparation, and conducted its business at Wheeling, W. Va., from which place it sold and shipped its preparation in bottles properly labeled. It had the preparation made, however, at Detroit, Mich., from which point it was shipped to claimant in casks by car lots, and, when received, was bottled and labeled by claimant in Wheeling before being offered for sale. Held, that such shipments were not made in interstate commerce, but only from the manufacturing agents to the owner, and the casks after their receipt by claimant were not subject to seizure and forfeiture because not labeled under section 10, Food & Drugs Act June 30, 1906, c. 3915, 34 Stat. 771 (U. S. Comp. St. Supp. 1907, p. 984).

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 41.*]

*For other cases see same topic & § Numbers in Dec. & Am. Digs. 1907 to date, & Rep’t Indexes

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5. DRUGGISTS (§ 2)—FOOD AND DRUGS ACT—"LABEL."

The word "label" as used in Food & Drugs Act June 30, 1906, c. 3915, 34 Stat. 768 (U. S. Comp. St. Supp. 1907, p. 928), which requires packages of drugs shipped in interstate commerce to bear a statement on the label of the quantity or proportion of any alcohol, etc., means a descriptive paper affixed to the package, which must include the statement of how much alcohol, etc., is contained in the package.

(Ed. Note.—For other cases, see Druggists, Dec. Dig. § 2.*
For other definitions, see Words and Phrases, vol. 5, pp. 3947, 3948.)

This libel proceeding seeks to confiscate 65 casks of liquid extracts under and by virtue of section 10, Act Cong. June 30, 1906, c. 3915, 34 Stat. 771 (U. S. Comp. St. Supp. 1907, p. 934), known as the "Food and Drugs Act." The Knowlton Danderine Company has intervened as the owner and resists the confiscation. The facts have been agreed, trial by jury has been waived, and all matters in controversy submitted to the court. The facts so agreed are as follows:

The said Knowlton Danderine Company is a corporation organized under the laws of the state of Illinois, having a warehouse, laboratory, and finishing department in Wheeling, in the state of West Virginia, and is the proprietor of a preparation for the hair which it markets in three-ounce, six-ounce, and twelve-ounce bottles under the trade name of "Danderine," the formula of which is a trade secret and comprises liquid extracts and other ingredients. Parke, Davis & Co., who are mentioned in the said libel as shippers, are manufacturing pharmacists at Detroit, in the state of Michigan, and are under contract with the said Knowlton Danderine Company, the respondent in this proceeding, to compound the said formula and to cause the same to be transported and delivered in bulk in car load lots to the respondent at Wheeling, and no sale of the said danderine is made to the public or any outside purchasers until the said casks are emptied and the contents thereof placed in the properly marked bottles. The said casks are made of wood bound with iron hoops, and shipped like barrels, and for the purposes of safe transportation a sufficient number of casks, each holding about 50 gallons, are used, which, when emptied by the respondent, are returned to the said Parke, Davis & Co. to be again refilled and shipped. Each and every one of the 65 casks mentioned in said libel contained a drug product accurately compounded in accordance with said formula, and said drug product contained an average of 10 per centum of alcohol. All of the said casks are marked in the same manner, with the exception that the figures, some of which show the number of gallons contained therein and others the number of casks, are marked in the same manner when shipped, and are marked wholly upon one end of the cask. Varying as to figures as aforesaid, each cask is marked as follows:

49½
S 46022
#63
Wheeling Terminal,
19th St. Delivery
Knowlton Danderine Company,
Wheeling, W. Va.
505 lbs.

There are no other marks, brands, or labels upon the said casks or any of them, and the casks which are referred to in the said libel were marked in the manner hereinafter indicated, and had no other marks, brands, or labels upon them. When the contents are removed from the said casks they are

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
placed in bottles, and on each bottle is a printed label containing in plain letters the words “Danderine Scalp Tonic, Alcohol 10 per cent.”

The said respondent has a spur track running into its building at Wheeling, upon which each car is left as soon after its arrival as possible, and the casks are removed from the car promptly by the respondent, which bottles and labels the contents, which process of bottling and labeling is known as the finishing process, and in pursuance of this custom the respondent had before the seizure of the casks, which was made in this proceeding, emptied 59 of the said 65 casks, and was engaged in bottling and labeling the same, and would have continued so doing until all of the 65 casks were bottled and labeled but for the seizure in this proceeding of the 6 casks which had not been emptied or bottled, though the last-mentioned 6 casks had been removed from the car in which they had been shipped and received.

The 65 casks mentioned in the said label were shipped by Parke, Davis & Co. to the respondent by boat to Sandusky, in the state of Ohio, where they were transferred to a car which contained nothing else, and the said last-mentioned car was forthwith transferred from Sandusky, in the state of Ohio, to Wheeling, in the state of West Virginia, and was delivered upon the premises and in the building of the respondent, and was emptied at the time of the seizure of the said 6 casks.

The libel filed in this proceeding is based upon an examination of the samples of the contents of the said casks obtained from the respondent a few days prior to the filing of the said libel by a food and drugs inspector from the Department of Agriculture of the United States. The Secretary of Agriculture did not cause notice to the effect that it appeared from such examination of the said sample that the same was adulterated or misbranded to be given to the respondent as the owner and claimant thereof, or to any one else, before the matter was directed to the attention of the District Attorney, or before this proceeding was begun and the casks seized by the marshal.

After the United States marshal had seized 6 of the 65 casks of liquid extracts mentioned in the said libel, he permitted a food and drugs inspector of the Department of Agriculture to open one or more of the said casks of liquid extracts and to transfer and remove therefrom about 3 gallons of the contents thereof.

The situation and conditions as shown by the facts herein set forth were substantially the same from the time when the 65 casks involved in this proceeding were originally shipped from Detroit down to and including the present time.


DAYTON, District Judge (after stating the facts as above). The defenses relied on are: (a) That the food and drugs act (Act June 30, 1906, c. 3915, 34 Stat. 768 [U. S. Comp. St. Supp. 1907, p. 928]) does not require a drug product to be labeled, nor, if unlabeled, to bear any statement respecting the amount of alcohol contained, but, if labeled, the label must contain the statement. The casks in controversy were not labeled, therefore not subject to the provisions of the act. (b) The libel is predicated upon an examination of specimens under section 4 of the act; but the Secretary of Agriculture did not cause any notice to be given to the party from whom the samples were obtained, nor afford such party any opportunity to be heard. (c) The goods seized were, at the time of seizure, no longer in the “package” or condition in which the importer received them, but had become merged with the property of the state, and were therefore not under the operation of the interstate commerce clause of the Constitution or of any law sub-
sisting by virtue of such clause. The "original package" in this case was the car which was delivered upon the premises and into the possession of the defendant, and which had been entirely emptied of its contents before seizure of the 6 casks taken upon the warrant issued in this case. (d) Seizure of 6 casks upon a warrant for 65 casks was not authorized or legal. (e) In no event is a food or drug product subject to libel proceedings under section 10 of this act unless it is being or has been transported into another state for the purpose of sale. In this case the product seized was transported in bulk for the distinct purpose of being "finished," or, to use a nontechnical term, of being bottled and labeled; and it is admitted that, when ready for sale, the salable package bore a label containing a lawful statement respecting content of alcohol.

In support of the first ground of defense, it is contended that "the courts of the United States in determining what constitutes an offense against the United States must resort to the statutes of the United States enacted in pursuance of the Constitution." In re Kollock, 165 U. S. 528, 17 Sup. Ct. 444, 41 L. Ed. 813. That "regulations prescribed by the President and by the heads of the departments, under authority granted by Congress, may be regulations prescribed by law, so as lawfully to support acts done under them and in accordance with them, and may thus have, in a proper sense, the force of law; but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the thing a criminal offense in a citizen, where the statute does not distinctly make the neglect in question a criminal offense." U. S. v. Eaton, 144 U. S. 688, 12 Sup. Ct. 767, 36 L. Ed. 591. And that, therefore, this court, in construing this statute, cannot be influenced by any departmental rules or regulations prescribed for its enforcement, but can look alone to the terms of the statute, penal in character, to ascertain whether or not the owner of these casks of liquid can be held either liable to criminal prosecution or to confiscation of its property. In construing the terms of the statute, it is further insisted that a criminal offense cannot be created by implication, but only by direct and positive terms. Granting at once these several propositions to be sound, the crucial question is, does the food and drugs act in express terms require drug products to be labeled? The argument of counsel, that Congress intended by this act, not to correct the evil of failing to label, but of falsely and fraudulently labeling, and therefore drug products, even when put up in packages suitable for retailing, but which bear no labels, are not within the misbranding provisions of the act, is ingenious but untenable, and wholly refuted by the express terms of the act. The first section of it makes it "unlawful for any person to manufacture within any territory or the District of Columbia any article of food or drug which is adulterated or misbranded" within the meaning of the act. This is an unqualified prohibition against the manufacture itself, so far as the Congress had the power to prohibit; that is, in these parts of the country over which it had full control and jurisdiction. Section 2 provides that:

"The introduction into any state or territory or the District of Columbia from any other state or territory or the District of Columbia or from any
foreign country, or shipment to any foreign country, of any article of food or
drugs which is adulterated or misbranded, within the meaning of this act,
is hereby prohibited."

Here was the exercise, to the fullest limit, by Congress of its power,
under the interstate commerce clause of the Constitution, to prevent
adulterated and misbranded food and drug products from being placed
upon the markets and sold as pure and genuine ones in the several
states by expressly banishing them from lawful interstate commerce.
In view of these express provisions, I cannot hold with counsel that
the evil intended by Congress to be met was simply the false and de-
ceptive branding of drug products and not the sale thereof. The ques-
tion therefore, recurs to whether this act in such direct terms requires
the labeling of drug products offered for sale in the original package
as to subject one failing to do so to a criminal prosecution or to con-
fiscation of the property. The two sections from which I have quoted
expressly provide for criminal prosecution and penalties for their vio-
lation. Sections 6, 7, and 8 of this act define the terms "drug" and
"food" as used; what articles of each shall be deemed adulterated,
and what articles of each shall be deemed misbranded. It is provided
that:

"The term 'misbranded' as used herein, shall apply to all drugs, or articles
of food, or articles which enter into the composition of food, the package or
label of which shall bear any statement, design, or device regarding such
article, or the ingredients or substances contained therein which shall be
false or misleading in any particular."

And further, "if the package fail to bear a statement on the label
of the quantity or proportion of any alcohol," and other specified sub-
stances contained therein. Counsel insist that these provisions do not
directly require a label, and that in order to warrant prosecution the
provision should have been in effect:

"For the purposes of this act an article shall also be deemed to be mis-
branded: In case of drugs * * * if the package or other container
thereof fail to bear a label."

I think this is too technical, even under the strict rules governing
the construction of criminal statutes. Suppose the provision had read
"if the package fail to bear a statement on a label of the quantity of al-
cohol," etc., would it not as well meet the view of counsel? A label
is defined by Webster to be "a slip of paper, parchment, &c., affixed to
anything, and indicating the contents, ownership, destination," etc.
The use of the word itself, therefore, carries the meaning that it is a
descriptive paper affixed to the package, and in express terms the act
requires the descriptive matter borne by the paper to include the state-
ment of how much alcohol, etc., is contained in the package. It does
not seem to me that the ruling in the case of United States v. Twenty
Boxes of Corn Whisky, 133 Fed. 910, 67 C. C. A. 214, can be made at
all applicable here. There an entirely different character of statute
was being construed. It did not attempt to bar from interstate com-
merce the article unbranded, but only to bar the shipment, "under any
other than the proper name or brand known to the trade," of spiritu-
ous or fermented liquors or wines. This statute was unquestionably
passed to prevent fraud upon the revenue, and not as a regulation of
interstate commerce. It follows that the first ground of defense must be unavailing.

The second, to the effect that the Secretary of Agriculture did not cause notice to be given the owner and allow hearing before seizure, has been directly decided in United States v. Fifty Barrels of Whiskey (D. C.) 165 Fed. 966, where Judge Morris, in overruling an exception to the libel based on this ground, says:

"Such seizures are not unusual, and it is plain that, if the harshness were conceded, it would not justify the court in reading into the law a limitation which it does not contain. The act provides two different proceedings to enforce its provisions. One is by criminal proceeding in personam; the other is by a proceeding in rem, by seizure of the offending thing itself, and forfeiture if found to be violative of the law. In this latter case there is no provision for a preliminary examination."

With this construction of the statute I am in entire accord, and defense on this ground must be overruled.

Nor do I think sound the third ground of defense, to the effect that in this case the car arriving at Wheeling and shunted into the private side track of respondent was the "original package" and not the several casks in which the liquid was contained. The term "original package," as employed by law, admits of no precise definition applicable to all. Generally, it is said to be a parcel, bundle, bale, box, or case made up of or "packed" with some commodity with a view to its safety and convenient handling and transportation. It does not necessarily mean that goods shall be inclosed in a tight or sealed receptacle. It relates wholly to goods as prepared for transportation, and has no necessary reference whatever to the package originally prepared or put up by the manufacturer. Indeed, the idea of the "original package" may well be made to cover certain forms of property which do not ordinarily admit of being packed or incased in any other manner than in the car or vessel in which they are transported, such, for instance, as steel beams, threshing machines, and other bulky articles. Cook v. Marshall County, 119 Iowa, 384, 93 N. W. 372, 373, 104 Am. St. Rep. 285. This definition has been quoted as being the most favorable I have found to the contention of respondent in this case. Many others have been carefully collated in 6 Words & Phrases, 5059, and the term has been fully discussed in Austin v. Tennessee, 179 U. S. 343, 21 Sup. Ct. 132, 45 L. Ed. 224. Without prolonging discussion, it seems to me clear that in this case the cask is the "original package," for the very simple reason that the car was wholly incompetent to "package" the liquid itself; the cask was a complete entity of itself, not connected or bound up with any other article, but capable of and in fact containing some 50 gallons of this liquid, an amount capable thereby of being safely and conveniently handled and transported; each cask was marked to the consignee, and if separated from the car was capable of shipment independent thereof without either loss or inconvenience; the casks were shipped independently from Detroit to Sandusky by vessel, and then transferred to the car for shipment to Wheeling, their final destination. And holding the cask to be the "original package," it becomes unnecessary to consider to any extent the fourth ground of defense, that a seizure of 6 casks under a
warrant for 65 casks was unlawful. The warrant being for the whole shipment, the government, if it had the right of seizure at all, could take the whole or any part it could find in the original packages.

This brings us to the fifth and last defense relied upon, to the effect that this liquid extract was not shipped in these casks for the purpose of sale thus in bulk, but was so shipped to the owner thereof from one state to another for the purpose of bottling into small packages suitable for sale, and when so bottled it is admitted the bottles were labeled so as to express the content of alcohol and comply with the requirements of the act. A careful analysis of the provisions of the act has convinced me that this defense must be sustained. The language of the statute is:

"Any person who shall ship or deliver for shipment from any state or territory or the District of Columbia to any other state or territory or the District of Columbia, or to a foreign country, or who shall receive in any state or territory or the District of Columbia from any other state or Territory or the District of Columbia, or foreign country, and having so received shall deliver, in original unbroken packages, for pay or otherwise, or offer to deliver to any other person, any such article so adulterated or misbranded within the meaning of this act, or any person who shall sell or offer for sale in the District of Columbia or the territories of the United States any such adulterated or misbranded foods or drugs, or export or offer to export the same to any foreign country, shall be guilty of a misdemeanor." Section 10.

Again:

"Any article of food, drug, or liquor that is adulterated or misbranded within the meaning of this act, and is being transported from one state, territory, district, or insular possession of the United States, or if it be imported from a foreign country for sale, or if it is intended for export to a foreign country, shall be liable to be proceeded against in any District Court of the United States within the district where the same is found, and seized for confiscation by a process of libel for condemnation."

These provisions must be construed strictly in favor of the accused. So construed, I am persuaded they must be held to mean that any one owning an adulterated or misbranded food or drug product who ships to another in another state such product is guilty; that any one having received such product so shipped from another state by the owner or seller thereof, who shall, in the state where so received, deliver or offer to deliver such product to another in the original package, for pay or otherwise, shall be guilty; that any person who has received such product from any other state, who sells or offers it for sale, whether in the original package or not, in the District of Columbia or the territories, is liable. Congress had no power except in the District of Columbia and the territories to prohibit one from manufacturing adulterated food and drug products; it had no power to prevent one anywhere from personally consuming such products; it did have power to suppress the manufacture of such in the District of Columbia and the territories, and by this act has done so; it had the further power to restrict in the course of commerce the transportation from state to state of such products, and it has done so; it had power, after such product was received from another state, to restrict its sale in the original package, and it has done so. It did not, in my judgment, have power to restrict one from manufacturing in one state such
product and removing it from that state to another for the purpose of personal use and not sale, or for use in connection with the manufacture of other articles to be legally branded when so manufactured. The government's inspector was entirely justified in concluding that this shipment in these original package casks was a violation of this act, because they were consigned for shipment by Parke, Davis & Co. at Detroit, Mich., to the Knowlton Danderine Company at Wheeling, W. Va., and they were not branded. It was reasonably to be assumed that Parke, Davis & Co. were the owners and sellers, while the Knowlton Danderine Company was the purchaser. From the agreed statement of facts, however, it is apparent that the formula of the preparation is a trade secret; that Parke, Davis & Co. were not the owners of this formula, but only the manufacturing agents, under contract, of the owner, the Danderine Company, and only acted as agent for the owner in directing such shipment to the owner itself of its own property; that such owner did not, "having so received" such product, either "deliver, in original unbroken packages, for pay or otherwise, or offer to deliver to any other person," the same; nor did it "sell or offer for sale in the District of Columbia or the territories of the United States."

It seems clear that the transportation of this liquid was solely to the bottles made in Wheeling instead of the transportation of the bottles from Wheeling to the liquid manufactured in Detroit, and that it was so bottled in Wheeling and properly branded before any sale or disposition of it was attempted. Under such circumstances I am constrained to hold that the 6 casks must be surrendered to respondent, and the libel dismissed.

UNITED STATES v. BALTIMORE & O. R. CO.
(District Court, W. D. Pennsylvania. May 17, 1909.)

An action for penalty under the federal safety appliance act (Act March 2, 1893, c. 196, § 1, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]) is a civil case, and the government is only required to prove its case by a preponderance of the evidence and not beyond a reasonable doubt.

[Ed. Note.—For other cases, see Penalties, Cent. Dig. § 34; Dec. Dig. § 33.*]

If a railroad company hauls a car which is defective as to coupling appliances or grabirons or handholds, although the defective car does not contain any interstate traffic, yet if it is hauled in a train which contains another car that is loaded with interstate traffic, then the statute is violated.

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

The safety appliance act (Act March 2, 1893, c. 196, § 1, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]) imposes upon a railroad company an absolute duty to maintain the prescribed coupling appliances, grabirons, and handholds in operative condition, and is not satisfied by the exercise of reasonable care to that end.

[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.]

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

The coupling and uncoupling apparatus on each end of every car must be in an operative condition.

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

5. Evidence (§ 586*)—Weight and Sufficiency—Negative and Positive Testimony.

Positive testimony is to be preferred to negative testimony, other things being equal; but where it was the duty of an inspector on the part of the railroad company to inspect cars, and he says that he did inspect the cars that came in and did not see certain defective appliances, that is not such negative testimony that it should not receive the same consideration, other things being equal between the witnesses, as positive testimony.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2432–2435; Dec. Dig. § 586.*]

(Syllabus by the Court.)


McCleave & Wendt, for defendant.

ORR, District Judge (charging jury). This is an action brought by the United States against the Baltimore & Ohio Railroad Company to recover penalties which the United States says the Baltimore & Ohio Railroad Company should pay by reason of violations by that company of an act of Congress, to which I now call your attention. It is entitled:

"An act to promote the safety of employes and travelers upon railroads, by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes." Act March 2, 1893, c. 196. § 1. 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174).

The fourth section of that act says that:

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

I have referred to that section first, because 10 of the specifications in the complaint in this case relate to the provisions of that section.

Section 2 of the act says that:

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

The first specification in the bill of complaint in this case is based upon that section.

Now, that act was amended in 1896, and section 6 of the act as amended provides that:

"Any such common carrier using any locomotive engine, running any train, or carrying or permitting to be hauled or used on its line any car in violation of any of the provisions of this act shall be liable to a penalty of one

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States district attorney in the District Court of the United States having jurisdiction in the locality where such violation shall have been committed." Act April 1, 1896, c. 57, § 1, 29 Stat. 86.

The construction placed by the courts upon that act has been somewhat various, and I have given the matter considerable attention. I am of the opinion, and so instruct you, that that act imposes upon a common carrier the absolute and imperative duty of having its cars used in interstate commerce equipped in the manner required by the act.

It has been argued here that the railroad company should not be responsible except for want of ordinary care in keeping its appliances in order, and that it would be a great hardship upon the railroad company to hold otherwise. I say to you that, the exercise of reasonable care by the railroad company to keep the cars equipped with the appliances required by the act will not excuse the railroad company from its default.

It has also been argued here on behalf of the railroad company that that company should not be liable to these penalties except it has been willfully negligent. I say to you that the matter of willful negligence does not enter into this case at all, because the law makes it an absolute, imperative duty upon the railroad company to keep its cars so equipped.

In arriving at this construction, it is necessary to consider the conditions that existed at the time and immediately preceding the passage of that act of Congress. We know from our own experience that many and many a time have we been introduced to trainmen and have shaken hands with only part of a hand. We knew that the injuries resulting to trainmen were so great that there was an economic loss to the country by reason of the impairment of these men for doing the full and proper work that they would have been able to do had they perhaps not suffered the injury. It was to remedy those conditions that this act was passed.

There is another phase of the act to which it is perhaps not necessary to call your attention here; that is, that a railway employé does not assume the risks occasioned by continuing in the employ of a railroad company after knowledge of defects on the cars or the failure of the railroad company to keep its cars equipped as provided by the act. This law changed the common law with respect to that.

In arriving at this conclusion, I have considered the question of hardship that has been suggested upon the part of the railroad company. I say to you that there is no more hardship on the part of the railroad company than there is on the part, we will say, of a licensed saloon keeper, who inquires of a minor if he is of full age before he furnishes him with liquor, and is informed that he is of full age; for that licensed saloon keeper, although he was deceived by the man who received the drink, is held under the law to be liable. It was his duty to take care of that. And the question of hardship upon the railroad company, I say, is not a matter to be considered in this case at all, because the act of Congress has specified what the railroad company was to do in order to change the conditions that previously existed, and, whether it is hard upon a railroad company or not, it was within the
province of Congress to so enact, and until Congress changes the law we must hold to its meaning.

Now, in the questions that arise here, you must determine whether or not these cars, if they were used at all by the railroad company, were used in interstate commerce—that is, in commerce between states, rather than in intrastate commerce—in commerce within the state lines. Because, if those cars were used in commerce within the limits of the state lines and not between states, then the act of Congress does not apply.

The first cause of action in the complaint is that a certain car designated by the initials and number N. Y. O. & W. 9570 was used in interstate traffic on the defendant's railroad near Connellsville, and that the uncoupling apparatus on the "A" end of that car was out of repair and inoperative, because of the fact that the chain connecting the lockpin with the uncoupling lever was broken. You have heard the testimony with respect to the inspection of that car by the railroad inspector in that yard, and you have heard the testimony of the witnesses for the government with respect to the removal of that car from the yard in a direction going east, I believe they said; and you will determine whether or not that car was used in going from Connellsville with that defective coupling apparatus. If you find it was used in interstate commerce with that defective coupling apparatus, then your verdict would be for the plaintiff. If, however, you find that that car was not defective, that the coupling apparatus was not defective, that it had been examined, inspected by the railroad company, and that it was not defective when started on its way east in the train, then your verdict, so far as that cause of action is concerned, should be for the defendant. You have heard the evidence of those witnesses. You are to determine their credibility, and you are to determine from all of the evidence what the facts in the case are.

A point has been put to me that positive testimony, other things being equal, is to be more relied upon than negative testimony, everything being equal between the witnesses. I think I understand what that means, and I will later read the point and have affirmed it. But I want to say this, that what may be negative testimony under one state of facts is not negative under another. As, for instance, a man who might testify that he did not hear a whistle blown or a bell rung is testifying to negative circumstances, and his testimony, perhaps, is not entitled to as much weight as is the testimony of the man who says he heard it. But if it was a man's duty to hear the whistle or to hear the bell, then if he says he did not hear it, while it is negative in its character, yet, because it was his duty—other things, I say, between the witnesses being equal—the testimony would have the same weight as the testimony of the man who said he heard the bell and whistle. And so it is with the testimony in this case. If it was the duty of the inspector on the part of the railroad company to inspect those cars, and he says that he did inspect the cars that came in there and did not see this defective appliance, that is not, to my mind, such negative testimony that it should not receive the same consideration, other things being equal between the witnesses, as positive testimony. I think they
are both positive, because it was the duty of that man to make the inspection.

The remaining causes of action in the specification all arise at New Castle Junction. You have heard the testimony there from the two inspectors who represented the government, and you have heard the testimony of the inspector on the part of the railroad company. The second cause of action charges the use in interstate commerce of a car initialed and numbered B. & O. 57170, when the grabiron or handhold on the "A" end of that car was missing. The third cause of action charges the use of car initialed and numbered B. & O. 57945, when the grabiron or handhold on the right-hand side of the "B" end of the car was missing. The fourth cause of action charges the use by the defendant in traffic of car initialed and numbered B. & O. 56258, when the grabiron or handhold on the right-hand side of the "A" end of the car was missing. The fifth cause of action charges that the defendant used in interstate traffic a car initialed and numbered A. C. L. 16131, when the grabiron or handhold on the right-hand side of the "A" end of the car was missing. The sixth cause of action charges the defendant with the use in interstate traffic of car initialed and numbered B. & O. 52324, when the grabiron or handhold on the right-hand side of the "A" end of the car was missing. The seventh cause of action charges the defendant with using in interstate commerce a car initialed and numbered C. L. & W. 8352, when the grabiron or handhold on the left-hand side of the "A" end of the car was missing. The eighth cause of action charges the defendant with the use in interstate commerce of car initialed and numbered B. & O. 50152, when the grabiron or handhold on the right-hand side of the "A" end of said car was missing. The ninth cause of action charges the defendant with using in interstate commerce a car initialed and numbered B. & O. 56526, when the coupling and uncoupling apparatus on the "A" end of said car was out of repair and inoperative, the lock-link, it being charged, being broken on said end of said car. The tenth cause of action charges the defendant with the use in interstate commerce of a car initialed and numbered B. & O. 53598, when the coupling and uncoupling apparatus on the "B" end of said car was out of repair, the lock-link said to be broken on said end of said car. The eleventh cause of action charges the defendant with having used in interstate commerce a car initialed and numbered B. & O. 29074, when the grabiron or handhold on the side near the "A" end of said car was missing. The twelfth cause of action charges the defendant with having used in interstate commerce a car initialed and numbered B. & O. 57184, when the grabiron or handhold on the right-hand side of the "B" end of said car was missing. The thirteenth and last cause of action charges the defendant with having used in interstate commerce a car initialed and numbered B. & O. 50259, when the grabiron or handhold on the right-hand side of the "A" end and on the right-hand side of the "B" end of said car were missing.

Now, if you should find the facts to be true as alleged in these causes of complaint as I have read them to you, that these cars were used by the defendant in interstate commerce when these grabirons or handholds were missing, or when the link-chain was broken, so that
the coupling could not be uncoupled without getting between the cars, then the plaintiff is entitled to recover for each of these offenses the sum of $100. But if you should find that any one of these cars was not so used by the defendant as charged, then your verdict with respect to such particular car or cars should be for the defendant. It appears to be the uncontradicted evidence in this case that Connellsville and New Castle Junction were points of repair for the Baltimore & Ohio Railroad.

I have been asked to charge you that it was not necessary for the agents or officers of the Interstate Commerce Commission to notify the railroad company of these defects, and I will so charge you that there was no legal liability upon them to do so. But I cannot help but feel that, in view of the purpose for which this act was passed, and in view of the fact that those points were repair points, it was a matter of common ordinary honesty, for the purpose, a matter of common ordinary human obligation, to have informed the railroad company, if they had time to inform them, or to inform the officers in charge of the repairing and inspecting of the cars there, before permitting those cars to go out upon the road as a menace to people who might have to use them, of defects found. I will charge you that there was no legal liability upon them to do so, but I have expressed myself as I have done, because I think that is right.

As I say, you have the evidence before you. You must decide the questions of fact that are presented to you; and if I have said anything to indicate my opinion as to the credibility of witnesses, or as to the facts where they are disputed, you should disregard what I say, because the determination of the facts is wholly for you, in the light of the instructions upon the law which I have given you.

Counsel for plaintiff has asked me to charge you as follows:

First. That this is a civil case, and the government is only required to prove its case by a preponderance of the evidence and not beyond a reasonable doubt. Answer. Affirmed.

Second. That if they should find that the defendant hauled a car which was defective in not complying with the safety appliance law as to coupling appliances or grabirons or handholds, although the defective car does not contain any interstate traffic, yet if it is hauled in a train which contains another car that is loaded with interstate traffic, then the act is violated. Answer. Affirmed.

Third. That the safety appliance law imposes upon a railway company an absolute duty to maintain the prescribed coupling appliances and grabirons and handholds in an operative condition, and is not satisfied by the exercise of reasonable care to that end. Answer. Affirmed.

Fourth. That the inspectors in the employ of the Interstate Commerce Commission are not required to inform the employés of the defendant, when they make the inspection of the cars sued upon, of the defects found in the appliances. Answer. Affirmed.

Fifth. That the coupling and uncoupling apparatus on each end of every car must be in an operative condition. Answer. Affirmed.

Sixth. That positive testimony is to be preferred to negative testimony, other things being equal; that is to say, when a credible witness
testifies to having observed a fact at a particular time and place, and
another equally credible witness testifies to having failed to observe the
same fact, with the same or equal opportunity to so observe such fact,
the positive declaration is to be preferred to the negative, in the ab-
sence of other testimony corroborating the one or the other. Answer.
Affirmed.

Defendant’s counsel has requested me to instruct you as follows:

(1) That this action, being for the infliction of a penalty upon the
defendant for the violation of the act of Congress commonly known
as the “Safety Appliance Act,” is criminal in its nature, and, if the sev-
eral cars mentioned in the several causes of action set forth in the
plaintiff’s statement were equipped with the several safety appliances
required by the safety appliance act aforesaid, and reasonable care used
by the defendant to keep and maintain such appliances in good order,
so as to keep them available for the purposes for which they were in-
tended, the defendant has complied with the duty imposed upon it by
the safety appliance act, and plaintiff cannot recover. In this case the
plaintiff has not shown that the several defects in the safety appliances
mentioned in plaintiff’s statement existed at the time same were dis-
covered as alleged, by reason of want of reasonable care by defendant
in the repair thereof, and the verdict must be for the defendant. An-
swer. Reasonable care to maintain the appliances contemplated by the
act of Congress will not relieve the defendant from liability if the jury
find as a fact that defendant used in interstate commerce any one or
more of the several cars without such appliance. The point is refused.

(2) This action being to recover a penalty for an offense criminal
in its nature, if the cars mentioned in the plaintiff’s statement had been
equipped with the couplers and handholds as required by the act of
Congress known as the “Safety Appliance Act,” and even if at the time
of the inspection thereof by the government inspectors a coupler should
be found in a defective condition or a grabiron or handhold torn off
or in a defective condition, yet the burden of proof is upon the plaintiff
to show that such defective conditions were the result of a willful neg-
lect on the part of the defendant company to inspect and repair such
safety appliances so as to make them available for use, and there is in
this case no evidence offered by the plaintiff sufficient to convict the
defendant of willful neglect or gross negligence equivalent thereto to
repair and maintain said appliances in good order and available for use,
and the plaintiff is not entitled to recover the penalty imposed by the
said act of Congress known as the “Safety Appliance Act,” and the
verdict should be for the defendant. Answer. The point is refused.

(3) There is not sufficient evidence to justify a verdict against de-
fendant upon the first cause of action set forth in the plaintiff’s state-
ment, and the verdict thereon must be for the defendant. Answer.
That point is refused.

A similar point has been put with respect to each of the other causes
of action, and I have refused them all just as I have the one last read.

Now, gentlemen, you will take the case and consider the evidence,
and, in the light of such instructions as I have given you, render your
verdict according to the facts as you may determine them.

Verdict for government on all counts.
1. Injunction (§ 104*)—Conspiracy to Prevent Operation of Mine—Right of Bondholders to Maintain Suit.

Holders of bonds of a coal company secured by mortgage on its property, the value of which depends solely on the ability of the company to mine and market the coal in place thereon, have such an interest in the property that they may maintain a suit in equity to enjoin former employees of the company who went out on a strike and others conspiring with them from illegally preventing the operation of the mines by threatening and intimidating the company’s employees and others who wish to become employees, where it is alleged that without such operation the company cannot pay the interest on its bonds or the principal when it matures.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 104.*]

2. Injunction (§ 114*)—Conspiracy to Prevent Operation of Mines—Right of Bondholders to Maintain Suit.

Such bondholders are not required to apply to the trustee who holds the mortgage to bring such suit, which is outside of the terms of his trust; but, being the principals in interest, they may protect their rights by direct suit in their own names.

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


Neither are such bondholders required to allege and show a demand on the company to bring such suit and its refusal, having a distinct interest of their own which they are entitled to protect.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 118.*]


To a suit by bondholders of a coal company to enjoin striking employees and others conspiring with them from illegally interfering with and preventing the working of the company’s mines by threatening and intimidating its employees, which operation of its mines it is alleged is necessary to enable the company to pay the interest on complainant’s bonds as it matures, the company is not a necessary party.

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

In Equity. On demurrer to bill.

Melville H. Carter and three other citizens of Maryland have filed their bill against Osburn Fortney and 33 other individual citizens of West Virginia, in which they charge the Merchants’ Coal Company to be a West Virginia corporation, the owner of valuable coal lands in Preston county, said state, and operating a coal mining plant at Tunnelton in said county, having mine openings, tipple, miners’ houses, electric mining machinery, and a capacity for over 200 mine workers; that it has valuable existing contracts to furnish coal to contractors therefor, which it is bound to fill or lose and be held liable in damages for the breach, besides loss of profits, one of which is with the Baltimore & Ohio Railroad Company to furnish large quantities of coal necessary to supply its locomotives in continuing operation over its road; that about the last of March, 1908, the coal market becoming depressed and the price of coal being low, the coal company notified its miners of a 10 per cent. reduction in wages, which reduction its miners refused to accept, and the company closed down its mines until August, 1908, when it decided to again commence operation, offering its miners employment at the reduced wage, which they again refused to accept; that when the company attempted to start work the former employees and miners interfered with the operation and with those em-

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep’t Indexes
ployes and miners who went to work, and thereupon the company again closed its mines until the last week in December, 1908, when it again started operation; that many former miners and employees went back to work, but a great number refused to do so, creating the necessity on the part of the company of bringing in from other localities other miners desirous of working for the wage offered; that immediately after this last commencement of operation in December, 1908, a large number of former employees, with others who had not been employed, colluded, conspired, and combined together for the express purposes of preventing the company from securing the services of other miners, of securing those at work to quit such service, to prevent the company from operating its mines, and to prevent it from fulfilling its contracts of sale of coal; that these conspirators included the defendants named and others unknown, and that, in pursuance of their purposes and conspiracy, they, by threats, menaces, insulting language, jeers, and hootings, caused many to quit work and intimidated others desiring to work from doing so; that such threats and menaces were being carried on to an extent necessarily requiring the company to keep guards and officers upon its property to prevent injury to its managers, superintendents, employes, and its property; that the miners at work are met on the streets by defendants and their co-conspirators, driven from the sidewalks to the streets, are threatened, menaced, jeered, hooted at, called “blacklegs,” “yellow dogs,” “blacksheep,” “scabs,” other names too vile to be written, are stoned on the streets, assaulted as they go to and from work, their houses have been fired into with guns, stones thrown through their windows and at members of their families in broad daylight on the public streets of the town; that deputy sheriffs employed to watch over the company’s property and to keep the peace are jeered, hooted at, threatened, and no assistance is rendered by the authorities of the town in preservation of order; that these conspirators rush to every passenger train stopping in the town in great numbers and endeavor, forcibly and otherwise, to prevent persons alighting from such trains who seem to be seeking employment with the company, and by threats and menaces seek to prevent those alighting from engaging in the employment of the company; that they display large banners, at the arrival of trains, warning all persons not to engage in the employment of the coal company, have gone masked at night to the engine room of the company and delivered to its firemen a letter notifying them that they would be killed if they did not cease working for the company; that in consequence of all these acts the company has been prevented from employing more than one-half of the miners and employes to whom it could give work and who are willing and anxious to work if properly protected. Specific threats are set forth, and it is charged that the existing conditions have become unbearable, and “that, by reason of the conduct of defendants and their co-conspirators, the property of said coal company is in jeopardy and liable to be destroyed and greatly damaged, and great loss incurred by its being unable to operate its mines, or to operate them fully, and that the lives of persons now employed by said coal company, and those who come seeking employment, are in danger at the hands of said defendants and their co-conspirators, and that the town officers as aforesaid will render practically no assistance, and the county officers are unable to cope with the situation.”

It is then alleged that the company’s property is worth from $250,000 to $500,000, the sole value of which consists in its being able to mine, ship, and sell coal at a profit, which it cannot do so long as such conspiracy is effectual, as it now is, and great loss and damage will be incurred if mining operation has to be discontinued; that the company under such conditions will not be able to meet its obligations and the interest thereon; that plaintiffs are large creditors of the coal company, holding bonds against it secured by a mortgage, interest upon which is payable semiannually and the principal after a period of years. It is charged that the defendants are wholly insolvent; that the coal company has taken no sufficient legal steps to restrain the unlawful conspiracy; that its property is being damaged and the value thereof largely destroyed, and great danger and loss threatened plaintiffs as such bondholding lien creditors. An injunction is prayed against defendants and all others conspiring with them to restrain them from interfering with the company’s mining operation, its officers and employees, and from engaging in the various acts of threatening, menacing, intimidating, and assaulting the company’s of-
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Officers and employees and miners on account of their service with the company; from picketing the property of the company, or from by unlawful means preventing others from entering the service of the company. A hearing upon the motion for injunction and a temporary restraining order was granted. Certain of the defendants have appeared and entered their demurrer to the bill, in which are assigned as grounds:

First. That the said plaintiffs have not shown by their said bill that they have any such right or interest in the contract of employment existing between the Merchants' Coal Company of West Virginia, a corporation, and the men engaged by said Merchants' Coal Company to work in and about its mine and coal plant, as entities them to the relief by said bill prayed.

Second. That it appears from said bill that there is no privy of contract between said plaintiffs and the men in the employ of the said Merchants' Coal Company, whereby said employees are working for the said Merchants' Coal Company, as enables the said plaintiffs to invoke the aid of a court of equity in the protection of the contractual rights of said Merchants' Coal Company, existing between it and its employees, or such persons as it seeks to bring into its employment.

Third. That it does not appear from said bill that any sufficient effort has been made on the part of the said plaintiffs or any of them to induce the said Merchants' Coal Company to institute a suit to invoke the aid of a court of equity to protect it in its contractual rights and relations existing between it and its employees or other persons whom it is seeking to bring into its employment.

Fourth. That there are not proper parties to said bill, in this: That the said Merchants' Coal Company, a corporation, named in said bill, is directly interested in the contract existing between it and its employees, and that this court can pronounce no proper decree affecting the rights of the parties under such contract in the absence of the said Merchants' Coal Company, the only party to such contract directly interested in its enforcement except the employees engaged to work for said company under and by virtue of said contract.

Fifth. That it does not appear from said bill that the said defendants or any of them are seeking to injure or destroy the property, or any part thereof, mentioned in the said bill upon which the plaintiffs claim a lien by virtue of a deed of trust or mortgage existing thereon given to secure certain bonds, a part of which bonds, as shown by said bill, is held by the plaintiffs.

Sixth. That it is not shown by said bill, by appropriate allegation of facts, that the plaintiffs, or any of them, will suffer irreparable injury by reason of any of the matters and things in said bill set forth and averred.

Seventh. That it appears from said bill that the plaintiffs have ample security for the payment of the bonds which they hold, by virtue of the deed of trust or mortgage upon the property described in said bill, and that it does not appear that they are interested in the output of the coal from the mines of the Merchants' Coal Company; that they have not contracted for the purchase of said coal, and have no such connection with the mining and sale of said coal as to give them any right or interest in any existing contract between the Merchants' Coal Company and its employees for the work to be done in and about said mines in the operation of mining and shipping coal therefrom.

Eighth. That the plaintiffs have made no such showing by their said bill as entitles them to relief in equity relating to the contractual rights of the debtor, the said Merchants' Coal Company of West Virginia, because it clearly appears from the bill that the right of suit, if any exists, but which these defendants protest does not exist, belongs to the said Merchants' Coal Company, a corporation, and not to the said plaintiffs or any of them, as it nowhere appears from the said bill that the said corporation has refused to come into a court of equity for the purpose of enjoining these defendants because of the acts and doings by them alleged in the said bill to have been committed and threatened to be committed.

Ninth. That it nowhere appears in said bill that the plaintiffs have exhausted all the means within their reach to obtain through, by, and in the name of the said corporation, the Merchants' Coal Company, redress for their alleged grievances, or that the said corporation has declined to take action in conformity to their wishes touching the matters and things in said bill contained.

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Tenth. That it ought to be made to appear from said bill that the suit of the plaintiffs is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance, inasmuch as this suit is within the spirit of rule of practice 94 adopted for and applied by courts of equity of the United States.

This demurrer has been argued and submitted.

P. J. Crogan, for plaintiffs.
Charles E. Hogg, for defendants.

DAYTON, District Judge (after stating the facts as above). It is my purpose to dispose of this demurrer as briefly as possible, and to abstain from any expression touching the facts involved. The demurrer admitting the allegations of the bill to be true justify me in giving them construction liberal to the interests of the complainants without in any manner, in case the demurrer is overruled, prejudicing judgment upon final hearing when the evidence shall disclose to what extent these allegations are sustained by the facts. It seems to me that this demurrer substantially involves these propositions:

First, lack of interest in plaintiffs: (a) Because the object of the bill is alleged to be to protect the Merchants' Coal Company in a contract made by it with its employés, to which the plaintiffs are not parties. (b) Because the bill alleges the interest of the plaintiffs to be solely a bonded or trust indebtedness of the company owned by them of $24,000 in the aggregate, with no allegation that the company's bonded indebtedness exceeds this sum, while the value of its property is alleged to be from $250,000 to $500,000, whereby is clearly shown that no danger of irreparable injury to plaintiffs' interests is apparent. (c) Because the plaintiffs, as bondholders of the coal company, secured by mortgage on its property, given to trustees, cannot maintain action in their own name without showing that the trustees have refused to bring an action. (d) Because the bill contains no sufficient allegation that the plaintiffs have applied to the company to bring suit to protect its own interests and thereby those of these plaintiffs.

Second, for want of parties. No decree can be entertained in the cause that does not directly affect the business and property rights of the coal company, therefore it is a necessary party.

Considering these, it is hardly necessary now to say that injunction will be granted "where the members of a labor organization, or other employés, conspire unlawfully to interfere with the management or business of another, and to compel the adoption of a particular scale of wages, by congregating riotously and in large numbers in and near the place of business of such other person, and for the purpose of preventing other laborers from entering into such other person's employment or remaining in such employment, by intimidation, consisting in physical force or injury, either actual or threatened, to person or property." Hogg, Eq. Principles, 387, § 278.

Such acts on the part of employés are common results of a strike on their part. A strike may be entirely legal where it is a voluntary refusal on the part of such employés to work for their employer because of conditions existing and his refusal to correct the same in accord with their lawful demands. On the other hand, it becomes illegal if it be the result of an agreement depriving those engaged in it
of their liberty of action, and it becomes criminal if it be a part of a combination for the purpose of injuring or molesting either masters or men. Arthur v. Oakes, 63 Fed. 310, 11 C. C. A. 209, 25 L. R. A. 414.

On the other hand, there may be a combination of persons not employed created "for the purpose of injuring or destroying the business of another, either by efforts to prevent, by unlawful means, the sales of his products to the public or the use of some particular thing in his business, or by materially lessening or entirely stopping the manufacture of his products, through the loss or want of the necessary or proper employés, vehicles, or machinery, the lack whereof is caused or brought about by the illegal acts of such combination, or by the union of both of these unlawful and unwarranted agencies operating at the same time upon the business of such other person." Such combination is known as a "boycott," and is condemned alike by the common law and modern decisions as illegal. Hopkins v Okley Stave Co., 83 Fed. 912, 28 C. C. A. 99; Hogg's Eq. Principles, 387, § 279.

The allegations of this bill, in effect, charge a conspiracy involving the elements of both the strike and of the boycott. It is charged that the employés of the company in March, 1908, refused to accept a wage reduction, and, as they had right to do, surrendered their employment, and the company in consequence ceased operation; that in August following, when it sought to resume work, upon the continued refusal of its old employés to accept the reduction and upon their interference with the operation, the company again shut down and remained so until the last of December. Thus a period of nine months substantially elapsed during which these men were not in the service of this company and could not be considered its employés in any sense of the term. It is then charged in effect that these defendants, some of whom had formerly worked for the company and some had not, formed a combination or conspiracy, with others unknown, to prevent this company from resuming operations, from mining its coal, and complying with its contracts to deliver the same to its customers, and thereby destroy its business and the value of its property; that this is sought to be accomplished by menaces, threats, assaults upon, and intimidation of, its employés designed to compel them to cease laboring for the company, and by like illegal acts to prevent others from entering such employment. It would seem that more of the elements of the boycott are present than of the strike. It may be well termed a lawful strike that has degenerated into a boycott in many respects not only illegal but criminal in character. Counsel for these defendants has most ably argued that the purpose and object of the bill must be construed from its allegations to be only to protect the coal company in its contract with its present employés, to which contract the plaintiffs are not parties and therefore have in law naught to do. If I could construe this to be the true purpose and object of the bill, I would have no trouble in sustaining the demurrer. To so protect the men from intimidation and injury may be an incident of the relief sought, but the scope of the bill I conceive to be much broader. It may, it seems to me, be epitomized from its apt allegations to be to protect the property of this company, depending for its sole value, as
alleged, upon its ability to profitably mine and dispose of its coal in place thereon, which mining can only be done by individual employés; to protect it from inevitable breach of contracts with its customers whereby loss and damage will be incurred; to enable it lawfully to carry on its business, a property right it has, without illegal and criminal interference on the part of these alleged conspirators defendants, and this in order that the value of its property may not be lessened or destroyed, the lien of plaintiffs' trust bonds be thereby impaired or rendered valueless, but on the contrary, it may be permitted to fulfill its trust contract with plaintiffs by paying them the semiannual interest and the bond principal when due.

It would seem clear that the allegations of the bill justify an injunction in the premises at the instance of the coal company, had it applied for it to a court of competent jurisdiction. The question then resolves itself into whether this court has right to grant it at the instance of these trust bondholders. The first objection that these bondholders hold an indebtedness of $24,000 only, with no allegation of other like bonded indebtedness outstanding against a property charged to be worth from $250,000 to $500,000 in value, would have been sufficient to refute the idea of irreparable injury to their rights and interests possibly, if the other allegations were not in the bill that the sole value of this property depends upon the ability of the company to operate at a profit the mining of its coal and the meeting of its interest charges and the payment of the principal of its indebtedness when due. Under these averments it must necessarily depend upon the evidence whether such allegations of the bill can be sustained. No matter how strong the presumption to the contrary may be upon final hearing, these allegations upon demurrer stand for confessed as true.

The second objection, that bondholders secured by a trust deed cannot maintain suit without alleging the refusal of the trustees to institute the same, is not tenable for these reasons: That a lienholder has right to an injunction against a trespasser, whether an owner or an outsider, is well settled. And it has been held that a mortgagee, a judgment creditor, a vendor's lienholder, and a bondholder secured by mortgage have a right to such relief. 1 Spelling, Ex. Rem. §§ 266, 267, 271, and 469. The right in such case is inherent in the person holding the lien security, and the form by which such security is held would seem to be immaterial. It would hardly be in accord with the true principles of equity practice to hold that a principal in interest could only act through his representative having no substantial interest but only as a trustee. The function of the trustee to preserve and maintain the existence of the property might possibly be broad enough to authorize him to maintain a suit for that purpose, if the creditors secured direct him to do so, but it is certainly not so broad as to prevent these creditors from protecting their own interests in the premises unless he shall permit them to do so.

My predecessor, Judge Jackson, in several cases similar to this, but not reported, has sustained injunctions awarded to bondholders, and no question has been heretofore raised as to the correctness of his ruling in this particular. I am persuaded that no good reason exists for now reversing it. I am aware of the fact that it is counter to the
ruling of Judge Ross in Consolidated Water Co. v. City of San Diego (C. C.) 89 Fed. 272, but with the utmost respect for the judgment of this learned judge, it seems to me there is a marked distinction between the cases cited by him in support of his position and the one here, or, to an extent, to the one he was deciding. A trust mortgage generally by its own express terms is a tripartite agreement between creditors, debtor, and trustee whereby the creditors as a class loan their money upon certain stipulated terms and conditions to the debtor, who secures these loans upon like terms and conditions by a lien upon designated property. To properly secure this lien, and further to create an agent for both creditors and debtor to secure performance of the mutual terms and conditions agreed upon, inter partes, the property is conveyed to a trustee with express powers to perform these conditions. Under such circumstances it has been well held that individual bondholding creditors thus secured must, before bringing suit themselves, request the trustee to sue touching all matters relating to the obligations inter partes created by the terms of the trust itself, such as the demand for accounting from the trust debtor or the demand for a foreclosure and sale. The reason in such cases is clear; the creditors are by the terms of the trust created a class with equal rights, and the trustee is created an agent for them as such. In many cases it would be distinctly against the interests of the other creditors to allow one or more of their number to institute proceedings for selfish reasons against the property, involving its management and calculated to destroy its credit or value. Such are the cases cited by Judge Ross. But in a case like this, when the bondholding creditor is not seeking to interfere with but to maintain the trust obligations and the trust subject from interference and destruction from outside sources, over which neither bondholder, debtor, nor trustee have any control, I can perceive neither any power, or at least obligation, on the part of the trustee, limited by the terms of his trust, himself to sue without direction from the bondholders or to prevent the bondholders from suing.

The third objection, that such bondholder before suing must allege that he has applied to the company to bring such suit, is fully answered, in my judgment, by the reasoning in the cases of Mercantile Trust Co. v. Texas & P. Ry. Co. (C. C.) 51 Fed. 529, Consolidated Water Co. v. City of San Diego (C. C.) 84 Fed. 369, and second decision in same case, 89 Fed. 272.

This brings us to the last objection made, that the coal company is a necessary party. Touching this question an apparent conflict of authority exists between the ruling of Judge Ross in Consolidated Water Co. v. City of San Diego, supra, affirmed by the Circuit Court of Appeals for the Ninth Circuit, 93 Fed. 849, 35 C. C. A. 631, and that of Judge Goff in Ex parte Haggerty (C. C.) 124 Fed. 441, but, as Judge Goff has pointed out, in this latter case radical difference in conditions existed, making the conflict only apparent and not real. Judge Goff in this Haggerty Case has so fully and lucidly set forth the reasons why in cases like this the company is not a necessary party that I can add nothing thereto.

The demurrer must be overruled.
In re MONEYS IN REGISTRY OF DISTRICT COURT.
(District Court, E. D. Pennsylvania. May 20, 1909.)
Nos. 1872, 1791, and 4.

1. Deposits in Court (§ 11*)—Disposition of Unclaimed Deposits—Federal Statute.
Under the provision of Rev. St. § 906, as amended by Act Feb. 19, 1887, c. 265, § 3, 29 Stat. 578 (U. S. Comp. St. 1901, p. 711), that it shall be the duty of the judge or judges of the respective federal courts to cause any moneys which have remained in the registry of the court unclaimed for 10 years or longer to be deposited in a designated depository of the United States to the credit of the United States, after a fund has remained in its registry unclaimed for 10 years or more the court has no power to then award it to a claimant, but can only follow the statute, and any claim must be presented to the Treasury Department.

[Ed. Note.—For other cases, see Deposits in Court, Cent. Dig. § 12; Dec. Dig. § 11.*]

2. Salvage (§ 28*)—Derelict Property—Rights of Salvor.
A salvor of derelict property found at sea who took the same to a court of admiralty and libeled it for salvage, claiming the entire proceeds, but was awarded a moiety only, the remainder being deposited in the registry of the court subject to its orders, is entitled to such balance where, after the lapse of a number of years, no owner or claimant of the property has appeared.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. § 69; Dec. Dig. § 28.*

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

On Exceptions to Report of Special Commissioner.
Walter C. Douglas, Jr., and J. Whitaker Thompson, for the United States.
James F. Campbell, for certain claimant.

J. B. McPHERSON, District Judge. In January, 1908, upon petition of the United States attorney representing that certain funds had been in the registry of the District Court unclaimed for more than 10 years, and asking that an order might direct their payment to the United States, a commissioner (Edward F. Pugh, Esq.) was appointed "to ascertain and report the status of each case, as also what disposition, if any, should be made of the funds in the registry therein, with authority to make such advertisements and conduct such correspondence as he may think most likely to ascertain the persons entitled to the funds in the respective cases." The commissioner made a careful and painstaking inquiry concerning each of the funds, and his report is now before the court. In all of the cases except three he reported that the money should be paid into the treasury, and no objection has been urged to these recommendations. In each of the three instances referred to he awarded the fund to the claimants, and in this respect his recommendations have been brought up by the government for review.

Two of the funds came into existence under Bankr. Act March 2,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
IN RE MONEYS IN REGISTRY OF DISTRICT COURT. 471

1867, 14 Stat. 517, c. 176, and the report of the commissioner thereon is as follows:

"William A. Knight, Bankrupt, 1867, No. 1872.

"This was an Involuntary petition filed in 1875. A composition with creditors was made by the bankrupt, which was approved by the register and by the court; and the property was reconveyed to the bankrupt July 21, 1875. Such creditors as the bankrupt could settle with personally were so settled with, but in obedience to the orders of the court sundry sums of money were paid in by him for creditors not then accessible, all of which have been paid to the persons entitled, except the sum of $8.70, which was the percentage due on a certain due bill of $29, given by the bankrupt to one William E. Patton of Germantown, but then held by a person unknown to the bankrupt. This person never proved his debt, nor did he make any claim to the money. In the opinion of the commissioner, therefore, it belongs to the bankrupt.

"The commissioner notified William Knight Shryock, Esq., attorney for the bankrupt, by letter of October 21, 1908, hereto annexed, marked 'Exhibit G,' and on November 4, 1908, was attended by William A. Shryock, Esq., who presented letters testamentary upon the estate of William A. Knight, deceased, granted to Lucy Worden Knight, Edith H., Amos K., and Helen Knight, executors (which letters were granted by the register of wills of Philadelphia, August 18, 1908), and on their behalf made claim to the balance in court, which the commissioner thinks should be awarded to them, and it is so awarded."

"Jonathan Lodge, Bankruptcy of 1867. No. 1791.

"A petition in bankruptcy was filed in 1875. The bankrupt made a composition with his creditors which was approved by the register and by the court May 12, 1876, all of the creditors assenting except the following: William McCrone, John S. Lear & Co., John McGovern, George Lawton & Co., and William Bowker. The settlement having been approved on December 27, 1876, it was ordered that the unassenting creditors be directed to accept the compromise of 25% cash and 50% in notes of the bankrupt, as follows:

<table>
<thead>
<tr>
<th>Claim</th>
<th>Cash</th>
<th>Jdgt. Note</th>
</tr>
</thead>
<tbody>
<tr>
<td>William McCrone</td>
<td>$65 52</td>
<td>$16 38</td>
</tr>
<tr>
<td>John S. Lear &amp; Co.</td>
<td>3 00</td>
<td>1 75</td>
</tr>
<tr>
<td>John McGovern</td>
<td>10 00</td>
<td>2 50</td>
</tr>
<tr>
<td>George Lawton &amp; Co.</td>
<td>136 36</td>
<td>34 09</td>
</tr>
<tr>
<td>William Bowker</td>
<td>27 50</td>
<td>6 88</td>
</tr>
</tbody>
</table>

|$90 60

"The $60.60 was paid into the registry, and the estate was reconveyed to the bankrupt.

"Subsequently, to wit, November 26, 1879, William McCrone appeared, accepted and received his $16.38, leaving in the registry a balance of $44.22. There was testimony that diligent search was made in December, 1876, for John S. Lear & Co., John McGovern, George Lawton & Co., and William Bowker, but that they could not be found. They did not prove their claims in the bankruptcy proceeding. Therefore they can hardly be considered creditors, especially after so great a length of time, and the fund is really the property of the bankrupt.

"This matter appears in the advertisement above mentioned, Exhibit C, and the commissioner also notified George S. Graham, Esq., attorney of record for the bankrupt, of a meeting to be held November 2, 1908, at 3 o'clock. Mr. Graham sent word requesting an adjournment until November 9, 1908, at 3 o'clock, at which time a meeting was held and Mr. Graham asked another adjournment. He subsequently appeared, and it was shown that Jonathan Lodge died intestate January 14, 1906, leaving no estate, so that no letters of administration were taken. Three children survived him, viz., William B. Lodge, Mary Watson, and James Lodge, represented by Mr. Graham.

"Under the circumstances more than two years having elapsed since the death of Jonathan Lodge, the commissioner thinks that the fund should be
paid to George S. Graham, Esq., as attorney for the estate of Jonathan Lodge, deceased, and it is so awarded."

I agree with the commissioner in believing that these two sums of money belong in equity to the persons to whom he has awarded them respectively, but in my opinion I have no power to order the payment. The present proceeding is taken under sections 995 and 996 of the Revised Statutes, as amended by Act Feb. 19, 1897, c. 265, § 3, 29 Stat. 578 (U. S. Comp. St. 1901, p. 711), and these sections read as follows:

"995. All moneys paid into any court of the United States or received by the officers thereof in any case pending or adjudicated in such court shall be forthwith deposited with the Treasurer or Assistant Treasurer or a designee of the United States in the name and to the credit of such court, provided that nothing herein shall be construed to prevent the delivery of any such money upon security according to agreement of parties under the direction of the court.

"996 (as amended). No money deposited as aforesaid shall be withdrawn except by order of the judge or judges of said courts, respectively, in terms of time or in vacation to be signed by such judge or judges and to be entered and certified of record by the clerk, and every such order shall state the cause on which such order is drawn, and it shall be the duty of the judge or judges of said courts, respectively, to cause any moneys deposited as aforesaid which have remained in the registry of the court unclaimed for ten years or longer to be deposited in a designated depository of the United States to the credit of the United States."

Section 996 does not attempt to forfeit or escheat the money described therein; it merely changes the depository. Instead of allowing the fund to remain in the registry of the court, the money is to be "deposited in a designated depository to the credit of the United States." So far as appears, this is (in theory at least) no more than a substitution of depositories, or a change in the name to which the fund is to be credited, and does not in any manner affect the right of the true owner to pursue his claim upon the money. Instead of coming into court, however, he must now deal with the treasury, and no doubt the practical result of the substitution, especially where only small sums are concerned, will be to give to the United States the perpetual use of the sums so transferred. But I am not concerned with the practical effect of the statute. Its meaning seems to be clear, and I am bound to obey its direction. So far, therefore, as these two small funds are concerned, I think I have no option in the matter. They were paid into court in 1875 and 1876 for the express use of the creditors named, and no claim has ever been made for them, either by these creditors or on behalf of the respective bankrupts, until a few months ago. Equitably they may belong to the estate of the bankrupts, but they have "remained in the registry of the court unclaimed for ten years or longer," and it is therefore my duty to direct them to be transferred to the credit of the United States.

The remaining fund stands upon a different footing, as will appear by the following quotation from the commissioner's report:

"Twenty Bales of Cotton—Admiralty—No. 4 of 1880.

"On January 16, 1880, the steamship Allentown, belonging to the Philadelphia & Reading Railroad Company, picked up at sea, about 30 miles S. W. of Key West, 20 bales of cotton floating on the water. Apparently no vessel
was near by. The cotton was brought to Philadelphia, libeled for salvage, and sold by the marshal on February 26, 1880, for $1,052.62, leaving a balance in the registry (after payment of costs) of $910.

"April 28, 1880, the court awarded to and distributed money among the libelants, one-half of the fund, to wit, $455; retaining in the registry the other half, to wit, $455, which was directed to be and remain in the registry subject to the further order of the court.

"It was supposed, when the libel was filed, that all of the bales were un-marked, the marks having apparently been obliterated from the effect of the sea water, the exterior being defaced and torn; but on a careful survey under order of the court, upon two of the bales were found marks, being apparently C. H. W.

"The commissioner sent a notice to the district attorney and also to the general solicitor of the Philadelphia & Reading Railroad Company. On Monday, October 19, 1908, the commissioner was attended by Walter C. Douglas, Jr., Esq., assistant U. S. district attorney, and James F. Campbell, Esq., attorney for the Reading Railroad Company, both of whom claimed the entire fund, and sustained their respective contentions by both oral and written arguments.

"The commissioner believed that it was his duty to endeavor to find the owners of the cotton, and thought it possible that it had been shipped originally from one of the Gulf ports. He therefore caused advertisements to be inserted in the Times Despatch of New Orleans, the Ledger of Mobile, Ala., and the News of Galveston, Tex. A copy of such advertisement is hereon annexed, marked 'Exhibit H.' The commissioner has received no reply to the advertisements, and is obliged to report, therefore, that he has been unable to ascertain who were the owners of the cotton.

"The question whether the fund should be paid to the United States or to the salvors (the owners not having appeared or made claim to it) is not free from difficulty.

"The cotton was found floating at sea, not far from the coast at Key West, in the path of vessels bound to or from any of the Gulf ports. It must have formed part of the cargo of a vessel (no doubt from a Gulf port) from which it had been jettisoned, or which, having been wrecked or having foundered, had become a partial or total loss. The marks on some of the bales, though indistinct, were not entirely obliterated. Probably the cotton had been insured and was abandoned by the owners to the underwriters, but, whether it had or had not, the owners or underwriters, or both, must have known by what vessel it had been shipped—whether she came safely to port with part of her cargo, or whether vessel and cargo were lost.

"In either case they were put upon inquiry as to what had become of their cotton. So far as is known, they made none. They did not appear before the court in the salvage suit; nor have they appeared before the commissioner, in answer to his advertisements. May it not be said, therefore, that they abandoned their property, to all intents and purposes?

"The libel alleges that the libelants are entitled to salvage, and 'also, if, upon due course of proceeding, no owner or owners shall appear and prove title to the said twenty bales of cotton, to the whole remaining portion thereof, or of the proceeds of sale thereof.'

"The decree awards and apportions 50 per cent. salvage, and orders that the remaining half of the net fund in the registry, to wit, $455, be and remain in the registry of the court, subject to the future order of the court.' It is therefore still entirely within the court's control.

"It appears, then, that the salvors originally claimed the whole fund. They have not withdrawn this claim, but on the contrary they renew it before the commissioner; so that it can hardly be said, literally, that the fund has remained in the registry 'uncalled.' The real question is whether the court ought or ought not to adjudge the fund to the salvors under the circumstances of the case.

"Some traces of the old doctrine that all unclaimed chattels found at sea belong to the United States as the successor of the right of the King are found in the earlier cases. It was so decided by Judge Davis in Massachusetts, in 1829, in the case of Peabody v. Proceeds of 28 Bales of Cotton, Fed. Cas. No.
In that case the surplus over the salvage was denied to the salvors and awarded to the United States. This, however, was not the practice in Pennsylvania, nor is it believed, in some of the other districts.

"In 1820, the case of Hollingsworth v. Doublooms, Fed. Cas. No. 6,629, Judge Peters had decided that where remnants of a chest, in which were some gold pieces, were found floating at sea, the finders were entitled to salvage, but that the residue should be deposited in court for a year and a day, subject to any legal claims; and, if no such claims should be interposed, the fund was to be disposed of agreeably to the future order and decree of the court.

The commissioner has examined the original record in this case, and finds that, after the expiration of the year and a day, the court decreed that the residue of the fund be paid to the libelants (the salvors) or to their attorney of record; and it was so paid.

"In Russell v. 40 Bales of Cotton, Fed. Cas. No. 12,154, Judge Locke held in 1872, in a very elaborate and careful opinion, that after the expiration of a suitable time, ordinarily a year and a day, the residue of any fund remaining after the payment of costs and proper salvage, would usually be paid to the salvors, upon the ground that the lapse of time was sufficient to raise a presumption of abandonment by the owners, and that such delivery should be absolute unless the court should think it probable that some claim would be made thereafter, in which case a refunding bond might be required from the salvors.

"The opinion reviews many decisions and text-writers.

"The decision was affirmed by the Circuit Court in a per curiam opinion.

"This is the view of the law taken by Mr. Parsons in his work on Maritime Law, vol. 2, p. 617, to wit, that the balance should be held for a year and a day, and, if no owners then appeared, it should be paid to the finder.

"And by Judge Marvin, Wreck and Salvage, p. 143.

"If a year and a day was considered a sufficient time to bar owners years ago, when the means of communication and information were not as perfect as they are today, surely the 28 years which had elapsed in the present cause ought to be sufficient presumption against them.

"The same general principle was announced by the Court of Appeals of Ohio, in 1843, in the case of Wyman v. Hurlburt, 12 Ohio, 81, 40 Am. Dec. 461, in which it appears that a schooner containing some specie was sunk in Lake Erie and so remained about nine months. The jury found that it had been abandoned; and the court awarded the whole proceeds to the finders, denying the claim of the former owners.

"When this case was decided, the admiralty jurisdiction had not been extended over the Great Lakes.

"It is true undoubtedly that, under the ordinary circumstances, salvors, as such, will not be awarded the whole fund. Perhaps the strongest case on this point is The Felix (D. C.) 62 Fed. 620, where the salvors were awarded but a part of the fund, although it was shown that the expenses had exceeded greatly the value of the salvaged property. But in this and similar cases the owners appeared, contested the demand of the salvors, and claimed the residue, upon the ground that, if it should be awarded to the salvors, the vessel owners would have received no benefit from the work, which is of the essence of salvage.

"There have been cases where the value of the property saved was small, and there was no appearance or contest by owners, where the court by its original decree has awarded to the salvors the entire fund. The Zealand, Fed. Cas. No. 18,205; The Carl Schurz, Fed. Cas. No. 2,414; The Calrnsmore (D. C.) 20 Fed. 524.

"The matter may be looked at from another point of view.

"There is nothing of especial mystery or sanctity in personal property lost at sea. Why should it differ from any other personal property?

"Ever since the world became sufficiently civilized to see that the King or the lord of the manor ought not to be allowed to appropriate what he pleased, it has been the law that, where goods are lost and the owner does not reclaim them, they belong to the finder. 1 Blackst. Com. (2d Ed.) 9; 2 Kent's Com. 290.

"Or as it is stated more accurately, 'the finder of personal property who takes it into his possession thereby acquires, by occupancy, a special prop-
IN RE MONIES IN REGISTRY OF DISTRICT COURT. 475
erly in it, which is valid against all the world except the true owners.' Brantly on Per. Property, § 127; Bouvier's Law Dict. tit. 'Finder.'

"Nor is the title affected by the place of finding.

"For example (in the absence of special regulations, or acts of assembly), a railroad conductor is entitled to money found by him in the cur, as against the railroad company, especially where advertisement has been made and no claimant has appeared. Tatum v. Sharpless, 6 Phila. (Pa.) 18 (1865).


"The finder may maintain trover against a third party who has become possessed of the article, and the latter may not set up the title of the true owner. Harker v. Dement, 9 Gill (Md.) 7, 52 Am. Dec. 670.

"No doubt it was the duty of the Allentown to bring this cotton to Philadelphia; and perhaps it was her duty to libel it for salvage, rather than to hold or to sell it. At all events, it was quite proper for her to take this course. It was fair to her crew, and to the unknown owners of the cotton. But why should she be considered as forfeiting her rights by doing so? Her owners have always claimed the whole fund, for themselves and their associates, and, in the opinion of the commissioner, they are entitled to it.

"'Nor is it necessary that the court should go into this question at present as to who are entitled to have the balance. The libel was filed by the Philadelphia & Reading Railroad Company on their own behalf and on behalf of the crew of the Allentown. Their successors, the Philadelphia & Reading Railway Company, are before the court claiming the balance, which may well be awarded to them; they taking the responsibility of its distribution. If they should fail to account to any one entitled, doubtless such person would have a right of action against them. Andrews v. Wall, 3 How. 508, 11 L. Ed. 729.

"The commissioner reports, therefore, that the fund be awarded to the Philadelphia & Reading Railway Company, libelants, for themselves and other parties interested with them as salvors, and that it be paid to them, or to their proctor, James F. Campbell, Esq.; Thomas Hart, Jr., Esq., the original proctor of record, having died."

As will be observed, the salver has always claimed the whole of the fund, and, while it is true that the question of its right to one-half has remained undecided for 28 years, there is nothing to show that the claim has ever been withdrawn or abandoned. As sometimes happens, the dispute was apparently forgotten both by the government and by the salver; but as soon as the government moved again in the matter, the claimant also promptly resumed action, and has vigorously urged what is asserted to be its right. It is apparent, therefore, that the fund has not remained unclaimed in the registry of the court for 10 years or longer, and in strictness, therefore, the court may perhaps be stepping somewhat beyond the limit of section 996, as amended, in deciding in this proceeding upon the merits of the dispute. But the controversy should be brought to an end, and the decision may be treated as made in the original cause (No. 4 of 1880 in admiralty), where indeed it properly belongs. The learned commissioner's discussion of the legal question involved is satisfactory in every respect, and I adopt it as the opinion of the court. Unquestionably, as it seems to me, the weight of the American authorities supports the position that, unless the United States has somehow shown its intention to exercise whatever sovereign power it may possess over the proceeds of derelict property, the salvors are entitled to the whole of such proceeds against all the world except the original owners; and there is no serious contention on the part of the government that it has ever manifested any purpose to exercise such power. I may add, in reply to a faint suggestion in the brief, that
the purpose was certainly not manifested by the remote implication of section 996. That section, as I have already said, puts forward no claim to ownership by the government of the funds remaining unclaimed in the federal courts; it merely directs where they shall be deposited hereafter.

Appropriate decrees may be prepared in accordance with this opinion.

UNITED STATES v. MARRIN et al.
(District Court, E. D. Pennsylvania. May 22, 1908.)
Nos. 44, 45, and 46.

1. BAIL (§ 74*)—IN CRIMINAL PROSECUTIONS—DISCHARGE OF SURETIES.

The arrest, trial, conviction, and imprisonment of a defendant who is at large on bail in a criminal case in a federal court by the courts of another state into which he voluntarily went with knowledge that prior indictments were there pending against him do not exonerate his bail from liability for his nonappearance.

[Ed. Note.—For other cases, see Ball, Cent. Dig. § 291; Dec. Dig. § 74.*]

2. BAIL (§ 84*)—IN CRIMINAL PROSECUTIONS—DISCHARGE OF SURETIES.

In such case it was not part of the duty of the district attorney of the United States to go into the foreign jurisdiction and institute or join in proceedings for the release or discharge of the prisoner from the custody of the state, and his failure to do so affords no defense to a proceeding to forfeit the defendant’s bail.

[Ed. Note.—For other cases, see Ball, Dec. Dig. § 84.*]

3. BAIL (§ 79*)—IN CRIMINAL PROSECUTIONS—DISCHARGE OF SURETY.

A court will not exercise its discretion, where it is vested with such discretion, to refuse to forfeit a criminal recognizance to enable a creditor of the principal to recover a sum deposited by him with his surety as indemnity.

[Ed. Note.—For other cases, see Ball, Dec. Dig. § 79.*]

On Petition to Stay Forfeiture of Recognizance.
See, also, 159 Fed. 767.

J. Whitaker Thompson, for the United States.
John Creth Marsh, for defendant.
Edmund F. Harding and William P. Maloney, for Walter Westlake, administrator, etc.
Edward P. Bailey, for American Surety Co. of New York.

HOLLAND, District Judge. Frank C. Marrin presents his petition to this court praying that he be not held in default by reason of his nonappearance in person in court, and that his recognizance be not forfeited. On May 18, 1908, Marrin took an appeal from a sentence imposed upon him in this court to the appellate court of the Third circuit, and entered into a recognizance, with the United States Fidelity & Guaranty Company as surety, in the sum of $10,000, the condition of which is as follows:

“That if the said Frank C. Marrin, alias Frank C. Stone, alias Franklin Stone, alias Thomas Harper, whose application for a writ of error in the above matter has been allowed and is now pending, shall be and appear at the District Court of the United States for the Eastern district of Pennsy-
vanila, upon the determination of the proceedings on said writ of error, and the receipt and filing of a mandate or other process or certificate showing the disposition thereof by the said Court of Appeals, or within five days thereafter, to answer or obey any final order or judgment which shall be made in the premises, and not depart said court without leave thereof, then this recognizance to be void, otherwise to remain in full force and virtue."

On the 27th of February, 1909, the judgment of this court was affirmed. After the mandate had been returned the United States district attorney gave notice that he would require petitioner's appearance in court on the 12th day of April, 1909. Marrin failed to appear, but instead presented a petition asking that his recognizance be not forfeited, for the reason that upon the 18th day of September, 1908, whilst in the state of New York, he was arrested upon a warrant based upon old indictments filed in the Court of Quarter Sessions in Kings county, N. Y., in 1895, upon the charges of forgery and grand larceny, upon which indictments he was tried, convicted, and on the 21st day of October, 1908, sentenced to a term of imprisonment of 15 years at Sing Sing. It appears that shortly after his arrest in New York, on the 2d day of October, 1908, he obtained a writ of habeas corpus which was sued out of the United States District Court for the Eastern District of New York, claiming a right to be discharged because of his obligation to appear in the District Court here upon the determination of the pending appeal. The application for discharge was heard by Judge Chatfield, and it appears from the opinion of the court in Ex parte Marrin (D. C.) 164 Fed. 633, that the—

"American Surety Company appeared in court, by attorney, made no answer to the writ, and disavowed any interest in the matter except in the obligation imposed upon it by the bail bond furnished in the city of Philadelphia. The application was brought to the attention of the United States through the district attorney of the United States for the Eastern district of New York, the United States was represented in court by an assistant United States attorney for this district, and the statement was entered upon the record that the United States had no motion to make, did not apply for the custody of the said Frank C. Marrin, and cared neither to join in nor oppose the present application."

It is strenuously urged by the petitioner and his surety that the United States should not be permitted to forfeit his bond under the circumstances. There further appears in opposition to the forfeiture one Walter Westlake, administrator of Caroline Barry, deceased, who claims a fund of $10,000 placed in the possession of the American Surety Company as a counter indemnity by Marrin when the surety company became his bail. Caroline Barry, deceased, was an elderly woman residing in Brooklyn, who suffered the loss of all her property by reason of the crimes committed by Marrin for which he was indicted, convicted, and sentenced in New York. The United States filed a demurrer to these petitions, and insists upon its right to forfeit the recognizance, as Marrin failed to appear in accordance with its terms. The precise contention of the government is clearly stated by Judge Dillon in United States v. Van Fossen et al., 28 Fed. Cas. 357, No. 16,607:

"The case stands thus: The United States had the actual custody of the principal to answer an indictment which had already been preferred against
him. Upon the recognizance being taken, the principal was delivered into what Blackstone calls the 'friendly custody' of his sureties instead of being committed to prison. 4 Bl. Comm. 301. They thenceforth became invested with full authority over his person. They are his jailers. They may take him at any time or place—in the state or beyond it. They are aptly said to have the principal always upon the string, and they may pull it when they please, to surrender him in their own discharge. Anonymous, 6 Mod. 231. If they do not exercise their power to prevent his going beyond the jurisdiction, and he does so with or without their consent, and commits an offense and is sentenced to prison for it, this cannot be accepted by the state in whose tribunals the recognizance was taken as a defense thereto."

The petition in that case as subsequently amended suggested that the offense committed was prior to the date of the recognizance, but the court held that that fact did not change the legal obligation of the sureties. The view taken by Judge Dillon in the Van Fossen Case was fully sustained by Justice Swayne in the case of Taylor v. Tain-
tor, 83 U. S. 366, 21 L. Ed. 287. It was there stated that in order to exonerate the bail the performance of the condition thereof must be rendered impossible by the act of God, the act of the obligee, or the act of the law, and it was said that where the principal dies before the day of performance the case is within the first category; where the court before which the principal is bound to appear is abolished without qualification, the case is within the second; if the party be ar-
rested in the state where the obligation is given and sent out of the state by the Governor upon the requisition of the Governor of another state, it is within the third; and it is equally well settled that, if the impossibility be created by the obligor or a stranger, the rights of the obligee will be in no wise affected. The failure to appear was not because of sickness, death, or any other circumstance falling within the first reason, but it is claimed that by both the act of the obligee and the act of the law he was prevented from complying with the condi-
tions of his recognizance. It is contended his failure to appear result-
ed from the failure of the United States district attorney to urge Judge Chatfield to release him. Upon entering into the recognizance Marrin was delivered into the custody of his surety, who was thereafter re-
sponsible for his appearance. Upon this contract the government had a right to rely, and it is not required to go out of the jurisdiction in which the recognizance was given to help the cognizor to extricate himself from a situation in which he of his own motion became en-
tangled. The prosecuting attorney has the right to go before any court, either state or national, and urge the release or removal of a fugitive criminal under bail in his district, if in the judgment of the government it is for the best interests in the administration of the criminal law to do so, and it would depend entirely upon the judgment of the court before which the hearing was had whether or not the party should be released or removed to answer the conditions of his bail and appear when required. The matter of removal is entirely within the discretion of the court, and the most the government or its prosecuting attorney could do in any case would be to make a case which would appeal to that discretion, but whether or not it will make the effort should be left to the judgment of the officers of the govern-
ment. Though the United States attorney was present at the hear-
ing, his failure to request Marrin's release was no such act of the obligee as to relieve the surety, because non constat that the request would have been granted by the court. It was Marrin's own act in going into that jurisdiction that rendered his appearance impossible. Our attention has not been called to any case holding that under any circumstances the prosecuting attorney of a district in which the recognizance runs is required to make an effort to secure the removal or release of an alleged criminal arrested in another jurisdiction. He may do so, but he is not required to act. The recognizance is taken to secure that very result. Its condition is absolute in this regard, and, in our judgment, it would be a very dangerous innovation to require the government to not only see to it that responsible bail is secured, but, in addition, require it to keep its prosecuting officers in readiness to appear in other and distant jurisdictions to aid the principal in the recognizance to extricate himself from an arrest from which alone the latter is to blame.

If, then, neither the first nor the second reason stated in Taylor v. Taintor can afford any relief, the defense pleaded must rest upon the proposition that his appearance is excused because of the act of the law. Justice Swayne, in Taylor v. Taintor, supra, says:

"There is a distinction between the act of the law proper and the act of the obligor, which exposes him to the control and action of the law."

Marrin and his surety would have been wholly protected had he remained in the Eastern district of Pennsylvania until the time for his appearance in this court. If he had remained within this jurisdiction, he could not have been removed on a warrant of arrest from any other jurisdiction without an order of court. If the court had concluded, as it did in the Beavers Case (C. C.) 131 Fed. 366, that justice demanded his removal, such an order would at the same time relieve his sureties from liability for his appearance. It would be an act of the law, putting it beyond his power to appear in accordance with the condition of his recognizance; but should the court have in its wisdom concluded that it would promote justice to have him held in this district to answer the charge here, his removal could not have been effected; but when he voluntarily went into another district with knowledge of the existence of criminal charges against him there, his arrest was the result of his own act, which "exposed him to the control and action of the law." Marrin was fully aware that the criminal charges in New York against him were still pending, as he had shortly before been arrested here on a warrant from that jurisdiction, and an effort was made to remove him, but this demand was refused by Judge McPherson. At this hearing the United States district attorney appeared and took part in resisting his removal. In spite of this warning that these grave criminal charges against him were still pending, and that the New York authorities were availing themselves of every lawful means of securing his presence in that jurisdiction to answer the charges, he of his own motion went into the jurisdiction where he knew he would be arrested, and now insists that it was not his own act which exposed him to the operation and action of the law there, preventing his appearance, but that the failure of the Unit-
ed States district attorney to extricate him from the situation in which he placed himself was the real cause, which resulted in the refusal of the court to discharge him, and because of this quiescence of the government's representative and the action of the court the principal and his surety are relieved from further liability. At most, the United States district attorney could only have urged Marrin's release in the proceeding before Judge Chatfield, so that when his presence here would be required he could, if he then felt so inclined, appear; but the district attorney could not insist on Marrin's removal at the hearing, as he had given bail and security for his appearance within five days after the "filing the mandate" of the Court of Appeals, and he was not in default. The distressing poverty into which his victim had been plunged by his alleged forgeries, from a position of comparative affluence, had highly incensed that portion of Brooklyn aware of the circumstances, and Marrin's presence among them, free from arrest and beyond the power of the local authorities to try him for these alleged offenses, would no doubt in their judgment be regarded little less than a crime, so that out of respect for the feelings of the community in which he was arrested, as his removal could not be demanded, the district attorney could scarcely be expected to insist that he be discharged, thereby enabling him to go unmolested abroad in a community in which high crimes were pending against him, in the commission of which he not only offended against the state, but, it is charged, swept away her entire fortune and impoverished Mrs. Barry.

The petition of Walter Westlake, administrator of Caroline Barry, deceased, urges that the bail bond be vacated, and that the American Surety Company be exonerated thereon, and that the United States government and the American Surety Company be directed to institute proceedings to secure the surrender of Marrin—this in order that the counter indemnity deposit of $10,000 placed with the American Surety Company by Marrin may be released and paid over to the petitioner as the administrator of Caroline Barry, deceased, from whom Marrin, it is said, secured it through his forgeries.

It is claimed that the provisions of section 1020, Rev. St. (U. S. Comp. St. 1901, p. 719), places the matter of forfeiture within the discretion of the court when "it appears * * * there has been no willful default of the party, and that a trial can notwithstanding be had in the case, and that public justice does not otherwise require the same penalty to be enforced." Aside from the question as to whether we should encourage the practice of depositing an indemnity with surety on a bail bond by remitting the penalty in order to release the indemnity; it does not appear to this court that there has been no willful default. When it is remembered Marrin left the jurisdiction in which the prosecuting attorney had once taken part in securing his release from arrest on warrants from New York state, and voluntarily went into the latter jurisdiction almost immediately after his release here, it seems that no other conclusion is warranted but that the default on his part was willful and entitles him to no relief now; nor is his surety in any better position, because it not only failed to prevent him from leaving this district, but it was present at the hearing, and, notwithstanding it was "his jailer" and had him in its "friendly cus-
tody,” it failed to urge his release, but in fact “disavowed any interest in the matter except its obligation imposed upon it by the bail bond,” etc.

It must be conceded that if, under any circumstances, the court would have a right to remit the penalty in order that the indemnity fund could be recovered, and Mrs. Barry herself had presented a petition for that purpose, accompanied with proof of her ownership to the fund deposited, the circumstances of her loss and the fact of her impoverished condition, resulting from the loss of her property through the alleged forgeries, would make a very strong case to move the court to a remission of the penalty; but in this case the claim is made by her heirs, who, while entitled to her property, are by no means entitled to the same consideration in the determination of this question that the decedent would have been entitled to receive. If the surety failed to do what the law required of it at the time of the hearing before Judge Chatfield, the claimants for the fund have their remedy; but it is contended by the government that there is no legal, equitable, or moral ground why the surety should be relieved in order that Mr. Westlake may have an easier method of enforcing his claim against the surety to the indemnity deposited by Marrin, and in this we think the government is right.

The demurrers to the petitions of Frank C. Marrin et al. are sustained, and the motion of the government to forfeit the recognizance is allowed.

In re NEILL-PINCKNEY-MAXWELL CO.

(District Court, E. D. Pennsylvania. May 17, 1909.)
No. 3,001.

Bankruptcy (§ 166*)—Voidable Preferences—Giving Security—Proof of Insolvency.

An assignment by a debtor corporation within four months prior to its bankruptcy of fire insurance policies under which there had been a loss to a creditor as security held not voidable as a preference because of the insufficiency of the evidence to show, with the clearness required, that the corporation was in fact insolvent when the assignment was made, or that, if so, the creditor had reasonable cause to believe it insolvent.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250–258; Dec. Dig. § 106.*]

In Bankruptcy. On certificate of referee.

Maxwell H. Kratz and J. Howard Reber, for trustee.
Joseph H. Brinton, for C. S. Knowles.

J. B. McPHERSON, District Judge. The order made by the referee on March 26, 1909, dismissing the trustee’s petition praying for the reassignment of certain policies of insurance, is affirmed for the reasons given by the learned referee (Theodore M. Etting, Esq.).

Referee’s Certificate on Review.

To the Honorable the Judges of said Court:
The question presented for review is whether under the evidence the referee erred in dismissing a petition filed by the trustee asking for an order on a

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep’t Indexes 170 F.—31
creditor to whom certain policies of fire insurance were assigned by the above-named bankrupt company, within four months of the bankruptcy, for the re-assignment of the same. The material averments in the above petition are alleged insolvency at the time of the assignment, knowledge and reasonable cause of belief on the part of the assignee that a preference was intended. The assignee in his answer denies all of the above averments.

Upon the issue thus raised extended proof has been offered by both parties. I find the facts to be as follows:

The Neill-Plackney-Maxwell Company is a corporation incorporated under the laws of West Virginia. On January 30, 1908, an involuntary petition in bankruptcy was filed against the company! and on February 15, 1908, the company was adjudged a bankrupt. Prior to bankruptcy the company conducted a wholesale electrical supply business at 925 Arch street in the city of Philadelphia.

C. S. Knowles, the assignee of the policies in dispute, is a Boston merchant, and was the largest creditor of the Neill-Plackney-Maxwell Company at the time of its bankruptcy. During the entire summer of 1907 Knowles had endeavored to obtain a reduction of the indebtedness due him. The only amount which he succeeded in obtaining during that time was $500. At the time of the assignment the amount due Knowles was $10,958.98.

On September 15, 1907, Knowles, being dissatisfied with his inability to obtain money from the company and being doubtful about its financial standing, sent his credit man, Hardy, who had previously conducted the correspondence with the Neill-Plackney-Maxwell Company, to Philadelphia for the purpose of ascertaining its financial condition and of endeavoring to obtain a payment if possible. Hardy did not succeed in getting any money, but he was given an opportunity of examining the company’s books to ascertain the extent and value of its stock and resources. He made an estimate of the value of the merchandise on hand, bills receivable and fixtures, and ascertained the liabilities of the company. He found that the company had little or no money on hand, and that collections were difficult; but in this connection it must be remembered that the period was one of great depression in business and of consequent difficulty in collections.

Hardy’s conclusion from the above examination was that the company was solvent, that its assets exceeded its liabilities by about $15,000, that it was carrying too much stock, and that its business was conducted at a place the rental of which was too high. These facts he mentioned at the time to Riffo, the president of the company, and reported the same to Knowles on his return to Boston. During August of 1907, in consequence of repeated dunning, the company gave Knowles notes in part payment of its indebtedness. The first of the above notes, which was for $1,500, fell due in the latter part of September. Shortly before the note fell due, Riffo wrote to Knowles that he would be unable to meet the note when due, and asked for an extension. This circumstance, together with the fact that a check given by the company to Knowles had not been met when deposited, led to the sending of Hardy again to Philadelphia.

Hardy arrived in Philadelphia on September 25, 1907, and went to 925 Arch street. Riffo was not in the store at the time. Hardy then saw that the stock of the company had been injured by fire which had occurred on September 22nd, two or three days before he left Boston. Hardy knew nothing of the fire prior to his arrival in Philadelphia, but he came to Philadelphia for the purpose of taking hostile proceedings against the company, and apparently with the intent of asking for the appointment of a receiver. After leaving 925 Arch street, Hardy saw his counsel, A. J. Wilkinson, Esq.; he apparently then knew that there was outstanding insurance on the stock. After leaving Mr. Wilkinson, he had an interview with Riffo alone, and then proposed that Riffo should make an assignment of the policies in dispute. Riffo apparently was in some doubt as to the legality of so doing, and preferred, before committing himself, to consult his counsel. Hardy assured him that there was no doubt about the legality if the company was solvent. Riffo assured him of the company’s solvency. At this interview, Hardy, in pressing his demand for the assignment, stated in substance to Riffo that he had come to Philadelphia for the purpose of applying for a receiver, but that the fire had been for the company a fortunate circumstance. The result of this interview was that
IN RE NEILL-PINCKNEY-MAXWELL CO.  483

Hardy and Riffo proceeded to the office of Thomas D. Finletter, Esq., the
general counsel of the company, Hardy being accompanied by A. J. Wilkinson,
Esq., who, as before stated, had been previously retained in the case. Riffo
assured Mr. Wilkinson that the company was solvent, and Mr. Finletter's ad-
vise was sought and obtained by Riffo. Mr. Finletter had no knowledge of
the financial condition of the company, other than that which he possessed
from statements furnished by Riffo. In answer to the inquiry as to whether
the assignment in question could be made, Mr. Finletter advised Riffo that
the assignment could be legally made if he so desired, inasmuch as it appeared
from the statements which Riffo had furnished him that the company was
solvent. The result of this interview, which, as before stated, took place on
September 25th, was that it was there agreed that certain outstanding insur-
ance policies which are the policies in dispute should be assigned to Knowles
as collateral security for the payment of his debt. Mr. Wilkinson desired that
the assignment should be made pursuant to a resolution passed by the board of
directors of the company, and on September 27th a meeting of the board of
directors was called and held, at which resolutions were adopted authorizing
the assignment, and the assignment was executed on the same day.

Whilst these are not all the facts disclosed by the testimony, it is believed
that they are the material and controlling facts.

To justify the order asked for, the burden of proof is on the trustee to show
by sufficient evidence the following elements of voidable preference. He must
show:

(1) That the bankrupt, whilst insolvent,
(2) within four months of bankruptcy,
(3) made the assignment in question.
(4) That Knowles had reasonable cause to believe that a preference was in-
tended thereby.
(5) That the assignment enabled Knowles to obtain a greater percentage of
his debt than other creditors of the same class.

The proofs presented are sufficient in my judgment to comply with all the
requirements above referred to other than the first and fourth.

The question at issue is therefore narrowed to a consideration of the suf-
ficiency of the proofs offered to sustain the requirements last above mentioned.
In support of the proof of insolvency, the trustee has offered in evidence the
schedules filed by the company after its bankruptcy. Taking the schedules as
a starting point, the trustee has offered other evidence, chiefly that of Riffo,
as proving that the company was insolvent at the date of the assignment, to
wit, on September 27, 1907. The schedules in question were filed on February
19, 1908. Riffo, in his examination in chief, testified that after the fire he
made a valuation of the company's assets and liabilities, and found that the
company was insolvent on September 27, 1907, but on cross-examination it
was impossible to obtain from Riffo any evidence as to the date on which the
above estimate was made. He kept, he stated, a memorandum book which
contained information which would enable him to supply this deficiency, but
this book was never produced at the hearings, notwithstanding numerous en-
deavors made to obtain the same.

It further appears that after the fire Riffo began withdrawing money from
the concern, the exact amount of which it is difficult to estimate. He certainly
withdrew at least $7,000. These withdrawals, together with sacrifices of stock
made to meet the demands of importunate creditors and the difficulties of col-
clecting money on book accounts, were undoubtedly circumstances which had
their influence in causing the bankruptcy of the company. Riffo's testimony
when on the stand in the bankruptcy proceedings is undoubtedly at variance
with the statements which he made to the counsel of the company, to Knowles,
and to Hardy at the interviews above referred to preceding the assignment.
It seems impossible to regard Riffo as a witness upon whose veracity much re-
liance can be placed.

As opposed to his testimony, there is the evidence of Hardy to the effect
that, after unusual opportunity for observation and a valuation of the stock,
the company was solvent on September 15th, which was seven days before the
fire, and it does not appear from the evidence that the solvency of the com-
pany was affected by anything which occurred in the interval. The existing
depression was such that little or no business was done during this period. From testimony taken in the bankruptcy proceedings it appears that, so far as the stock and fixtures were concerned, Hardy's valuation was a fair one; his estimate of the value of the book accounts was too high, but there is a material difference between the value of the book accounts of a going concern and the valuation of the same accounts after bankruptcy, and at all events the margin of solvency, viz., $18,000, is sufficiently large to allow for considerable discrepancy in this regard without materially affecting Hardy's conclusion that the company was solvent on September 15th.

It follows that of course the company might have been solvent on September 15th and yet have been insolvent on September 27th. The fire undoubtedly had an influence on the company's business. It not only destroyed a portion of its assets, but knowledge of the fire made creditors of the company more insistent, but the uncontradicted evidence is that the property injured was fully covered by insurance and that the company at the time of the fire was carrying an excess of stock.

The proof offered by the trustee in support of insolvency is, in my judgment, far less cogent than that which was rejected in the recent case of Tumlin v. Bryan (C. C. A.) 21 Am. Bankr. Rep. 319, 165 Fed. 166.

After carefully considering the evidence adduced in support of and against the allegation of insolvency, the evidence produced by the trustee is, in my judgment, not sufficient to sustain the allegation of insolvency of the company at the time of the assignment.

If, however, I am in error in holding that the trustee has failed to furnish the requisite proof, then there remains the further question: Did Knowles know, or did he have reasonable cause to believe, that a preference was intended? Hardy denies that he had such knowledge, but if all things pointed to insolvency the belief of Knowles is immaterial. Neither knowledge nor actual belief are required to be shown. The rule is that all the surrounding circumstances are to be taken into consideration, and, if they are sufficient to lead an ordinarily prudent man to conclude that a preference was intended, the actual knowledge or belief of Knowles is immaterial. Sundheim v. Ridge Ave. Bk. (D. C.) 15 Am. Bankr. Rep. 132, 138 Fed. 951; In re Hines (D. C.) 16 Am. Bankr. Rep. 495, 144 Fed. 543.

The fire no doubt so far changed the previous condition as to put Knowles upon inquiry. He was not required to again examine the books of the company. He was only bound by such information as was open to observation and would yield to reasonable inquiry. In re Wolf Co. (D. C.) 21 Am. Bankr. Rep. 73, 164 Fed. 448.

Under all the circumstances of the case, considering the repeated assurance of Riffo, coupled with the fact that his representations of solvency were of such a character as to induce belief on the part of Mr. Finletter, the company's counsel, Hardy had, I think, a right to rely upon their accuracy. In this connection it should also be remembered that the assignment to Knowles was not an isolated transaction through which the company transferred to Knowles the residue of its resources. The truth seems to be that at the time the assignment was made the company apparently intended to continue business, and it was believed that it would pull through; but in order to satisfy the demands of the more important creditors, assignments of outstanding policies of insurance were made to several creditors in payment, whilst others took material at varying values. When a debtor pays and a creditor receives the amount of a just debt, the natural presumptions are in favor of good faith in the transaction. Merchants constantly continue to make payments up to the very eve of failure, and it would be disastrous to have them set aside on slight proof. In considering the proof offered, it is not easy to avoid giving undue consideration to the fact that within a few months after the assignment the company became bankrupt; but if this were sufficient to make a transaction voidable, uncertainty and unreasonableness would probably attend all transactions between debtor and creditor, except when the debtor was admittdly solvent. In no two cases of this character are the facts precisely similar, but, in arriving at the conclusions above indicated, the recent case of Tumlin v. Bryan and In re Wolf Company, above referred to, as well as the case of Irish v. Citizens' Trust Co. of Utica (D. C.) 21 Am. Bankr. Rep. 39, 163 Fed. 880, may
be adverted to in connection with the thought which I have endeavored to express.
For the reasons heretofore stated, the petition praying for the reassignment of the policies is dismissed.

In re EUREKA FURNITURE CO.
(District Court, E. D. Pennsylvania. May 17, 1909.)
No. 2,387.

1. CORPORATIONS (§ 247*)—Stockholders—Liability to Creditors on Unpaid Subscription—Attempted Release from Subscription.
One who subscribed for stock of a corporation, assisted in its organization, and became its secretary, acting as such at the time the corporation took over the property and business of a partnership at an agreed valuation and assumed its debts, and who prepared the papers therefor without inquiry as to the facts or value of the property, cannot avoid liability on his subscription to creditors on the ground that the corporation was defrauded in the purchase, nor can he be released from his subscription by the other stockholders except subject to the rights of creditors.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 247.]*

Stockholder's liability to creditors in equity, see notes to Rickerson Roller-Mill Co. v. Farrell Foundry & Machine Co., 23 C. C. A. 315; Scott v. Latimer, 33 C. C. A. 23.]

2. BANKRUPTCY (§ 250*)—Collection of Assets—Power to Order Assessments on Unpaid Subscriptions to Stock of Bankrupt Corporation.
A court of bankruptcy has power to order assessments on unpaid subscriptions to the stock of a bankrupt corporation.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 250.*]

In Bankruptcy. On certificate of referee.
Samuel Scoville, Jr., and Harris S. Sparhawk, for trustee.
Furth & Singer, for Morris L. Zimmerman and Alexander J. Brian.

J. B. McPHerson, District Judge. The two orders of the referee, each dated June 30, 1908, with reference to the unpaid stock subscriptions of Morris L. Zimmerman and Alexander J. Brian, respectively, are hereby affirmed for the reasons given by the learned referee (Joseph Mellors, Esq.):

Sur rule to show cause why stockholders should not be assessed.

Certificate of Referee.

To the Honorable the Judges of the Said Court:
The undersigned, referee to whom the matter entitled as above was referred, respectfully certifies:
This matter is before the referee upon petition of trustee for rule to show cause why Alexander J. Brian, Mark M. Dintenfass, David H. Cohen, and Morris L. Zimmerman should not be assessed in the sum of four dollars, fifty and seventy-six hundredths cents ($4.50 6/100) on each share of stock of the Eureka Furniture Company, Inc. subscribed to by them.
This rule was made absolute against Mark M. Dintenfass, and a judgment has been entered against him in the court of common pleas.
As to David H. Cohen, the trustee has never been able to obtain service on him.

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
An answer was filed on behalf of Alexander J. Brian and Morris L. Zimmerman, which practically admits all the substantial facts set forth in the petition for the rule, which are as follows:

Findings of Fact.

The Eureka Furniture Company, Inc., was adjudicated a bankrupt on the 13th day of December, 1905, and on the 3d day of February, 1906, Charles E. Schwartz was elected trustee of the bankrupt's estate.

The total amount of claims filed and allowed against the said estate, amount to $17,028.18, and the statutory time for filing claims has long since expired. There has been one dividend of 15 per cent. paid on said claims, leaving due thereon $14,473.95.

The trustee has now in his hands a balance of funds applicable to the payment of these claims, amounting to the sum of $951; said balance being also subject to the payment of costs, disbursements, commissions, and counsel fees.

The only remaining assets of this estate are certain book accounts, which are not collectible, and unpaid subscriptions to the stock of said bankrupt.

The said company was chartered under the laws of Pennsylvania July 20, 1905, with a capital stock of $50,000, divided into 5,000 shares of $10 each.

The original subscribers to the stock of said company and the amount subscribed for by each are the following:

Alexander J. Brian........................................... 750 shares.
Mark M. Dintenfass........................................... 750 shares.
David H. Cohen............................................... 750 shares.
Morris L. Zimmerman....................................... 750 shares.

There is due on said subscriptions of Alexander J. Brian the sum of $7,500, by Mark M. Dintenfass the sum of $7,500, and by Morris L. Zimmerman the sum of $7,500.

None of the facts as to the subscription to the stock or the sum of the call are denied, but the answer alleges that both Brian and Zimmerman were induced to subscribe to this stock by false and fraudulent representations. These fraudulent representations were alleged to have been made by David H. Cohen, and were in effect that the business of the Eureka Furniture Company was worth $25,000, and that the business yielded a net profit of $10,000 per annum. The time and place of making these representations is not given. It is denied that the stock was subscribed for by Brian and Zimmerman on July 20, 1905. The answer goes on to allege that on a date (not fixed), but prior to the 19th day of September, 1905, Brian and Zimmerman discovered that the business of the Eureka Furniture Company was not worth $25,000, but was hopelessly insolvent, and that thereafter Cohen, Dintenfass, Brian, and Zimmerman agreed that Brian and Zimmerman should be released from their subscriptions, and that at the first meeting of the stockholders Brian and Zimmerman were formally released from their subscriptions.

Admitting all of the allegations of the answer, they do not constitute a defense to the petition or any sufficient reason why the prayer of the petition should not have been granted. The testimony offered in support of the allegations of the answer, moreover, shows a state of facts which by no means support the contention of the respondents. At the hearing of the issues framed by the petition and answer, Zimmerman did not appear at all and offered no testimony, and there is no question that as to him the rule should have been made absolute. Brian testified vaguely as to statements made to him by a certain Cohen as to the worth of the business of the Eureka Furniture Company, that on the faith of these representations he subscribed for 750 shares. Brian is a member of the bar, and presumably acquainted with business affairs, but testified that he subscribed to the stock on July 20, 1905, but never examined the stock or the books of the company, and made no investigation at all of the company until some months afterwards. He further testified that, although he became aware that the company was a fraudulent affair, he nevertheless acted as secretary at the first meeting of the corporation, and the minutes of all meetings of the corporation were kept in his handwriting. The minute book was offered in evidence, and at the first meeting it appeared that an election of officers was held and that Brian participated in this meeting before any resolution was passed absolving him from any liability. It appeared that the Eureka Furniture Company, Inc., took over the old business
of the Eureka Furniture Company, a partnership, taking over its assets and assuming its liabilities, and that, despite the statement of Brian in his answer that the corporation had no creditors at the time of the first meeting, a bill of sale was offered in evidence in his handwriting containing a list of the creditors of the partnership assumed by the corporation bearing date of the first meeting of the corporation. This bill of sale shows that there were $5,000 of accounts payable by the corporation. It further appears that Brian in his own handwriting made at the first meeting stated that Cohen sold to the corporation stock, fixtures, book accounts, good will, etc., of the net value, exclusive of the good will, of $20,594.52, and that the corporation paid therefor the sum of $21,000, of which $8,000 was paid in cash and $13,000 in stock. No investigation was made of these facts, and the respondent never even examined the stock or the books of the corporation. Some months later he became convinced that the corporation was insolvent. He attended the first meeting of the corporation, of which he is one of the Incorporators, and acted as the secretary of the meeting, conducted the election of the officers, wrote the minutes of this and subsequent meetings in his own handwriting, and spread, on the record that the business of the partnership was worth about $20,000, and allowed the corporation to purchase it for $21,000 without a word of protest, and prepared a bill of sale setting forth the list of creditors taken over by the corporation, and then had a resolution introduced purporting to release himself and Zimmerman from any liability for the stock subscription. The authorities hold that under such a state of facts the liability on his stock subscription is not released.

The Supreme Court has passed on a case which is on all fours with the facts herein, in the case of Hilliard v. Allegheny Co., 173 Pa. 1, 34 Atl. 221. The headnote shows the facts of that case and the decision of the Supreme Court as follows:

"A stockholder who is secretary of a corporation, who through possession of the minute book, or from other sources, has full and complete knowledge of the organization of the company and the details of the business, cannot, after a year and a half and after the company has become insolvent, set up as ground for a claim against the officers of the company who sold him his stock that he was induced to buy it on false and fraudulent representations upon their part and that the company had been fraudulently organized."

The case of Howard v. Turner, 155 Pa. 340, 26 Atl. 753, 35 Am. St. Rep. 883, holds emphatically that a contract to take and pay for stock in an action made in consequence of a fraudulent prospectus is voidable only and not void, and can only be avoided subject to the rights of creditors.

In the case at bar the gross laches of the respondent certainly does not give him any standing to avoid this contract. A party who is a trained member of the bar and yet accepts the vague allegations of a person as to the assets and liabilities of a partnership without ever examining the books or making any investigation of the stock of the company cannot afterwards avoid the contract when the rights of creditors have intervened.

Moreover, the decisions are unanimous that officers of a corporation have no power to release a subscriber from his subscription without a valuable consideration. To this effect are the cases of Graff v. Railroad, 31 Pa. 489; Bedford v. Bowser, 48 Pa. 37; Railroad v. Conway, 177 Pa. 364, 35 Atl. 716; Janette Bottle Works v. Schall, 13 Pa. Super. Ct. 96; Garrett v. Railroad, 78 Pa. 465; Bolt Works v. Schultz, 143 Pa. 250, 22 Atl. 994; Muncy Co. v. Green, 143 Pa. 269, 13 Atl. 747.


A subscription to stock of a railway company is not only an undertaking with the company, but with the other stockholders and the commonwealth. It is not within the power of the officers to release subscriber without a valuable and sufficient consideration.
In Sanger v. Upton, 91 U. S. 56, 23 L. Ed. 220, the Supreme Court of the United States held:

"The amount of the unpaid subscription to the stock of the corporation is a trust fund for the payment of its debts. It is a substitute for the personal liability which subsists in private copartnerships. When debts are incurred, a contract arises with the creditors that it shall not be withdrawn or applied otherwise than upon their demands until such demands are satisfied. The creditors have a lien upon it in equity. If diverted, they may follow it as far as it can be traced, and subject it to the payment of their claims, except as against holders who have taken it bona fide for a valuable consideration and without notice. It is publicly pledged to those who deal with the corporation for their security. Unpaid stock is as much a part of this pledge, and as much a part of the assets of the company, as the cash which has been paid upon it. Creditors have the same right to look to it as to anything else, and the same right to insist upon its payment as upon the payment of any other debt due to the company." As regards the creditor, there is no distinction between such a demand and any other asset which may form a part of the property and effects of the corporation. In re Remington, etc., Co. (D. C.) 9 A. B. R. 538, 119 Fed. 441.

That corporate stock subscriptions are a primary fund for the payment of the corporate debts is well settled and not disputed, but a call is necessary before unpaid subscriptions can be collected. In re Bottling Co. (D. C.) 3 Am. Bankr. Rep. 195, 96 Fed. 945.

The referee is therefore of opinion that the order made upon Alexander J. Brian and Mark M. Dintenfass to pay to the trustee in bankruptcy their unpaid subscriptions to the stock of this company was properly made.

Joseph Mellors, Referee in Bankruptcy.

Decree.

And now, to wit, this 30th day of June, A. D. 1908, on the petition of Charles E. Schwartz, the trustee in bankruptcy of the estate of said bankrupt, and on the order to show cause dated November 14, 1907, signed by Joseph Mellors, referee in bankruptcy, why Alexander J. Brian, Mark M. Dintenfass, David H. Cohen, and Morris L. Zimmerman should not be assessed in the sum of $4,5076 on each share of stock of the said bankrupt company subscribed to by them, and it appearing that personal service of said order to show cause has been made on said Morris L. Zimmerman, and that he has subscribed and not paid for 750 shares of stock of said bankrupt, and an answer having been filed and testimony having been taken, and after hearing Samuel Scoville, Jr., Esq., for the petition, and Emanuel Furth, Esq., in opposition, and after due deliberation had,

It is ordered and decreed that Morris L. Zimmerman is liable in the sum of $4,5076 on each share of 750 shares of the stock of said Eureka Furniture Company, Ltd., subscribed for by him, and that each share of stock subscribed for by him be assessed in said sum, and that he is liable in the sum of $3,380.70 on his said subscription to the trustee of the estate of said Eureka Furniture Company, Inc., bankrupt, in said sum, and that he make payment thereof to Charles E. Schwartz, trustee in bankruptcy of the Eureka Furniture Company, Inc., bankrupt, at his office within one week from the date of this order, and on or before the 7th day of July, A. D. 1908; said subscription when paid and collected to become part of the assets of the said bankrupt estate, and to be accounted for and distributed under the orders of said court. In default of such payment, Charles E. Schwartz, trustee of the estate of said bankrupt, is hereby authorized and directed to institute such proceedings against said Morris L. Zimmerman as are necessary to recover the said sum due by him on said stock either at law or in equity.


Decree.

And now, to wit, this 30th day of June, A. D. 1908, on the petition of Charles E. Schwartz, the trustee in bankruptcy of the estate of said bankrupt, and on the order to show cause dated November 14, 1907, signed by Joseph Mellors, referee in bankruptcy, why Alexander J. Brian, Mark M. Dintenfass, David H. Cohen, and Morris L. Zimmerman should not be assessed in the sum of
GEORGE D. HARTER BANK v. STRAUSS.

§4.5076 on each share of stock of the said bankrupt company subscribed to by them, and it appearing that personal service of said order to show cause has been made on said Alexander J. Brian, and that he has subscribed and not paid for 750 shares of stock of said bankrupt, and an answer having been filed and testimony having been taken, and after hearing, Samuel Scoville, Jr., Esq., for the petition, and Emanuel Furth, Esq., in opposition, and after due deliberation had,

It is ordered and decreed that Alexander J. Brian is liable in the sum of §4.5076 on each share of 750 shares of stock of said Eureka Furniture Company, Ltd., subscribed for by him, and that each share of stock subscribed for by him be assessed in said sum, and that he is liable in the sum of §3,550.70 on his said subscription to the trustee of the estate of said Eureka Furniture Company, Inc., bankrupt, in said sum, and that he make payment thereof to Charles E. Schwartz, trustee in bankruptcy of the Eureka Furniture Company, Inc., bankrupt, at his office within one week from the date of this order, and on or before the 7th day of July, A. D. 1908; said subscription when paid and collected to become part of the assets of the said bankrupt estate, and to be accounted for and distributed under the orders of said court. In default of such payment, Charles E. Schwartz, trustee of the estate of said bankrupt, is hereby authorized and directed to institute such proceedings against said Alexander J. Brian as are necessary to recover the said sum due by him on said stock either at law or in equity.


GEORGE D. HARTER BANK v. STRAUSS.

(Circuit Court, E. D. Pennsylvania. May 25, 1909.)

No. 490.

Judgment (§ 46*).—Warrant to Confess.—Construction.—“Us, or Any or Either of Us.”

A warrant of attorney contained in a joint and several note signed by eight makers authorizing the holder to have judgment confessed against “us, or any or either of us,” is not exhausted by the entry of judgment against one or more but not all of the makers, but is the equivalent of eight separate warrants each signed by one of the makers, and the holder may at his election enter a several judgment against each maker.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 65; Dec. Dig. § 46.*]

For other definitions, see Words and Phrases, vol. 8, p. 7223.]

On Rule to Vacate Confessed Judgment.

Dinner Beeber, for plaintiff.

E. Cooper Shapley, for defendant.

J. B. McPherson, District Judge. The facts upon which this rule is to be determined are not in dispute. On July 17, 1903, the following written instrument was executed in Canton, Ohio:

$16,000.

Canton, Ohio, July 17, 1903.

On Oct. 1, 1903, after date, without grace, we jointly and severally, as principal debtors, promise to pay to the order of The Geo. D. Harter Bank, sixteen thousand dollars, at said bank, with interest at the rate of 8 per cent. per annum after maturity, and we consent and agree that after this obligation shall have become due, the time of payment thereof may be extended from time to time, by any one or more of us, without even the knowledge or consent of the other or others of us, and in case of such extensions and notwithstanding the same, we shall and will remain and continue liable thereon, as if no

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
such extensions had been made. And we hereby authorize and empower any attorney of any court of record, in the state of Ohio or elsewhere, in our name or behalf, or in the name or behalf of either of us, to appear before any such court of record, at any time after the above obligation shall have become due, waive the issuing and service of process, and at the suit of said payee, or any endorsee, or legal holder of such obligation, without notice to us, confess judgment against us, or any or either of us, in favor of said payee, endorsee, or legal holder of said obligation, for the amount that may appear due thereon, for principal and interest, and also for costs of suit; and also to release all errors in the judgment so confessed, and to waive all right and benefit of appeal, and any and all proceedings to set aside, vacate, open, suspend or reverse such judgment, or any execution issued thereon.

The United Sheet & Tin Plate Co.,
M. F. Straus, Pres. [Seal.]
Lakln C. Taylor. [Seal.]
J. H. Eller. [Seal.]
Thos. Hackett.
H. Hess.
M. F. Straus.
A. T. Stone.
R. L. Shoemaker.

So far as appears, no action was taken thereon by the payee until January 23, 1908, when judgment by confession was entered in Canton, Ohio, against Lakin C. Taylor, A. T. Stone, J. H. Eller, R. L. Shoemaker, and H. Hess. Execution was then and there issued upon the judgment, and a certain sum of money, less than the principal of the note, was realized. Other payments, either before or after January 23d, were also made, for which credits were duly given, the result being that on January 27, 1909, there was still due upon the note the sum of $12,477.18, principal and interest. No judgment had yet been entered against the United Sheet & Tin Plate Company, nor against Thomas Hackett and M. F. Straus, either jointly or severally, but on the date last named, January 27th, a judgment by confession was entered in the Circuit Court of the United States for the Eastern District of Pennsylvania against M. F. Straus, severally, for $12,477.18. On January 30th the defendant, Straus, obtained the pending rule to show cause why the judgment should not be vacated, and he now urges in support of the rule that the warrant to confess judgment was exhausted on January 23, 1908, when judgment was entered in Canton against five of the makers. Whether the warrant to confess judgment was thus exhausted, is the only question for decision.

Apparently the point is of first impression. I have been referred to no case that decides it, and I have found none that bears importantly upon it. It is of little consequence whether the law of Pennsylvania or the law of Ohio is to be regarded as controlling, for neither state has determined the question either by legislation or by the decision of its courts. It is no doubt true, as was ruled in Hamilton v. Schoenberger, 47 Iowa, 385, that a confession of judgment pertains to the remedy, and is therefore governed in some respects by the law of the state in which the confession is to be entered. Accordingly it was held by the Supreme Court of Iowa that, as the Code of that state had covered the whole subject of recovery and rendition of judgments, a confession of judgment executed in Pennsylvania, which
differed in material respects from the provisions of the Iowa Code, could not be formally enforced in the latter state. Upon the other hand, it may probably be accepted as equally true that, where a warrant of attorney is executed and delivered in the state of Ohio, the substantive rights of the parties to the warrant will be determined by the law of that state, and will be enforced even in a jurisdiction where the substantive rights may be different, unless some reason of public policy should prevent. Forsyth v. Barnes, 228 Ill. 326, 81 N. E. 1028. But these questions seem to be academic in the present inquiry, for there is no contention that the law of Ohio differs in any respect from the law of Pennsylvania, so far as the substantive rights of the parties to this agreement are concerned, nor so far as the method of procedure is concerned by which the warrant was executed in this court.

The single point, therefore, is: What rights did the payee acquire by the execution and delivery of the note and the accompanying warrant to confess judgment? Or, perhaps, the point may be still further limited, so as to read: What rights did the payee acquire that can be enforced in the state of Pennsylvania? Assuming the law of Ohio and Pennsylvania to be identical, I turn to the Pennsylvania decisions that have been cited, observing, as I pass, that no Ohio decision has been referred to that is in conflict or is in point. But, indeed, a similar remark may be made concerning the Pennsylvania decisions to which the defendant has referred. None of these has to do with the question now under consideration. In Martin v. Rex, 6 Serg. & R. (Pa.) 296, judgments on successive dates were entered on the same bond against the same defendant in different counties, and it was held that, when the judgment was entered on the first date in the first county, the warrant was executed. But this was not the case of a joint and several judgment. In Neff v. Barr, 14 Serg. & R. (Pa.) 166, judgments were confessed on the same day, by virtue of the same warrant, against the same two defendants in two different counties, and the question was simply which judgment was entitled to precedence. It was apparently conceded by the Supreme Court of Pennsylvania that whichever judgment was entered first exhausted the power. Adams v. Bush, 5 Watts (Pa.) 289, was a plain case. A single defendant had given a bond in a penal sum conditioned for the delivery of logs at different dates, and an attempt was made to enter five judgments thereon for different sums. It was, of course, held that this could not be done, and that only one judgment could be entered upon the bond for the penal sum. Ulrich v. Vonneida, 1 Pen. & W. 245, was the case of two judgments upon the same warrant against the same single defendant in two separate counties upon different dates, and it was ruled that the entry of the two judgments upon the same warrant was irregular. To the same effect is Ely v. Karmany, 23 Pa. 314, and Philadelphia v. Johnson, 208 Pa. 645, 57 Atl. 1114, where the cases already referred to are reviewed.

Obviously, these decisions do not touch the question now involved. Here is a warrant to confess judgment signed by one corporation and seven individuals, following a joint and several obligation to pay money, and authorizing the confession of judgment against "us, or
any or either of us," for the amount that may appear to be due there-
on. This is the full equivalent of eight separate warrants, signed by
each maker of the note, authorizing judgment to be entered against
the signer, either individually, or jointly with all the others, or jointly
with any one or more of the others. And it cannot be doubted that
in this case "or" includes "and." Otherwise the power would be
exhausted if the judgment was entered against only one of the sign-
ers, a result that is so absurd as hardly to need refutation. It is mani-
fest that each maker of this note intended to obligate his individual
property for its payment, and to that end authorized the entry of a
judgment against him. To say, therefore, that the power was ex-
hausted when a judgment was entered against one or some of the
signers, is to reach a conclusion that, when the maker pursued his
remedy against these, presumably at the place where he was most
likely to obtain results against them, he thereby surrendered his right
to pursue the others; and this does not commend itself as a cor-
rect construction. It amounts to holding that, when a creditor has
been given a power to pursue eight debtors, either jointly or severally,
as he may elect, and he elects to pursue five jointly in the first in-
stance, he is thereby conclusively presumed to have abandoned his
right to pursue either or any, or all, of the other three against whom
he has then taken no action whatever. Suppose that the three debtors,
against whom the plaintiff did not proceed in Canton, had no prop-
erty there, while the other five did have some assets within the grasp
of a local execution; what possible reason required the creditor to
proceed against the property of the five that was then exposed to
his process, at the risk of giving up all his rights against the other
three debtors, who in all probability had no property whatever there
within reach of the law? I think it would be technical in the ex-
treme to adopt the position contended for by the defendant. What-
ever strength it might be necessary to concede to his argument in
obedience to legal principles, if the obligation were joint, and not
joint and several, it is, I think, enough to note that the agreement
here is not only joint, but is also several; and that, if the several ob-
ligation is to have its ordinary meaning, it must be held to declare
that each of the several debtors may be pursued as an individual, and
as an individual may be compelled to respond wherever the creditor
may elect to follow him. This does not hold that more than one judg-
ment can be entered against the same defendant.
We have passed the point, I think, in the history of the law when
it seemed almost shocking to suppose that more than one judgment
could be entered upon the sacred record in a common-law action.
There is a good deal of legislation on this subject in Pennsylvania, as
well as elsewhere; but, without referring to it, I think it may safely
be said that, where the parties themselves have agreed that there may
be more judgments than one upon an obligation to which they have
set their hands, the courts need not shrink from carrying out their
contract.
The rule to vacate the judgment is discharged.
In re McGowan.

(District Court, D. South Carolina. May 29, 1909.)

Bankruptcy (§ 396*)—Exemptions—South Carolina Statute—"Head of a Family."

Under Const. S. C. art. 3, § 28, which provides that there shall be exempt "to every head of a family residing in this state, whether entitled to an exemption in lands or not, personal property to the value of $500," as construed by the Supreme Court of the state, the head of a family is one who controls, supervises, and manages a house and has living with him and is supporting some person whom it is either his moral or legal duty to support; and a bankrupt who was a single man, living alone, and whose parents were living, is not the head of a family and entitled to the exemption because he was at the time of his bankruptcy paying the board and expenses of a sister at a school.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 396.*

For other definitions, see Words and Phrases, vol. 4, pp. 3225-3233; vol. 8, p. 7677.]

In Bankruptcy. On review of decision of referee.

S. G. Mayfield, for bankrupt.


Brawley, District Judge. The question that comes up on this review of the decision of the referee is whether the bankrupt is entitled to a homestead exemption of $500 out of the proceeds of the sale of the stock of merchandise. The referee holds that he is so entitled. The creditors except on two grounds: (1) That the bankrupt is not the head of a family. (2) That in no event would he be entitled to homestead exemption in the goods in question as against creditors who present claims for the purchase money of the same.

McGowan, the bankrupt, is a young man about 23 years of age, and unmarried. His father and mother live in Colleton county, upon a tract of land owned by the latter. About three years ago the bankrupt moved to the town of Bamberg in the adjoining county, and began a mercantile business on his own account. For a time he seemed to prosper, receiving a good deal of money from the mercantile business, which he spent with a lavish hand. Moved by a creditable desire to assist his family, during his days of apparent prosperity he had one of his sisters brought to Bamberg and put her at the Carlisle Fitting School, paying for her board and tuition, and supplying some of her clothing, and announced his intention of educating and supporting her. The sister boarded at the school, and McGowan boarded elsewhere in the town, and it appears that during the same period he contributed to the education of a younger brother, who lived at home with his father's family. At no time did the sister live under the same roof with the bankrupt, and there was no formal adoption of the younger sister or brother, but it appears that it was his intention to educate and support the sister, and perhaps the brother, the father and mother of the bankrupt being in needy circumstances.

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
The money that he expended was derived wholly from the mercantile business, which culminated in bankruptcy, his indebtedness amounting to $7,000 or $8,000, and the assets consisting of the stock of merchandise, supposed to be of the value of about $2,000.

The Constitution of South Carolina provides, in section 28 of article 3, for a homestead in lands to the value of $1,000, and "to every head of a family residing in this state, whether entitled to a homestead exemption in lands or not, personal property to the value of $500.00," one of the provisos of said section being that "no property shall be exempt from attachment, levy, or sale for taxes or payment of obligations contracted for the purchase of said homestead, or personal property exemption," etc. As will be seen, the exemption is to the "head of a family." In a broad sense, all those who are descended from one common progenitor, or are of the same lineage, may be said to be a family. We sometimes speak of the human family as being the descendants of Adam, but in the sense in which the word is commonly used, and in the decisions of the Supreme Court of this state in construing the term, the definition of the lexicographers, approved and accepted by the court, is that "a family is a collective body of persons who live in one home, under one head or manager"; or, as somewhere defined, "it embraces the household, composed of parents and children or other relatives, domestics and servants, a collective body of persons living together within the same curtilage, subsisting in common, and directing their attention to a common object, the promotion of their mutual interests and social happiness"; but as will be seen when we consider the decisions in this state, the head of the family is not necessarily the father of children. The word has a sort of flexible meaning, yet in construing the homestead law, while there is no well-defined rule that is applicable to every case, and however flexible the term, it is not dependent upon the mere will or caprice of the debtor.

One of the earliest cases is Garaty v. Bu Bose, 5 S. C. 499, where it was held that a bachelor, having no persons dependent upon him and none residing with him except servants and employés, is not the head of a family in the sense of the term as used in the constitutional provision with reference to homestead exemption. The court says:

"The homestead was intended not alone as a benefit to the head of the family, but to those whose relations to the head demand on the one hand support and protection, and on the other require a contribution by the aid of their labor to the maintenance and conduct of the general establishment to which they belong. This would naturally be the case between parents and minor children, who are in terms embraced within the exception. It would not follow that, although the head of the family may not be a parent, the one substituted as the head would lose the favor of the provision, for it would extend to one having under his roof those so connected with him by ties of residence and association as to become part and parcel of his household, changing their domicile with him, and having no residence but that which they enjoy under his favor. It is not necessary to constitute a family that the relation of parent and child must exist. The respondent here is a single man, no person under the same roof with him, and no one on his premises save servants and employés. Their continuance with him is temporary. He can change them from time to time, and they at their own will may depart his service. There is absent that peculiar feature which can be better understood than described, which distinguishes the family even from those who may dwell within the limits of the same curtilage."
In Moyer v. Drummond, 32 S. C. 167, 10 S. E. 952, 7 L. R. A. 747, 17 Am. St. Rep. 850, the court held that the expression "his roof" in the above opinion was not meant to imply that one of the conditions necessary was that the person claiming to be the head of the family should be the owner of the house in which the collective body of persons alleged to constitute a family reside; that "as a matter of fact," said the court—

"it is well known that many persons who are undisputed heads of a family reside in houses which they do not own, but which are owned by their wives, and in that case, where the brother and sister lived together in a house belonging to the latter, the undisputed testimony being that the brother supported the sister and ran the establishment, the sister being dependent on him for support, and they living together as one family, it was held that the brother was the head of the family, and the court cited with approval the words of Simpson, C. J., in Bellings v. Evans, 23 S. C. 316, that the term 'family' is not to be taken in a restricted sense, but in its ordinary sense, which includes persons living in one house and under one head or manager. In that case the court affirmed the opinion of the Circuit Court, holding that the defendant was the head of the family, as his son was living with him as a part of his family. That son being a married man, no doubt entitled to have his wife and children with him, if he had any children, certainly this constituted a family, of which the defendant was the head.”

In Chamberlain v. Brown, 33 S. C. 597, 11 S. E. 439, two unmarried sisters lived together, and it was held that the one who supported the dependent sister was the head of the family.

In Fant v. Gist, 36 S. C. 577, 15 S. E. 721, homestead was claimed in land on which Gist had lived, his family consisting of himself, his wife, an orphan boy, and his wife's niece, whom Gist and his wife had informally adopted. His wife and the boy had died, leaving as the only surviving members of the family Gist and the wife's niece, who had been entirely supported by Gist, who lived with him except when at school. The house had been burned, and Gist had removed temporarily to the town of Newberry, where he remained while the house was being rebuilt. It was held that Gist was the head of a family, that it was clear that prior to the death of the wife he was the head of the family, consisting of the persons named, and the question was whether he lost that character by the death of his wife and the little boy, leaving as the only other member of his family the niece, whom he had adopted, who had been taught to look to him for her support, and was still dependent upon him. "To the question thus stated," says the court, "it seems to us that there can be but one answer, and that is that Gist is still the head of the family.”

In Wagener v. Parrott, 51 S. C. 494, 29 S. E. 240, 64 Am. St. Rep. 695, Parrott, his wife, and adopted daughter lived together upon the land out of which homestead was claimed. The only question in the case was whether an adopted child stood in the same relation to the head of the family as a child of the blood, and the court held that there was no difference in the eye of the law between a child of the blood and an adopted child.

It will be seen that in all of these cases there were two or more persons living together, under the same roof, which, under all the definitions, was necessary to constitute a family. The cases cited go
farther in support of the claimant’s contention than any others found in the state reports, but they fall short of doing so. That which comes nearest is Moyer v. Drummond, 32 S. C. 167; 10 S. E. 982, 7 L. R. A. 747, 17 Am. St. Rep. 850, where a brother supporting an invalid sister was held to be the “head of a family,” but the facts in that case make it readily distinguishable from this. There the “undisputed testimony,” says the court, is:

“My sister and myself live together in one family; have so lived for 8 years; she is sickly; she has nothing now but the house and lot; she has no other close relations except myself. I support my sister and run the establishment; have one servant hired; my sister is dependent upon me for a support, and I support her as a part of my family.”

And the court, after citing this testimony and other testimony of like import, says:

“It seems to us clear that this testimony is sufficient to show that these two persons, bearing the close relation of brother and sister, live together, that she is dependent upon him for a support which he provides for her, and that he as head of the household manages and controls, hires the necessary servants, and provides for the table,” etc.

Here the brother and sister never lived together as one family. Except during the period when she was at school at Bamberg, where she boarded at the school establishment, her home was with her parents in the adjoining county.

We will now examine briefly the decisions in other states having similar homestead provisions. “The head of the family,” says the court in Duncan v. Frank, 8 Mo. App. 286, “is a person in charge of a family, which is a collective body of persons living in one house, under one manager. The relations between them must be of a permanent and domestic character. He need not necessarily be a husband or a father, but may be any person who has charge of or manages the affairs of a collective body, living together.”

In Brokall v. Ogle, 170 Ill. 115, 48 N. E. 394, the head of the family, within the homestead statute, is a “householder or person on whom other members of the household are dependent for support, or to whom such householder owes a duty.”

In Virginia the term “householder” and “head of the family” are convertible terms, and employed as explanatory one of the other. Each signifies one who provides for a family, one who keeps house with his family.

In Calhoun v. Williams, 32 Grat. (Va.) 18, 34 Am. Rep. 759, the term was held to signify one who occupies such a relationship towards persons living with him as to entitle them to a legal or moral right to look to him for support. Such relation must consist of some tie, close in its moral obligation, and permanent in its character.

In Re Morrison (D. C.) 110 Fed. 735, the court says:

“While it is true that there is some conflict of authority as to whether an unmarried man can be the head of a family, the weight of authority is in favor of considering every person as the head of a family who keeps house and has living with him, and is supporting, some person whom it is either his moral or legal duty to support. • • • A man who controls, supervises, and manages the affairs of the house is the head of the family.”
In Rolator v. King, 13 Okl. 37, 73 Pac. 291:

"Although in general it is the husband, father, or mother who is the head of the family, yet where a son of full age assumes the obligation of providing for the widowed mother and her children, with whom he lives, and who are dependent upon him, he is in legal contemplation the head of the family."

A case most nearly akin in its facts to the one now under consideration is that of Jones v. Gray, 3 Woods, 494, Fed. Cas. No. 7,463. There the bankrupt, an unmarried man, residing in Athens, Ga., but not keeping house there, had a mother and unmarried sister who boarded with a married sister of the bankrupt in Augusta, Ga. They had no means of support, and had been supported for some years by the bankrupt. Woods, Circuit Judge, considered the question whether, under the laws of Georgia granting exemptions to the head of the family, the bankrupt upon this state of facts could be regarded as the head of the family, and held that he could not, saying:

"He, a single man, without family of his own, lives in one town and supports by his contribution his mother and unmarried sister, who live in another town and are inmates of the family of the married sister of the bankrupt. To call a man so situated the head of the family is, in my opinion, unwarrantably extending the meaning of the phrase. The bankrupt and his mother and unmarried sister do not constitute a family. The bankrupt cannot therefore be the head of the family, for a family is a collective body of persons who live in one house and under one head or manager."

There is nothing in the circumstances of this case which could lead the court to distort the accepted meaning of the term, which is that the head of the family is one who controls, supervises, and manages a house, and has living with him, and is supporting, some person whom it is either his moral or legal duty to support. The bankrupt never had living with him any such family. So long as he was apparently prosperous, he educated and supported his sister, but she never lived with him, and there was no obligation permanent in its character which bound him to support her. It is true that the tie of blood constituted a sort of moral obligation, but there was no legal obligation which could be enforced. He might have discontinued his assistance according to his whim and fancy. He had never brought his sister to live with him under the same roof, and thus established a tie such as existed in Gist's Case and in the Parrott Case. While it was very commendable that he should contribute to the support of his father's family, it must be remembered that such contributions were drawn from a fund supplied by his creditors, and a court of justice should not be astute to find reasons for further depletion of such a fund.

As I am of opinion that the bankrupt was not the head of a family within the meaning of the constitutional provision, the decision of the referee is reversed.

170 F.—82
UNITED STATES v. NORTHERN PAC. RY. CO. et al.
(Circuit Court, D. Montana. April 3, 1900.)

No. 870.

1. MINES AND MINERALS (§ 9*)—PUBLIC "MINERAL LANDS"—COAL LANDS.
Coal lands are "mineral lands" within the meaning of that term as generally employed in the laws regulating the disposal of the public domain.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 9.*
For other definitions, see Words and Phrases, vol. 5, pp. 4515-4516.]

2. PUBLIC LANDS (§ 81*)—RAILROAD GRANTS—CONSTRUCTION.
An act of Congress giving a railroad company to which a grant of public lands has been made and patented, on the relinquishment of such of the lands as lay within a forest reservation, the right to select other public lands in lieu thereof, is to be construed in accordance with the rules governing grants, by which nothing passes by implication, and, unless the words used are clear and explicit as to the lands subject to selection, that construction should be adopted most favorable to the government.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 81.*]

3. PUBLIC LANDS (§ 81*)—RAILROAD GRANT—SELECTIONS IN LIEU OF LAND IN RESERVATION—CONSTRUCTION OF STATUTE.
Act March 2, 1899, c. 377, § 3, 30 Stat. 994, which gives the Northern Pacific Railroad Company, on its conveyance to the United States of its lands previously granted and patented to it lying within the Mt. Ranier National Park and the Pacific Forest Reserve, the right to select in lieu thereof in any state through which its road runs "an equal quantity of nonmineral public lands, so classified as nonmineral at the time of actual government survey," must be construed, in harmony with the general policy of the government in making railroad grants, to limit the same strictly to nonmineral lands, and the railroad company is not authorized thereby to select lands which are not actually nonmineral, even though they may have been erroneously so classified when surveyed.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 81.*]


HUNT, District Judge. This is a suit brought by the United States against defendants to have a certain patent for coal lands in Montana, issued to the Northern Pacific Railway Company, adjudged null and void. The lands were selected in December, 1899, by the defendant Northern Pacific Railway Company, in lieu of certain lands conveyed by it to the United States, under the provisions of Act Cong. March 2, 1899, c. 377, 30 Stat. 993, entitled "An act to set aside a portion of certain lands in the state of Washington, now known as the Pacific Forest Reserve, as a public park, to be known as the Mount Ranier National Park." Section 1 of the act sets apart the particular lands which Congress desired to include within a park for the benefit and enjoyment of the people. Section 2 places the park under the exclusive

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
control of the Secretary of the Interior, and authorizes him to make
degulations for the management of the park, and the construction of
roads therein, and to make provision against the destruction of fish and
game. Section 3 reads as follows:

"That upon execution and filing with the Secretary of the Interior, by the
Northern Pacific Railroad Company of proper deed releasing and convey-
ing to the United States the land in the reservation hereby created, also
the lands in the Pacific Forest Reserve which have been heretofore granted
by the United States to said company, whether surveyed or unsurveyed, and
which lie opposite said company's constructed road, said company is hereby
authorized to select an equal quantity of nonmineral public lands, so classi-
Oed as nonmineral at the time of actual government survey, which has been
5 or shall be made, of the United States not reserved and to which no adverse
right or claim shall have attached or have been initiated at the time of the
making of such selection, lying within any state into or through which the
railroad of said Northern Pacific Railroad Company runs, to the extent of
the lands so relinquished and released to the United States. * * *"

Section 4 of the act provides that upon the filing by the railroad at
the local land office of the land district in which any tract of land
has been selected, and the payment of fees, and after the approval of
the Secretary of the Interior, patents of the United States convey-
ing to the railroad company the lands so selected shall be issued. In
case the tract so selected shall be at the time of the selection unsur-
veyed, the list filed by the railroad company at the local land office
shall describe the tract so as to designate it with reasonable certain-
y; and, within three months after the lands including such tract
shall have been surveyed and the plats filed by the local land office,
a new selection list shall be filed by the company describing the tract
according to the survey. Section 5 provides that the mineral land
laws of the United States are extended to the lands lying within the
reserve and park.

The cause was heard on bill and answer. The facts are that the
lands in controversy were surveyed several years before the selection,
and were classified as nonmineral at the time of actual government
survey. The fact that they contained coal deposits of more or less
value was known to the railway company at the time of selection. On
August 17, 1903, patent to the lands was issued to the Northern Pacific,
which thereafter conveyed certain parcels thereof to the defendants
Rocky Fork Coal Company of Montana and Northwestern Improve-
ment Company, neither of which defendants acquired any higher rights
to the lands in question than the Northern Pacific Railway acquired.

The question presented involves the proper construction of section
3 of the statute referred to. If counsel for the government are cor-
rect, we must read the law as if it in effect contained the copulative
"and," so as to make the authority of the railroad company one "to se-
lect an equal quantity of nonmineral public lands and so classified as
nonmineral at the time of actual government survey," etc.; while if the
contention of counsel for the defendants is acceptable, then the words
"nonmineral public lands, so classified as nonmineral at the time of
actual government survey," etc., indicate definitely what lands were
available to the railway company in lieu of those relinquished, and
were used by Congress to give certainty and security to the selections
made, by definitely fixing what lands could be selected, irrespective
of the actual character of the land. The Department of the Interior, upon presentation of the question involved, decided that the railroad company was entitled to select the lands in controversy, and accordingly, in August, 1903, patent was issued. Davenport v. Northern Pacific Railway Co., 32 Land. Dec. Dep. Int. 28. To adopt the construction asked for by the government is not wholly satisfactory, in that it calls for the practical insertion of the conjunctive into the text; while to adopt the defendants’ view seems unsound, because it ignores the full significance of the words “nonmineral public lands,” as found in the sentence, which gives to the railroad company general authority to select.

We must, therefore, regard the case as one where the letter of the law has failed to convey a clear meaning; hence we are at liberty to turn to some general rules which will aid in solving the doubtfulness. By doing this, we may ascertain some points of superior strength, upon which the judgment of the court should rest, subject to review by the learned judges of higher tribunals.

It is proper to consider that the general policy of Congress has been to reserve mineral lands from grants made of public lands; and that coal lands are mineral within the meaning of that term, as generally employed in the laws regulating disposal of the public domain, has also been decided. Mullan v. United States, 118 U. S. 271, 6 Sup. Ct. 1041, 30 L. Ed. 170; Northern Pacific Railway v. Soderberg, 188 U. S. 526, 23 Sup. Ct. 365, 47 L. Ed. 575. The special express provisions made in certain acts of Congress, of which the original act making grant to the Northern Pacific Railroad was one, to aid in the construction of railways, to the effect that coal and iron lands shall not be deemed mineral within the provisions of such acts, emphasize the point that such lands would be included as mineral, unless specially excluded. Barden v. Northern Pacific Railroad, 154 U. S. 288, 14 Sup. Ct. 1030, 38 L. Ed. 992. Undoubtedly, the lands to be taken under the act in question are such as the definitions of Congress and the decisions of the Supreme Court have attached to the word “mineral” since 1864. Northern Pacific Railway Company v. Soderberg, supra; United States v. Mullan (C. C.) 10 Fed. 785.

There is, likewise, the fundamental rule of construction of statutes that Congress is not to be presumed to have used words without a purpose; that superfluous words are not to be presumed to have been used; and that a statute must be expounded, if practicable, so as to give some effect to every word. Platt v. Union Pacific R. R. Co., 99 U. S. 48, 25 L. Ed. 424.

I am not convinced by the defendants’ argument that the act of Congress under examination was “in no sense a grant,” and that the usual rules of construction applicable to grants are not pertinent. True, the object of the legislation was an exchange of lands, but the lands surrendered had been vested in the railroad company under a public land grant act, and as those to be selected were also to be public lands, title to which should be vested by patent from the United States, in the absence of words clearly indicating a different intention, it is but reasonable to hold that the right of selection of the lieu land was subject to such construction as governed grants of lands at the
time of the passage of the act under which such selection might be made. Mullan v. United States, supra. The lands to be selected still retain the general character of a donation, and in selection the very valuable right has been given to the grantee to choose its lieu lands from any nonmineral public lands, when classified, lying in any state into or through which the railroad of the Northern Pacific Railway Company runs. This opportunity was doubtless regarded as a strong inducement to the railroad company. But whether we call the act one of grant or exchange, it was authority for a transfer of a nature such as to justify applying to the statute the rule of construction that nothing passes by implication, and unless the words of the grant are clear and explicit as to the land conveyed, that construction which is most favorable to the government should prevail. United States v. Oregon, etc., R. R., 164 U. S. 527, 17 Sup. Ct. 165, 41 L. Ed. 541; Leavenworth, etc., R. Co. v. United States, 92 U. S. 740, 23 L. Ed. 634.

Now, under these principles, it cannot be well held that Congress contemplated changing its policy by giving to the railroad company choice of any public lands in any of the states through which its road runs, though of a kind infinitely more valuable than the kind out of which those that were surrendered to the government by the railroad company were taken; yet defendants' argument would put gold, silver, and other precious metals all within the classes of lands from which selection might be made, provided the lands containing them had been classified as nonmineral at the time of survey.

In my judgment, the intent of Congress is best gathered by co-ordination of the language of the statute with relation to this general policy of the government, to the condition of the country when the act under examination was passed, and to the decisions of the Supreme Court, as referred to. Doing this, I find, not that there was an enlargement of the right of selection from classes of public lands outside of those which are reserved, but that the general authority to select "an equal quantity of nonmineral public lands" means selection from the nonmineral public lands, and only from nonmineral public lands.

The particular words following the general characterization of lands so authorized to be selected confine the right of selection to lands already classified as nonmineral, or to those which shall be so classified. Any lands selected, however, must always be of the general class, nonmineral, and must have been so classified in the past, or must be so classified in the future. That is to say, the fact of their nonmineral character must exist, and though classification is essential before the right of selection attaches, yet, if the lands are not nonmineral, the fact that they have been "so classified" does not operate as a binding determination that they were nonmineral in character, and preclude the government from asserting its right to have lands which are mineral in fact excluded from those out of which selection may be made. True character, and not classification without regard to true character, is the fundamental meaning.

I accord most respectful consideration to the views of the officers of the General Land Office of the government, and admit the force of the arguments which attach much weight to rulings made in Davenport v. Northern Pacific Railway Company, supra, and in Ward v.
St. P. & M. R. Co., decided by the commissioner on March 15, 1894, and to the fact that Congress knew the construction put upon the language of the act approved August 5, 1892, c. 382, 25 Stat. 391, providing for the relief of settlers upon lands in North and South Dakota; but I cannot yield the view already expressed of what seems to me to be the accurate construction.

The complainant is entitled to a decree.

In re FARMERS' SUPPLY CO.
(District Court. S. D. Ohio, W. D. May 6, 1909.)
No. 4,044.

1. COURTS (§ 338*) — FEDERAL COURTS — SUIT BY PARTNERSHIP — CONFORMITY TO STATE PRACTICE.
Rev. St. Ohio, §§ 3170-1 to 3170-7, provides that every partnership, with certain exceptions, transacting business in Ohio under a fictitious name or designation not showing the names of the persons interested as partners, must file in the county of its principal place of business a certificate stating the name and residence of each partner, and, in case of its failure to do so, shall not commence or maintain an action on, or on account of, any contracts made or transactions had in their partnership name in any court in the state until they have filed such certificate. Held, that a partnership's failure to comply with such act only affected its right to sue in the state courts, and did not impair or restrict the jurisdiction of the federal courts conferred by the federal Constitution and statutes.
[Ed. Note.—For other cases, see Courts, Cent. Dig. § 901; Dec. Dig. § 338.*]

2. MECHANICS' LIENS (§ 156*) — NOTICE OF LIEN — FORM OF "NOTICE."
Rev. St. Ohio, § 3185, provides that, within 30 days after a principal contractor shall have filed an affidavit for a mechanic's lien on the owner's property, he shall notify the owner, his agent or attorney, that he claims such lien, and, if he fails to do so, the lien shall be null and void. Held, that "notice" as so used meant information by whatever means communicated, knowledge given or received; and, written notice not being expressly required, oral notice was sufficient.
[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 187; Dec. Dig. § 156.*
For other definitions, see Words and Phrases, vol. 5, pp. 4839-4844; vol. 8, p. 7733.]

3. CORPORATIONS (§ 477*) — SEALS — FAILURE TO USE — MORTGAGES.
Where a corporation had power to execute a mortgage, and there was neither a statutory nor charter provision directing the mode of procedure, the mortgage having been executed in the same manner as that of an individual, it was not defeated for want of the corporate seal.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1869; Dec. Dig. § 477.*]

4. BANKRUPTCY (§ 331*) — CLAIMS — JOINER OF PETITIOVERS.
Where claimants indorsed notes for defendant corporation and received a mortgage on the corporation's property to secure the indorsement, and thereafter claimants paid the notes at maturity, each advancing one-half of the funds, they were entitled as joint petitioners to assert a mortgage lien on the premises in bankruptcy proceedings against the corporation.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 520; Dec. Dig. § 331.*]

*For other cases see same topic & § number in Dec. & Am. Digls. 1897 to date, & Rep'r Indexes.
5. Mortgages (§ 46*)—Recitals as to Consideration.
Where a mortgage, duly executed, was delivered and recorded and was a mortgage between the parties, it was not invalidated as to third persons by the fact that it did not accurately describe the consideration for which it was given, nor give any information as to the date of the notes, nor, except by implication, to whom the notes which it attempted to secure had been delivered.
[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 119; Dec. Dig. § 46.*]

Where a mortgage did not accurately describe the debt, it was permissible to show by parol what its true character was, and for what purpose and what consideration it was given, though it mentioned an amount differing from the sum named in either of the notes it was given to secure.
[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1921; Dec. Dig. § 419.*]

Where a corporation’s notes would not have been discounted except for the indorsement of claimants, whose liability as indorsers was secured by a mortgage on the corporation’s property, claimants became creditors of the corporation contingently at and from the time of the indorsement.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1871; Dec. Dig. § 478; Mortgages, Cent. Dig. §§ 208–289.]

8. Bankruptcy (§ 159*)—Liens—Corporate Notes—Indorsement—“Present Consideration.”
Where a corporation executed a mortgage to claimants to secure their indorsement of the corporation’s notes, such mortgage was based on a present consideration within Bankr. Act July 1, 1898, c. 541, § 67d, 30 Stat. 564, 565 (U. S. Comp. St. 1901, p. 3449), protecting liens given or accepted in good faith for a present consideration which have been recorded according to law, if record thereof is necessary, etc.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 259; Dec. Dig. § 159.*]

9. Liens (§ 7*)—Equitable Liens.
Where a party by express agreement sufficiently indicates an intention to make specific property a security for a debt or other obligation and promises to transfer such property as security, equity impresses the property with an equitable lien in case security is not given.
[Ed. Note.—For other cases, see Liens, Cent. Dig. §§ 26–28; Dec. Dig. § 7.*]

10. Bankruptcy (§ 165*)—Liens—Preferences.
Where, at the time a corporation executed a mortgage to indorsers of its paper to secure the indorsement, it was financially embarrassed but solvent, and the mortgage was given and accepted in good faith and not in contemplation of or in fraud of the bankruptcy act or with intent to hinder, delay, or defraud the corporation’s creditors or any of them, it did not constitute a preference, but was valid.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 259, 265; Dec. Dig. § 165.*]

On Petitions for Review.
John N. Van Deman, Geo. R. Young, and D. B. Van Pelt, for trustees.
C. E. Swadener, for Rasor Lumber Co. and Lenz and Stine.
Eric J. Weaver, for Citizens’ Banking Co.

*For other cases see same topic & § number in Dec. & Am. Digis. 1907 to date, & Rep’r Indexes
SATER, District Judge. The right of the individuals doing business as partners under the firm name of the "Rasor Lumber Company" to commence or maintain an action in this court on the mechanic's lien asserted in their intervening petition is disputed on the ground that they have not complied with the requirement of the amendatory act of February 13, 1896 (92 Ohio Laws, p. 25; sections 3170–1 to 3170–7, both inclusive, Rev. St. Ohio), which provides that every partnership, excepting certain commercial and banking partnerships, transacting business in Ohio under a fictitious name or designation not showing the names of the persons interested as partners in such business, must file with the clerk of the court of common pleas of the county in which its principal office or place of business is situated a certificate stating the full name and residence of each partner, and that, in case of failure so to do, the persons so doing business as partners "shall not commence nor maintain an action on, or on account of, any contracts made or transactions had in their partnership name in any court of this state," until they shall have first filed such certificate.

The purpose of the act is that a public record shall be had of the individual members of all partnerships, other than those especially excepted from its provisions, with such definiteness and particularity that those dealing with them may at all times know with whom they are dealing and to whom they are giving credit or becoming bound. Partnerships subject to the provisions of the act are not by its terms placed under any disability as regards the acquisition and ownership of property, or the making of contracts, or the transaction of business. The only penalty attached by the act to the failure to file the required certificate is the legal incapacity of the offending partnership to commence or maintain an action on, or on account of, any contracts made or transactions had in the partnership name, in any court of the state, until it shall have first filed the required certificate. The Ohio act is borrowed from that of California, and instructive cases supporting the foregoing announcements are: Meads, Seaman & Co. v. Lasar, 92 Cal. 231, 28 Pac. 935; Cheney v. Newberry, 67 Cal. 126, 7 Pac. 444, 445; Phillips v. Goldtree, 74 Cal. 151, 13 Pac. 313, 15 Pac. 451; Wing Ho v. Baldwin, 70 Cal. 194, 11 Pac. 565; Sweeney v. Stanford, 67 Cal. 635, 8 Pac. 444; Quan Wye v. Chin Len Hee, 133 Cal. 183, 55 Pac. 783; Hartzell & Co. v. Warren, 11 Ohio Cir. Ct. R. 269.

The jurisdiction and remedies conferred by the Constitution and statutes of the United States on the national courts are uniform throughout the different states of the Union, and cannot be impaired, restricted, or destroyed by state legislation, which prescribes a condition only by compliance with which a partnership having a fictitious name may commence and maintain litigation in its own courts. In Dunlop v. Mercer, 156 Fed. 545, 551, 86 C. C. A. 435, 441, it is said:

"By section 8, article 1, of the Constitution, the Congress was empowered to establish 'uniform laws on the subject of bankruptcy throughout the United States,' and by the bankruptcy law of July 1, 1898 (c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]), jurisdiction was conferred on the District Courts of the United States to 'cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, ex-
cept as herein otherwise provided.' This jurisdiction was not granted by, and it cannot be revoked, annulled, or impaired by, the law or act of any state.


Section 3185, Rev. St. Ohio, provides that, within 30 days after a principal contractor shall have filed an affidavit for a mechanic's lien on the owner's property, he shall notify the owner, his agent or attorney, that he claims such a lien, and, if he fail so to do, the lien secured shall be null and void. The Farmers' Supply Company, in the improvement of whose elevator the material furnished by the lumber company was used, having made an assignment in trust for the benefit of its creditors to its president, who had been active in securing the elevator repairs, one of the lien claiming petitioners gave him, while acting as president and assignee, oral notice of the lumber company's claim to a lien. The statute does not specify the kind of notice to be given, but, wherever written notice is required by the Ohio mechanic's lien law, such requirement is expressed in clear and unmistakable terms or by necessary implication. "Notice" means "information by whatever means communicated; knowledge given or received." United States v. Foote, 13 Blatchf. 418, Fed. Cas. No. 15,128; White v. Fleming, 114 Ind. 573, 16 N. E. 487. Where a mechanic's lien statute requires notice to the owner without using any language to indicate that written notice is intended, an oral notice is sufficient. McLeod v. Capell, 7 Baxt. (Tenn.) 196; Vinton v. Builders' & Manufacturers' Association, 109 Ind. 351, 9 N. E. 177; Boisott on Mechanics' Liens, § 355; White v. Fleming, supra; 21 Am. & Eng. Ency. Law, 583; Treadway & Marlatt's Ohio Mechanic's Lien Law, § 180.

The Supply Company, through oversight, did not affix its corporate seal to the mortgage given by it to the Citizens' Banking Company. The use of private seals in Ohio has been abolished. Section 4, Rev. St. Ohio. Seals are no longer necessary on deeds and mortgages (sections 4106, 4107), excepting in those instances in which some statute specifically provides otherwise. It is now well settled that, whenever a corporation has the power to make a contract and is not restricted in the manner of so doing, it stands as to such contract on the same footing as a natural person, and in relation thereto it may adopt the same modes immediately calculated to accomplish its purpose which an individual could adopt. The Supply Company had the power to execute the mortgage, and there being no statutory or charter provision directing the mode of procedure, and the mortgage to the bank having been executed in the same manner as that of an individual, it cannot be defeated for want of a corporate seal. Cook on Corp. (4th Ed.) § 721; Thompson on Corp. §§ 5047, 5052; 10 Cyc. 1006, 1007; Blunt v. Walker, 11 Wis. 349, 78 Am. Dec. 709; Murray v. Beal, 23 Utah, 548, 65 Pac. 726; Gottfried v. Miller, 104 U. S. 521, 26 L. Ed. 851; Poyser & Son v. Standard Pav. Brick Co., 46 Wkly.

At a meeting of the board of directors of the Supply Company held in May, 1907, it was unanimously agreed that if Stine and Lenz would indorse two notes of the company for $1,000 and $1,500, respectively, to enable it to make needed repairs on its elevator, the company would secure them by mortgage on such property. No resolution to that effect was offered or adopted, and no record was made of the proceedings at the meeting. Stine and Lenz, believing the company to be solvent, under the assurance that they would be protected by mortgage, indorsed the notes, each due 90 days after date, by guaranteeing their payment at maturity. The notes were discounted by the company at banks, and the proceeds were applied in payment of such repairs. On June 24th the board passed a resolution that Stine and Lenz be given a mortgage "on elevator to secure note given for repair of same," and on the day following the president and secretary of the company executed and delivered to them a mortgage conditioned as follows:

"Provided, nevertheless, that whereas, the said Farmers' Supply Company are indebted to the said Jacob Stine and Isaac Lenz and have executed their promissory note for the payment of $2,500, payable ninety days after date, with interest at six per cent.; Now, if the said Farmers' Supply Company shall pay said sum of money, with the interest, when due, then these presents shall be void."

Stine and Lenz paid the notes at maturity; each advancing one-half of the money. As joint petitioners, they assert a mortgage lien on the premises for the $2,500 and accrued interest. This was permissible, Bates, Pl. & Pr. 2183, 2184.

Under objection, the mortgage and notes were admitted in evidence, and witnesses were permitted to testify to the agreement reached at the May meeting by the directors, and that the intention in giving the mortgage was to secure Stine and Lenz as indorsers of the two notes. The conditioning clause does not correctly describe the consideration of the mortgage, nor does it or the resolution of the board give any information as to the date of the note, nor, except by implication, to whom the note mentioned in it was delivered. It cannot, however, be successfully claimed that the instrument as between the parties is not a mortgage. Neither the corporation nor its creditors are injured by the fact that the mortgage describes one $2,500 note, instead of two notes aggregating that amount, or by the fact that the mortgage suggests, if it does not actually describe, an indebtedness to the mortgagees, instead of reciting that its purpose is to indemnify them against loss for having guaranteed the company's notes. It is a familiar rule that a mortgage, duly executed, delivered, and recorded is not invalid as to third parties from want of certainty in describing the debt to be secured, when, upon the ordinary principle of allowing extrinsic evidence to apply to a written contract and its proper subject-matter, the debt intended to be secured may be shown as between the parties themselves. Hurd v. Robinson, 11 Ohio St. 232; Jones on Mortgages, § 352; Gill v. Pinney, Adm'r, 12 Ohio St. 38; Greiss v. Wilkop, 12 Ohio Cir. Ct. R. 481; Lattimer v. Mosaic Glass Co., 13 Ohio Cir. Ct. R. 163. 169.
The mortgage debt secured ought to be so described as to be notice to subsequent purchasers, lienholders, and creditors generally, or be sufficient at least to put them on inquiry; but the lien is not affected by a clerical inaccuracy in the description of the debt. It was permissible to show that the mortgage is simply one of indemnity, what its true character is, and for what purpose and what consideration it was given, although it mentions an amount differing from the sum named in either of the notes and suggests that it was given for a single note, instead of two notes. McKinster v. Babcock, 26 N. Y. 378; Mayer v. Grottendick, 68 Ind. 1, and Moses v. Hatfield, 27 S. C. 324, 3 S. E. 538, quoting Jones on Mortgages, § 384; Pingrey on Mortgages, §§ 468, 498; Crafts v. Crafts, 13 Gray (Mass.) 360; Jones on Mortgages, §§ 351, 354; Shirras v. Caig, 7 Cranch, 34, 3 L. Ed. 260; Hall v. Tay, 131 Mass. 192.

It is claimed that the addition of the proceeds of the two notes to the assets of the corporation was not made by Stine and Lenz, the guarantors of the notes, but by the banks that discounted them; that there was no present consideration for the mortgage; and that consequently it is not protected by the saving provision of section 67d of the bankrupt act. Manifestly the money realized on the notes would not have reached the coffers of the corporation but for the indorsement of Stine and Lenz. They became its creditors contingent upon the time of indorsement. Remington on Bank. §§ 644, 1310, and cases cited. If an obligation be assumed upon a valid agreement that the bankrupt will execute a mortgage upon certain specific property to secure the assumed liability, a mortgage executed and delivered in pursuance of such agreement, within a reasonable time thereafter, is valid, and the liability assumed will be deemed a present consideration for the conveyance. Douglass v. Vogeler (D. C.) 6 Fed. 53; Gattman v. Honea, 10 Fed. Cas. 89, No. 5,271; In re Jackson Iron Mfg. Co., 13 Fed. Cas. 260, No. 7,153; Sabin v. Camp (C. C.) 98 Fed. 974; Loveland on Bank. (3d Ed.) 585; Wilder v. Watts (D. C.) 138 Fed. 426; In re Grandy & Son (D. C.) 146 Fed. 318; Remington on Bank. § 1372. The reason for this is found in the general law that where a party by express agreement sufficiently indicates an intention to make specific property a security for a debt or other obligation, and promises to transfer such property as security, equity, regarding that as done which ought to be done, creates an equitable lien upon the property designated. Wilder v. Watts, supra.

Whether the mortgage was executed and delivered in pursuance of a valid, prior, enforceable contract, having its inception at the May meeting of the directory, legally obligating the company to make the conveyance, and whether the adoption of the resolution at the June meeting, and the subsequent execution and delivery of the mortgage, was such a ratification as related back to the beginning of the transaction so as to defeat the intervening rights of third parties, strangers to the transaction, and other creditors of the company (Murray v. Beal, supra; In re Kansas City Stone, etc., Co., 14 Fed. Cas. 128, No. 7,610; Holland v. Drake, 29 Ohio St. 441; Coleman v. Darling, 66 Wis. 155, 28 N. W. 367, 57 Am. Rep. 259), need not be considered, unless the circumstances were such that the giving and acceptance of the mortgage constituted a preference under sections 60a and 60b of
the bankrupt act, or was with the intent to injure, delay, or defraud the company's creditors, or any of them, in violation of section 3 of such act. Conceding that the method adopted by the corporation to raise funds was an unusual one, and that it was financially embarrassed, it nevertheless was solvent, and Stine and Lenz would have so found had they investigated its condition. The mortgage was given and accepted in good faith, and not in contemplation of or in fraud of the bankruptcy act, or with intent to hinder, delay, or defraud the company's creditors, or any of them, and is valid.

The referee is affirmed, and an order may be drawn accordingly.

UNITED STATES et al. v. O'BRIEN et al.
(Circuit Court, D. Washington, W. D. September 24, 1903, and February 6, 1904.)
No. 849.

INDIANS (§ 10*)—LANDS—DISCLAIMER OF TITLE BY STATE.
Under the provision of Const. Wash. art. 26, by which the state forever disclaimed "all right and title * * * to all lands * * * owned or held by any Indian or Indian tribes," the state has no title, and can convey no right, to any of the shore lands surrounding Squaxon Island, which prior to the admission of the state had been set apart by treaty as a reservation for the Squaxon Indians and was then actually used and occupied by them, including the beach and shore.
[Ed. Note.—For other cases, see Indians, Dec. Dig. § 10.*]

In Equity.
This suit was instituted by the government of the United States, jointly with a number of Indians as complainants, for an injunction to restrain vendees of the state of Washington from interfering with the Indians in their occupancy and use of the shore of an island which, by a treaty made with the Indians, was designated as an Indian reservation. The suit was defended by the state of Washington. A demurrer to the bill of complaint was overruled. Thereafter the case was submitted on the bill and answer, and a decree was rendered in favor of the complainants.

J. W. Robinson, for defendants.
W. B. Stratton, Atty. Gen., for intervener.

On Demurrer to Bill of Complaint.
HANFORD, District Judge. It is my opinion that the whole of the Squaxon Island was lawfully reserved for the use of the Indians, and that by the treaty referred to in the bill of complaint, and the laws of the United States, it has always been unlawful for white men to reside upon or occupy any part of said island. The Indians, for whose use the island was reserved, used and occupied the entire island, including the beach and shore, at the date of the enabling act and the adoption of our state Constitution, and by the terms of the enabling act, and the compact between the people of this state and the United States government, contained in the Constitution, this state entirely disclaimed "all right and title * * * to all lands

*For other cases see same topic & § NUMBER in Dec. & Am. Digz. 1907 to date, & Rep'r Indexes
* * * owned or held by any Indian or Indian tribes." This disclaimer applies not only to lands owned by the Indians, whether patented or unpatented, but also to all lands held—that is to say, occupied and used—by individual Indians or by tribes.

It is my opinion that the proposed sale of a rim encircling this island reservation is not only an injustice to the Indians, but an unwarranted exercise of power by officers of the state government, and that the defendants have acquired no rights whatever by virtue of the contracts under which they claim.

Demurrer overruled.

On Motion for Judgment on the Bill of Complaint and Answer.

All of the defendants have joined in an answer to the bill of complaint herein, which answer contains a full and candid admission of all of the facts set forth in the bill of complaint which in the opinion of the court are material. By denial of knowledge or information sufficient to form a belief, the answer makes an issue as to whether the Squaxon Indians have worked or cultivated oyster beds or clam beds in tide waters surrounding the island; but I hold that it is immaterial whether the Indians did or did not work or cultivate oyster beds or clam beds, since enough is admitted to make certain that the Indians by their continued exclusive possession and use of the whole island held and claimed the same at the time of, before, and since the adoption of the Constitution of the state of Washington.

Upon consideration of the bill and answer, it is the opinion of the court that the complainants are entitled to a decree for the relief prayed for in full, and the court directs that a decree be prepared accordingly.

UNITED STATES et al. v. ASHTON et al.
(Circuit Court, W. D. Washington, W. D. April 18, 1909.)
No. 1,397.

1. INDIANS (§ 10*)—LANDS—ORIGINAL RIGHT OF OCCUPANCY.
The Indians have a right to occupy the country inhabited by them to the exclusion of white people, until their rights shall have been relinquished by them or terminated by laws enacted by Congress.
[Ed. Note.—For other cases, see Indians, Cent. Dig. § 25; Dec. Dig. § 10.*]

2. PUBLIC LANDS (§ 1*)—GOVERNMENT OWNERSHIP—ORIGIN AND NATURE OF TITLE.
The government of the United States is the primary source of title to all land within all territory acquired by national authority, and Congress has plenary power to dispose of it.
[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 1.*]

3. NAVIGABLE WATERS (§ 36*)—LANDS UNDER WATER—OWNERSHIP BY STATE.
The Oregon country was acquired by the United States with the object in view of creating new states to be admitted into the Union on an equality with the original states, and until the states now existing in that country were organized and admitted the national government held the title to the shores and beds of navigable waters therein as trustees for the future states. If there is any exception to this general rule, it must rest upon

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
a special grant expressly authorized by a law enacted by Congress to provide for some peculiar requirement of the national government.

[Ed. Note.—For other cases, see Navigable Waters, Dec. Dig. § 36.*]


As the original states which ordained our national constitution succeeded to the ownership of the shores and beds of navigable waters within their boundaries which previous to their separation from the mother country appertained to the British Crown, so states later admitted to the Union on an equality with them became vested with a like ownership as an attribute of sovereignty, to be exercised for the benefit of all of the people.

[Ed. Note.—For other cases, see Navigable Waters, Dec. Dig. § 36.*]

5. **Navigable Waters** (§ 37*).—Tide Lands—Grants by State.

The space bordering the shores of the sea and navigable Inlets and harbors which may be reclaimed from the sea and devoted to beneficial uses without obstructing navigation or detriment to the paramount rights of the public is valuable, and may be granted to individuals by the state in the exercise of its sovereign power.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. § 203; Dec. Dig. § 37.*]

6. **Boundaries** (§ 15*).—Navigable Waters.

Under the laws of the United States in surveys of public lands bordering on navigable waters, the shore lines are meandered, and in general all grants and conveyances of such lands by the government give title only to land above the line of ordinary high water.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 108–117; Dec. Dig. § 15.*]

7. **Indians** (§ 10*).—Lands—Rights as Original Occupants.

The aboriginal inhabitants of the country now composing the United States were not seised of titles to real estate.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 25; Dec. Dig. § 10.*]

8. **Indians** (§ 11*).—Lands—Extinguishment of Indian Title.

All exclusive rights of the Puyallup Indians as occupants of land in the Oregon country were terminated by Oregon Donation Act Sept. 27, 1850, c. 70, 9 Stat. 496, and were relinquished by them by the treaty of December 26, 1854, 10 Stat. 1132.

[Ed. Note.—For other cases, see Indians, Dec. Dig. § 11.*]

9. **Boundaries** (§ 15*).—Navigable Waters.

The executive order of President Pierce in 1857 setting apart lands bordering on Commencement Bay in Oregon Territory as a reservation for the Puyallup Tribe of Indians did not grant any right or title to shore lands, which could only be done by Congress for some national purpose; and in any event, under the provision of the treaty of December 26, 1854, 10 Stat. 1132, which vested in the President the power to change and relocate the reservation, the subsequent allotment and conveyance in severalty of the lands therein in accordance with a survey made under Act May 29, 1872, c. 233, 17 Stat. 186, in which the shore line was meandered and the lands allotted extended only to the line of ordinary high tide, had the effect of extinguishing any rights of the tribe as a community to tide lands, if any such previously existed.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 108–117; Dec. Dig. § 15.*]

10. **Indians** (§ 10*).—Lands—Disclaimer of Title by State.

The provision of Const. Wash. art. 26, by which the state forever disclaimed "all right and title * * * to all lands * * * owned or held by any Indian or Indian tribes," cannot operate in any way as a grant or conveyance of title by the state, but its utmost effect is to bar the state

*For other cases see same topic & § NUMBER in Dec. & Am. Diggs. 1907 to date, & Rep't Indexes
and its vendees from claiming land owned or held in exclusive possession by Indians or tribes at the date of the adoption of the Constitution.

[Ed. Note.—For other cases, see Indians, Dec. Dig. § 10.*] Suit in equity to determine adverse claims to land situated in the rim of Tacoma Harbor between the line of high tide and deep water. Heard on the bill of complaint and the answers of the several defendants. Decree for the defendants.


Ashton & Hayden, Edward E. Cushman, and W. H. Doolittle, for defendants.

HANFORD, District Judge. Upon the hearing of an application for an order referring this case to the master in chancery for the taking of evidence, the defendants by their solicitors contended vigorously that such reference is unnecessary, and the merits of the case were very fully presented as if the hearing had been upon the bill and answers of the defendants, and upon due consideration the court finds that the controversy involved is easily determinable from conclusions deducible from the pleadings, together with indisputable facts of general notoriety and public documents and records of which the court takes judicial notice.

The attitude of the respective parties as well as the rights which they assert must be defined in order to make a clear statement of the issues. The government of the United States appears as a complainant, not to maintain any distinct right menaced by the defendants, but merely to give its sanction to the litigation in the capacity of general guardian and protector of the Indians. The other complainants are Indians, formerly members of the Puyallup Tribe; each of them has received an allotment of land within the boundaries of the reservation for the Puyallups, and become a citizen of the United States and of the state of Washington, entitled to all the rights, privileges, and immunities of citizens and subject to the laws of the state by virtue of the provisions of an act of Congress commonly referred to as the "Dawes Act" (Act Feb. 8, 1887, c. 119, 24 Stat. 390; 1 Supp. Rev. St. 536).

They sue as individuals and as trustees, representing all the surviving members and heirs of deceased members of their tribe. The tribe, although disintegrated by the enfranchisement of its members, has not been by any formal proceeding dissolved, and the complainants, as individuals, have interests, and as trustees represent the interests of all the other Puyallup Indians, in the community property and rights of their tribe. The bill of complaint avers that all the land which is the subject of controversy is such community property, and that each of the defendants wrongfully claims title adversely to them to specified tracts thereof. The substantial part of the prayer of the bill is as follows:

"And that each of said defendants be required to set forth any and every adverse interest claimed or demanded in or to said premises, to the end that

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1897 to date, & Rep't Indexes
the same be justly adjudicated and declared null and void against these plaintiffs, and that the defendants have not or has either of them any estate or interest in the said property or any part thereof, and that these plaintiffs be declared and decreed to be the owner in fee of said premises and accretions, and entitled to the sole and exclusive right and possession thereto, free and clear from any claim of the defendants thereto, and that the defendants and each and every one of them be forever barred from asserting or claiming any estate or interest therein, and that they and each of them be restrained and enjoined from entering into possession of or interfering with the possession or occupancy of these plaintiffs, or doing any of the acts and things hereby sued to be enjoined."

By section 1, art. 17, of its Constitution:

"The state of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide in waters where the tide ebbs and flows, * * * provided, that this section shall not be construed so as to debar any person from asserting his claim to vested rights in the courts of the state."

Merely to maintain its claim of sovereignty, the state has intervened as a party and joined the defendants in disputing the contention of the complainants.

The defendants respectively claim title in severalty to tracts and parcels of the land in controversy as vendees of the state, and pray for a decree confirming and quieting said titles against the claim asserted by the Indian complainants.

The title asserted by the Indian complainants, if valid, must be founded upon prescription or continuous exclusive possession, or else be derived from one of the following ultimate sources, viz.:

(a) The aboriginal title; that is to say, the rights of the Indians as first occupiers of the country.
(b) The government of the United States, which by the acquisition of new territory became vested with the paramount title to all the land.
(c) The state of Washington, which by virtue of its sovereignty is the recognized owner of the shores and beds of all navigable waters within its boundaries not granted, ceded, or otherwise disposed of by its authority.

The following well-established rules of law must control the decision of the case:

First. The Indians have a right to occupy the country inhabited by them to the exclusion of white people, until their rights shall have been relinquished by them, or terminated by laws enacted by Congress. Hot Springs Cases, 92 U. S. 703, 23 L. Ed. 690; Beecher v. Wetherbee, 95 U. S. 517, 24 L. Ed. 440.

Second. The government of the United States is the primary source of title to all lands within all territory acquired by national authority, and the Congress has plenary power to dispose of it. Johnson v. McIntosh, 8 Wheat. 543, 5 L. Ed. 681; Pollard v. Hagan, 3 How. 212, 11 L. Ed. 565. In this connection the word "land" is to be given its proper definition, so that the rule will be consistent with the rules hereinafter stated.

Third. The Oregon country was acquired by the United States, with the object in view of creating new states to be admitted into the Union upon an equality with the original states, and, until the states now existing within that country were organized and admitted
into the Union, the national government held the title to the shores and beds of navigable waters therein, as trustee for the future states. Pollard v. Hagan, 3 How. 212, 11 L. Ed. 565. If there is any exception to this general rule, it must rest upon a special grant expressly authorized by a law enacted by Congress to provide for some peculiar requirement of the national government. Shively v. Bowlby, 152 U. S. 1, 14 Sup. Ct. 548, 38 L. Ed. 331.

Fourth. The assertion of ownership in the shores and beds of navigable waters within its boundaries, made by the state of Washington, is founded upon the doctrine that no individual can acquire a proprietary right to any part of the sea, because the sea is a highway of commerce for the whole world, and the coast within the range of cannon shot is the limit of national dominion. Therefore jurisdiction of the seacoast and of all navigable inlets and bays is an attribute of sovereignty to be exercised for the general welfare of all people, and as the original states, which ordained our national Constitution, succeeded to the jurisdiction within their respective boundaries, which previous to their separation from the mother country appertained to the British Crown, the state of Washington at the time of its admission into the Union on an equality with them became vested with like jurisdiction.

Fifth. The space bordering the shores of the sea and navigable inlets and harbors which may be reclaimed from the sea, and devoted to beneficial uses without obstructing navigation, or detriment to the paramount rights of the public, is valuable, and may be granted to individuals by the state in the exercise of its sovereign power.

Sixth. The laws of the United States enacted by Congress for the parceling and disposition of the public domain prescribe a system of subdivision into 40-acre tracts and fractions. The lands are surveyed by running township and section lines, and establishing corner posts or monuments. The surveys of land bordering navigable water terminate at the line of ordinary high water. The shores are meandered to ascertain sinuosities, and all tracts which are cut into by shore lines are platted as fractional lots. In general, all grants and conveyances by the government give title only to land above the line of ordinary high water. Mann v. Tacoma Land Co. (C. C.) 44 Fed. 27; s. c., 153 U. S. 273, 14 Sup. Ct. 820, 38 L. Ed. 714. Whatever exceptions there may have been to this rule in actual transactions do not in any way affect the issues in this case.

The material facts to which these fundamental principles must be applied for the purpose of determining the rights of the parties herein are as follows:

The exclusive feature of the rights of Indians as occupiers of the country within the boundaries of Oregon Territory, which as originally organized included this state, was terminated by the act of Congress creating Oregon Territory, and the act of September 27, 1850, c. 76, 9 Stat. 496, familiarly known as the "Oregon Donation Law," because those acts were designed to encourage families to emigrate from the states and become permanent inhabitants of Oregon. Notwithstanding that fact, however, the government subsequently made treaties with the Indians whereby they relinquished their rights to all
land in this region not specifically held in reserve for their use. A treaty was made with the Puyallups and allied tribes December 26, 1854. 10 Stat. 1132. By that treaty the land designated as a reservation for the Puyallups comprised 1,280 acres on the west side of Commencement Bay, but it was never surveyed as a reservation nor occupied as such. Governor Stevens selected for the tribe a much larger and better body of land through which the Puyallup river flows into Commencement Bay, and caused it to be surveyed and a map made, showing its exterior boundaries, a photographic copy of which map is here exhibited.
The lands so selected, surveyed, and mapped were, by an order made by President Pierce in the year 1857, set apart as a reservation for the Puyallups in lieu of the 1,280 acres designated by the treaty, and was accepted by them. As shown by the map, part of the north and west boundaries follow the shore of Commencement Bay, but instead of adhering strictly to the shore line, part of the west boundary was a straight line cutting across points of land and indentures of the bay.

After the government survey of the township in which this reservation is situated had been made, President Grant by an executive order dated September 6, 1873, extended the reservation so as to include therein a fractional lot of section 34 situated west of the straight line, said fraction being all of the upland contiguous to the straight line not previously included. Subsequently all of the reservation as extended, except a tract reserved for agency purposes situated south of the Puyallup river, was cut up into lots and surveyed and platted and allotted to the Indians in severalty, and patents were issued to the allottees. This survey and platting of the reservation was pursuant to authorization by Congress, which by an appropriation act approved May 29, 1872 (Act May 29, 1872, c. 233, 17 Stat. 186), appropriated $150,000 for the survey of the exterior boundaries of Indian reservations and subdividing portions of the same. The survey and plat were duly approved and became a public record in the General Land Office of the United States in the year 1874. In making this survey the straight line constituting part of the west boundary as shown by Governor Steven's map was disregarded, and the boundary was traced following the sinuosities of the shore in conformity to the general system of public land surveys, so that only the land above the line of ordinary high tide was included in the reservation and platted.

By the treaty of 1854 the Indians were guaranteed the right of taking fish at all usual and accustomed grounds and stations, in common with all citizens of the territory, and of erecting temporary houses for the purpose of curing; and, although denied by the defendants, it will be assumed as a fact for the purpose of this decision that the Indians were accustomed to resort to the shallow water adjacent to the reservation as fishing grounds. But they have never made other use of the tide land involved in this controversy, nor held corporeal possession thereof.

In the year 1873 Tacoma was designated as the Western terminus of the Northern Pacific Railroad, and before the adoption of our state Constitution it had grown to be an important commercial city. It has continued to grow and still grows; Commencement Bay is its harbor, and its shore lands between high and low water are of great value as sites for industrial works, and especially for terminal grounds for other railroads having projected lines extending to the city.

Under authority of the state these so-called tide lands have been platted, with projected streets intended to preserve the public right of free access to the harbor from the city and from the allotted lands of the Indians.

Article 26 of the Constitution of the state of Washington is a compact with the United States, by which the state makes the following disclaimer:
"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 thereof shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States. * * *"

Pursuant to Act Cong. Aug. 19, 1890, c. 807, 26 Stat. 354, a commission consisting of three eminent citizens was appointed to visit the Puyallup reservation and make a full investigation regarding it, with reference to specified points, including the following:

(1) The nature of the title to, and value of, the lands allotted in severalty. (2) Whether there are any common lands which have not been allotted, and, if so, the value of the same and of the interest of the Indians therein. (3) Whether such reservation embraces the land on Puget Sound between high and low water mark.

The commission made a report which was submitted to Congress by President Harrison, with an accompanying letter written by Hon. John W. Noble, Secretary of the Interior (Ex. Doc. No. 34, 52d Cong. 1st Sess). The Secretary's letter contains the following statements:

"Upon the receipt of the report of the commission it was referred to the Assistant Attorney General for this department for his opinion in regard to the conclusions arrived at by the commission. It was also referred to the Indian Office for an expression of opinion as to the views adopted by the commission.

"On comparing the several views thus obtained, I find quite a divergence of opinion on some of the points of investigation by the commission; and upon a careful consideration of them all, as fully set forth in the papers transmitted herewith, my views as to the propositions, taken in their regular order, are as follows: * * * As to whether the reservation embraces the land between high and low water mark. "The Assistant Attorney General and the commission agree that the land below high-water mark is not embraced in the reservation, while the Commissioner of Indian Affairs thinks differently, as he believes it was the intention of the executive order to embrace it. In my judgment all that was granted by the executive order was contained in legal subdivisions only, which extended only to the meander line; which line did not extend to low-water mark."

After the report of the commission had been submitted, Congress made provision for the sale of such allotted lands as the allottees did not need for homes, and for the platting and sale of part of the agency tract. Act March 3, 1893, c. 209, 27 Stat. 633. Pursuant to that law a commission was appointed to select the lands to be sold and manage the sale thereof, and said functions of the commission have been executed with the approval of the Secretary of the Interior, and with apparent respect to the opinion of Secretary Noble, holding that the Indians have no right to tide lands.

The defendants are bona fide purchasers from the state of the lands involved in this litigation.

A very good decision of this case could be made in a short paragraph, stating the simple proposition that the complainants are not entitled to prevail, for the reason that they have failed to set forth in their bill of complaint any deed, grant, law, treaty, record, or prescriptive right evidencing any color of title in the Puyallup Tribe of
Indians as a community to any part of the shore lands involved in this litigation, nor have they made even a pretext of right by virtue of actual exclusive possession thereof. The foregoing statement of legal principles and narrative of facts has been made, however, because of the large interests involved, and out of respect for the learned lawyers who have laboriously and in good faith prepared the case and submitted it for adjudication.

The conclusions deducible from the premises are as follows:

(a) The aboriginal inhabitants of this country were not seised of tides to real estate. Johnson v. McIntosh, 8 Wheat. 543, 5 L. Ed. 581; United States v. Cook, 19 Wal. 591, 22 L. Ed. 210; Buttz v. Northern Pac. R. Co., 119 U. S. 55, 7 Sup. Ct. 100, 30 L. Ed. 330; United States v. Moore, 161 Fed. 513, 88 C. C. A. 455. All exclusive rights of the Indian complainants, as original occupiers of the country, were terminated by the Oregon donation law, and were relinquished by them by the treaty of 1854.

(b) Any disposition of proprietary rights in the seashore by the government of the United States, being obnoxious to the firmly established principle that control of the seacoast is an attribute of sovereignty appertaining to the states, could only be valid, if valid at all, by virtue of the exercise of the power vested in Congress to be exercised for the national welfare, and there is no pretext set forth in the bill of complaint or stated in the argument of the complainants' solicitors that any proprietary right to shore lands became vested in the Puyallup Tribe as a community by virtue of any provision, expressed or implied, of any act of Congress whatever. The treaty of 1854 was not in any sense a conveyance of title to any of the lands in controversy to the Puyallup Indians; on the contrary, the treaty was a relinquishment by said Indians of whatever rights to these lands may have been theretofore claimed by them. For the reasons already stated, the President could not grant shore lands by the making of an executive order designating the tract of land to be held as a reservation, and the executive orders made by President Pierce and President Grant, referred to in this opinion, cannot by any rule of interpretation or construction be made to express an intention, on the part of either President, to effect an object other than that of setting apart land for the use of the Indians for whatever period of time it might be required for such use, and the orders referred to do not purport to fix the boundaries of the reservation irrevocably or permanently. They were made in the exercise of authority expressly assented to by the Indians in the treaty of 1854, vesting in the President the power to change and relocate the reservations, and by the approval of the survey and platting of the reservation, which was in legal effect the act of the President, the western boundary originally indicated by the straight line of Governor Steven's map was changed to a line following the sinuosities of the shore at ordinary high tide. The patents issued to the Indian allottees for designated tracts to be held in severalty, conveyed no proprietary rights in any land to the Puyallup Tribe as a community nor any incidental rights other than, or different from, the rights comprised within ordinary and usual conveyances, by patent, of land bordering tidal waters, which do not
convey the title to the shore land beyond the ascertained line of ordinary high tide. Every one of those patents extinguished all the rights of the tribe as a community with respect to the tract of land conveyed by it. The fishing rights secured to the Indians by the treaty, were by its express declaration a mere privilege to be enjoyed in common with all citizens and logically antagonistic to any claim of an exclusive or adverse right, and entirely lacking in all of the essentials of a grant of an inheritable estate.

The whole argument in support of the complainants' contentions is reduced to conciseness in the criticism of the report of the Puyallup commission made by Mr. T. J. Morgan, Commissioner of Indian Affairs, as follows:

"I cannot accept the view of the commissioners in relation to the ownership of the lands on Puget Sound lying between high and low water mark.

"It appears to me that the government in selecting this particular tract of land situated upon the borders of Puget Sound as a home for the Puyallup Indians, and throwing about them the lines of a reservation as a separation between them in their home, on the one hand, and all others on the outside of that line on the other, had in mind, primarily, the isolation of these people temporarily and their protection under the specific care of the government, until they could reach the point of self-protection. I can hardly think that the government designed to withhold from these people any rights or privileges of any kind whatever which could ordinarily attach to an act of government vesting in them the right and title to this particular body of land. If the government had intended to reserve to itself or for another the right and title to the lands lying between high and low tide borders upon the reservation, I think that fact would have been expressly stated in the executive order extending the reservation.

"On the other hand, the letter of the Acting Commissioner of Indian Affairs, dated August 26, 1873, in asking for the extension of the boundaries of the reservation (see pamphlet, Executive Orders to Indian Reservations Prior to April 1, 1890, p. 88), stated expressly that 'this would give them a mile of water frontage directly north of Puyallup River, and free access to the waters of Commencement Bay at that point.'

"The executive order issued by President Grant, September 6, 1873, extending the reservation in accordance with the request of the Acting Commissioner, confirmed, as it seems to me, specifically, this express stipulation, and thus secured to the Indians, beyond any question, any and all right and title to any land whatever lying between them and the deep water.

"It is worthy of note, also, as stated by the commission on the authority of Agent Eells, that at the head of Commencement Bay there are patented tracts, portions of which are submerged at high tide, from which it would appear that not only has the government in general terms conveyed to them this tide land in consideration, but in specific cases has patented to them a portion thereof.

"This view seems to be confirmed by a map of the reservation, prepared in 1856 by Governor Stevens, who made the treaty with the Puyallups, in which, while not conclusive in itself, the water line of the reservation is so drawn as to certainly seem to include a considerable portion of land that ordinarily would be overflowed by high tide. While this is not conclusive in itself, it certainly adds weight, in so far as it goes, to the conclusion which I have set forth.

"In differing in this particular with the views of the honorable Assistant Attorney General (see his memorandum), I beg leave to suggest that the setting apart by the government of this particular tract of land to these people was, from the nature of the case, as being intended to provide an isolated home for them, exceptional in its character, and takes it out of the operation of the common law as set forth by the commissioners."

The concluding paragraph of the above quotation challenges attention to the fallacy of the whole argument, for there it appears to be
based upon an assumption that by setting apart this reservation for their use the government intended to isolate the Fuyallups, and for that reason a grant of the shore should be presumed contrary to the general laws of the country. If the supposed intention existed when the reservation was first created and was based upon conditions then existing, it was subject to change when the conditions changed by the advance of civilization, the education and enfranchisement of the Indians, and the utilization of Commencement Bay as the harbor of a commercial city. Of course, a mere change of conditions would not annul a valid grant of property rights, but the executive orders making a reservation of public land for use of the Indians were not irrevocable, nor in any sense a grant of title. The difference between a reservation and a grant is as wide as the difference between a tenancy at will and an estate of freehold, and every step in the process of transferring the title to land within this reservation, and the entire history of Indian reservations, is incompatible with any theory other than that the title remained vested in the government until the lands were allotted or sold. Ross v. Eells (C. C.) 56 Fed. 855; s. c., 64 Fed. 417, 12 C. C. A. 205; U. S. v. Moore, 161 Fed. 513, 88 C. C. A. 455.

I intend by my selection of words in the preceding paragraph to emphasize the fact that the object of this suit is to obtain a decree establishing an absolute title in fee simple to property of no value as fishing ground, but worth now several hundred thousand dollars for industrial uses, and having, in view of its environments and in connection with projected enterprises, a potential value of many millions of dollars; and to direct attention to the distinction between this case and the case of the United States v. Winans, 198 U. S. 371, 25 Sup. Ct. 662, 49 L. Ed. 1089, which was a suit to preserve rights of Indians to resort to a fishing station for the purpose of taking and curing fish, assured to them by a treaty.

(c) Can the title asserted by the Indian complainants be supported by any grant from, or declaration or act of, the state of Washington, or by estoppel? The decision of these questions involves only the consideration of the compact between the state of Washington and the United States government contained in article 26 of the state Constitution. In two unpublished decisions, this court has held that shore lands, and lands subject to tidal overflow at extreme high tide, are comprehended within the terms of the compact by which the state disclaims all right and title to all lands owned or held by any Indian or Indian tribes. In one of said cases the property in controversy was the rim of Squaxon Island, the whole of which was by a treaty reserved for an Indian reservation, and which at the time of the adoption of the Constitution remained a reservation and in the exclusive possession of the Indians, and the court held that, by actual possession of the Island, the Indians held all of its shore, and therefore vendees of the state were by the terms of the compact precluded from acquiring any right thereto until the rights of the Indians should be terminated by action of the government of the United States. In the memorandum decision, the Court said:
"This disclaimer applies not only to lands owned by the Indians, whether patented or unpatented, but also to all lands held, that is to say, occupied and used, by individual Indians, or by tribes." Manuscript Decision in Case of United States v. O'Brien et al. (No. 849, filed in U. S. Circuit Court at Tacoma).

The other case referred to involved the title to land covered with grass situated within the surveyed boundaries of the Swinomish Indian reservation, and above the line of ordinary high tide, although subject to overflow periodically by extreme high tides. The Swinomish reservation having been surveyed according to established rules, and the land in question being within the surveyed boundaries of an Indian reservation at the date of the adoption of the state Constitution, and being above the line of ordinary high tide, and having been allotted to an Indian, the title of the allottee was held to be superior to the claim of title asserted by a vendee of the state, and the decision was rested partly upon the compact contained in the state Constitution. Manuscript decision in case of Corrigan v. Brown (No. 1093, filed in U. S. Circuit Court at Seattle).

These decisions were based upon grounds which do not exist in the present case, and they are not precedents supporting the contention of the complainants.

The compact cannot be construed in any way to make it effective as a grant or conveyance of title; it is but a declaration that the state will respect existing rights of Indians during such time as such rights continue to exist, and its utmost effect is to bar the state and its vendees from claiming land owned, or held in exclusive possession, by Indians or tribes at the date of the adoption of the Constitution.

So far from establishing a title to the tide lands in controversy by prescription, or adverse possession, the facts are that the Indian complainants have never held exclusive possession, nor have they been recognized as owners; the state of Washington has, since its organization, continuously and steadfastly asserted its paramount title; and the national government through the Secretary of the Interior, the head of the department having superintendence of Indian affairs, denied the claim which they assert 15 years prior to the commencement of this litigation, during which time the Indian complainants have not been restrained by legal disabilities, but have been entitled to all the rights of citizenship, including the right to litigate in the courts of the country.

For the reasons above given, I direct that a decree be entered on the merits, that the complainants take nothing, that the titles of the respective defendants be quieted, and that they recover their taxable costs.
IN RE AVERICK.

(District Court, M. D. Pennsylvania. June 1, 1909.)

No. 1,085, in Bankruptcy.

Bankruptcy (§ 136*)—Order Requiring Bankrupt to Turn Over Property.
Where a retail merchant, three months prior to his bankruptcy, had a stock worth $5,000, to which he afterward added $10,500 worth, which was more than his business required, and failed to account in any way for goods to the value of more than $4,000, accepting the valuation given by himself in his schedules on his remaining stock, such facts were sufficient to sustain a finding that he concealed property from his trustee, and an order requiring him to turn the same over.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 136.*]

In Bankruptcy. On exceptions to report of John S. Courtright, referee, sur rule on bankrupt to turn over certain goods and merchandise.

W. A. Skinner and C. A. Van Wormer, for bankrupt.

R. L. Levy, for trustee.

ARCHBALD, District Judge. The bankrupt had two stores; the main one at Susquehanna, Pa., where he resided, and the other at Sidney, N. Y., a few miles distant. He went into voluntary bankruptcy on December 6, 1907, and turned over to his trustee his stock on hand, which he valued in his schedules at $6,800. As shown by his bills and invoices, he had bought for the fall trade goods to the amount of $10,427.19, and had on hand at the beginning of the season, as found by the referee, stock in the two stores of the value of $5,000—$4,000 at Susquehanna and $1,000 at Sidney. He paid out some $3,025 to creditors on various accounts in the three months preceding his bankruptcy, and had $1,100 of other cash expenses, beside losing $300 by sales on credit. These figures show $4,202.19 worth of goods unaccounted for, which the bankrupt must either have in his possession and keep back from his trustee, or else have disposed of and put the money in his pocket.

The conclusion so reached depends, of course, on the evidence and the deductions made from it, of which there can be no just criticism, provided the figures taken are accurate. That brand-new goods of over $10,000 went into these stores within a few months immediately preceding bankruptcy is not and cannot be denied, being proved by the bills or invoices. It is said, however, that these goods began to come in in June and July, and not, according to the dates on the bills, in August and the months following, the bills being postdated; and that the reckoning, therefore, should not begin with August 1st, but be carried back of that, which would make quite a difference. But, if this was the fact, it would have been very easy to have pointed out the particular bills to which it applied, on some few of which, indeed, the postdating is indicated; and, being capable of definite proof of this kind, it should not have been left to the mere general statement of the bankrupt. Beside that, when Greenwald was at the Susquehanna store, the fore part of August, his estimate of the stock there, which is

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
objected to as too high, was only $5,000, showing that in no event could any great quantity of new goods have come in until afterwards. It is true that he saw some fall and winter suits, so that there may have been some new goods there. But it is not at all likely, considering the quantity that he saw, and the fact that it was still summer, that there were very many.

The value of the goods which the bankrupt had when he failed is put in the schedules, where he would be inclined to make the most of them, at $6,800. According to the appraisers they were worth only $4,800, and they were sold by the trustee the latter part of January, after taking out the $300 exemption, at $3,900. It is now claimed that at cost prices, with which comparison is to be made, they were worth $7,600. But, all things considered, the estimate of the bankrupt, when he made up his schedules, may well be taken. There was no controversy then, as there is now, and he had no purpose to serve in fixing the value, except possibly to enhance it. And we are not obliged to accept what he says about it at this time, in the face of that, simply because he swears to it.

As already stated, the value of the stock in the Susquehanna store, when Greenwald was there, according to his estimate, was about $5,000. That he was competent to speak on the subject, by reason of his experience, there can be no question, and his observation was not a casual one. He looked over the store for the purpose of seeing how much there was, in order to decide whether to give the bankrupt credit. The contention now is that the stock on hand which he saw was only worth $3,000. But it is admitted by the bankrupt that this estimate is a mere guess by him. And opposed to it we have his statement, earlier in his examination, before there was any suggestion as to what it might lead to, that he carried as a rule at the Sidney store about one-half as much as at Susquehanna, and that the average at Sidney was about $2,500. It is said, however, that Greenwald cannot fix the time when he was there, except that it was between the 1st and the 15th of August, and that, at the later date, taking the bills as they read, $1,100 of new goods had come in, which should be allowed for. But the referee has not charged the bankrupt with having $5,000 at Susquehanna on August 1st, but $4,000, or $1,000 less than the amount fixed by Greenwald, which eliminates this question.

It is finally said that the money that went into the bank, rather than what was checked out, is to be taken as representing sales, and that this amounted to $7,060.91, including $850.42 of borrowed money to be deducted. But this sum is derived by going back to June 1st, which there is no reason for doing; and neither is there in the record any evidence by which, if material, to make the correction. And, besides that, if money from sales, above what was checked out, was deposited in bank, the bankrupt is not entitled to credit for it, unless it was also turned over to his trustee, or is otherwise accounted for, being convicted, without this, of having got away with just so much more; whether of property, or money derived from it, is immaterial.

What is there, then, to relieve the bankrupt from the logic of the situation? He lost no money by speculation, bad investments, or gambling. He had no bad debts outside of the $300 already allowed him.
Neither his store nor his personal expenses were large, and all that he paid out on this account, as well as on business debts or for borrowed money, has been credited. The amount of goods which he bought was altogether beyond the needs of his business, and, having been received within three or at most four short months immediately preceding his bankruptcy, had disappeared at the end of that time with almost nothing to show for it. He could not have sold them in the ordinary course of trade, his business not being large enough to take them. And if he disposed of them at forced sales it would have been known and attracted attention. It is this that constitutes the strength of the case against him and gives an adverse cast to his so-called failure. All things considered, the only fair conclusion, with the figures so seriously against him as they are, is that he covertly made away with so much as he cannot account for, and should now in consequence be required to produce and turn it over.

There is nothing in the position that the order made does not correspond with the petition of the trustee, which is the basis of the proceedings. In both he is charged with having in his possession goods and merchandise of a specified character and value which he withholds from his trustee, which is clearly sufficient to apprise him of the charge against him.

The motion to dismiss the proceedings is refused, the exceptions are overruled, and the order of the referee is confirmed.

PROVIDENT CHEMICAL WORKS v. HYGIENIC CHEMICAL CO.
(Circuit Court, S. D. New York. May 14, 1909.)

1. Contracts ($206*)—Construction—Agreement to Share Cost and Expense of Suit—"Expense."

An agreement between two parties to share in paying the "cost and expense" of a suit against one of the parties includes the costs taxed against such party as a part of the "expense" of the suit.

[Ed. Note.—For other cases, see Contracts, Dec. Dlg. § 206.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2590-2593; vol. 8, p. 7637.


Plaintiff and defendant, each of whom was charged with infringement of a patent and interested in establishing its invalidity, entered into a contract to share equally the cost and expense of defending any and all suits brought against either or its customers. A suit against plaintiff resulted in a decision of the Circuit Court of Appeals affirming the validity of the patent, and an application for a writ of certiorari to the Supreme Court was denied. Subsequently the owner of the patent brought a suit for infringement against defendant, in which the only litigated issue was as to defendant's infringement. Held, that the cost and expense of such suit were not within the contract, which must be construed as intended to apply only to suits in which the parties had a mutual interest.

[Ed. Note.—For other cases, see Contracts, Dec. Dlg. § 206.*]

At Law.

This is an action submitted upon agreed facts, and arising upon a contract between the parties to share the "cost and expense" of defending certain suits

*For other cases see same topic & § Numbers in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
brought by the Rumford Chemical Works upon patent No. 474,811. Both plaintiff and defendant were concerned in the manufacture of granulated phosphate, upon the production of which the patent in question was taken. They were each interested in establishing the invalidity of the patent, if possible, and, being individually each threatened with suits by the Rumford Chemical Works, they entered into an agreement on May 17, 1900, by which they mutually promised "that any and all suits brought by said Rumford Chemical Works shall be fully and faithfully defended, as follows: If brought against any person (or persons) west of the Mississippi river, or in the states of Wisconsin, Illinois, Mississippi, and Tennessee, the same shall be defended under the supervision of the said Provident Chemical Works through attorneys appointed by it; and, if brought against a resident of any other of the United States, the same shall be defended under the supervision of said Hygienic Chemical Company through attorneys appointed by it, the cost and expense of such defenses to be equally borne by the parties hereto."

The Rumford Chemical Works commenced a test suit against the plaintiff and two of its customers on the 15th day of June, 1900, which eventually resulted in the establishment of the patent in favor of the Rumford Chemical Works by the Circuit Court of Appeals for the Second Circuit on the 7th day of July, 1904. Application was made for a writ of certiorari to the Supreme Court, and this was denied on December 8, 1904, thus closing this litigation.

The parties paid all expenses of this litigation during its continuance, in accordance with the contract, but the defendant refuses to pay the costs and disbursements which the complainant in that suit taxed against this plaintiff, and which amounted to $4,646.46, and likewise refuses to pay one-half the disbursements of the plaintiff to its attorneys, Von Briesen & Knauth, which were incurred for the purpose of reducing these costs. The amount of these is $312.90. The plaintiff sues for one-half of each of these sums under the contract. The position of the defendant is that the costs taxed were not part of the "cost and expense of such defenses."

The defendant likewise pleads a counterclaim which arises upon the contract under the following circumstances: The Rumford Chemical Works had brought other suits beside the one which was made a test, and one of these suits was against the Hygienic Chemical Company. This was dismissed on July 21, 1904, by an order entered in the clerk's office of this court dismissing the bill with costs in favor of the defendant by reason of the failure to except or reply to the answer, but the Rumford Chemical Works began another suit on August 2, 1904, in which the Hygienic Chemical Company was defendant, together with certain individuals. This suit came on for a hearing before Judge Holt on April 12, 1907, at which he dismissed the bill. Upon appeal to the Circuit Court of Appeals for this circuit, Judge Holt's decree was reversed on February 11, 1908, and a decree for an injunction and accounting was entered in accordance with the opinion of the Circuit Court of Appeals upon its mandate. A writ of certiorari has been granted by the Supreme Court in that case, and the proceedings are still pending undecided in the Supreme Court. After the decision of the Circuit Court of Appeals in the case against the plaintiff herein, the plaintiff notified the defendant that it would not be liable for any further cost in carrying on the litigation between the Rumford Chemical Works and the defendant, but this notice the defendant repudiated and alleged that it would hold the plaintiff to the contract. The defendant has paid the sum of $2,065.83 for disbursements and legal services since the decision of the Circuit Court of Appeals in the case of the Rumford Chemical Works against the plaintiff herein, and claims the right to charge the plaintiff with one-half of that sum, or $1,032.91, under the contract. The legal services from December 8, 1905, were rendered by different attorneys from those agreed upon by both parties to conduct the case of the Rumford Chemical Works against the plaintiffs. The substitution of these attorneys was without the consent of the plaintiff.

The decision of the Circuit Court of Appeals in the case against the defendant is reported in 159 Fed. 436, 89 C. C. A. 416, and this is by reference made a part of the agreed facts upon which the case is to be heard. It appears from this decision that the second suit turns entirely upon the question of whether the defendant had, in fact, infringed patent No. 474,811, not upon the question of the validity of that patent. The Circuit Court of Appeals decided
that by its share in the first suit, in which this plaintiff was defendant, it had become a privy to the infringement, and that an injunction should go.

Gardenhire & Jetmore, for plaintiff.
Jellenik & Stern, for defendant.

HAND, District Judge (after stating the facts above). I will first consider the plaintiff's claim. The words "cost and expense of such defenses" ought reasonably to be interpreted as including any expense directly caused by defending the suits. It may be that "cost," if used alone, could have been limited to a disbursement made in exchange for a quid pro quo, though we do use the word also to indicate loss without anything received in exchange, as in the expression, "You will find it to your cost"; but the word "expense" clearly covers any disbursement, whether made in purchase of the services of lawyers, or without any quid pro quo whatever. It must include all sums whose payment became necessary because the suits were defended, rather than settled without litigation. Among the sums which the plaintiff was obliged to pay because it had interposed a defense, were the sums taxed for costs and disbursements to the complainant in the patent suit, the Rumford Chemical Works. These were an expense arising from the defense, for the reason that without any defense there could never have been any such expense. The parties certainly meant to share every loss which should be occasioned by the impending contest, and the contest could not have gone on without assuming the risk of costs in case of defeat. I do not suppose that the plaintiff would have consented to allow its case to be conducted by attorneys chosen by the defendant, if it had supposed that the bill of costs those attorneys were running up was a matter of indifference to the defendant.

Judge Levintritt's decision in Munro v. Maryland Casualty Co., 48 Misc. Rep. 183, 96 N. Y. Supp. 705, is distinguishable. In that case the casualty company had agreed to assume the expense of any suit brought against the insured for negligence. This promise was "to defend at its own cost." Such an agreement made by one in the position of a lawyer certainly did not include the obligation to pay the costs in case of defeat. The promise was, not to pay all expense which might result from contesting the plaintiff's claims, but to conduct the defense of the litigation.

I think, therefore, that the plaintiff should have judgment upon its claim for the full amount of $2,323.23.

Next, as to the counterclaim of the defendant. The question is, whether the parties intended to share the expenses of more than one litigation carried to a conclusion. The words used are "any and all suits," and these words were clearly required by the fact that the Rumford Chemical Works, as is usual, purposed to carry on a general attack against both the parties hereto and their customers. I have no doubt that the cost of all litigation in all these suits was to be shared by the parties up to a time when it became reasonably certain that the validity of the patent had been definitely decided. After that point it could not have been to the mutual advantage of either party to continue to fight, although it might have been to the separate advantage of either. However, it was the mutual advantage of both
which dictated the contract in question, and their obligations must be limited to that purpose. It was reasonably certain, after the denial of the writ of certiorari by the Supreme Court in the suit of Rumford Chemical Works against the plaintiff, that the validity of the patent was established. The success which the defendant had in the subsequent litigation, and the possibility of its ultimate success in the Supreme Court, does not, so far as the statement of facts goes, depend upon the invalidity of the patent, but upon whether the defendant was in fact an infringer. If the validity of the patent is still in issue, this fact should have been stated in the agreed facts, and, as the facts are, I can only consider the decision of the Circuit Court of Appeals, from which it clearly appears that the second suit did not involve the validity of the patent. So far as the plaintiff is concerned, the contract conclusively established that, whether the defendant was an infringer or not, it had an active interest in the litigation. After that litigation was determined, the plaintiff could not have had the slightest interest in the question of whether the Rumford Chemical Works could hold the defendant in a suit.

I conclude, therefore, that the second litigation was not within the meaning of the contract between the parties, and that therefore the plaintiff was not responsible to the defendant for the costs incurred in that contest.

I therefore direct that judgment be entered for the plaintiff in the sum of $2,479.67, with interest from December 29, 1904, upon $2,323.23, and that the counterclaim be dismissed upon the merits, with costs.

I do not find any statement in the agreed facts showing when the bill for services was paid to Von Briesen & Knauth, and so I cannot award interest upon that sum, unless the parties agree.

THE NETTIE.

THE FRANK C. KUGLER.

(District Court, E. D. Virginia. May 3, 1909.)

TOWAGE (§ 15*)—INJURY TO TOW—MUTUAL FAULTS.

While a tug was towing four barges on a hawser down Pamlico Sound at night, during a storm, her hawser parted, setting the tugs adrift. She signaled them to anchor, and herself proceeded to a port. One of the barges drifted upon a shoal and grounded, losing her cargo and receiving serious injury. Held, on the evidence, that the hawser supplied by the tug which had been spliced was unsuitable and insufficient for the service, and rendered her liable for the injury; that the barge was also in fault for failing to anchor properly, and that the damages should be divided, the preponderance of the evidence showing that she drifted for an hour before grounding.

[Ed. Note.—For other cases, see Towage, Cent. Dig. § 36; Dec. Dig. § 15.*]

In Admiralty. Suit against tug for grounding of tow.

Floyd Hughes, for libelant.

Edward R. Baird, Jr., for respondent.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
WADDILL, District Judge. The libel in this case was filed in behalf of the owners of the barge Frank C. Kugler, and the owners of the cargo of phosphate on board thereof, to recover of the respondent the damages occasioned by the grounding of the Kugler, while in tow of the tug Nettie, along with three other barges, in the waters of Pamlico Sound, N. C.

On the night of the 4th of November, 1908, the Nettie had in tow the barge Kugler, and three other barges—the Sallie, the C. G. Blades, and the J. B. Blades—en route from Norfolk, Va., to Bayboro, N. C., the Kugler being the hawser barge, loaded with a cargo of 531 tons of fertilizer, and the other three barges being light. The tow started from Norfolk on the 30th of October, 1908, then consisting of the first three barges named and certain lighters, and after passing through the canals, having dropped the lighters en route, and taken on instead the fourth barge, the J. B. Blades, on the night of the 4th of November, 1908, while proceeding down Pamlico Sound, in the vicinity of the Old Tower Light, on the Royal Shoals, and, after having passed the Bluff Shoal Light some four or five miles, about 10:30 p. m., encountered a severe gale, which resulted in the tug's hawser parting, and setting the tow adrift; whereupon the tug gave signals indicating the parting of the hawser, and the necessity of the tow coming to anchor, and immediately proceeded to the nearest harbor, neither standing by the tow, nor awaiting to see that the barges were properly anchored. Some time thereafter, variously estimated at from 20 minutes to 2 hours, the Kugler grounded on the Royal Shoal, where she remained some days, and until removed by the Merritt & Chapman Wrecking Company. The damage to the Kugler was quite serious, and her cargo a total loss. The other barges, after the Kugler grounded, cast anchor, and sustained no injury.

The grounds of negligence alleged by the libelant and respondent, respectively, against each other, are many; but the case turns upon whether, as claimed by the libelant, the tug was equipped with an unsuitable and insufficient hawser; whether the tow was being navigated too closely to the Royal Shoal, and run aground; or whether, as claimed by the Nettie, the hawser parted at a point some mile and three-quarters to the northwestward of the Old Tower Light, on Royal Shoal, and the Kugler failed promptly and properly to cast her anchor, thus drifting upon the shoal and grounding.

Many witnesses were examined by the parties respectively, including the crews of the tug and barges, and several experts, as to the sufficiency of the hawser, as also persons familiar with the waters of Pamlico Sound, who testified as to the probability or improbability of the happening of the accident as claimed by the parties.

The conclusion reached by the court upon the whole case is:

First. That the tug Nettie was not equipped, at the time of the parting of the toline, with a sufficient and suitable hawser for the purpose of performing the work in hand, as was required of her, and for loss arising thereby she is liable. The Britannia (D. C.) 148 Fed. 495, 499, and cases cited. Considerable evidence was introduced by the respondent tending to show the exercise of proper care in the selection of this hawser; but after giving much consideration to the
same, the fact that it was a spliced hawser, and parted at least twice when its strength was tested, satisfies the court that it was not a suitable and safe appliance for the service required, taking into account especially the dangers liable to, and which did, arise from encountering heavy seas in Pamlico Sound.

Second. The questions of negligence in the navigation of the tow, the place of the parting of the hawser, and grounding of the Kugler should be considered together. If the Kugler grounded, as contended for by the libellant, virtually at the time of the parting of the hawser on Royal Shoal, in the vicinity of the Old Tower Light, as distinguished from a mile and three-quarters to the westward thereof, then the question of negligence arising from improper navigation would be quite apparent. But if the barge was allowed to drift at this point, and ground, after the parting of the hawser, and after proper signals had been given by the tug to come to anchor, by reason of the barge's navigator's failure to perform his duty in promptly anchoring, a different condition arises. The correct solution of these questions can only be determined from a full review of all the testimony. After the most careful consideration the court can give, having seen and heard the witnesses testify, most of whom are intelligent, and all doubtless conscientious in their several statements, the finding of the court is that, from the very large preponderance of the testimony, the barge did not ground, as contended for by her, a few minutes after the parting of the hawser, but, on the contrary, the hawser parted when she was some distance from the location in which she grounded, and that subsequently, and at least an hour after the hawser parted, the barge drifted and grounded upon Royal Shoal, which was due in part either from the failure promptly to anchor the barge, or the dragging of the port anchor, which was the only one cast out. The storm at the time was terrific; the night very dark; and the navigators of the three remaining barges all testified to the failure of the Kugler to anchor, and of drifting for at least an hour, and the Kugler does not claim to have put out but one anchor, and that the lighter of the two she had on board; her navigator's statement being that it was only necessary to put out one, as he found he was in shoal water. The testimony, however, in this regard strongly preponderates against his statement, and there is also some evidence to show that the Kugler's master, by reason of the storm, was disabled from seasickness, which may possibly account for his dilatory and inefficient action in caring for his barge after the parting of the hawser. Be that as it may, it sufficiently appears to the court that he did not promptly exercise the degree of care that he should have done, having regard to the necessity for safe anchorage of his barge, and the neglect of which in part caused the loss.

Third. Having reached the conclusion that the damage to the Kugler and her cargo arose from the joint and concurring negligence of the tug and the Kugler, it follows that the damages arising from the occurrence should be divided between them, and a decree determining the question of fault and dividing the damages may be entered.
SHULTHIS v. M'DOUGAL.

SHULTHIS v. McDOUGAL et al.†

BERRYHILL v. SHULTHIS et al.

(Circuit Court of Appeals, Eighth Circuit. June 3, 1909.)

Nos. 2,901 and 2,905.

1. INDIANS (§ 18*)—LANDS—DEATH BEFORE ALLOTMENT—DESCENT UNDER STATUTE—"DESCEND."

Section 7 of the supplemental agreement with the Five Civilized Tribes of Indians (Act June 30, 1902, c. 1323, 32 Stat. 501), promulgated August 8, 1902, provides that "all children born to those citizens who are entitled to enrollment under previous acts, subsequent to July 1, 1900, and up to and including May 25, 1901, and living upon the latter date, shall be placed on the rolls made by said commission." Also, "if any such child has died since May 25, 1901, or may hereafter die before receiving his allotment of lands, and distributive share of the funds of the tribe, the lands and moneys to which he would be entitled if living shall descend to his heirs as herein provided to be allotted and distributed to them." Held, that the word "descend," which was technically inapplicable to the situation described, since the decedent would never be seized of the property, was used to indicate the character of the title or estate which passed to the heirs, it not being intended that they should take the property as an additional bounty from the tribe but by virtue of their heirship, their title being one of inheritance rather than of purchase, the situation being made the same by such provision as though the title had become vested in the decedent before his death.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 49; Dec. Dig. § 18.*

For other definitions, see Words and Phrases, vol. 3, pp. 2012-2014.]

2. INDIANS (§ 18*)—LANDS—DEATH BEFORE ALLOTMENT—DESCENT—"NEW ACQUISITION"—"FROM HIS FATHER."

The heirs who take under such provision and their estate are determined by Mansf. Dig. Ark. c. 49, which provides that, on the death of a person intestate, unmarried, and leaving no children, the estate, if it came from the father, shall go to the father, and if from the mother shall go to the mother, "but if the estate be a new acquisition it shall descend to the father for his lifetime and then descend in remainder to the collateral kindred of the intestate." A child whose father was a member of the Creek Tribe, but whose mother was not, was born May 6, 1901, and died in November of the same year. He thus became entitled to enrollment in the tribe, but had not received his allotment at the time of his death. Held that, technically, the Arkansas statute did not apply to the situation, since the land to which the decedent was entitled and which was the common property of the tribe did not, strictly speaking, come to him by grant, inheritance, or purchase, but by a division of lands held in effect by a tenancy in common, to an interest in which he was born as a member of the tribe entitled to enrollment therein; but that, applying the statute by analogy, such land was not a "new acquisition," but came to him by the blood of his tribal parent, or, within the meaning of the statute, "from his father," and that therefore, on his death and the subsequent allotment his father took the full title, and not merely a life estate.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 49; Dec. Dig. § 18.*

For other definitions, see Words and Phrases, vol. 5, p. 4783.]

3. INDIANS (§ 15*)—LANDS—POWER TO CONVEY.

Such land having been in substance, although not technically inherited by the father from his son, the father had full power to sell and convey

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep't Indexes.

†Motion for rehearing pending.

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the same after its allotment to him under Act April 26, 1906, c. 1876, § 22, 34 Stat. 145, which provides that “the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe may sell and convey the lands inherited from such decedent.”

[Ed. Note.—For other cases, see Indians, Dec. Dig. § 15.*]

4. Indians (§ 16*)—Oil and Gas Leases—Necessity of Recording.
Under Mansf. Dig. Ark. c. 27, extended to Indian Territory by Act Feb. 19, 1903, c. 707, 32 Stat. 841, and which provides that “no deed, bond or instrument in writing for the conveyance of any real estate or by which the title thereto may be affected in law or equity shall be good or valid against a subsequent purchaser unless such deed, bond or instrument, duly executed and acknowledged or approved shall be filed for record,” a so-called departmental lease executed by an Indian, giving the lessee the right for 15 years to explore for and extract oil and gas, is an instrument which must be recorded in order to be valid against a subsequent purchaser of the land without notice, although such lease was required by statute to be approved by the Secretary of the Interior and had not been so approved at the time of the sale of the land by the lessor.

[Ed. Note.—For other cases, see Indians, Dec. Dig. § 16.*]

5. Indians (§ 16*)—Oil Lease—Validity as Against Subsequent Purchaser.
The filing of a copy of an oil and gas lease executed by an Indian in Indian Territory, at the Indian agency, required by the rules of the Interior Department, is merely for administrative purposes, and does not charge a subsequent purchaser of the land with constructive notice of such lease, especially where Congress had previously provided for the recording of such instruments and designated the places of record.

[Ed. Note.—For other cases, see Indians, Dec. Dig. § 16.*]

Purchasers of a tract of land from an Indian inquired of him if he had ever signed any papers against the land, to which he replied that he had signed an old lease, but he thought it was no good because the parties came back and wanted him to sign new papers, which he refused to do. He was then asked who the parties were, but stated that he did not know. The purchasers then made a small payment, but refused to close the deal until they had procured an abstract of title which showed the land clear. Held, that they had done all that was required of them, and were not chargeable with notice of a prior unrecorded oil and gas lease.

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

7. Vendor and Purchaser (§ 229*)—Bona Fide Purchaser—Notice of Incumbrance.
Where a purchaser of land, having no notice of any incumbrance thereon, yet procured an abstracter to make inquiry at a place where oil leases were filed, but where he was not bound to inquire, and was told that there was nothing on file affecting the land, he is not chargeable with notice of an oil lease which was in fact there on file.

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

Appeal from the Circuit Court of the United States for the Eastern District of Oklahoma.
For opinion below, see 162 Fed. 331.

*For other cases see same topic & § number in Dec. & Am. Diggs. 1907 to date, & Rep'r Indexes
C. L. Thomas and Edgar A. De Meules, for Shulthis.
George S. Ramsey (P. C. West and N. A. Gibson, on the brief), for
McDougal and others.
S. V. O'Hare (F. L. McCain, on the brief), for intervener, Berry-
hill.

Before HOOK, Circuit Judge, and RINER and AMIDON, Dis-
trict Judges.

AMIDON, District Judge. This is a suit in equity brought by the
appellant to determine conflicting rights to a parcel of real property
situated in Oklahoma. While the cause was pending, George Frank-
lin Berryhill was permitted to file a petition in intervention therein
and make common cause with the complainant. The decree below dis-
missed the bill upon the merits. The case can best be presented by
unfolding the facts and the law together.

Andrew J. Berryhill was the son of George Franklin Berryhill, a
member of the Creek Nation of the mixed blood, and Clementine
Berryhill, his wife, a noncitizen of that tribe. He was born on the
6th day of May, 1901, and died in the month of November of that
year, leaving no brothers or sisters surviving him. At no time dur-
ing his life was he entitled to enrollment as a member of the tribe,
or to an allotment of its property. After his death, by the supple-
mental agreement entered into between the Commission to the Five
Civilized Tribes and commissioners of the Creek Nation (Act June
30, 1902, c. 1323, 32 Stat. 501), proclaimed by the President August
8, 1902, it was provided in section 7, as follows:

“All children born to those citizens who are entitled to enrollment under
previous acts, subsequent to July 1, 1900, and up to and including May 25,
1901, and living upon the latter date, shall be placed on the rolls made by
said commission.”

Andrew J. Berryhill met precisely the conditions of this agreement.
He died, however, before the agreement was entered into, as already
stated. But the agreement further made express provision for such a
contingency in section 7, as follows:

“And if any such child has died since May 25, 1901, or may hereafter
die before receiving his allotment of lands, and distributive share of the funds
of the tribe, the lands and moneys to which he would be entitled, if living,
shall descend to his heirs, as herein provided, and be allotted and distributed
to them.”

The phrase, “as herein provided,” refers to chapter 49 of Mans-
field's Digest of the Statutes of Arkansas, which deals with the sub-
ject of heirship and descent.

The word “descend” is, of course, inapplicable to the actual con-
tingency provided for by the statute, because that contingency contem-
plates the death of the child before he had actually become seised of
any interest in the land. The word “descend” is a word of art, and
indicates the transference of property by inheritance. If any sig-
ificance is to be given to it as used in this section, it must be held that
the intent of the parties to the agreement was that the land should pass
to the same persons and in the same proportions as it would have
passed if the child had died seised of it. Any other construction simply obliterates this word, and makes the land pass to the parties who are heirs directly by allotment from the tribe. The statute itself not only declares that it shall "descend," but also declares that it shall be "allotted and distributed," to the heirs. It is manifest, therefore, that both ideas were in the minds of the parties to the agreement.

This construction receives further support by the general scheme which the federal government and the Creek Nation formed for the disposition of the tribal property. The first requisite for the partition of the tribal estate in severalty among its members was to ascertain and legally establish who were members of the tribe. By reason of the many intermarriages between members of the tribe and members of the white and negro races, and by reason of the fraudulent claims to membership, the ascertainment of the particular persons who were in fact entitled to such membership proved a much more difficult task than was at first anticipated. The Commission was empowered and directed to prepare such a roll. This work not only required much investigation on its part, but resulted in voluminous litigation. Instead of being a work of months, it proved to be a work of years. In the meantime, however, the membership of the tribe was constantly undergoing change by birth and death. In order to provide for all members of the tribe who were born subsequent to the beginning of the enrollment, the date of right to enrollment was twice set forward, the statute last quoted fixing the latest date. By reason of these facts, when the roll was completed, it contained more names than there were members in being. The roll, however, furnished the basis for the division of the tribal estate. Every person whose name was entered on the roll was entitled to an equal proportion of the tribal land and funds; but by reason of the fact that before actual distribution could be made, and even while the enrollment was in progress, some persons whose names were on the roll would die, the statute made provision for the disposition of the share of tribal property which would go to them if living. Such a provision was necessary. Otherwise there would have been a portion of the tribal property undistributed. It was never the intent, however, either of the tribe or of the federal government to grant to parties having a kinsman who had died before the actual making of the allotment additional lands as a bounty. These kinsmen got all their right to additional lands under and through the enrolled member who had died. Whether the ancestor was actually seised of the property or not in his lifetime, was immaterial. It was the intent of the statute that the property should pass by the same right and in the same manner that it would have passed if the person enrolled had survived to receive his allotment. The tribe was not bestowing such land as a bounty, but was simply providing for the right of inheritance.

Congress itself has construed this statute. Section 5 of the act (Act April 26, 1906, c. 1876, 34 Stat. 138) provides:

"That all patents or deeds to allottees in any of the Five Civilized Tribes to be hereafter issued, shall issue in the name of the allottee; and if any such allottee shall die before such patent or deed becomes effective, the title to the lands described therein shall inure to and vest in his heirs; and
In case any allottee shall die after the restrictions have been removed, his property shall descend to his heirs or his lawful assigns, as if the patent or deed had issued to the allottee during his life; and all patents heretofore issued where the allottee died before the same became effective, shall be given like effect."

Here is an express declaration by Congress that the land shall descend to heirs the same as it would have descended if the patent or deed had issued to the allottee during his life, and it is declared that allotments for allottees who have died shall also thus descend. This interpretation by Congress of its own act leaves no room for doubt as to its intent.

We must, therefore, look to chapter 49 of the Arkansas statute both to ascertain who the heirs are, and what estate they shall take in the property. That statute does not treat of the subject of heirship independently, but combines that subject with the estate to pass by inheritance. Subsection 2 of section 2522 provides as to the general estate, both personal and real, of a person dying intestate, and having no children, that it shall go to the father. This section, however, is to be read in connection with section 2531, which deals with the subject of the devotion of property when there is no heir of the blood to whom it can descend. Under this statute, if the deceased person came by the estate from his father, it is to go to the father, and, if he came by it from his mother, it goes to the mother. The statute then proceeds:

"But if the estate be a new acquisition, it shall ascend to the father for his lifetime, and then descend in remainder to the collateral kindred of the intestate in the manner provided in this act."

This statute makes provision for all possible acquisitions of real property for the civilized white community whose estates it was intended to govern. Among the people of Arkansas there was no way of acquiring land except by grant, gift, or inheritance. This was true even of lands acquired from the federal government under the public land laws. The patentee of such lands was always required to purchase the same either by residence and improvement, or the payment of a purchase price, or by these elements combined. It needs but a moment’s thought to see that, when this statute was applied to the lands of the Creek Nation, it was applied to a subject-matter entirely different from that which was in the mind of the Legislature of Arkansas. The lands of that tribe fit into neither of the classes mentioned in the statute. They did not come to a member of the tribe by inheritance from any ancestor, nor could they be spoken of with propriety as a purchase. In applying the statute in this case, therefore, we shall have to proceed by analogy only. The tribal lands belonged to the tribe. The legal title stood in the tribe as a political society; but those lands were not held by the tribe as the public lands of the United States are held by the nation. They constituted the home or seat of the tribe. Every member, by virtue of his membership in the tribe, was entitled to dwell upon and share in the tribal property. It was granted to the tribe by the federal government not only as the home of the tribe, but as a home for each of the members. From the time they took up their residence west of the Missis-
sippi, the Constitutions of the Five Nations provided that their land should remain "common property; but the improvements made thereon, and in the possession of the citizens of the nation, are the exclusive and indefeasible property of the citizens respectively who made, or may rightfully be in possession of them." The term "improvements," as here used, meant not only betterments, but occupancy. Cherokee Nation v. Journeyman, 155 U. S. 196, 210, 15 Sup. Ct. 55, 39 L. Ed. 120. These "improvements" passed from father to son, and were the subject of sale, with the single restriction that they should not be sold to the United States, individual states, or to individual citizens thereof. Under such regulations the members of the Creek Nation had been in possession of homes on their tribal lands for more than half a century. The portion of their lands which were not occupied in severalty, as well as the tribal funds, were treated as belonging to the members, and all income derived therefrom was distributed among them per capita. While the legal title to the tribal property belonged to the tribe as a political society, the beneficial use of the same had at all times belonged to the members in severalty. It was to such a condition of life and property as this that the plan of allotment here involved was to be applied. Its controlling principle is a clear recognition that each member of the tribe, by virtue of his membership, was entitled to an equal share in all the tribal property. To carry out the scheme, the law first proceeds on the one hand to ascertain the membership of the tribe, and on the other the actual present value of its property, and then directs that the tribal property be divided per capita so that each member shall receive an equal share thereof, according to its true value. The right to such a share is not created by the statutes, but is simply recognized and enforced by them. The several agreements and acts of Congress are not concerned with the legal title, but go back to the actual beneficial rights of property as they had always existed in Indian Territory. They require allotments to be made so as to save to each member his improvements, including his right of occupancy. While the tribe in carrying out the project grants the legal title to the property, it does not confer the right to that property. The act by which the distribution is made is spoken of not as a grant, but as an allotment. We are not departing from the well-established doctrine of the Supreme Court that the lands of these Indians belong to them as a political society and not to the individual members. Cherokee Trust Funds, 117 U. S. 288, 308, 6 Sup. Ct. 718, 29 L. Ed. 880; Delaware Indians v. Cherokee Indians, 193 U. S. 127, 24 Sup. Ct. 342, 48 L. Ed. 646. So long as the tribal relations continued, a member had no right to have a share of the tribal property set off to him as his private, separate estate, for the constitutional policy of the tribe was ownership in common. But when, as here, the time came to disband the tribe, its ownership as a political society could no longer continue, and the division of its property was far more nearly akin to the partition of property among tenants in common than the grant of an estate by a sovereign owner. Under such a scheme it cannot be said that the property which passed to an allottee is a new right or acquisition created by the allotment. The right to the property antedates the allotment,
and is simply given effect to by that act. Viewing the tribal property
and its division in this light, Andrew J. Berryhill acquired his right
to the land in question by his membership in the tribe. It was his
birthright. It came to him by the blood of his tribal parent, and not
by purchase. In applying the Arkansas statute, we shall accomplish
the purpose of Congress and the Creek Nation best by treating the
lands not as a new acquisition by him, but as an inheritance from his
parents as members of the tribe. His father was the only parent
through whom he derived his right, and to the father the land should
pass. If the mother had been a member of the tribe, then the land
should properly pass to the parents equally. From this premise it
necessarily follows that George Franklin Berryhill succeeded to the
entire estate of the property in question.

We next pass to the rights of the parties to this controversy under
the conveyances from George Franklin Berryhill. On June 5, 1906,
he and his wife executed a warranty deed of the property to Edmund
and Perry McKay in consideration of the sum of $2,000. It is now
contended that this deed was void because at the time of its execu-
tion the grantor was without legal capacity to make such a convey-
ance. It is conceded that George Franklin Berryhill had only such
power to dispose of the lands in question as was granted to him by
act of Congress. Both parties base their right upon section 22 of the
act approved April 26, 1906, which reads as follows:

"That the adult heirs of any deceased Indian of either of the Five Civilized
Tribes whose selection has been made, or to whom a deed or patent has been
issued for his or her share of the land of the tribe, * * * may sell and
convey the lands inherited from such decedent."

George Franklin Berryhill and appellant Shulthis make the same
argument upon this statute that they did upon section 7, above quoted.
It is urged that the land in question is not "inherited" land. For rea-
sons already explained, that contention, while technically right, is
substantially wrong. The scheme of the statute clearly indicates that
the land was to be regarded the same as if it had been inherited. No
sound reason can be adduced for treating these lands otherwise than
they would have been treated if Andrew J. Berryhill had survived
long enough to receive the allotment. This interpretation is further
supported by the provision of the several acts dealing with these allot-
ments. Every member of the tribe was allotted a share in the tribal
lands. Such allotment is repeatedly spoken of in the act as his "home-
stead." It was intended to be such, and to serve as a sure basis for
his own support and the support of his family, either actual or pro-
spective. To protect this homestead, it was made inalienable for the
term of five years. The reasons for making it inalienable did not ap-
ply to lands obtained by inheritance, and for that reason the statute
last quoted was passed granting power to convey the same. The
lands here in question fall under the same policy as lands obtained by
inheritance, and the statute should be held to apply thereto. Berry-
hill, therefore, had power to make the deed to the McKays.

The remaining question relates to the priority of the conflicting
claims of appellant, Shulthis, and the appellees who have succeeded
to the rights of the McKays. March 24, 1906, George Franklin Ber-
ryhill, under the power granted by section 17 of the act of Congress approved June 30, 1902, c. 1323, 32 Stat. 504, and the rules of the Land Department made pursuant thereto, executed to appellant, Shultz's, what is known as a "departmental lease," granting to him the right to explore for and extract oil and gas from the land in question for the period of 15 years. This lease, at the time it was executed, required for its completion the approval of the Secretary of the Interior. Pursuant to rules on the subject, it was executed in quadruplicate, one part to be sent to the Secretary of the Interior, another to be filed in the office of the Indian agency at Union Agency, Muskogee, and the other two parts to be retained by the lessor and lessee. One month later, to wit, April 26, 1906, the act was passed which empowered Berryhill to sell and convey the land absolutely without the approval of the Secretary of the Interior (section 22, c. 1876, 34 Stat. 145). June 5th following, Berryhill and his wife, in consideration of the sum of $2,000, executed and delivered the warranty deed to the McKays. The lease to Shultz was approved by the Secretary of the Interior about a year later, namely, April 21, 1907. It will be seen that the deed was given about a month after the lease. Was it subject to the lease? The lease was not recorded, and to answer this question we must first inquire whether it was subject to the registration law then in force in Indian Territory; for if it was not subject to that law, its priority in time would give it priority of right over the deed. By Act Feb. 19, 1903, c. 707, 32 Stat. 841, Congress extended the registration law of Arkansas, being chapter 27 of Mansfield's Digest, to the Indian Territory, and divided the territory into registration districts. It imposed upon the clerk or deputy clerk of court of those districts the duty to record, in books provided for that purpose, "all deeds, mortgages, deeds of trust, bonds, leases, covenants, defeasances, bills of sale, and other instruments of writing of, or concerning lands, tenements, goods or chattels." Section 671 of Mansfield's Digest also provides as follows:

"No deed, bond or instrument in writing, for the conveyance of any real estate, or by which the title thereto may be affected in law or equity, shall be good or valid against a subsequent purchaser of said real estate for a valuable consideration, without actual notice thereof, unless such deed, bond or instrument, duly executed and acknowledged, or approved, as is or may be required by law, shall be filed for record in the office of the clerk and ex-officio recorder of the county where such real estate may be situated."

Did the lease come within the class of instruments specified in these statutes? Was it an instrument by which the title of real estate "may be affected in law or equity"? We think it was. While it required the approval of the Secretary of the Interior before it became in all respects binding, that approval was intended solely to protect the Indian against improvidence. When the lease was executed and delivered, it created an inchoate interest in the land which by the approval of the Secretary became absolute without any further act of the parties. Even after the approval, there would have been nothing to record but the lease. By the doctrine of relation, the leasehold estate upon the approval of the lease, had its beginning at the date of the execution and delivery of the instrument. Either the lease creat-
SHULTHIS V. M'DOUGAL.

ed an equitable interest in the property in favor of the lessee at the time it was executed and delivered, or the lessee had no interest whatever in the property until the lease was approved. But if we should accept the latter alternative, the lease would be subsequent to the deed and in all respects subordinate to it, regardless of the registration law. A question almost identical with the one we are considering was before the Supreme Court in the case of Lomax v. Pickering, 173 U. S. 26, 19 Sup. Ct. 416, 43 L. Ed. 601. That involved a deed by an Indian, which by act of Congress, as well as the patent conveying the land to the Indian, was subject to the following restriction:

"But never to be leased or conveyed by him, them, his or their heirs, to any person whatever, without the permission of the President of the United States."

The land was situated in Illinois. The registration law of that state was by no means as comprehensive as the statutes above quoted; yet the Supreme Court of Illinois held that the deed upon its execution and delivery, and before it was approved by the President, was an instrument so affecting the title to real property as to require its registration. Speaking of this ruling, the federal Supreme Court used the following language:

"Even if this be not a construction of the state statute binding upon us, and decisive of the case, we regard it as a correct exposition of the law."

This decision, in our judgment, controls the question we are now considering, and under it the lease was subject to the registration law in force in the territory, and should have been recorded in order to protect the interest which it granted as against a good-faith purchaser. This is not a case in which the title to land is in the government and a proceeding is pending before the Land Department for its acquisition under the public land laws. The title to the land here was in Berryhill, and the object of the supervisory approval of the Secretary of the Interior was simply to protect the Indian against the improvident disposition of his property. Pickering v. Lomax, 145 U. S. 310, 316, 12 Sup. Ct. 860, 36 L. Ed. 716. We can attach no weight to the suggestion of counsel that Shulthis could not record his lease, because under the rules of the department one copy was to be delivered to, and retained by, him. The lease under such circumstances occupied precisely the same position as a deed. He could have filed it in the proper office for record, and upon its being recorded it would have been returned to him as the muniment of his right.

This leaves only the question whether appellants acquired their title with actual or implied notice of the lease. It is first urged that we should hold that they had implied notice, by reason of the fact that a copy of the lease was, pursuant to the rules of the Secretary of the Interior, filed with the Indian agent at Union Agency, Muskogee. That filing, however, was purely for administrative purposes, to aid the Land Department in supervising the leasing of these Indian lands. There was no rule or statute which made such filing notice to parties acquiring an interest in the property. Neither had such parties any right, as a matter of law, to examine the records at the Indian agency, or to take copies thereof. The evidence itself shows that peo-
ple dealing in oil and gas leases were accustomed to consult the agency records, and that, if inquiry was made there as to whether a given Indian had executed a lease of his property, the clerks in charge of the records would give such information as the records contained on the subject. This information, however, was given as a matter of courtesy, and not pursuant to any legal duty. Congress had already provided carefully for an official record of all instruments in any way affecting the title to real property, and had directed intending purchasers to that record for information. We cannot believe, therefore, that the rule of the Secretary of the Interior requiring a copy of such leases to be filed with the Indian agent could create another official record to which intending purchasers were bound to resort at their peril. That record could become notice to a purchaser only by proof that he actually consulted it and learned its contents before acquiring his interest in the property. The evidence affirmatively shows that the McKays knew nothing of the practice of filing leases at the Indian agency, and made no investigation there. They are therefore unaffected by that record.

Did the McKays have actual notice of the lease? The evidence as to the facts known to them on this subject, and the inferences properly deductible from such facts, are in direct conflict. Berryhill testified that the lease to Shulthis was obtained by two parties by the name of McElwane and Chaney, and that he himself did not know that the lease was in favor of Shulthis, but supposed it ran to McElwane. There was either some actual or supposed defect in the lease, and Chaney came repeatedly to the Indian urging him to execute new papers, which he refused to do. From this experience he came to believe that the lease was void. During the negotiations between him and the McKays for the sale of the land, they inquired of him whether there was anything against the property. His testimony as to what then took place is as follows:

"Q. Just go ahead and tell what you told them at the time you had this trade? A. Well, I didn't tell a great deal about it; I told them they had a oil and gas lease on it, and at the time I didn't believe it was any good, and I believe that was all.

"Q. Did you tell them why you didn't believe it was any good? A. Yes, sir.

"Q. Why did you tell them? A. Because they come back and wanted me to change my woman's name, and we didn't do it.

"Q. Did you tell them who took that lease? A. Told them who had it.

"Q. Who did you tell them? A. McElwane and Chaney."

Both of the McKays testified as witnesses in the case. The substance of their evidence is that, in response to their inquiry as to whether there was anything against the land, he at first said there was nothing, but afterwards stated that he had signed an old lease some time ago, but it was not any good; he said he knew, because the parties for whom he had signed this lease had come back after him and wanted him to sign up new papers, and, when asked the names of the parties to whom he had given the papers, he answered that he didn't know. This is the testimony of one of the McKays, and the other stated in substance as follows:
"We asked him if he had ever made any deal on his land or signed any papers of any kind against the land. He first said he had not signed any papers, and then he said afterwards that he did sign some kind of papers, but he didn't know who they was to, or what they meant, and they came back to him and wanted him to sign them over again, and he would not do this. He didn't know the name of the parties to whom he had made the papers. I remember of asking him who he had signed papers with, and he said he didn't know."

It appears from Berryhill’s evidence that he did not know McElwane, the party to whom he supposed the lease ran, but did know Chaney. Upon receiving the above information the McKays paid a small part of the consideration, and declined to pay the balance until they had obtained an abstract of title to the property. This they immediately did, and the abstract showed the title to be clear. They then went forward and paid the balance of the consideration. This evidence makes a close case on the question of notice. If Berryhill in fact told the McKays the name of the parties to whom he had executed the papers, they, of course, could not have accepted his statement that the papers were invalid, but would have been charged with the duty of consulting the other parties to the transaction, and ascertaining from them the nature and extent of their rights. Failure to do so would have impressed the land in their hands with all the rights of those parties. The question of notice, therefore, turns upon whether the preponderance of the evidence shows that the McKays knew, or could by the exercise of reasonable care have ascertained, the name of the parties holding these outstanding rights. The testimony of the McKays on this point is directly in conflict with that of Berryhill. They state that they inquired of him directly the names of the parties to whom he had executed these papers, and that he told them that he did not know who they were. We accept their testimony as the more credible on this question for the following reasons: First, witness for witness, they are certainly as trustworthy as Berryhill. Second, Berryhill at the time was anxious to consummate the sale of the land to them. He thus had a strong motive to conceal from them any knowledge which would be likely to defeat that purpose. His native shrewdness would teach him that, if he disclosed the name of Chaney, the McKays would consult him, and thus ascertain the state of the title and decline to consummate the purchase. Third, the McKays were farmers. There is no evidence in the record that they purchased the land for oil and gas purposes, or for any other purpose than agriculture. They had never themselves had anything to do with oil and gas leases, and for that reason knew nothing about the filing of such leases with the Indian agent, or that it was possible to learn from that source what leases an Indian had given. Fourth, the evidence contains convincing proof that they did not shut their eyes against ascertaining the existence of the outstanding rights referred to by Berryhill, in order that they might not learn the truth. On the contrary, they took the very steps which would have been taken by a prudent business man to ascertain the state of the title. Instead of consummating the purchase, they suspended the transaction, and ordered an abstract. They had good reason to believe that, if there was any outstanding instrument affecting the title to the property, the
records would disclose that fact. The abstract showed the title to be clear. This was strong confirmation of what Berryhill had told them that the papers which he had executed were "no good," and were so regarded by the parties to whom they had been given. Upon this showing we are of the opinion that the McKays acted in good faith in accepting the deed and paying the purchase price. They exhausted the sources of information that had been disclosed to them, and what they discovered was such as would have led a man of reasonable prudence to believe that the title to the property was clear. 2 Pomeroy's Equity Jurisprudence, p. 1008, note 1. The mere knowledge that papers had been previously executed which might affect the title to real property will not necessarily defeat the claim of a good-faith purchaser. In Stanley v. Schwalby, 162 U. S. 255, 16 Sup. Ct. 754, 40 L. Ed. 960, the purchaser employed counsel to examine the title. In the course of his investigation he learned as a fact that the land had been previously sold, but there being no conveyance of record, and the transaction being an old one, he reached the conclusion that the title of the vendor was good, and so reported to his principal. The Supreme Court, though holding that the principal was charged with all the knowledge possessed by his agent, still decided that the vendee was entitled to the protection of a good-faith purchaser. Speaking to this question, it said:

"In order to charge a purchaser with notice of a prior unrecorded conveyance, he or his agent must either have knowledge of the conveyance, or at least of such circumstances as would by the exercise of ordinary diligence and judgment lead to that knowledge; and vague rumor or suspicion is not a sufficient foundation upon which to charge a purchaser with knowledge of a title in a third person. Notice of a sale does not imply knowledge of an outstanding and unrecorded conveyance."

In the case of United States v. Detroit Lumber Co., 200 U. S. 321, 26 Sup. Ct. 282, 50 L. Ed. 499, the suspicious circumstances were much stronger than in the present case, but the Supreme Court refused to charge the purchaser with notice, using the following language:

"A chancellor will not be astute to charge a constructive trust upon one who has acted honestly and paid a full and fair consideration without notice or knowledge. On this point we need only to refer to Sugden on Vendors, p. 622, where he says: 'In Ware v. Lord Egmont, 4 De Gex, M. & G. 400, the Lord Chancellor Cranworth expressed his entire concurrence in what, on many occasions of late years, had fallen from judges of great eminence on the subject of constructive notice, namely, that it was highly inexpedient for courts of equity to extend the doctrine. When a person has not actual notice, he ought not to be treated as if he had notice, unless the circumstances are such as enable the court to say, not only that he might have acquired, but also that he ought to have acquired it, but for his gross negligence in the conduct of the business in question. The question, then, when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining and might by prudent caution have obtained the knowledge in question, but whether not obtaining it was an act of gross or culpable negligence.'"

See, also, the same case in this court, 131 Fed. 668, 674, 67 C. C. A. 1.

The position of the assignees of the McKays, however, is more favorable than their own. The evidence shows affirmatively that in
October, 1906, the McKays executed an oil and gas lease of the property to Arthur B. Reese, under whom the other defendants claim. The rule is well settled that, if Reese took without notice of plaintiff's lease, his title would be good though his vendor had such notice. Stanley v. Schwalby, 162 U. S. 255–283, 16 Sup. Ct. 754, 40 L. Ed. 960. At the time Reese accepted his lease, he inquired of the McKays whether there was any outstanding claim against the property, and was told by them that there was not. In proof of their statement they exhibited to him the abstract of title showing the land to be clear. Reese also caused inquiry to be made of the Indian agency as to whether any oil and gas leases appeared of record there, and received a certificate from an abstractor who made the inquiry on his behalf that no such lease had been filed. Reese had no actual knowledge of any fact or circumstance which put him upon inquiry, as to the existence of any prior lease or claim. Complainant seeks to charge him with notice because he in fact made inquiry at the Indian agency where the lease was filed, but failed to discover its existence. It is charged that his investigation there was negligent, and that he is therefore impressed with notice of all that he would have discovered if he had made proper inquiry. The answer to such a claim is this: Reese was charged with no duty of inquiring at the agency. An ineffectual inquiry, therefore, cannot place him in a worse position than he would have been if he had made no inquiry at all. But again, we think that he is not properly chargeable with negligence. He applied to an abstractor to ascertain from the files of the agency whether any lease appeared there against the property, and received a written statement from him that no such lease was on file. This surely was the exercise of such care as a reasonable and prudent business man would have exercised under the same circumstances. For reasons which we have already explained, the records at the Indian agency had no force to impart constructive notice. The evidence is clear that neither Reese nor his agent at the time he took his lease had any actual knowledge of what appeared upon those records. Inasmuch as he was under no legal duty to search at the agency, his ineffectual effort to ascertain the state of its files certainly cannot place him in the same position as he would have occupied if he had obtained actual knowledge of the lease.

From a careful examination of the evidence we are of the opinion that the defendants are entitled to the protection of good-faith purchasers as against complainant’s lease. The decree, therefore, of the trial court was right, and it is affirmed.

RINER, District Judge, concurs in the result.
UNITED STATES v. ILLINOIS CENT. R. CO.
(Circuit Court of Appeals, Sixth Circuit. March 27, 1900.)
No. 1,854.

   An action against an interstate railroad to recover penalties for several violations of Safety Appliance Act March 2, 1893, c. 196, § 6, 27 Stat. 532 (U. S. Comp. St. 1901, p. 3175), providing that each interstate railroad guilty of such violation shall be subject to a penalty of $100, is civil and not criminal in its nature, and hence the United States is entitled to a review on a writ of error.
   [Ed. Note.—For other cases, see Penalties, Dec. Dig. § 40.*]
   Duty of railroad companies to furnish safe appliances, see note to Felton v. Bullard, 37 C. C. A. 8.]

2. Penalties (§ 40*)—Action—Appeal.
   The constitutional prohibition against subjecting a person to be twice put in jeopardy for the same offense does not apply to actions by the United States against an interstate railroad to recover penalties for violation of Safety Appliance Act March 2, 1893, c. 196, § 6, 27 Stat. 532 (U. S. Comp. St. 1901, p. 3175), so as to prevent a review by the government of an adverse decision on a writ of error.
   [Ed. Note.—For other cases, see Penalties, Dec. Dig. § 40.*]

   An action by the government against an interstate railroad to recover penalties for violation of Safety Appliance Act March 2, 1893, c. 196, § 6, 27 Stat. 532 (U. S. Comp. St. 1901, p. 3175), being civil in its nature, the government is only required to prove its case by a preponderance of the evidence and not beyond reasonable doubt.
   [Ed. Note.—For other cases, see Penalties, Cent. Dig. § 34; Dec. Dig. § 33.*]

   While declarations of law bearing on the issues and indicating the proper judgment thereon by the Supreme Court of the United States are binding on the lower federal courts, expressions of opinion as to what the law would be on facts essentially different from those in issue are not controlling.
   [Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 327, 328; Dec. Dig. § 96.*]

   An interstate railroad is guilty of violating Safety Appliance Act March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), if it starts in transit a car containing interstate commerce with a defective coupling which could have been discovered by inspection, but not so, if the car when started had no discoverable defect but developed one in transit, and there was no subsequent lack of diligence either in discovering or repairing the same.
   [Ed. Note.—For other cases, see Railroads, Dec. Dig. § 229.*]

   Where, in an action against an interstate railroad for violating Safety Appliance Act March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), the government proves that a car laden for interstate traffic and with defective couplings has been hauled on defendant's tracks, the burden is then shifted to defendant to prove exculpatory facts, namely,

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
that it has used all reasonably possible endeavor to discover and correct the fault.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 224.*]


Safety Appliance Act March 2, 1893, c. 196, § 2, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), requires interstate carriers to equip their cars engaged in interstate commerce with automatic couplers, so that they “can be uncoupled without the necessity of men going between the ends of the cars.” Held, that the quoted clause is merely descriptive of the equipment required, and does not import that it is the duty of the carrier to keep such equipment in repair at all events.

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


Where an interstate carrier has equipped its cars, engines, etc., engaged in interstate commerce with automatic couplers, so that they can be coupled and uncoupled without men going between the ends of the cars, the carrier is then only required to use the utmost diligence in discovering and correcting defects in such equipment which may thereafter develop in the use thereof, and is not liable for violation of the act because of the mere transportation of a car containing a defective coupler, under the maxim that the law does not require an impossibility.

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

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

George Du Relle and P. J. Doherty, for plaintiff in error.

E. F. Trabue, for defendant in error.

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

SEVERENS, Circuit Judge. This is an action in the nature of a common-law action of debt brought in the District Court by the United States against the Illinois Central Railroad Company to recover penalties of $100 each for 22 alleged infractions of Safety Appliance Act March 2, 1893, c. 196, § 6, 27 Stat. 532 (U. S. Comp. St. 1901, p. 3175), each offense being set out in a separate count. Some of these counts were for hauling cars in interstate traffic with defective automatic couplings, some with defective grab irons and some with drawbars not on the proper level above the track. There was a plea of not guilty to each count, and special matters of defense were alleged in the several answers. The issues were tried by a jury. A stipulation as to certain facts was made by the attorneys for the parties and filed, of which the following is a copy:

"Defendant, for the purpose of this case, admits:

"(1) That it is a corporation doing business in Illinois and Kentucky, and is a common carrier, transporting over its railroad in Kentucky both cars carrying interstate commerce and cars carrying shipments wholly intrastate.

"(2) That each of the cars in paragraphs 1, 5, 6, 7, 10, 11, 12, 14, 15, 16, 17, 18, 19, 20, 21, and 22 contained interstate shipments; that each of the cars mentioned in paragraphs 4, 9, and 13 transported shipments purely intrastate, i. e., from one point in Kentucky to another point in Kentucky, and that each one of said cars was hauled by defendant in a train in which there was at least one other car that at the time contained an interstate shipment; and that the engines mentioned in paragraphs 2, 3, and 8 were used by defend-

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
Evidence bearing upon the issues was adduced by the parties, and the jury, having been instructed by the court, rendered a verdict for the plaintiff on seven of the counts in the sum of $100 each, and for the defendant on the other 15. The plaintiff brings the case here on a writ of error.

The first question arises upon a motion to dismiss the writ upon the ground that the proceedings in the court below were essentially of a criminal nature, and that the United States cannot have a writ of error upon proceedings of that description. It seems proper to advert to certain fundamental considerations upon which the procedure in such cases as this rests, and upon which the determination of the question here raised depends.

It is urged by counsel for the defendant that the punishment prescribed by the sixth section of this act is a penalty, that the proceeding for its enforcement is criminal in its nature, and that therefore the trial of the cause is to be governed by the rules of evidence, and the right to have a review in an appellate court is to be determined by the law applicable to a criminal prosecution. It may be admitted that in a sense the punishment prescribed by the act is a penalty. But penalties are of different sorts. They may consist of a sum of money which the offender shall pay in atonement for his forbidden act—in other words, of a fine—or shall suffer some other form of forfeiture of property, or they may consist of the infliction of the corporal punishment of the guilty party, or they may consist of both of these punishments. The public through its government may employ, within certain limitations, such of these various forms of punishment as it may deem just and necessary to the common welfare. Offenses range in respect of their turpitude from the smallest to the greatest, and the theory of punishment is that it shall be measured by the gravity of the offense. While it is true that the Constitution and laws of the country are prescribed and enforced for the protection of property as well as of the person, yet they regard with greater concern the protection of the latter. And so, when for small offenses a pecuniary punishment is prescribed as the atonement, it has long been the practice to employ a civil action for its recovery. Assuming that the punishment is just, the consequences to the defendant are not far different from those which happen in civil actions, only it is the government which is the plaintiff. The consequences of the judgment are substantially the same to him as if the penalty was bestowed upon a private party, except with regard to the scintilla of interest he has in the public revenue. If the public may, for a sufficient reason, compel the defendant to pay a fine, it is of little importance to him whether the government keeps it for its own purposes or turns it over to another who is already indemnified. Mere academic discussions of the theory of the practice by which it is done do not interest him. Probably in all the systems of law in the state and federal governments
there are instances where to civil liabilities there are attached penalties, there being something wanton or gross or otherwise peculiar to the liability. Yet such penalties are enforced in civil actions.

A very cogent, not to say persuasive, argument was addressed to us, founded upon the prohibition of the Constitution against subjecting a person to be twice put in jeopardy for the same offense. It is urged that this prohibition extends to a review of the trial in an appellate court; and, further, that it applies not only to prosecutions for crimes, but to prosecutions for misdemeanors also. And we must suppose that it is thought that the protection afforded thereby extends as well to artificial as to private persons; for the defendant here is a corporation. And if a private person may invoke it in a case when only the forfeiture of property is involved, there is color for the claim that a corporation may invoke it in a like case. This seems to us to be pushing the doctrine a long way and beyond its hitherto recognized scope.

We held in United States v. Baltimore & O. S. W. R. R. Co., 159 Feb. 33, 38, 86 C. C. A. 223, and again in the case of United States v. Louisville & Nashville R. Co. (recently decided) 167 Fed. 306, that the government was entitled to prosecute a writ of error from this court to the District Court to review the proceedings in an action of debt to recover a pecuniary penalty which alone was the punishment prescribed. To this ruling we adhere. The result is that the motion to dismiss must be overruled.

The principal questions upon the merits are two, and they arise upon the instructions given by the court to the jury: First. Whether, on the trial of an action such as this, the rule of the criminal law that the evidence must satisfy the jury of the guilt of the respondent beyond a reasonable doubt applies. Second. Whether the judge correctly stated the law to the jury when he said (as he did in substance) that if the defendant equipped the cars with the proper appliances as required by the act, and thereafter exercised the utmost degree of care and diligence in the discovery and correction of defects therein which could be expected of a highly prudent man under similar circumstances, it would have discharged its duty, and would not be liable to the penalty prescribed by the statute.

Respecting the first of these questions, we have little to add to what we said in United States v. Baltimore & O. S. W. R. Co., supra, and the observations already made in discussing the motion to dismiss the writ of error. It is impossible for us to distinguish this case upon any substantial ground, so far as concerns the present question, from that of United States v. Zucker, 161 U. S. 475, 16 Sup. Ct. 641, 40 L. Ed. 777, where, on the trial of an action by the United States to recover the value of merchandise forfeited by a fraudulent importation, the case turned upon the admissibility of certain evidence. If the action was of a criminal nature, it was inadmissible. If it were not, it should have been received. The question was much discussed by Mr. Justice Harlan, and the result was that the court held that the evidence should have been received, and this upon the ground that it was not a criminal proceeding.

170 F.—35
We have referred to instances where, in the enforcement of civil liabilities, penalties incurred by wrongful neglect to discharge them are also enforced; and yet we are not aware that it has ever been supposed that the rule of the criminal law respecting the degree of proof was to be imported into the trial of the civil action. The giving of such a remedy as that specified by the sixth section, without any restriction or condition, imports an action at law with the customary incidents of such an action. Being a remedy which does not touch the person, there is no such urgency for protecting him as to require that the rules for the conduct of a civil suit should be displaced and those of a criminal proceeding be taken in. We think the law does not sanction such an anomalous compound in legal proceedings. If, indeed, there be no substantial distinction between a case where the government retains the fine and one where it is given to a private party in excess of his otherwise legal right, there are decisions in point which hold that where the suit is a civil action for a penalty the evidence is sufficient if it preponderates, and need not be such as to remove all reasonable doubt. Roberge v. Burnham, 124 Mass. 277; O'Connell v. Leary, 145 Mass. 311, 14 N. E. 143; Louisville & N. R. Co. v. Hill, 118 Ala. 334, 22 South. 163; People v. Briggs, 47 Hun (N. Y.) 206.

We are therefore of opinion that the court erred in its instruction to the jury in this regard.

As the judgment must be reversed for the error above shown, we think it necessary to consider and dispose of the other allegations of error above stated, to the end that the court below may not be vexed with the same questions, which, as seems quite certain, will arise upon the new trial. The trial of so many causes of action upon one petition creates, as it did for the court below, some embarrassment in dealing with the questions which arise upon the several counts of the petition. Moreover, upon the new trial the evidence may not be the same as that given on the first. Evidence of new facts may be adduced, which, as we should think, would be desirable in order to make proper conclusions upon the merits of the several cases included in the petition. We shall best subserve the present purpose by indicating the general principles by which in our opinion the trial should be governed in respect to the subject we are now considering.

The instruction given to the jury in regard to the measure of the duty imposed upon the railroad company by the provisions of the safety appliance act was in the main, but not altogether, substantially in accord with the construction which we gave to them in the case of St. Louis & S. F. R. Co. v. Delk, 158 Fed. 931, 86 C. C. A. 95. It is urged, however, by counsel for the government that our opinion in that case has been overruled by the opinion of the Supreme Court in the case of St. Louis, Iron Mountain & S. Ry. v. Taylor, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. 1061. If this seemed to us with certainty to be so, we should of course be bound to yield our own opinion to the superior authority of that court. But if the judgment of the Supreme Court has not concluded the questions now presented, we think the duty incumbent upon this court is to follow its own decision, unless, indeed, it should become convinced that it was wrong. Thereupon, it will remain for the Supreme Court to determine whether the ruling it
has announced is to be extended to facts such as those of the present case.

The question recurs, to what extent is a judgment of a superior court of controlling authority? We do not allude to that respect and confidence which is always due to every expression of opinion of the superior court from the subordinate court, but to those declarations of essential import resting upon the facts and leading to the conclusion manifested by the judgment. Declarations of law bearing upon the issues and indicating the proper judgment thereon are binding. The facts and law of the instant case only are in the eye and thought of the court. But expressions of opinion as to how the law would be upon facts essentially different from those in issue are not controlling in another case when such different facts and issues are presented. These rules have been declared on many occasions by the Supreme Court itself, and no appellate tribunal has more strongly emphasized them. Cohen v. Virginia, 6 Wheat. 264, 399, 5 L. Ed. 257; Northern Bank v. Porter Tp., 110 U. S. 608, 4 Sup. Ct. 254, 28 L. Ed. 258; Plumley v. Massachusetts, 155 U. S. 461, 471, 474, 15 Sup. Ct. 154, 39 L. Ed. 228; Hans v. Louisiana, 134 U. S. 1, 10 Sup. Ct. 504, 33 L. Ed. 842; United States v. Wong Kim Ark, 169 U. S. 649, 679, 18 Sup. Ct. 456, 42 L. Ed. 890; Harriman v. Northern Securities Co., 197 U. S. 244, 25 Sup. Ct. 493, 49 L. Ed. 739; Downes v. Bidwell, 182 U. S. 258, 21 Sup. Ct. 770, 45 L. Ed. 1088.

In the case of St. Louis, etc., Ry. Co. v. Taylor, supra, the suit was an action to recover damages for a personal injury, and not a penal action such as is provided by section 6. It was founded upon the provisions of those sections of the act which relate to the subject of equipping the cars, and was not a prosecution for the use of such cars.

We gather from the facts stated in the opinion in the Taylor Case that the defect in the couplings of cars existed when the cars started on their journey, and that plates of metal, called "shims," were provided for temporarily remedying the inequality in the height of the drawbars. If that was so, the railroad company was chargeable with notice of the defective condition of the drawbars when the cars were sent out, and was at fault in not putting them in order, and did not relieve itself by trusting to its employés the making of the temporary makeshifts.

Whether the Supreme Court would apply the rule laid down in the Taylor Case to an action brought by the government for a penalty under section 6 of the act, we do not know. While we have held that, in giving an action of debt to recover a penalty, the implication is that the procedure, the pleading, the evidence, and the review of the proceedings are to be such as are incident to an action of debt, a question of much importance remains, which is whether, the offense being penal, the court is not to have regard to the constituents of the offense itself, and determine its quality by the tests of the criminal law. In other words, does the mere fact that the remedy is a civil action relieve the government from proving that the offense charged was criminal in its nature, and, specifically, was committed in willful neglect of the duty prescribed by law? The distinction between a remedy and
the cause of action is clear enough, but the answer, notwithstanding anything decided in Taylor's Case, is doubtful. Though involved in the case before us, the question has not been raised or discussed. We incline to think it should be answered in the negative, but we do not decide it.

This case was tried before the decision of the Delk Case. But the opinion of the court as expressed in its instructions to the jury, in most respects, proceeded along the lines of our opinion in the case alluded to. In this latter case the facts were that the car, on which were the defective couplings, had been sent back by the Belt Line because of the defect. It had been on the dead track in the yard to await repairs, which had been sent for, and was in the midst of other cars. It became necessary to move the defective car along the track in order to release and get out the other cars. It was during this operation that the plaintiff was hurt. There was evidence from which the jury might have found that the first knowledge which the defendant had of the defect in the coupler was when the car was sent back to it and it put the car on the "dead track" for repairs, and that it had done nothing toward actually promoting the transit of the car toward its destination. It was for the time being "tied up" for repairs. Still, as the majority of the court held, it was nevertheless engaged in interstate commerce, its freight not having yet been discharged. What we said in our opinion had reference to a case so circumstanced. We were not engaged in laying down universal rules upon the general subject, but only such as we conceived to be applicable to the facts of the case then before us. In effect, we concluded that if the defect had occurred at some previous time and the defendant had knowledge of it, or should, with reasonable diligence, have had notice of it, and with such knowledge, actual or implied, continued, without some justifying necessity, to haul the car upon its tracks while laden with goods which were the subject of interstate traffic, it would thereby violate the statute. We still concede that to be so. We think, further, that the railroad company would be liable if it starts in transit a car with a coupling containing a defect which could have been discovered by inspection; and vice versa, if a car when started in transit had no discoverable defect, the railroad company would not be liable to the penalty for a use of the car in the same transit by reason of a defect occurring during transit, provided there has been no subsequent lack of diligence either in discovering or in repairing the defect.

We are of opinion that, when the government has proved that a car laden for interstate traffic and with defective couplings has been hauled upon its tracks, the railroad company is bound to prove exculpatory facts, such as that it has used all reasonably possible endeavor to perform its duty to discover and correct the fault. We think, for example, that the court was in error in charging the jury that in the case of the cars coming from Mound City the jury might indulge the presumption that the appliances of the cars were in proper condition when they started, and that they remained so until such time as they were shown to be otherwise. We think the burden of proof was on the other party.
With regard to the sufficiency of the proof in view of the fact that the action is a civil action and is for a penalty, we have already expressed our opinion.

Now, as an original proposition we are unable to understand why it was, if Congress intended to enact such a law as it is now contended this law is, it should, after having proposed to itself the enacting a law "to promote the safety of employés and travellers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers," and having used fitting language to carry that purpose into effect and nothing more, have failed to declare that, having so equipped its cars with the couplings, the carrier should be required at all times and in all circumstances when in use to have them in effective condition. To hold that Congress has done this is to insert an interpolation into the act, and to make this interpolation such as shall require things confessedly impossible and to be apologized for by saying, as counsel for the government insist that we should, the law is so written; that it is a matter for the Legislature, and not for the courts, to determine. Is this a proceeding to be justified in order to make the statute mean what the counsel think the law ought to be? It seems clear to us that Congress, having accomplished its purpose by requiring carriers to equip their cars in the manner prescribed and to continue such equipment, was content to leave the incidents of their use to be regulated by the rules and principles of the common law.

Generally, the accepted rule is that if a given construction of a law leads to such results that it seems harsh, unreasonable, or to be performed with a great excess of difficulty, the court, on seeing such a prospect, will turn back to see if a construction is possible whereby such consequences can be avoided and another construction imposed having a more reasonable result. Such an act, we think, ought not to be so construed as to imply the intention to impose these consequences, unless its provisions are such as to render the construction inevitable. A time-honored rule for the interpretation of statutes forbids it. Said Mr. Justice Field, in delivering the opinion of the Supreme Court in United States v. Kirby, 7 Wall. 482, 19 L. Ed. 278:

"All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislation intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter."

This statement has been repeated by that court in numerous cases since that time; the latest being perhaps that of Jacobson v. Massachusetts, 197 U. S. 11, 25 Sup. Ct. 358, 49 L. Ed. 643. It is the opposite of this to recognize a hardship, an injustice, and then to fortify the way to it by adopting the fatalistic answer, "thus saith the law." And it is, indeed, worse than this if the law does not say it at all, it is to assume the conclusion and then mold the premises so that they may justify the conclusion. Accidents will happen, and at places more or less remote from places of repair, or where the car cannot be left upon the track without peril to the public as well as to the employés.
Undiscoverable defects may at any time appear while the car is moving on the track in a train, and it has been hauled in that condition before it can be known. We are not prepared to believe that Congress intended to impose a law upon a business of public utility which cannot be carried on without more or less frequent violations of such law, and to fasten thereon a liability to prosecution as for a crime or misdemeanor.

Among the fundamental legal principles, Broom in his Legal Maxims, *238, classes the maxim "Lex non cogit ad impossibilia," a rule of law which applies to statutes of the most positive character, statutes which cannot by any rule of construction be so interpreted as to prevent the certainty of the result. And in his commentary upon it he says:

"The law in its most positive and peremptory injunctions is understood to disclaim, as it does in its general aphorisms, all intention of compelling to impossibilities and the administration of laws must adopt that general exception in the consideration of all particular cases."

While this maxim is not uniformly applicable, as, for instance, when the statute relates to a dangerous business and gives a private remedy, we think it is a proper one to apply in the construction of a law inflicting a penalty, and the business to which it relates is not itself unlawful.

It was upon the application of this maxim that the case of Chew Heong v. United States, 112 U. S. 536, 5 Sup. Ct. 255, 28 L. Ed. 770, was decided. The Chinese exclusion acts of 1882 (Act May 6, 1882, c. 126, 22 Stat. 58), and 1884 (Act July 5, 1884, c. 280, 23 Stat. 115), forbade the re-entry of a Chinese laborer without the production of the collector's certificate, which by these acts he should obtain on leaving the United States. But he had left prior to the date of the acts, and so, of course, could not have obtained the certificate. By the treaty with China of 1880 (22 Stat. 826), being resident here, he was entitled to go abroad and return without hindrance or condition. Congress, however, had the power to pass laws in derogation of the treaty. But although the denial of the right to return without the certificate was peremptory, the court held that in this the act required an impossibility, and, for the purpose of saving the right given by the treaty, it was to be presumed that Congress did not intend its prohibition to be absolute, and that the statutes should be so construed as to avoid an unreasonable or unjust result.

On the argument, counsel for the government, when asked what language of the act created the absolute duty contended for, referred to the last clause in section 2, which is, "and which can be uncoupled without the necessity of men going between the ends of cars," as if that language constituted an independent requirement. But this language is descriptive of the equipment required, and imports nothing in regard to the duty of the carrier when from accident, or some other cause without his fault, the equipment becomes deranged. And, because the statute does not make any command in that regard, the general law supplements the duty of the carrier by declaring that he shall use the utmost diligence in having the defect corrected. By this har-
monious co-operation of statute and common law, the intended result is worked out without any unjust consequence.

The court is not at this time made up of the same members as it was when the Delk Case was decided, but all are agreed that the decision was right as applied to a defect occurring during transit, and that so applied we should abide by it unless it shall be overruled by the Supreme Court. Still, if it should be held that our decision in the Delk Case was wrong, it does not necessarily follow that in this suit for a penalty the court below was also wrong in giving the instruction complained of.

The result of these considerations is that, for the error in the instruction regarding the sufficiency and cogency of the proof required, the judgment must be reversed and a new trial awarded.

NORFOLK & W. RY. CO. v. HAZELRIGG.
(Circuit Court of Appeals, Sixth Circuit. April 19, 1909.)

No. 1,889.

1. PLEADING (§ 120* )—ANSWER—SUFFICIENCY OF DENIAL.
   Under the rule of code pleading which prevails in Kentucky, an answer which confines itself to denying in ipsis verbis the allegations of the petition, and does not attempt to deny their substance or spirit, is bad as being evasive and tendering immaterial issues.
   [Ed. Note.—For other cases, see Pleading, Dec. Dig. § 120.*]

2. MASTER AND SERVANT (§ 296*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.
   In an action by a brakeman against a railroad company to recover for an injury received while uncoupling cars used in interstate commerce, one of which was being moved with a defective coupler in violation of Safety Appliance Act March 2, 1893, c. 196, § 2, 27 Stat. 531 (U. S. Comp. St. 1901, p. 8174), it was error for the court to give a general instruction as to the effect of contributory negligence where the cars could have been uncoupled from the other side of the train without the necessity of going between them as plaintiff did.
   [Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 296.*]

3. TRIAL (§ 235*)—INSTRUCTIONS—WEIGHT AND SUFFICIENCY OF EVIDENCE.
   Where defendant pleaded a release in defense to an action for a personal injury, it was not error to refuse an instruction that to overcome the strong presumption arising therefrom the plaintiff must produce evidence to convince the minds of the jury beyond reasonable controversy.
   [Ed. Note.—For other cases, see Trial, Dec. Dig. § 235.*]

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

J. P. Holt and J. F. Hager, for plaintiff in error.
B. G. Williams, for defendant in error.

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

SEVERENS, Circuit Judge. This action was brought by Hazelrigg, the plaintiff below, for negligence resulting in the loss of an arm while in the employment of the railroad company, the plaintiff in er-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
ror, as a brakeman in its yard at Williamson, W. Va., in October, 1905. The pleadings having been several times amended, a substitute for the original petition was filed by leave of the court, and a new answer was filed. In this petition the plaintiff alleged that at the time of the accident the defendant was hauling and using cars in interstate commerce which were not equipped with proper couplings, that they were not in good repair, the particular defect being that a certain coupling pin could not be lifted out of its place so that the cars could be separated without going between the cars. This, as appeared from the evidence given on the trial, was because the chain which connected the pin with the lever was either too long or was broken. The plaintiff further alleged that he was directed by the defendant to uncouple the cars, and, after having tried to uncouple them by using the lever, he went between the cars to uncouple them, and was caught between the ends of the cars and his arm was crushed; and that his injury was caused by the gross negligence and carelessness of the defendant in permitting the couplings to be and remain out of repair and in a dangerous condition. The answer denied the negligence charged to the defendant, and alleged that the accident happened through the negligence of the plaintiff. The cause was tried by a jury, and a verdict was given for the plaintiff.

At the close of the evidence, counsel for the defendant moved for an instruction to the jury that they should render a verdict for that party. This was refused, and an exception was taken. The errors assigned relate to this action of the court, and to the refusal of instructions and to instructions given.

We see no sufficient ground for the complaint that the court refused to give peremptory instructions to find a verdict for the defendant. There was evidence which tended, at least, to support the allegations of the petition. Whether the jury ought to have regarded it as satisfactory is not a question for us. One question of law, however, is presented in this connection. For the defendant it is contended that there was no evidence whatever that the car in question was being used in interstate traffic. The court held that it was not necessary for the plaintiff to prove that the car with the defective couplings was engaged in interstate commerce, because, as the court said, there was no issue raised upon that point by the pleadings. In this we think the court was right. The petition alleged that "the defendant was hauling and using in interstate commerce on its line at said place freight cars not equipped with couplers coupling automatically by impact, and which could not be uncoupled without the necessity of one going in between the ends of the cars." The answer of the defendant was that:

"It denies that, on or about November 2, 1905, it was hauling or using in Interstate commerce on its line at Williamson, W. Va., freight cars not equipped with couplers coupling automatically by impact, or was so using cars which could not be uncoupled without the necessity of one going in between the ends of the cars."

This was a literal denial, and the rule of code pleading which prevails in Kentucky is that:

"An answer which confines itself to denying in Ipsiis verbis the allegations of the complaint, and does not attempt to deny their substance or spirit, is
bad as being evasive and tendering immaterial issues." 1 Encl. of Pl. § Pr. 798.

The instructions of the court were, as we think, in the main correct, and presented the case to the jury fully and fairly. With respect to the duty of the railroad company to equip its cars with automatic couplers and to maintain such equipment, and the duty of using all reasonable diligence in keeping the equipment in good order, the court charged the jury that the proper construction of the safety appliance act (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]) was that which we have since approved in St. Louis & S. F. R. Company v. Delk, 158 Fed. 931, 86 C. C. A. 95, and in United States v. Illinois Cent. R. Company (a case decided at our March session) 170 Fed. 542. Of course, it follows that in that regard we must think the defendant at least has no ground for complaint.

There is, however, a single point on which we think the court below was in error. This was in its charge and refusal to charge concerning the subject of contributory negligence on the part of the plaintiff. The defendant requested the court to give the following instruction:

"The court further charges the jury that if they shall believe and find from the evidence that, at the time and upon the occasion of receiving the injuries sued for, the plaintiff was himself negligent, and by his own negligence contributed to the injuries sustained by him and sued for herein, and that, but for which negligence upon the part of plaintiff, if any there was, such injury could not have happened to or been sustained by him, then they must find for defendant."

This request was refused. The charge given was:

"Certainly it is no defense in this case that he was guilty of contributory negligence in attempting to make a coupling at all, because the statute expressly provides that, if the cars are not equipped as required, the employee does not assume a risk, and you cannot defeat him because of his going in between the cars by calling it contributory negligence. If he can be defeated on any claim of this sort of contributory negligence, it must be on the ground that he failed after he got in there, and whilst trying to make the coupling under those circumstances, to exercise such care as an ordinarily prudent person would exercise under like circumstances. I am going to let you pass on that question, although I say that I doubt whether there is any evidence to justify you in so finding. However, I will allow you to pass on it."

We think the instructions asked for should have been given, and that the instruction given was erroneous. It is apparent that the difficulty which the court had arose from a misconception of the nature and scope of the risks which the servant by the general rule assumes by his contract of employment, and from which section 8 of the safety appliance act relieves him. The assumption of those risks of the employment which are known to him, or would be known by the exercise of common intelligence, is a term of the contract with his employer, and continues to be so from the beginning. If a new risk becomes apparent, he may refuse to go on until it is removed. It is not a risk which he had assumed. If he does go on, he is deemed to have assumed the new risk also, and the original contract is modified to that extent, and the employer will understand that the employment is to continue upon the new conditions. The safety appliance act eliminates this element of assumption of risk from the contract of employment when the risk arises from the nonperformance of the duties im-
posed by the act upon the employer. Contributory negligence is a different matter. It consists of mutual faults, the concurrence of which causes the mischief. In a case like this the fault of the employer consists in the creation of, or permitting the continuance of, a condition of danger; the fault of the employé is that, seeing the dangerous condition, he does not conduct himself with reasonable prudence to avoid injury. His contributory negligence is wholly alien to the contract of employment. The contract is not affected by the circumstance of the accident. The latter is an incident occurring during its execution. What we have here said is authorized by the opinion of this court delivered by Judge Taft in Narramore v. Cleveland, C., C. & St. L. Ry. Company, 96 Fed. 298, 37 C. C. A. 499, 48 L. R. A. 68.

The artificial distinction between negligence on the part of the plaintiff in going in between the cars, and in what he did after going in, seems to have been taken in order to give place to the doctrine of the assumption of risk. But that doctrine, as we have seen, had no application to such conditions. We have spoken of the distinction taken by the learned judge as "artificial," by which we mean that we cannot see any reasonable ground for it. That the instruction may have been harmful is shown by the facts which appeared from the evidence, that upon the opposite side of the track was another lever on the end of the other of the coupled cars whereby this same coupling could have been unlocked, and that another employé was standing on that side of the train who could, and doubtless would, if requested, have unlocked the coupling by using the lever on that side. And, further, the conditions were such that, if the plaintiff must needs be the man to open the coupling, he might have passed around the rear of the train and used the other lever. The danger being so great that Congress had made special provision for it, it would seem there would be reason for thinking that the employé should appreciate the danger and take such measures for avoiding it as were available to him. For this error the judgment must be reversed.

Another question is presented by the record. It appears that directly after the injury the plaintiff was taken to a hospital provided by the defendant, where his arm was amputated, and where he remained and was taken care of for five or six weeks, until he was supposed to be recovered, and was discharged. An agent of the company agreed with him to pay him $25 in cash, to give him a pass over its own road and $2.75 for further transportation to his home, for any possible claim against the company he might have on account of the accident; and thereupon the plaintiff gave the defendant the following receipt:

"Know all men by these presents, that the undersigned, John T. Hazelrigg, yard brakeman, in consideration of the payment by the Norfolk & Western Railway Company, of the sum of twenty-seven 75-100 dollars, the receipt whereof is hereby acknowledged, do hereby release and discharge the said company from all liability for or on account of the matter described above.

"Witness my hand and seal, this 14th day of December, 1905.

"John T. Hazelrigg. [L. S.1."

The "matter described above" was the "personal injuries received by him" in the accident herein mentioned. The defendant set up this receipt and release as a sufficient discharge. The plaintiff replied, and
gave some evidence tending to show, that at the time of giving it he was without money or means of subsistence and had no suitable clothing; that he was worn down by suffering and was afflicted by a malady which affected his mind, and that he did not read the paper and did not know what he was doing when he made the settlement.

It would be of no use to express our opinion of this reply to the receipt. It is sufficient to say that there was some substantive evidence to support it, and, under the rule settled for this court, the verdict of the jury settles the fact. Upon the law regarding this question, the court charged the jury as follows:

"It is claimed that it was not his act and deed, because he did not have mental capacity sufficient to know that he was settling his claim, or to comprehend the nature of the settlement he made. If such was the condition of his mind at that time, that was not his act and deed, and he is not bound by it. If, however, he did have mental capacity to know it and realize that he was making a settlement, and to realize the nature of that settlement, he is bound by it, and there can be no recovery in this case. The fact that the plaintiff did not read it does not invalidate it, nor is it invalidated because it was an unfair bargain and defendant took advantage of him in obtaining it from him. His remedy to invalidate it on this ground was in equity, and he has not seen fit to seek that remedy. He has seen fit to say that he did not know the nature of it, and did not realize that he was settling his claims against the defendant, and that he did not have mental capacity sufficient to know what he was doing, and that such was not his act and deed. Of course, this is a good answer to the release, if it is true, and it is for you to determine that question."

It might be that there was error in what was here said about the necessity of resorting to equity in the case supposed (see Wagner v. National Life Ins. Company, 90 Fed. 395, 33 C. C. A. 121), but the defendant did not make this point. For the rest, it is substantially correct, and does not seem to be questioned. But the defendant requested an instruction respecting the burden of proof, and was entitled to an instruction upon that subject. The instruction prayed was this:

"The court charged the jury that the burden in this case rests on the plaintiff to overcome the strong presumptions arising from the terms of and his signature to the writing of December 14, 1905, read in evidence, and the jury, to overcome such presumption, must do so upon evidence convincing the minds of the jury beyond reasonable controversy."

This instruction the court was not bound to give. In the first place, it was not for the court to characterize the presumption as "strong"—its weight was for the jury; and, secondly, while it is often said in similar circumstances that the evidence must be convincing beyond a reasonable doubt, yet this is done rather as matter of advice to the jury than as an absolute direction. The action being a civil action, where a preponderance of evidence is sufficient, it was sufficient if the evidence, of which the presumption was a part, taken as a whole, preponderated in favor of the plaintiff. Whether in this regard it would have been erroneous to have given this instruction as a help to the jury in weighing the testimony, we need not determine.

There are no other questions of sufficient importance to merit discussion.

The judgment must be reversed, with a direction to award a new trial.
CHICAGO, B. & Q. RY. CO. v. UNITED STATES.

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

No. 2,787.

1. APPEAL AND ERROR (§ 806*)—REVIEW—DIRECTED VERDICT.

Where at the close of the evidence both parties request a directed verdict, but two questions are open for consideration in the appellate court: First, was there substantial evidence supporting the finding? and, second, did the court commit any error of law during the trial?

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3474, 3475; Dec. Dig. § 866.*]

2. RAILROADS (§ 254*)—SAFETY APPLIANCE ACTS—CONSTRUCTION.

The duty imposed on railroad companies by Safety Appliance Act March 2, 1893, c. 196, 27 Stat. 531, as amended by Act April 1, 1896, c. 87, 29 Stat. 85 (U. S. Comp. St. 1901, p. 3174), and Act March 2, 1903, c. 976, 32 Stat. 943 (U. S. Comp. St. Supp. 1907, p. 885), are absolute, and a company is not relieved from liability for the penalty for its violation by the exercise of reasonable care, nor because the violation was not intentional.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 254.*]

3. RAILROADS (§ 254*)—SAFETY APPLIANCE ACTS—CONSTRUCTION.

An action to recover the penalty is a civil and not criminal action.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 254.*]

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

For opinion below, see 156 Fed. 180.

Charles J. Greene and Ralph W. Breckenridge, for plaintiff in error. Phillip J. Doherty and Charles A. Goss (A. W. Lane and Luther M. Walter, on the brief), for defendant in error.

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

ADAMS, Circuit Judge. Two suits were instituted by the United States to recover penalties for violating Safety Appliance Act of March 2, 1893, c. 196, 27 Stat. 531, as amended by the subsequent acts of April 1, 1896, c. 87, 29 Stat. 85 (U. S. Comp. St. 1901, p. 3174), and March 2, 1903, c. 976, 32 Stat. 943 (U. S. Comp. St. Supp. 1907, p. 885). Three separate violations are complained of in one suit and one in the other; but the two, having been consolidated for the purposes of a trial, will be treated as one suit with four counts.

The several counts charge the use in interstate traffic by the defendant railway company of four separate cars of insufficient coupling appliances or insufficient grabirons or handholds. They set forth all other facts essential to a cause of action in favor of the United States. After issue joined a trial was had, and, at the close of all the evidence, each side moved for a peremptory instruction in its favor. The court instructed for plaintiff, and a verdict was rendered accordingly. Due exceptions were preserved to this action, and the present writ of error challenges its correctness.

Both sides having requested an instructed verdict in their favor, under a familiar rule of practice, there are only two questions open for

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
consideration by us: First, was there substantial evidence supporting the finding? and, second, did the court commit any error of law during the trial? Empire State Cattle Co. v. Atchison, T. & S. F. Ry. Co., 147 Fed. 457, 459, 77 C. C. A. 601, and cases there cited. No claim is made under the latter head, so we are left to inquire solely as to whether the judgment below is supported by any substantial evidence. The cause is simplified by the concession of counsel for the railway company that there was evidence tending to prove the defective condition of each of the four cars as charged, and that they were all being used at the time stated in the several counts in hauling interstate commerce or as a part of a train containing other cars which were doing so.

The sole contention is that, notwithstanding this concession, inasmuch as it appears by the proof that defendant did not know its cars were out of repair and had no actual intention at the time to violate the law, but, on the contrary, had exercised reasonable care to keep them in repair by the usual inspections, it is not liable in this action. Learned counsel concede, what is undoubtedly true, that sustaining their contention involves a reversal of the doctrine unanimously declared by this court in United States v. Atchison, T. & S. F. Ry. Co. (C. C. A.) 163 Fed. 517, and United States v. Denver & Rio Grande R. R. Co. (C. C. A.) 163 Fed. 519, and a disregard of what they call the dictum of the Supreme Court in St. Louis & Iron Mountain Ry. Co. v. Taylor, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. 1061; and they accordingly invite us to enter upon a reconsideration of the questions so decided.

It was held by us, and in our opinion it was necessarily held by the Supreme Court in the Taylor Case, that the duty of railroads under the statute in question is an absolute duty, and not one which is discharged by the exercise of reasonable care or diligence. Since those cases were decided, this court in the case of Chi., Mil. & St. P. Ry. Co. v. United States (C. C. A.) 165 Fed. 423, has again approved of their doctrine, and the Circuit Court of Appeals for the Fourth Circuit in the case of Atlantic Coast Line R. R. Co. v. United States (decided March 1, 1909) 168 Fed. 175, in considering this question, made a review of pertinent authorities, and particularly of the cases of this court as well as of the Taylor Case, and in an exhaustive opinion reached the same conclusion that we did.

The main ground for asking a reconsideration of our former rulings is presented in an argument drawn from the assumed criminal character of the proceeding against the railroads authorized by the safety appliance law. It is argued that no criminal offense can be committed when no injury has befallen any one, or when there is no intent to do the act constituting the offense, and that no such offense can be established by construction. Whether these positions are maintainable as abstract propositions of law or not, concerning which we express no opinion, they have no application to the present case. This is not a criminal case. It is a civil action in the nature of the action of debt to recover a penalty, which Congress in its wisdom saw fit to impose upon railroads to secure compliance with certain specified regulations made to promote the safety of passengers and freight carried
in interstate commerce and to protect employés engaged in that service. After making provisions for the automatic coupling devices and grab-iron and handholds, the statute enacts that any common carrier making use of any car not equipped as required by the act "shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States. * * *" Section 6 of the act of 1893. This is not the language employed in fixing punishments denounced for criminal offenses. The act made it unlawful for railroads to use cars not equipped as therein provided, and thereby imposed a duty upon railroad companies to equip cars accordingly. This was, by clear and unequivocal language of the lawmaker, made an absolute duty, not dependable upon the exercise of diligence or the existence of any wrong intent on the part of the railroad companies. Whether a defendant carrier knew its cars were out of order or not is immaterial. Its duty was to know they were in order and kept in order at all times. Cases supra. A breach of this duty, like the breach of most civil duties, naturally entailed a liability, and Congress fixed that liability not as a punishment for a criminal offense but as a civil consequence, so far as the government was concerned, of a failure to perform the duty which in the opinion of Congress the public weal demanded should be performed by railroad companies.


In Fortune v. Incorporated Town of Wilburton, 73 C. C. A. 338, 142 Fed. 114, we had under consideration an action for violating an ordinance which subjected the offender to a fine and provided that the same might be enforced by imprisonment. We there held that the action for the fine was a civil action. Judge Hook, speaking for the court, said:

"The weight of authority is that such an action is civil in character and not criminal, even though, as in this case, payment of the penalty assessed is authorized to be enforced by the arrest and detention of the persons."

In the recent unreported case of New York Central & Hudson River Railroad Co. v. United States (decided by the Circuit Court of Appeals for the First Circuit) 165 Fed. 838, Judge Putnam, speaking for the court in an action to recover a penalty for violating Act June 29, 1906, c. 3594, 34 Stat. 607 (U. S. Comp. St. Supp. 1907, p. 918), known as the "Twenty-Eight Hour Law," after reviewing authorities, English and American, said:

"Therefore, in view of Atcheson v. Everitt, Cwp. 382, and other authorities cited, we must agree that, both in the United States, subject to the limitations we have stated, and in England, the present proceeding is held to be 'as much a civil action as an action for money had and received,' using the language of Lord Mansfield. While, as we have said, certain guaranties of the Consti-
tion apply, none of them touch any of the questions involved which are raised by the plaintiff in error; and the rules of pleading and procedure and evidence for this suit are those which apply to an ordinary civil action for debt between private parties."

In United States v. B. & O. S. W. R. Co., 159 Fed. 33, 38, 39, 86 C. C. A. 223, the Circuit Court of Appeals for the Sixth Circuit had under consideration the same "Twenty-Eight Hour Law." The action was to recover a penalty, and the contention was made that it was criminal and not civil. The court, in an opinion on a motion for rehearing, disposed of that contention by saying:

"The petition in each case was for the recovery of a penalty, and the actions are in the similitude of the common-law action for debt, the form being simplified by the rules of Code pleading. * * * The action of debt has long been used, and regarded as the appropriate remedy for the collection of penalties prescribed for the violation of statutes. * * *"

The Supreme Court in Lilienthal's Tobacco v. United States, 97 U. S. 237, 265, 24 L. Ed. 901, in United States v. Zucker, 161 U. S. 475, 481, 16 Sup. Ct. 641, 40 L. Ed. 777, in Schick v. United States, 195 U. S. 65, 24 Sup. Ct. 826, 49 L. Ed. 99, and in Hepner v. United States (just decided) 213 U. S. 103, 29 Sup. Ct. 474, 53 L. Ed. ---, treating respectively of violations of the national revenue laws, of the customs administrative act, of the oleomargarine act of 1886, and of the act regulating the immigration of aliens, announced principles which, in our opinion, are consistent alone with the theory that this is a civil action. To the same effect, also, are the following cases: Hawlloetz v. Kass (C. C.) 25 Fed. 765; The Good Templar (D. C.) 97 Fed. 651; City of Sparta v. Lewis, 91 Tenn. 370, 23 S. W. 182; Campbell v. Burns, 94 Me. 127, 46 Atl. 812; United States v. Brown, Fed. Cas. No. 14,662 (24 Fed. Cas. 1,248).

The exhaustive opinion of Judge Evans, in United States v. Illinois Cent. R. Co. (D. C.) 156 Fed. 162, to which our attention is called, in which the contrary conclusion was reached, has been carefully considered, but we are unable to give our assent to its conclusion.

For the reasons stated, and on the strength of the authorities cited, notwithstanding the able argument made to the contrary, we must adhere to the conclusions heretofore reached.

The judgment must be affirmed.

HALLA et al. v. COWDEN et al.†

(Circuit Court of Appeals. Ninth Circuit. May 3, 1909.)

No. 1,624.

1. DEEDS § 47*—EXECUTION—ATTESTATION—COMPETENCY OF WITNESSES.

Under Civ. Code Alaska, § 82 (31 Stat. 503), which requires deeds to be "executed in the presence of two witnesses," such witnesses need not be disinterested persons; the ancient rules so requiring being based on the fact that, under the law at that time, interested persons were not competent to testify in court to such execution in case of any controversy re-

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*For other cases see same topic & * NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
† Rehearing denied May 26, 1909.
specting it, which law has been generally abrogated, and is not in force in Alaska.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 106; Dec. Dig. § 47.*]

2. MINES AND MINERALS (§ 64*)—LEASES—VALIDITY OF ASSIGNMENT.

An assignment of a lease of mining property in Alaska, required by Code Civ. Proc. Alaska, § 1046 (61 Stat. 493), to be executed with the formality of a deed, is not invalid because the subscribing witnesses thereto were members of the partnership which was the assignee.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 64.*]

3. MINES AND MINERALS (§ 38*)—MINING CLAIM—EJECTMENT—QUESTIONS FOR JURY.

The pleadings in an action of ejectment for a mining claim held to present issues of fact which under the evidence were properly submitted to the jury.

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

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

Elwood Bruner and J. Allison Bruner (P. M. Bruner, Edward Lande, and John P. Allen, of counsel), for plaintiffs in error.

Charles E. Shepard (Thomas R. Shepard, of counsel), for defendants in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. This was an action in ejectment brought by the defendants in error against the plaintiffs in error in the District Court for the District of Alaska, Second Division, to recover possession of a certain placer mining claim in the Cape Nome mining district described as the “Golden Bull Claim.” Plaintiffs in the court below (defendants in error) based their right of action upon a lease executed by the defendants (plaintiffs in error) on February 26, 1906, wherein they leased the mining claim in controversy to F. R. Cowden, one of the plaintiffs, for a term of years beginning on February 26, 1906, and extending until July 1, 1909. By an assignment dated March 6, 1906, the plaintiffs, as copartners doing a mining business under the firm name and style of the Golden Bull Mining Company, succeeded to the interest of F. R. Cowden. It was provided, among other things, in the lease, that the lessees should enter upon the mining claim described immediately after the execution of the lease and work and mine the same steadily and continuously during the term thereof during the mining season, and it was further provided that any failure to work and mine the same for a period of 15 consecutive days was to be considered at the option of the lessors a violation of the agreement.

The defendants in their answer allege that the plaintiffs claim to be entitled to the possession of the premises by reason of the lease set forth in the complaint; that as one of the conditions of the lease plaintiffs covenanted and agreed to enter upon the said mining claim immediately after the execution of the lease, and to work and mine the claim steadily and continuously during the term of the lease during mining season, and any failure to work and mine said claim for 15

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
consecutive days to be considered at the option of the lessors a viola-
tion of the lease; that plaintiffs had failed, refused, and neglected to
prosecute the work continuously, and for a period of much more than
15 days had failed and neglected to do any work whatsoever upon said
mining claim; that in May, 1906, and after the plaintiffs had full
knowledge of the adverse claim of the owners and lessees of the Bon
Voyage placer mining claim which claim was in conflict with the Gol-
den Bull mining claim, the plaintiffs abandoned the claim, and sur-
rrendered the same to the possession of adverse claimants; that W. J.
Rogers, one of the plaintiffs, in violation of the covenants of the lease
and in fraud of the rights of the defendants, located a portion of said
claim in his own name, and adversely to the rights of the defendants,
and that at no time had the plaintiffs gone into the possession and
mined and operated the undisputed portion of the claim, or had they
attempted to do so as required by the terms, covenants, and conditions
of the lease. It was further alleged as a defense to the action that
plaintiffs had surrendered the lease to the defendants and abandoned
said mining claim, and ceased to prosecute work thereon for a period
of more than 15 days, and since said surrender had ceased to work
thereon, and forfeited thereby all rights if any they had which may
have been secured by them by said lease; that, by the terms of said
lease, it was provided that, upon the violation by the lessee therein or
any person under him of any covenant contained in said lease, the term
of said lease should at the option of the lessors expire, and the same
and the said premises with the appurtenances become forfeit to the
lessors; that the defendants exercised said option and retook pos-
session of said ground, and mined and operated the same until enjoined
by order of the court. In their reply plaintiffs alleged that in the
month of October, 1906, the owners of a certain placer mining claim
known as the Bon Voyage claim were in possession of ground being
a part of the Golden Bull claim mentioned in the complaint; that this
ground was in conflict between the Golden Bull claim and the Bon
Voyage claim; that defendants being desirous of bringing an action
against the owners of the Bon Voyage claim and their privies to re-
cover their possession of the ground in dispute, plaintiffs’ company ex-
cuted a release to the defendants in order that they might bring an
action of ejectment against the parties in possession of the disputed
ground; that they might be able upon the trial of such action to show
that they were entitled to the possession of said disputed ground, and
have the right of possession thereto; that, to enable the defendants
to bring such action, the plaintiffs executed the release which was plac-
ed in the hands of one T. M. Reed, an agent and attorney for the de-
fendants, not as an absolute delivery of the release to the said Reed or
to the defendants, but solely and expressly upon the condition that
the release should be held by the said Reed undelivered until the de-
fendants should have executed an agreement with the plaintiffs to
make a lease of the Golden Bull claim to the plaintiffs for a term of
two years from and after the conclusion of the contemplated litigation;
that the defendants, after having first agreed to do as aforesaid, re-
ceded from their agreement, and wrongfully obtained and took from
the possession of said Reed the lease and release thereof, and still re-
tain possession of the same; that the defendants had not executed, and they refused to execute, an agreement on their part for a new release; that, shortly after having so wrongfully obtained possession of said lease and release, the defendants without notice to the plaintiffs that they had receded from their agreement, and without making any demand upon the plaintiffs that they required plaintiffs to comply with the terms of said lease, entered into the possession of said leased premises, and they have thence retained possession thereof, and excluded the plaintiffs therefrom. It is further alleged in plaintiffs' reply that none of the time from the date when the plaintiffs temporarily suspended work on the leased premises in the month of May, 1906, until the time when said Reed on behalf of the defendants obtained from the plaintiffs the execution and deposit with him of said release and deposit of said lease, was comprised in the mining season for mining said leased premises according to the then customary and approved methods and seasons of working such grounds as that included in the leased premises. The case was tried before the court and jury, and upon the conclusion of the evidence it was submitted under instructions. The jury returned a verdict in favor of the plaintiffs.

It is assigned as error that the court overruled defendants' objection to the introduction in evidence of the assignment of T. R. Cowden, the lessee of the mining claim, to the Golden Bull Mining Company, on the ground that the assignment had not been executed with the formalities required by section 82 of the Civil Code of Alaska (31 Stat. 503). That section provides as follows:

"Deeds executed within the district of lands or any interest in lands therein shall be executed in the presence of two witnesses, who shall subscribe their names to the same as such; and the persons executing such deeds may acknowledge the execution thereof before any judge, clerk of the district court, notary public, or commissioner within the district, and the officer taking such acknowledgment shall indorse thereon a certificate of the acknowledgment thereof and the true date of making the same, under his hand."

Section 1046 of the Alaska Code of Civil Procedure, relating to evidence (31 Stat. 493), provides as follows:

"No estate or interest in real property, other than a lease for a term not exceeding one year, nor any trust or power concerning such property, can be created, transferred, or declared otherwise than by operation of law, or by a conveyance or other instrument in writing subscribed by the party creating, transferring or declaring the same, or his lawful agent under written authority, and executed with such formalities as are required by law."

The objection is that the assignment was not executed in the presence of two disinterested witnesses. The assignment was acknowledged before a notary public and executed in the presence of two witnesses, but these two witnesses were copartners, of the assignor in the Golden Bull Mining Company. It is therefore contended that they were not qualified to witness the execution of the assignment. This objection is supported by the case of Winsted Savings Bank, etc., v. Spencer, 26 Conn. 195, decided in 1857. In that case the execution of a mortgage deed to the Winsted Savings Bank, a private moneied corporation, was attested by a witness who at the time of the execution of the deed was a stockholder in the corporation. The witness was al-
so the magistrate who took the acknowledgment of the deed. The court referring to the statute of Connecticut concerning lands, which provides that the "subscribing of the name of the grantor shall be attested by two witnesses," said:

"But this is an ancient statute, and, as we suppose, has by the profession always been considered as requiring that deeds should be attested by disinterested or competent witnesses, witnesses who could testify in court with respect to the execution upon any controversy that might arise in respect to it."

The case of Child v. Baker, 24 Neb. 188, 38 N. W. 725, decided in 1888, is also cited to the same effect. In that case the law of Nebraska provided that:

"Deeds of real estate * * * executed in this state must be signed by the grantor or grantors * * * in the presence of at least one competent witness."

At that time a provision of the Code of the state relating to evidence provided as follows:

"A person who has a direct legal interest in the suit is not a competent witness unless called on for that purpose by the opposite party."

It was held that a subscribing witness who was the real owner of the title to be evidenced by the deed was not a competent witness under the statute. In both of these states the statutes disqualifying witnesses on account of interest have since been repealed. Wigmore on Evidence, § 488, and note.

The history of the rule disqualifying a witness on account of interest and the abolition of the rule is given in Wigmore on Evidence, §§ 575, 576, et seq. In section 576 the author refers to the abolition of the rule in the United States with this comment:

"The details of the old rule in its application to the numerous circumstances of pecuniary interest may therefore be ignored as having no longer any importance. In every jurisdiction under our law interest as a disqualification is expressly abolished."

In the laws of Oregon from which the Alaska Civil Code and Code of Civil Procedure were taken the disqualification of a witness on account of interest was abolished as early as 1862. The statute is found in B. & C. Comp. § 722. This provision was incorporated in the Alaska Code of Civil Procedure as section 1033, which provides:

"Neither parties nor other persons who have an interest in the event of an action or proceeding are excluded as witnesses."

It follows that the execution of the assignment was valid under the statute, and the objection to its introduction in evidence was properly overruled.

It is assigned as error that the court denied the motion of the defendants made at the close of the testimony to direct a verdict for the defendants. The motion was based upon several grounds, among others the issue raised by the plaintiffs' reply to defendants' answer. In defendants' answer it was alleged that the plaintiffs had surrendered the lease to the defendants, and had abandoned the mining claim, and ceased to prosecute the work thereon for a period of more than 15 days, and had ever since said surrender ceased to work thereon, and had
forfeited thereby all rights, if any they had, which may have been secured by them by said lease. In plaintiffs' reply it was admitted that a release had been executed by the plaintiffs and placed in the hands of one T. M. Reed, defendants' agent and attorney, but solely and expressly upon the condition that said instrument should be held by said Reed undelivered until defendants should have executed an agreement with the plaintiffs to make the lease of the Golden Bull claim to the plaintiffs for the term of two years from and after the conclusion of the contemplated litigation with adverse claimants to a portion of the claim. It was further alleged that defendants had wrongfully obtained possession of this release, and had entered into possession of the released premises. It is now contended by the defendants that plaintiffs by their pleading upon that issue were estopped from asserting any right to the possession of the mining claim until the termination of the litigation; that, as this litigation was still pending at that time, the court should have instructed the jury to return a verdict for the defendants. But plaintiffs' reply did not admit the surrender or defendants' right to the possession of the release placed in escrow; nor did it admit the right of the defendants to the possession of the premises in controversy. Both of these claims on the part of defendants were denied by the plaintiffs, and testimony was introduced tending to show that they were without foundation and without right, and the questions were submitted to the jury with the following instructions:

"If the defendants satisfy you by a preponderance of the evidence that the plaintiffs abandoned the claim and surrendered the lease to the defendants, your verdict should be for the defendants. On the contrary, if the plaintiffs have established their contention, as set forth in their reply to the defendants' answer, that T. M. Reed, attorney acting for the defendants, induced the plaintiffs to execute a release of their interest and rights in the lease by representing to them that it was necessary for them so to do in order that the defendants might successfully prosecute a suit for the recovery of the possession of a part of the leased ground against Frank H. Waskey and others, who had taken possession of the same to the wrong, as claimed, of both the defendants herein and their lessees, successors in interest, and assigns, the plaintiffs herein; that the release was placed in the custody of the said Reed in trust that he should hold the same until the defendants should execute and deliver to them an agreement stipulating that a new lease should be given to them running for a term of two years from the successful termination of the contemplated action against Waskey and others, and further stipulating that meantime, until the execution and delivery of this agreement to the plaintiffs, the release should be held in trust, and should be delivered to the defendants only in exchange for said agreement contemporaneously with the delivery of the agreement; and that the defendants afterwards wrongfully obtained the release from said Reed without delivering to the plaintiffs the agreement provided for in the proposition of Reed to them, and that the defendants, then taking advantage of their own wrong, took possession of the claim while the plaintiffs were awaiting fulfillment of the terms of the proposition of Reed,—then the entry upon the claim by the defendants was unlawful, and the plaintiffs should recover in this action, unless the plaintiffs had previously to the defendants' entry upon the claim abandoned the claim for more than 15 days without the assent or acquiescence of the defendants, or had in some other manner theretofore released the lessors from the obligations of the lease. * * * "If the jury find from the testimony that the lease and release of the lease were left with T. M. Reed to be delivered by T. M. Reed to the defendants upon defendants giving an agreement for a new lease, and that the defendants Schwarz and Halla obtained possession of these papers from T. M. Reed without complying with said conditions, and if the jury further find that, while
said papers were in the possession of T. M. Reed, the plaintiffs were led to believe, and had good cause to believe, from the acts, conduct, or silence of the defendants that the defendants were not then requiring of them a compliance with the terms of said lease and would not claim a forfeiture if they failed to comply with the terms thereof, then the jury are instructed that no forfeiture for failure to comply with the terms of said lease could be claimed by the defendants until they had put plaintiffs upon their guard, and had given notice to plaintiffs that they required of them a compliance with the terms of the lease.

"The jury are instructed that there is no evidence of any authorization of the placing of the lease in suit or of the release thereof which was executed on the part of the plaintiffs in the hands of T. M. Reed, except on the condition set forth in the resolution in evidence by which the plaintiffs, Golden Bull Mining Company, authorized the placing of said documents in the hands of said Reed, namely, that the defendants should execute an agreement to the plaintiffs to execute a lease of the Golden Bull claim to the plaintiffs for the period of two years from the conclusion of the litigation then about to be commenced against adverse claimants thereof, and the jury are further instructed, the undisputed evidence showing that the defendants did not execute any such agreement to execute a new lease, that the placing of said lease and said release thereof in the hands of said Reed has never taken effect as a surrender of the lease."

We are of the opinion that these instructions fairly presented to the jury the questions at issue.

It is further contended that the court should have instructed the jury to return a verdict for the defendants upon the ground that the plaintiffs quit work on the premises in controversy in May, 1906, and thereafter failed and neglected to work and mine the ground for a period of 15 consecutive days during the mining season as required by the lease. There was evidence tending to show that the mining season for this particular character of claim was during the winter, and that the winter work had been performed for this claim. It also appeared from the evidence that B. Schwarz, one of the defendants, was absent from Nome at the time his partners executed the original lease with the plaintiffs on February 26, 1906; that his name was signed to the lease by Otto Halla, one of his partners, without authority; that Schwarz returned to Nome in July, and on September 24, 1906, he signed the lease, the legal effect of which was to ratify the lease as of the date of February 26, 1906. This was also a fact tending to show that the failure of the plaintiffs to work the mine during the summer of 1906 was not understood by the defendants as a cause of forfeiture under the lease, or, if it was, that the forfeiture was waived. There was also evidence tending to show that the conduct of the defendants with respect to this lease and their dealings with the plaintiffs in other respects amounted to a waiver of a forfeiture under the terms of the lease.

We think the question of a forfeiture was properly submitted to the jury for their determination. We have examined the instructions given to the jury by the court, and find no error prejudicial to the defendants' rights. They covered all the appropriate instructions requested by the defendants, and those refused were properly refused.

The judgment of the court below is affirmed.
LOOE SHEE v. NORTH, Immigration Com'rr, et al.
(Circuit Court of Appeals, Ninth Circuit. May 3, 1909.)

No. 1,686.

1. ALIENS (§ 40*)—IMMIGRATION—STATUTES.
   Act Cong. Feb. 20, 1907, c. 1134, 34 Stat. 898 (U. S. Comp. St. Supp. 1907, p. 389), regulating the immigration of aliens into the United States, and providing for the deportation of alien prostitutes and such as become public charges within three years, etc., was a re-enactment and extension of Act Cong. March 3, 1903, c. 1012, 32 Stat. 1213, and prior legislation on the same subject enacted in the light of the construction placed on the prior acts by the courts.

   [Ed. Note.—For other cases, see Aliens, Dec. Dig. § 40.*]

2. ALIENS (§ 51*)—IMMIGRATION—PROSTITUTES.
   Act Cong. Feb. 20, 1907, c. 1134, § 2, 34 Stat. 898 (U. S. Comp. St. Supp. 1907, p. 391), excludes prostitutes or women or girls coming into the United States for any immoral purpose and section 3 declares that any alien woman or girl who shall be found an inmate of a house of prostitution, or practicing prostitution, at any time within three years after she shall have entered the United States shall be deemed to be unlawfully therein, and shall be deported. Held, that where petitioner, an alien female, was found practicing prostitution in the United States within three years after her entry, she was subject to deportation, though her status at the time of entry as the wife of a citizen of the United States entitled her to enter.

   [Ed. Note.—For other cases, see Aliens, Dec. Dig. § 51.*]

3. ALIENS (§ 51*)—IMMIGRATION—PROSTITUTION—EVIDENCE.
   Evidence that an alien female was found practicing prostitution within three years after her entry was evidence that she was a prostitute when she entered the United States, and was therefore subject to deportation as provided by Act Cong. Feb. 20, 1907, c. 1134, 34 Stat. 898 (U. S. Comp. St. Supp. 1907, p. 389).

   [Ed. Note.—For other cases, see Aliens, Dec. Dig. § 51.*]

4. ALIENS (§ 40*)—STATUTES—REPEAL—EXCLUSION—PROSTITUTES.

   [Ed. Note.—For other cases, see Aliens, Dec. Dig. § 40.*]

5. ALIENS (§ 23*)—EXCLUSION—STATUTES—CHINESE PROSTITUTES.
   Act Cong. Feb. 20, 1907, c. 1134, 34 Stat. 898 (U. S. Comp. St. Supp. 1907, p. 389), providing for the exclusion of alien prostitutes, was applicable to Chinese persons, notwithstanding section 43 declares that the act shall not be construed to repeal, alter, or amend existing laws relating to the immigration or exclusion of Chinese persons or persons of Chinese descent.

   [Ed. Note.—For other cases, see Aliens, Dec. Dig. § 23.*]

Appeal from the District Court of the United States for the Northern District of California.

McGowan & Worley, for appellant.

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
LOOE SHEE V. NORTH.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. This is an appeal from an order of the District Court for the Northern District of California dismissing proceedings upon order to show cause why a writ of habeas corpus should not issue as prayed for in an application made on behalf of one Looe Shee.

It is alleged in the petition for a writ of habeas corpus that Looe Shee came to the United States of America from the republic of Mexico as the lawful wife of Lew Chow, a citizen of the United States, in April, 1906, and since her arrival in the United States she has continued to be, and then was, the wife of said Lew Chow; that she was being imprisoned, restrained, confined, and detained of her liberty by Hart H. North, Commissioner of Immigration at the port of San Francisco, without authority of law; that she was in custody under a warrant of deportation issued September, 1907, by the Secretary of the Department of Commerce and Labor under the provisions of Immigration Act Feb. 20, 1907, c. 1134, 34 Stat. 898 (U. S. Comp. St. Supp. 1907, p. 389); that said warrant of deportation provided that she, the said Looe Shee, be deported from the United States to the Empire of China. It was alleged that said Looe Shee last resided in the republic of Mexico, and left her home therein to enter the United States as the lawful wife of Lew Chow, a citizen thereof. Upon the petition the court ordered the Commissioner of Immigration to show cause why a writ of habeas corpus should not issue as prayed for.

In the answer to the order to show cause the Commissioner of Immigration set forth his application to the Secretary of Commerce and Labor for a warrant for the arrest of Looe Shee, the issuance of the warrant, the arrest, and the taking of Looe Shee before a board of special inquiry; her appearance before the board by attorneys, who were fully advised as to their right to introduce evidence in her behalf; the refusal of her attorneys to offer any testimony in her behalf; the findings of the board:

"That Looe Shee was admitted at the port of San Francisco, where she arrived in transit from Mexico, via El Paso, Tex., on April 28, 1906. That she is a native of China, married to Lew Chow, a Chinese native of the United States, who has since deserted her and is supposed to be dead. That on the 22d instant said woman was arrested in a house of prostitution located on Ross alley, near Jackson street, this city, where she was practicing prostitution. That she has been a prostitute for a year or more last past. Upon her arrest she was given every opportunity, in accordance with the foregoing telegraphic warrant and the statute, to show cause why she should not be deported to the country whence she came, and at a regular meeting of the board of special inquiry, in accordance with the aforesaid warrant, on the advice of her attorney, she stood mute and refused to answer any question. And the above facts were ascertained from her preliminary statement taken at the time of her arrest, on the 22d Instant, and from the madam of the brothel in which she was found."

The answer alleges:

"That a full and correct report in writing of the hearing before the board of special inquiry was made to the Secretary of Commerce and Labor, and thereupon the said Secretary issued the warrant for the detention and deportation of the said Looe Shee, under which she was held in custody."
The warrant is dated October 10, 1908, and is set forth in the answer. It is signed by the acting Secretary of Commerce and Labor and recites:

"That the said Looe Shee is an alien within the meaning of the said statute, is a prostitute, was a prostitute at the time of her admission into the United States, and has been found an inmate of a house of prostitution practicing prostitution," and that "the period of three years after landing had not elapsed."

The answer admitted that, prior to the time the said Looe Shee entered the United States, she went through the form of a contract of marriage and marriage ceremony with a native Chinese person named Lew Chow, which said native Chinese is mentioned in the petition in this case. In the eighth paragraph of the answer it was alleged that:

"Respondent [the Commissioner of Immigration] was advised and believed that the said contract of marriage and marriage ceremony were performed in the City of Mexico, in the United States of Mexico; that the said marriage contract and marriage ceremony were a mere sham, and a means for evading the laws of the United States prohibiting the landing of Chinese persons within the United States; that the said marriage contract and marriage ceremony were entered into and performed solely for the purpose of enabling the said Looe Shee to land in and enter the United States as the wife of a native Chinese person, when in fact the said Looe Shee was not otherwise entitled to land in or to enter the United States; and the said marriage contract was not entered into and the said marriage ceremony was not performed for the purpose of creating the relation of husband and wife, other than as therein stated."

In the court below evidence was introduced upon the issues presented by the application for the writ of habeas corpus, the order to show cause, and the answer, and the court found all of the allegations contained in the answer to be true, except paragraph 8 of the answer, to the effect that the marriage ceremony therein referred to was a sham, and was entered into for the purpose of evading the laws of the United States prohibiting the landing of Chinese persons. As a conclusion of law the court found that the petitioner was not entitled to a writ of habeas corpus as prayed for, and the proceedings were thereupon dismissed.

The proceedings for the deportation of Looe Shee were in pursuance of the following provisions of the act of February 20, 1907, entitled "An act to regulate the immigration of aliens into the United States" (34 Stat. 898):

"Sec. 2. The following classes of aliens shall be excluded from admission into the United States: * * * Prostitutes, or women or girls coming into the United States for the purpose of prostitution, or for any other immoral purpose. * * *"

"Sec. 3. * * * And any alien woman or girl who shall be found an inmate of a house of prostitution or practicing prostitution, at any time within three years after she shall have entered the United States, shall be deemed to be unlawfully within the United States and shall be deported as provided by sections 20 and 21 of this act."

"Sec. 20. That any alien who shall enter the United States in violation of law, and such as become public charges from causes existing prior to landing, shall upon the warrant of the Secretary of Commerce and Labor, be taken into custody and deported to the country whence he came at any time within three years after the date of his entry into the United States. * * *

"Sec. 21. That in case the Secretary of Commerce and Labor shall be satis-
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It appears from the answer that Looe Shee had full opportunity to be heard before the executive officers of the government upon all questions involving her right to be and remain in the United States under this statute. This brings the case within the law as declared in the Japanese Immigrant Case, 189 U. S. 86, 23 Sup. Ct. 611, 47 L. Ed. 721. In that case a Japanese woman was landed at the port of Seattle, in the state of Washington, on the 11th day of July, 1901. On or about July 15, 1901, the immigrant inspector, having instituted an investigation into the circumstances of her entry into the United States, decided that she came into the United States in violation of the law, that she was a pauper, and a person likely to become a public charge; aliens of that class being excluded by Act March 3, 1891, c. 551, 26 Stat. 1084 (U. S. Comp. St. 1901, p. 1294). It was contended that the provisions of the latter act, giving to inspection officers plenary power over the classes of aliens herein referred to, should be construed to extend only to aliens who had not effected an entrance into the United States, and not to those who had lawfully entered the United States and had been incorporated into the population of the country. The proceedings in the case were in conformity with the provisions of that act and other acts of Congress then in force, and were substantially the proceedings followed in the present case under Act Feb. 20, 1907, 34 Stat. 898. This act was a re-enactment and extension of the legislation upon the subject of immigration, and made in the light of the construction placed upon the previous acts by the courts. The decision of the Supreme Court in the Japanese Immigrant Case is therefore applicable to the present case. In that case the court said:

"That Congress may exclude aliens of a particular race from the United States, prescribe the terms and conditions upon which certain classes of aliens may come to this country, establish regulations for sending out of the country such aliens as come here in violation of law, and commit the enforcement of such provisions, conditions, and regulations exclusively to executive officers, without judicial intervention, are principles firmly established by the decisions of this court. Nishimura Eoku v. United States, 142 U. S. 651, 12 Sup. Ct. 336, 35 L. Ed. 1146; Fong Yue Ting v. United States, 149 U. S. 638, 13 Sup. Ct. 1016, 37 L. Ed. 905; Lem Moon Sing v. United States, 158 U. S. 583, 15 Sup. Ct. 967, 39 L. Ed. 1082; Wong Wing v. United States, 163 U. S. 228, 16 Sup. Ct. 977, 41 L. Ed. 140; Fok Yung Yo v. United States, 185 U. S. 296, 305, 22 Sup. Ct. 686, 46 L. Ed. 917."

"In Nishimura's Case the court said: 'The supervision of the admission of aliens into the United States may be intrusted by Congress either to the Department of State, having the general management of foreign relations, or to the Department of the Treasury, charged with the enforcement of the laws regulating foreign commerce; and Congress has often passed acts forbidding the immigration of particular classes of foreigners, and has committed the execution of these acts to the Secretary of the Treasury, to collectors of customs, and to inspectors acting under their authority.' After observing that Congress, if it saw fit, could authorize the courts to investigate and ascertain the facts on which depended the right of the alien to land, this court proceeded: 'But, on the other hand, the final determination of those facts may
be intrusted by Congress to executive officers; and in such a case, as in all others, in which a statute gives a discretionary power to an officer, to be exercised by him upon his own opinion of certain facts, he is made the sole and exclusive judge of the existence of those facts, and no other tribunal, unless expressly authorized by law to do so, is at liberty to re-examine or controvert the sufficiency of the evidence on which he acted. Martin v. Mott, 12 Wheat. 19, 31, 6 L. Ed. 537; Philadelphia & Trenton Railroad v. Stimpson, 14 Pet. 448, 458, 10 L. Ed. 535; Benson v. McMahon, 127 U. S. 457, 8 Sup. Ct. 1240, 32 L. Ed. 234; In re Otelza, 138 U. S. 330, 10 Sup. Ct. 1031, 34 L. Ed. 464. It is not within the province of the Judiciary to order that foreigners who have never been naturalized, nor acquired any domicile or residence within the United States, nor even been admitted into the country pursuant to law, shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches of the national government. As to such persons, the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law. Murray v. Hoboken Co., 18 How. 272, 15 L. Ed. 372; Hilton v. Merritt, 110 U. S. 97, 3 Sup. Ct. 548, 28 L. Ed. 83.

"In Lem Moon Sing's Case it was said: 'The power of Congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications.' And in Fok Yung Yo's Case, the latest one in this court, it was said: 'Congressional action has placed the final determination of the right of admission in executive officers, without judicial intervention, and this has been for many years the recognized and declared policy of the country.'

"What was the extent of the authority of the executive officers of the government over the petitioner after she landed? As has been seen the Secretary of the Treasury, under the above act (Act Oct. 19, 1888, c. 1219), was authorized, within one year after an alien of the excluded class entered the country, to cause him to be taken into custody and returned to the country whence he came. Substantially the same power was conferred by Act March 3, 1891, c. 551, by the eleventh section of which it is provided that the alien immigrant may be sent out of the country, 'as provided by law,' at any time within the year after his illegally coming into the United States. Taking all its enactments together, it is clear that Congress did not intend that the mere admission of an alien, or his mere entering the country, should place him at all times thereafter entirely beyond the control or authority of the executive officers of the government. On the contrary, if the Secretary of the Treasury became satisfied that the immigrant had been allowed to land contrary to the prohibition of that law, then he could at any time within a year after the landing cause the immigrant to be taken into custody and deported. The immigrant must be taken to have entered subject to the condition that he might be sent out of the country by order of the proper executive officer; if within a year he was found to have been wrongfully admitted into or had illegally entered the United States. These were substantially the views expressed by the Circuit Court of Appeals for the Ninth Circuit in United States v. Yamasakata, 100 Fed. 404, 40 C. C. A. 454. "

"Now it has been settled that the power to exclude or expel aliens belonged to the political department of the government, and that the order of an executive officer, invested with the power to determine finally the facts upon which an alien's right to enter this country, or remain in it, depended, was 'due process of law, and no other tribunal, unless expressly authorized by law to do so, was at liberty to re-examine the evidence on which he acted, or to controvert its sufficiency.' Fang Yue Ting v. United States, 149 U. S. 698, 713, 13 Sup. Ct. 1016, 37 L. Ed. 905; Nishimura Ekiu v. United States, 142 U. S. 651, 12 Sup. Ct. 336, 35 L. Ed. 1146; Lem Moon Sing v. United States, 158 U. S. 538, 547, 15 Sup. Ct. 967, 39 L. Ed. 1082."

This case was followed under revised and amendatory statutes in United States v. Sing Tuck, 194 U. S. 161, 24 Sup. Ct. 621, 48 L. Ed.
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It is contended, however, on behalf of Looe Shee, that, having entered the United States lawfully as the wife of a citizen of the United States, the act of Congress did not apply to her, as the wife of a citizen takes the status of her husband. But this is not a question of status, having relation only to the date of her arrival and entry into the United States. The question is: What was her status at that time, and what has it been during the probation period of three years prescribed by Congress? As said by Mr. Justice Holmes in the late case of Keller v. United States, 213 U. S. 138, 29 Sup. Ct. 470, 53 L. Ed. —:

"For the purpose of excluding those who unlawfully enter this country, Congress has power to retain control over aliens long enough to make sure of the facts. Yamataya v. Fisher (Japanese Immigrant Case) 130 U. S. 56, 23 Sup. Ct. 611, 47 L. Ed. 721. To this end it may make their admission conditional for three years. Pearson v. Williams, 202 U. S. 281, 26 Sup. Ct. 608, 50 L. Ed. 1029. If the ground of exclusion is their calling, practice of it within a short time after their arrival is or may be made evidence of what it was when they came in. Such retrospective presumptions are not always contrary to experience or unknown to the law. Bailey v. Alabama, 211 U. S. 452, 454, 29 Sup. Ct. 141, 53 L. Ed. —. If a woman were found living in a house of prostitution within a week after her arrival, no one, I suppose, would doubt that it tended to show that she was in the business when she arrived. But how far back such an inference shall reach is a question of degree, like most of the questions of life. And, while a period of three years seems to be long, I am not prepared to say, against the judgment of Congress, that it is too long."

This was said in a dissenting opinion; but it was not a dissent from anything that the majority of the court had said in the case. On the contrary, it was the statement of the law as it had been declared by the court in previous cases with respect to the conditions upon which aliens are permitted to be and remain in this country, and upon that subject unquestionably expressed the views of the whole court.

It is further contended that, as Looe Shee arrived in this country on April 28, 1906, and was a resident in the United States at the time of the passage of the act of February 20, 1907, the act did not apply to her. This question was before Judge Wolverton in the District Court of Oregon in the case of Ex parte Durand (D. C.) 160 Fed. 558. In a carefully considered opinion, referring to the provisions of Act March 3, 1903, c. 1012, 32 Stat. 1213, and Act Feb. 20, 1907, 34 Stat. 898, the court held that the act of 1907 continued in force the act of 1903 as to the conduct of alien prostitutes during the period of probation provided by law, and saves the right of the United States to deport one who arrived in 1906, though no proceeding was brought for that purpose until 1908. We adopt the opinion in that case as our opinion on this question in this case.

It is objected that the act of February 20, 1907, does not apply to Chinese persons, or a person of Chinese descent. The objection is based upon the provisions of section 43 of the act, which provides as follows:
"... Provided, that this act shall not be construed to repeal, alter, or amend existing laws relating to the immigration or exclusion of Chinese persons or persons of Chinese descent. ..." 34 Stat. 898.

It is contended that Congress has expressed its purpose in the Chinese exclusion acts that the immigration, residence, and exclusion of Chinese persons should be governed by the laws of Congress upon that subject, and not by the general laws regulating immigration. We cannot agree to such a limitation of the act of February 20, 1907, which is entitled "An act to regulate the immigration of aliens into the United States," and by the terms of its various provisions applies to all aliens alike. To hold otherwise would be to favor the Chinese with respect to the admission of certain objectionable individuals, which could not have been the purpose of Congress. We think the construction placed by the Attorney General upon a similar provision in the act of March 3, 1903, is the construction to be placed upon this statute. 24 Op. Atty. Gen. 706. In that opinion the Attorney General said:

"There is nothing in the laws specially relating to the immigration of Chinese persons providing for the exclusion of a merchant or member of any other excepted class, although he may be suffering from a loathsome or dangerous contagious disease; and, unless the act now under consideration is applicable to him, such person may enter the United States with impunity, and the public must suffer the consequences. I can see no valid reason for concluding that the Congress intended, by the proviso in question, to imperil the public safety by allowing a diseased person, because of his Chinese descent, to enter, when the very law in which this proviso appears has, as one of its special purposes, the further and more effective protection of the public from the evil consequences to be expected as a result of the presence of one so afflicted, and to this end prescribe his exclusion."

He further said:

"To admit a Chinese man known to be suffering from a contagious disease, when another alien not so descended would be excluded because afflicted with the same disease, would to that extent defeat the legislative intent, made clear by the terms of the act, and apparently lead to unjust and unexpected results."

With respect to the objection that the warrant of deportation was signed by the acting Secretary of Commerce and Labor and not by the Secretary or Assistant Secretary of that Department, the court will take judicial notice of the departments of the government and the executive officers of such departments. Wigmore on Evidence, § 2576. The judgment of the court below is affirmed.

BRICKSON v. PENNSYLVANIA R. CO.
(Circuit Court of Appeals, Third Circuit. May 18, 1900.)
No. 28.

1. RAILROADS (§ 460*)—FIRES—CONTRIBUTORY NEGLIGENCE OF OWNER OF PROPERTY.

Where a railroad company maintains a platform on its right of way for public use in loading and unloading its cars, and as a necessary incident to its use for that purpose more or less litter and refuse falls upon the ground, a shipper using the same and making no more than the usual

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep'r indexes
amount of litter is under no duty to remove the same, and his failure to do so does not constitute contributory negligence, which will preclude him as a matter of law from recovering for a loss of property from a fire starting by an engine, but communicated to his property through such accumulated refuse.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 460.4]

2. RAILROADS (§ 480)—FIRES—ACTIONS—PRESUMPTIONS AND BURDEN OF PROOF
—NEW JERSEY STATUTE.

Under Act N. J. April 14, 1903 (P. L. p. 673) § 57, which provides that, in an action for an injury done to property by fire communicated from an engine of a railroad company in violation of the provisions of the act, “proof that the injury was communicated from an engine shall be prima facie evidence of such violation, subject to be rebutted by evidence,” etc., where a plaintiff proves that a fire which destroyed his property was communicated from an engine on defendant’s railroad, the presumption of a violation of the statute thus raised must be rebutted by evidence, and the question is one for the jury.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 480.4]

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

George S. Silzer, for plaintiff in error.
Alan H. Strong, for defendant in error.

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

GRAY, Circuit Judge. This case comes up on writ of error from the Circuit Court for the District of New Jersey, where the plaintiff was nonsuited in his action against the defendant corporation, for damages caused by fire from defendant’s locomotive communicating with the plaintiff’s buildings.

Plaintiff’s buildings were immediately on the side of the railroad right of way, and about six inches therefrom. In this building, plaintiff conducted the business of hay pressing, and storing baled hay. On its right of way, next to plaintiff’s property, the railroad company had built a platform for loading cars. This platform extended from plaintiff’s building to a siding between said platform and one of the main tracks of the defendant company. On this siding, the defendant placed cars when necessary to receive goods for transportation and to be loaded from said platform, the platform being about flush with the floor of a car. This platform was used by the plaintiff and by those of the public to whom it was convenient and who desired to ship goods therefrom. Plaintiff’s balerroom, adjoining this platform and opening upon it, stood upon posts about 3½ feet from the ground. On the day before the fire in question, plaintiff had been loading bales of hay from his balerroom, across the platform into a freight car placed upon the siding of the defendant, adjacent thereto. The loading of the car from the balerroom over the platform having been completed late in the afternoon, the car was allowed to stand on the siding next the platform until the next morning, when, about 8:30 o’clock, one of the defendant’s trains passed rapidly along the main track nearest the siding. As this train was passing this

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep’t Indexes
platform, there were dropped or ejected, presumably from the fire box of the locomotive, a quantity of live coals and cinders. Sparks were also seen coming from the smokestack. A strong west wind was blowing from the railroad towards plaintiff’s buildings, which swept the fire, immediately after the passing of the train, under the platform and into the rubbish under plaintiff’s building, from which it was communicated to the building itself. In a short time, the car, platform, and plaintiff’s building were destroyed.

It was in evidence that there was a quantity of loose hay extending from under the car and platform towards the rubbish, waste paper, etc., under plaintiff’s building, and the testimony was that the fire from the burning coals dropped by the locomotive was communicated to this loose hay and thence to the rubbish under plaintiff’s building. A statute of New Jersey, passed in 1903 (Act April 14, 1903; P. L. p. 673), provides as follows:

“56. Every company or person operating or using any railroad shall take and use all practicable means to prevent the communication of fire from any engine used by them in passing along or being upon such railroad to the property, of whatever description, of any owner or occupant of any land adjacent or near to said railroad, and shall provide such engine with a screen or cover in the smokestack so as to arrest and prevent, as much as practicable, the escape of fire; any company or person refusing or neglecting to make such provision shall forfeit for every such refusal or neglect one hundred dollars to any person who may sue for the same, to be recovered, with costs, in an action upon contract in any court having cognizance thereof, one-half of the sum to go to the person suing and one-half to the state for the public school-fund.

“57. When injury is done to property by fire communicated from an engine of any company or person in violation of the foregoing section, such company or person shall be liable in damages to the person injured; and in every action for an injury done to the property of any person by fire communicated from an engine in violation of the preceding section of this act, proof that the injury was communicated from an engine shall be prima facie evidence of such violation, subject, nevertheless, to be rebutted by evidence of the taking and using all practicable means to prevent such communication of fire as by said section required; it shall be lawful for any railroad company to insure such property exposed to loss by fire communicated from its engines, and such company shall have an insurable interest therein.”

There can be little or no doubt that the fire which destroyed plaintiff’s building was communicated from the locomotive of the train passing immediately before its outbreak. At the close of the plaintiff’s evidence, a motion for nonsuit was made by defendant’s counsel, and granted by the court, the learned judge saying:

“The only conclusion from the evidence which the jury could draw is, that the fire originated on the defendant’s lands under or near the platform. The plaintiff’s own testimony is strongly to this effect, and all the other evidence is in harmony with it. It apparently caught from combustible matter lying on the defendant’s land at that place. There is, however, no evidence of there having been any litter or other combustibles at that point prior to the time of the fire.

“The evidence shows that in loading cars at that point, some straw and hay fell through the cracks on either side of the platform, and the jury, if the case were left to them, would naturally and necessarily infer that it was this straw and litter which caught fire. This was put there by the plaintiff in the course of his business; I think it was negligence to allow it to remain there, and that such negligence contributed to his injury. But if it were-
the duty of the defendant to remove it, it would be allowed a reasonable

time to discharge its duty before it could be deemed negligent. The
evidence shows that this car had just been loaded, and was still standing on
the track. Under the circumstances, which are undisputed, I think the
question of reasonable time thus presented, is a question of law rather than
of fact, and as such I must conclude that the defendant has not been shown to
be negligent in that respect.

"In short, so far as the evidence discloses, if there had been no litter on
the defendant's property, there would have been no fire. This litter was
put there and allowed to remain there by the plaintiff, and as its being there
undoubtedly contributed to the plaintiff's injury, I feel constrained to grant
the motion for a nonsuit. It was the causal connection between defendant's
negligence and the injury, without which the latter would not have happened."

We cannot agree as to this finding of contributory negligence on
the part of the plaintiff, as a matter of law. It appears from the
evidence that the scattered hay on defendant's right of way, under
the car and under the platform, was presumably dropped through the
spaces on either side of the platform, while the hay was being handled
between plaintiff's baleroom and the freight car, these spaces being
between the platform and defendant's baleroom and between the plat-
form and the freight car. It is not shown in what quantity this litter
existed under the car and platform, just before the fire, and we are
not to presume that its quantity was greater than was to be expected
from the delivery of the 100 bales or more from defendant's plat-
form into the freight car. The platform was a public one erected
by defendant on its own premises, for the purposes of its freight
traffic. There was necessarily incident to the delivery and reception of
bulky goods from shippers, for transportation by defendant, a cer-
tain amount of litter and refuse. Such conditions appertain to the
business in which defendant was engaged. It invited the delivery
of goods upon this platform for shipment, and if the litter or waste
material remaining on the railroad premises was unavoidable, and
nothing more than what was usually attendant upon the transaction of
such business, no duty devolved upon the shipper to remove the same.
On the contrary, if the accumulation of such material presents a dan-
ger to adjoining property from its liability, under favoring conditions,
to communicate fire, it is the duty of the railroad company to remove
the same. Such an accumulation may come from the delivery of
goods by a number of shippers, and it would be unreasonable to re-
quire that each of them should, after finishing his delivery, return to
defendant's premises to sweep up whatever usual and unavoidable
litter had been made thereby. We think, therefore, at this stage of
the case, the learned judge of the court below erred in finding the
plaintiff guilty of contributory negligence, as a matter of law.

It is to be observed that, by section 57 of the New Jersey statute,
above referred to, it is enacted that:

"In every action for an injury done to the property of any person by fire
communicated from an engine, in violation of the preceding section of this
act, proof that the injury was communicated from an engine shall be prima
facie evidence of such violation, subject, nevertheless, to be rebutted by evi-
dence of the taking and using of practicable means to prevent such com-
munication of fire as by said section required."
The court below seems to have overlooked this provision of the law, in deciding, as a further ground of nonsuit, that if it were the duty of the defendant to remove this loose hay and litter, the question of reasonable time within which this should be done, was, under the circumstances, a question of law, rather than of fact, and in concluding that defendant had not been shown to be negligent in that respect. There was admittedly proof that the fire, and therefore the injury, was communicated from an engine of the defendant. There was, therefore, prima facie evidence of violation by the defendant of the duty imposed upon it by the statute. That is, there was a presumption of negligence which the defendant must rebut, in order to relieve it therefrom. Whether it has done so, is clearly a question for the jury.

The judgment below is therefore reversed, with directions for further proceedings consistent with this opinion.

BRADY et al. v. BERNARD & KITTINGER et al.
(Circuit Court of Appeals, Sixth Circuit. February 13, 1909. Rehearing Denied May 15, 1909.)

No. 1,855.

   An appeal from a judgment making an adjudication of bankruptcy must be taken within the 10 days allowed by Bankr. Act July 1, 1898, c. 541, § 25a, 30 Stat. 553 (U. S. Comp. St. 1901, p. 3432), and the time cannot be extended or revived by any subsequent proceeding in the case.
   [Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 920; Dec. Dig. § 461.*]

   An order of a court of bankruptcy refusing to vacate an adjudication is not one of the orders from which an appeal is provided for by Bankr. Act July 1, 1898, c. 541, § 25a, 30 Stat. 553 (U. S. Comp. St. 1901, p. 3432), nor is it one relating to a controversy arising in bankruptcy proceedings appealable under section 24a, but is an administrative order reviewable only on petition to revise under section 24b.
   [Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 915; Dec. Dig. § 440.*]

   The provisions for appeal made by Bankr. Act July 1, 1898, c. 541, § 25a, 30 Stat. 553 (U. S. Comp. St. 1901, p. 3432), and those for revision under section 24b, are mutually exclusive, and, where an appeal has been erroneously taken, it cannot be treated and sustained as a petition for review.
   [Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 915; Dec. Dig. § 440.*]

   A Circuit Court of Appeals cannot render a cause with directions to dismiss for want of jurisdiction, where the alleged want of jurisdiction in the court below is predicated upon an issue of fact adjudicated in the court below in favor of jurisdiction, and where the order or judgment making such adjudication is not properly brought up for review.
   [Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3302; Dec. Dig. § 840.*]

*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 Western District of Kentucky.

Norman Farrell, Jr., and S. A. Anderson, for appellants.
J. R. Duffin and G. B. Likens, for appellees.

Before SEVERENS, Circuit Judge, and KINAPPEN and SANFORD, District Judges.

SANFORD, District Judge. This is an appeal from the District Court for the Western district of Kentucky, sitting in bankruptcy. The appellees have moved the court to dismiss the appeal upon the ground that it was not taken in time.

The proceedings below, so far as now material, were as follows:

On December 25, 1907, Bernard & Kittinger and the other appellees filed in said District Court an involuntary petition in bankruptcy against the appellant, Philip Brady. On January 9, 1908, Brady filed a plea to the jurisdiction of the court, averring that he had never had his domicile, residence, or place of business within said district; and on January 13, 1908, by leave of the court, filed an answer, averring that he was a farmer chiefly, and therefore not subject to the bankruptcy act of July 1, 1898, c. 541, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3418), and denying that he was insolvent or had committed any act of bankruptcy; to which answer replication was filed.

No further proceedings were had until April 17, 1908, when the attorney who represented the petitioning creditors in the court below presented to the court and filed in the cause a written instrument, dated March 5, 1908, signed by Brady, withdrawing from the record his plea to the jurisdiction and answer, admitting the allegations of the petition, and consenting that he might be adjudged a bankrupt; and on the same day, in pursuance of this instrument and at the instance of said attorney, an order was entered by the court reciting that, upon the motion of said Brady, his plea and answer were withdrawn, and that, the petition for adjudication having been thereupon heard and considered, the said Brady was declared and adjudicated a bankrupt, and the cause referred to the referee in bankruptcy.

On April 12, 1908, 11 days thereafter, the said Brady and the other appellants, claiming to be his creditors also, came and moved the court to set aside the order adjudging Brady a bankrupt, and tendered to the court their sworn petitions praying the same relief, alleging in substance that the aforesaid instrument signed by Brady, upon which the adjudication was based, had been signed and left with the said attorney for the petitioning creditors on condition that it was only to be used in the event Brady failed to comply with certain conditions of a proposed settlement; that Brady had fully complied with these conditions, but that the said attorney had refused to dismiss the case in accordance with the agreement; that Brady had thereupon notified said attorney that his consent to the adjudication in bankruptcy was withdrawn, and that he would resist any effort to have him adjudged a bankrupt upon the authority of the aforesaid instrument; and that thereafter, without notice to Brady, said attorney had wrongfully and

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without right presented said instrument to the court, and caused the aforesaid motion and order of adjudication to be entered.

At a subsequent hearing upon this motion, counter affidavits were filed by the original petitioning creditors, alleging in substance that the aforesaid written instrument had been deposited by Brady with their said attorney with the agreement that if Brady did not comply with the terms of the proposed settlement it was to be filed as the basis of an adjudication in bankruptcy; that Brady had failed to comply with these terms; and that their said attorney, after notifying Brady's attorney that he would promptly file said instrument, had filed the same in good faith, concealing nothing, and in accordance with the agreement.

The motion to set aside the adjudication having been taken under advisement, the court thereafter, of its own motion, entered an order allowing the parties to take proof on the question whether Brady's residence, domicile, or principal place of business had been within the district for the greater portion of the six months immediately preceding the filing of the petition in bankruptcy; and, proof having been taken on this question alone, the court, on June 9, 1908, entered an order reciting that, pursuant to a written opinion that day filed, the motion to set aside the adjudication of bankruptcy was overruled. In the written opinion thus referred to, no reference was made to the manner in which the order of adjudication had been obtained, or to the question whether the said attorney for the petitioning creditors had been authorized to use Brady's written consent as a basis for the adjudication, but the jurisdictional question raised by Brady's plea was alone considered, and, the court reaching the conclusion that it was fairly certain from the testimony that Brady's principal place of business had been within the district for the greater part of the six months preceding the filing of the petition, it was recited that the motion to set aside the order of adjudication "is therefore overruled."

On June 18, 1908, within 10 days thereafter, Brady and the creditors who had moved the court to set aside the adjudication were granted an appeal from "the judgments made and entered in the foregoing causes on April 17, 1908, and on June 9, 1908."

The appellees, after filing a brief on the merits, before the hearing in this court moved to dismiss the appeal on the ground that, not having been taken within 10 days from the judgment of April 17, 1908, adjudicating Brady a bankrupt, it was not in time.

1. In so far as the appeal was taken from the judgment of adjudication entered April 17, 1908, the motion to dismiss must be granted. Section 25a of the bankrupt act of July 1, 1898, c. 541, 30 Stat. 553 (U. S. Comp. St. 1901, p. 8423), provides that an appeal taken from a court of bankruptcy to the Circuit Court of Appeals from a judgment adjudging a defendant a bankrupt "shall be taken within ten days after the judgment appealed from has been rendered." As no appeal was prayed or granted from the judgment of adjudication within 10 days after its rendition, the time for appealing therefrom expired at the end of the said 10 days, and could not be extended or revived by any subsequent proceeding in the case. Credit Company v. Arkansas Railway Company, 128 U. S. 258, 261, 9 Sup. Ct. 107, 32
L. Ed. 448; Conboy v. First Nat. Bank, 203 U. S. 141, 145, 27 Sup. Ct. 50, 51 L. Ed. 128; In re Alden Electric Company, 123 Fed. 415, 89 C. C. A. 509. As neither the motion nor the petitions to set aside said judgment were made or presented to the court until after the expiration of said 10 days, the case cannot, for that reason, if for no other, be brought, even by analogy, within the rule laid down by this court in the case of Mills v. Fisher & Co., 159 Fed. 897, 87 C. C. A. 77, 16 L. R. A. (N. S.) 656, that where a petition to rehear is filed within 10 days after the judgment the time for taking an appeal is thereby extended.

2. The same reasoning, however, does not apply to the appeal from the order or judgment refusing to set aside the adjudication of bankruptcy. The provisions of section 25a of the bankrupt act, allowing appeals to be taken to the Circuit Court of Appeals from judgments adjudging or refusing to adjudge a defendant a bankrupt, granting or denying a discharge, and allowing or rejecting a debt or claim of $500 or over, within 10 days after the entry of the judgment appealed from, relate only to the cases specifically mentioned in this section. The order or judgment overruling the motion to set aside the adjudication of bankruptcy is not one of the judgments specified in such section; hence, if an appeal would lie at all to this court from such order, it would not be controlled by the limitation of time contained in said section of the bankrupt act, but could be taken within the same period as other appeals from the District Courts; that is to say, within six months after the entry of the order sought to be reviewed, as provided in section 11 of the Court of Appeals act of March 3, 1891, c. 517, 26 Stat. 829 (U. S. Comp. St. 1901, p. 552). Steele v. Buel, 104 Fed. 968, 44 C. C. A. 287; Booneville Nat. Bank v. Blakey, 107 Fed. 891, 47 C. C. A. 43; In re Mueller, 135 Fed. 711, 68 C. C. A. 349; General Orders in Bankruptcy, 36 (89 Fed. xiv, 32 C. C. A. xiv).

Furthermore, even if the provisions of section 25a of the bankrupt act were otherwise applicable to the appeal taken from this order or judgment, it is obvious that the time for such appeal would not begin to run from the date of the original judgment of adjudication, but only from the date of the order appealed from, and, having been taken within 10 days from such date, the appeal would be within the proper time.

3. While, however, in so far as the appeal was taken from the order or judgment of June 9, 1908, the motion to dismiss cannot be sustained upon the ground upon which it was based, namely, that the appeal was not taken in time, the court is constrained of its own motion to dismiss such an appeal, for the reason that the order or judgment overruling the motion to set aside the judgment of adjudication is not one from which an appeal will lie to this court. As already stated, it is not one of the specified judgments which are reviewable by appeal under section 25a of the bankrupt act. Neither will an appeal lie under section 24a of the act, investing the Circuit Courts of Appeals with "appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy of which they have appellate jurisdiction in other cases." The "controversies arising in bankruptcy proceedings" referred to in this section, as has been heretofore held by,
this court, are "those independent or plenary suits which concern the bankrupt's estate, and arise by intervention or otherwise between the trustee representing the bankrupt's estate and claimants asserting some right or interest adverse to the bankrupt or his general creditors," and do not include "administrative orders and decrees in the ordinary course of a bankruptcy between the filing of the petition and the final settlement of the estate," which, under section 24b of the bankrupt act, are subject to revision by this court in matter of law upon petition for review. In re Mueller, 135 Fed. 712, 68 C. C. A. 349; Dickas v. Barnes, 140 Fed. 849, 72 C. C. A. 261, 5 L. R. A. (N. S.) 554; Davidson v. Friedman, 140 Fed. 853, 72 C. C. A. 553; In re McMahon, 147 Fed. 684, 77 C. C. A. 668; O'Dell v. Boyden, 150 Fed. 731, 80 C. C. A. 397.

While the line of demarcation between the classes of cases respectively appealable and reviewable is not always distinctly marked, it is clear that the proceedings under the motion to set aside the judgment adjudicating Brady a bankrupt related to an administrative matter which arose in the ordinary course of the administration of the bankrupt estate, under the power of the court to set aside a judgment improperly obtained as an incident to the principal cause and without recourse to an original proceeding for that purpose (Doss v. Tyack, 14 How. 297, 14 L. Ed. 428), and that the order or judgment overruling the motion to set aside the adjudication would have been reviewable by this court in matter of law upon a petition for review seasonably filed in this court. It was expressly held by this court in the case of In re Ives, 113 Fed. 911, 51 C. C. A. 541, that an order sustaining a demurrer to a petition filed for the purpose of vacating an adjudication in bankruptcy is not a judgment from which an appeal will lie, under section 25 of the bankruptcy act, but is reviewable by petition in matters of law. And in the case of Plymouth Cordage Company v. Smith, 194 U. S. 311, 24 Sup. Ct. 725, 48 L. Ed. 992, in which it was held that the Circuit Court of Appeals had jurisdiction to revise in matter of law the proceedings of a District Court in Oklahoma, in bankruptcy, it appears that one of the particulars in which it was sought to review such proceedings was the refusal of the District Court to permit certain creditors of the bankrupt to file a motion to set aside an order dismissing a petition in involuntary bankruptcy. Clearly, the revisory power in reference to setting aside an order dismissing a petition in bankruptcy would be the same as that in reference to an order refusing to set aside an adjudication of bankruptcy.

It is also the settled rule of this court, in accordance with the great weight of authority in the federal courts, and in harmony with the case of First National Bank v. Title & Trust Company, 198 U. S. 280, 25 Sup. Ct. 693, 49 L. Ed. 1051, and earlier decisions of the Supreme Court, that the provisions for appeal under section 24a of the bankrupt act and those for review under section 25b are "mutually exclusive," and that where an appeal has been erroneously taken it cannot be treated and sustained as a petition for review. In re Mueller, 135 Fed. 712, 68 C. C. A. 349; Dickas v. Barnes, 140 Fed. 849, 72 C. C. A. 261, 5 L. R. A. (N. S.) 554; Davidson v. Friedman, 140
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4. It is urged, however, in behalf of the appellants, that it is shown by the weight of the proof that the appellant Brady did not have his principal place of business within the Western district of Kentucky, as found by the District Court; that hence there was no jurisdiction of the cause in the court below; and that, instead of dismissing the appeal, the cause should be remanded to the District Court with instructions to dismiss the entire proceedings. It is, however, sufficient to say in answer to this contention that the rule which appellants seek to invoke, that an Appellate Court will remand a cause with instructions to dismiss whenever it appears from the record that there was no jurisdiction in the court below, has no application except where such want of jurisdiction affirmatively appears upon the face of the record, in a case otherwise properly before the Appellate Court, as in that of Mattingly v. Northwestern R. R. Company, 158 U. S. 53, 15 Sup. Ct. 725, 39 L. Ed. 894, and that the Appellate Court has no jurisdiction to so remand where the alleged want of jurisdiction in the court below is predicated upon an issue of fact adjudicated in the court below in favor of the jurisdiction, and where the order or judgment in which such adjudication was involved is not properly brought before the Appellate Court for review.

5. It results that the appeal in this case must be dismissed. No opinion, however, is expressed as to whether, in view of the lapse of time, a petition for review can now be "seasonably filed" within the rule stated by this court in the case of O'Dell v. Boyden, hereinabove cited.

An order will be entered dismissing the appeal in accordance with this opinion, with costs to the appellees.

JOHNSON v. UNITED STATES.

Circuit Court of Appeals, First Circuit. May 20, 1909.)

No. 810.


The rule applied that, on the trial of a criminal case, the judge may in his discretion exclude evidence of facts which, though relevant to the issue, appear to him to be too remote to be material under all the circumstances of the case.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 674.*]

2. Criminal Law (§ 825*)—Instructions—Necessity of Requests.

The rule applied that, where the instructions of the court on a particular issue in a criminal case are correct as far as they go, the omission to call attention to a particular phase of such issue is not ground for reversal, unless the court's attention was called to it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2005; Dec. Dig. § 825.*]


On the trial of a bankrupt, charged with concealment of property from his trustee, testimony of the trustee is admissible to show that he was not

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
Informed by defendant that property belonging to him was stored in places where that charged to have been concealed was found by the trustee. Jacobs v. United States, 161 Fed. 694, 88 C. C. A. 554, and Johnson v. United States, 163 Fed. 30, 89 C. C. A. 508, construed.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 495.*]

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

See, also, 89 C. C. A. 508, 163 Fed. 30.

John J. Coady (Harvey H. Pratt, on the brief), for plaintiff in error.


Before COLT, PUTNAM, and LOWELL, Circuit Judges.

PUTNAM, Circuit Judge. This was an indictment of a bankrupt for concealing certain goods in fraud of his bankruptcy. He was convicted and sentenced, and then sued out this writ of error. There are quite a number of alleged errors assigned, but they class themselves as stated herein.

The first alleged error was that the court allowed proof of a declaration by Johnson, the bankrupt, made in August, to the effect that he intended to open a number of stores in the autumn, and “stick it into those people” who have been trusting him, “and let the whole thing go up in smoke in April.” He meant April of the following year, and he made an assignment for the benefit of his creditors on the 2d day of that month. The only apparent objection to this is the remoteness of the declaration from the consummation of the intention declared. It does not seem to us to be sufficiently remote to be objectionable on that score. Moreover, on questions of remoteness of this character, the trial judge is permitted to exercise a certain degree of discretion which we cannot overrule in this case.

Then come several alleged errors based on the fact that, while the indictment sets out that the details of the goods secreted were unknown to the grand jurors, a bill of particulars was filed by the United States on the order of the court on Johnson’s motion. These alleged errors relate to evidence which the court admitted with reference to other goods, the whole having a tendency to show that there was a connected intent on the part of Johnson with reference to a general concealment of merchandise from his creditors. The point of the objection seemed to be the rule that nothing except what was detailed in the bill of particulars could lay the basis of a conviction; but, on the attention of counsel being called to the distinction arising from the fact that the evidence objected to was well within the supplemental rule, admitting, for the purpose of showing a fraudulent intent, contemporaneous acts of a character similar to that charged in the indictment, we understood counsel to waive these alleged errors, as they properly should have done.

Johnson also objects that the court refused to admit his wife to prove that up to the time of failure he was paying all his creditors

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
in the usual way. This was offered for the purpose of showing that there had been no attempt to conceal assets. This was a matter of so little weight, and so remote, that we think it was within the discretion of the trial judge to refuse to admit it, and that the exercise of this discretion was of such a character that, under the circumstances, we are not called on to revise it. We adhere to, and approve, the rule stated in Chase's Stephen's Digest of the Law of Evidence (2d Ed.) 6, as follows:

"The judge may exclude evidence of facts which, though relevant or deemed to be relevant to the issue, appear to him too remote to be material under all the circumstances of the case."

Illustrations of this rule are found in the succeeding pages of the work cited and in the notes to the text.

The next alleged error is that the trial judge erred in his instructions to the jury concerning the failure of Johnson to keep books of account. It appears that he did not keep books of account, and the reason he gave was that his transactions were strictly cash, and kept on slips which were destroyed as each transaction was closed. The court submitted the facts about this matter to the jury, to be weighed by them on the question of intent. The court undoubtedly had generally the right to do this. The instructions excepted to cover nearly two pages. So far as they go they are correct, so that, in any event, this court would not be compelled to act on exceptions to a whole mass of instructions, as were those at bar, unless very substantial error existed. Passing by that, the instructions, as we have said, are correct so far as they go; and, if the court omitted to call attention to some particular phase which might not have been in its mind, and which was in the mind of Johnson, it was the duty of Johnson to call attention to it, and ask further instructions if he desired to except. This is the ordinary and just rule.

The trustee in bankruptcy was permitted to testify that he had never learned from Johnson that there was property belonging to him stored in the places where the goods covered by the indictment were found, and that the trustee himself found the goods in question, apparently without the assistance of the bankrupt. This was objected to on the ground that it was an attempt to disclose Johnson's testimony before the referee. The decisions of this court in Jacobs v. United States, 161 Fed. 694, 88 C. C. A. 554, and Johnson v. United States, 163 Fed. 30, 89 C. C. A. 508, are relied on by the plaintiff in error. In these cases it was decided in substance that neither a bankrupt's schedules in bankruptcy nor his examination before the referee, if objected to by the bankrupt, are admissible on an indictment of this character. Also, in Jacobs v. United States, indirect methods of getting in the examination were condemned; and it is especially on that point that the plaintiff in error now relies. No exception was taken to the form of the interrogatory. It is difficult to conceive how, ordinarily, the fact of concealment in violation of the statute can be proven, except by testimony drawn from the trustee in this manner; and we have no doubt that, standing alone, this question and answer are not covered by either of the two decisions cited, or that, standing alone, no error would appear. The record, however,
shows that, on the cross-examination of the plaintiff in error, the fact that there had been an examination of the bankrupt was put into the case without any objection. In the order in which the record is made up, this was apparently put in before the testimony of the trustee was offered; and it is in view of that fact that the plaintiff in error urges that the United States, in putting in this testimony, had reference to the examination before the referee, and thus sought to accomplish a result in an indirect method which had been condemned generally in Jacobs v. United States. This, however, is not the natural order in which the case would be brought out. The trustee's evidence introduced by the United States would naturally precede the testimony of the plaintiff in error, who was called in his own behalf. The objection to the introduction of the testimony of the trustee makes no allusion to the fact that the existence of an examination had already been introduced in evidence; so the record does not show that, when the objection was made in connection with the introduction of that testimony, the attention of the trial court was called to the fact that there had been an examination before the referee. Therefore, in any event, whatever the order of the evidence, the attention of that court was not called to the specific point on which the plaintiff in error now relies. Consequently, we are compelled to treat the evidence of the trustee as though it stood by itself; and, standing by itself, we, as we have said, have no doubt of its admissibility.

We believe we have now considered all the propositions brought to our attention by Johnson, and we find no error in the record.

The judgment of the District Court is affirmed.

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ATOKA COAL & MINING CO. v. MILLER.

(Circuit Court of Appeals, Eighth Circuit. April 30, 1909.)

No. 2,739.

MASTER AND SERVANT (§ 288*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—MACHINERY AND APPLIANCES—EXTENT OF MASTER'S DUTY.

In defendant's coal mine there was a double car track extending down an incline to the shaft. Empty cars were drawn up while loaded cars were let down by means of a cable. At the top of the incline the cable passed around a horizontal wheel, was crossed in front of it, and each end passed over a sheave wheel at the side for the purpose of holding them apart and in their crossed position. Plaintiff, who was an employé in the mine, was between the two parts when the sheave wheels gave way, and was injured by the two parts of the cable springing together. Held that, in an action to recover for the injury, it was prejudicial error to submit to the jury the question of defendant's negligence in failing to plant posts between the two branches of the cable, which might have held them apart when the wheels gave way; it appearing that the appliances as used had been in operation for many years without disclosing any necessity for such posts, and there being no evidence that they were customary or had ever been used elsewhere, and the rule being that a master is not required to adopt every conceivable precaution against accident, but only to exercise reasonable care.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 288.*]

*For other cases see same topic & § numbers in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
In Error to the United States Court of Appeals in the Indian Territory.
For opinion below, see 7 Ind. T. 104, 104 S. W. 555.
Ira D. Oglesby, for plaintiff in error.
William A. Vinson (J. H. Gordon, Randell & Randell, and Wilkins & Vinson, on the brief), for defendant in error.
Before SANBORN and HOOK, Circuit Judges, and AMIDON, District Judge.

HOOK, Circuit Judge. This was an action by Dave Miller against the Atoka Coal & Mining Company for personal injuries received while working in its mine, and claimed by him to have been caused by defective machinery. Upon a trial to a jury in the United States Court for the Central District of the Indian Territory, Miller recovered a verdict for $8,000. The trial court regarded it as excessive, and required a remittitur of $3,500 as a condition to overruling defendant’s motion for a new trial; and judgment was thereupon entered for $4,500. The judgment was affirmed by the United States Court of Appeals in the Indian Territory. The defendant prosecuted this writ of error.

In the underground workings of the mine there was an incline leading from a cross-entry down to the bottom of the shaft. The coal as it was mined was hauled in small cars along the entry to the top of the incline. The cars were then switched to one or the other of two tracks running down the incline to the shaft. The double track on the incline was operated in this manner: At the top was a large wheel placed in a horizontal position and controlled by a brake. In front of it, on either side, were two small sheave wheels, also disposed horizontally. A long wire rope or cable passed around the large wheel, and then crossed in front of it and around the outside of the small wheels; the purpose being to give the rope as much friction surface as possible on the large wheel to prevent it from slipping. One end of the rope was attached to loaded cars at the top of the incline and the other to empty cars at the bottom. When the large wheel revolved the loaded cars were let down the incline on one track and the empty cars were pulled up on the other. There were switches near the top of the incline so arranged that cars could be shunted from one track to the other and taken off into either end of the intersecting entry as desired. By the crossing of the rope in front of the large wheel and its passage over the outer edges of the sheave wheels there was, while the appliances were in operation, a strain upon the sheave wheels caused by the loaded and empty cars at the ends of the rope. Were it not for the sheave wheels, which kept the two arms of the rope apart, they would have come together, recrossed, and assumed their original tangential position to the large wheel.

On the occasion in question the plaintiff went between the ropes, it is claimed unnecessarily, to throw a switch while some loaded cars were being let down and some empties were being pulled up. The sheave wheels gave way, and he was caught and injured by the straightening of the arms of the rope. Though there was sufficient
evidence to require the submission of the case to the jury, it should be observed that the verdict might well have been the other way. There was a sharp conflict as to the cause of the accident, whether an accidental derailment of the cars at a point down the incline, resulting in a sudden and excessive strain on the sheave wheels, or, as was charged in the complaint, some defect in the appliances about the wheels themselves. There was also a like conflict in the evidence as to whether those appliances were in fact defective, and, if defective, whether that condition was discoverable by the exercise of reasonable care in inspection, and also as to whether the plaintiff was guilty of contributory negligence in going between the ropes while the machinery was in operation, contrary to the rules.

Some evidence was received on behalf of plaintiff, over defendant's objection, that if the defendant had planted posts in the bight of the ropes near the sheave wheels they might have caught the ropes and prevented them from straightening out and causing the injury. The court submitted that evidence to the jury, and instructed them that, if the placing of the posts was feasible and ought to have been done, it was the duty of defendant, in the exercise of ordinary care, to place them there, and a failure to do so would be an act of negligence. This was error. Although the complaint contained a general averment of negligence, which we think was sufficient for the introduction of evidence, the evidence received was wholly insufficient to authorize a finding that the defendant was negligent in that particular. The appliances as defendant had them had been in operation many years without disclosure of the necessity for such posts, and it was not shown that the use of them was customary, or in fact that they had ever been used elsewhere. There was nothing more than mere suggestion that if posts had been placed near the sheave wheels they might have caught the ropes and prevented them from flying together; but there was nothing from which the duty of the defendant to maintain them could reasonably have been inferred. After an accident it is easy to suggest methods by which it might have been avoided, though a careful and prudent person engaged in such business would not have anticipated they were reasonably necessary. It was not the duty of the defendant to adopt every conceivable precaution against accident, but simply to exercise reasonable care in supplying and maintaining reasonably safe appliances.

The evidence upon the substantial issues in the case was so conflicting that the prominence given to the matter of posts was well calculated to prejudice the defendant. Upon this subject the Court of Appeals in the Indian Territory said:

"We believe that inasmuch as the complaint was not drawn upon the theory above stated, and in view of the character of the evidence in connection therewith, that the court erred in the admission of such evidence and in instructing the jury upon such theory. And we further believe that the court should have given the appellant's (defendant's) instruction No. 11 eliminating this theory from the case, although, had the complaint been drawn upon this theory and the evidence supported it, we could find no fault with the action of the court in this respect. It is true that the admission of the evidence and the instruction to the jury upon this question may have influenced the jury in determining the amount of damage in this case; but in view of the other evi-
dence in the case we believe that had this evidence been excluded, and had they not been instructed on this point, their verdict would have been for the appellee just the same. And in view of the remittitur of $3,500 required by the court before overruling the motion for a new trial, equalizing the damage with the injury sustained, we believe that the admission of this evidence and the giving of these instructions have not been prejudicial to the appellee in this case. And we refuse to reverse the case on these grounds."

But the admission of the evidence and the giving of the instruction did not, as the court supposed, bear upon the amount of damage. The amount of damage was determined by the nature and extent of the injuries which the plaintiff sustained. The error of the trial court bore upon the plaintiff’s right to recover at all, not how much he should recover, and no court can measure its influence upon the minds of the jurors or weigh it in dollars. It may have been the determining factor in their finding that defendant was negligent. But, even if the evidence and instruction had related to the amount of recovery, the case was not of a character to permit of the extraction of the error by the reduction of the verdict.

There are various other matters presented, which, however, are not likely to arise again, and we need not discuss them.

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

HUXLEY v. PENNSYLVANIA WAREHOUSING & SAFE DEPOSIT CO.

(Circuit Court of Appeals, Third Circuit. June 1, 1909.)

No. 10.

APPEAL AND ERROR (§ 78*)—DECISIONS REVIEWABLE—FINALITY OF ORDER.

A rule made on petition of a defendant requiring the plaintiff and a third party to interplead, but which does not discharge the defendant from liability nor make any disposition of the property which the action was brought to recover, is not a final order from which a writ of error will lie.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dlg. § 464; Dec. Dlg. § 78.*]


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

Joshua R. Morgan, for plaintiff in error.

Joseph H. Taulane and White, White & Taulane, for defendant in error.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below, Norman S. Huxley, herein styled plaintiff, brought an action against the Pennsylvania Warehousing & Safe Deposit Company, herein styled defendant, to recover six automobiles. Thereupon the defendant presented to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep’t Indexes
that court a petition wherein it alleged it had no title to said machines; that they had been stored with it by the Dragon Automobile Company, to which it issued six certificates; that the plaintiff claimed ownership of the automobiles by virtue of ownership of these certificates; that the Dragon Automobile Company, since the storage, had gone into bankruptcy, and its receiver had notified defendant not to deliver the automobiles to the plaintiff. The petitioner offered to bring the automobiles into court or dispose of them as it might direct. It also prayed an order for plaintiff and the receiver to interplead. Thereupon the court, on June 22, 1908, granted a rule on plaintiff and the receiver "to show cause why they should not interplead as to the subject-matter of this action, and why the Pennsylvania Warehousing & Safe Deposit Company should not have leave to dispose of said six automobiles as the court shall direct." To this rule separate answers were filed by plaintiff and the receiver. The only action shown thereon by the court is the memorandum in the docket entries:

"Sept. 18, 1908. Ordered that the rule granted June 22, 1908, on Norman S. Huxley, Dragon Automobile Company, and James A. Hayes, Jr., receiver thereof in bankruptcy, to show cause why they should not interplead as to the subject-matter of this action, and why the Penna. Whg. & Safe Dep. Co. should not have leave to dispose of the said six automobiles as the court shall direct, be made absolute."

The docket entries also show that no orders were subsequently made. Thereupon the plaintiff, without joining the receiver or requesting him to join therein, sued out this writ, and as error assigned the court's action, first, "in making absolute the said rule for an interpleader," and second, "in not dismissing the said rule for an interpleader."

Passing by the question whether, when an order affecting several persons is made, a writ can be sued out by one alone in the absence of summons, severance, or a sufficient showing for nonjoinder of the other (Port v. Schloss Bros. & Co., 149 Fed. 731, 79 C. C. A. 437), we think the record in this case fails to disclose a final order to warrant a writ of error. No order has been made marshaling the parties; no direction has been entered as to the disposal of the property, though the rule to do so was made absolute; and, what is the vital point to the plaintiff, the defendant has not by order been discharged of liability. Under these circumstances, we are of opinion no writ lies. If the court does not discharge the defendant from liability, and this has not been done, the plaintiff is not aggrieved, and if the title of the receiver finally prevails, then the plaintiff was not aggrieved by the court's action. Without passing on any of these questions or expressing any view as to what order would be a final one, or at what stage of the proceeding error would lie, it suffices to say that in the present status of the case a writ of error does not lie, and the one sued out must be dismissed. This conclusion is in accord with federal and state authorities. In Bostwick v. Brinkerhoff, 106 U. S. 3, 1 Sup. Ct. 15, 27 L. Ed. 73, the court say:

"The rule is well settled and of long standing that a judgment or decree to be final, within the meaning of that term as used in the act of Congress giving this court jurisdiction on appeals and writs of error, must terminate
the litigation between the parties on the merits of the case, so that, if there should be an affirmance here, the court below would have nothing to do but to execute the judgment or decree it had already rendered. * * * It has not always been easy to decide when decrees in equity are final within this rule, and there may be some apparent conflict in the cases on that subject, but in the common-law courts the question has never been a difficult one. If the judgment is not one which disposes of the whole case on its merits, it is not final."

In addition thereto, the Pennsylvania cases—Armstrong v. Espy, 220 Pa. 48, 69 Atl. 69; Russell v. Stewart, 204 Pa. 211, 53 Atl. 771; Kenworthy v. Equitable Co., 218 Pa. 289, 67 Atl. 469; and Watkins v. Hughes, 206 Pa. 527, 56 Atl. 22—are in accord with our view that there is no basis in this record for a writ of error, and the same should be dismissed.

SHARPE v. ALLENDE.

(Circuit Court of Appeals, Third Circuit. June 3, 1909.)

No. 18.

Bankruptcy ($ 166*)—VOIDABLE PREFERENCE—REASONABLE CAUSE FOR CREDITOR TO BELIEVE INSOLVENCY OR INTENT OF DEBTOR.

The fact alone that a creditor knows his debtor to be financially embarrassed and is pressing for payment of his claim is not sufficient to charge him with having reasonable cause to believe his debtor to be insolvent and that a transfer of property to him as security is intended as a preference, so as to render such transfer voidable on the bankruptcy of the debtor, under Bankr. Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 (U.S. Comp. St. 1901, p. 3445).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 256; Dec. Dig. § 166.*]

Appeal from the District Court of the United States for the Middle District of Pennsylvania.

See, also, 164 Fed. 448.

I. C. Elder and J. A. Strite, for appellant.

Ruthrauff & Nicklas and O. C. Bowers, for appellee.

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

BUFFINGTON, Circuit Judge. In the court below, the estate of the Wolf Company being in course of administration in bankruptcy, John S. Allender presented a petition, alleging he was the owner by assignment by that company of an account it formerly had against the Pacific Export Lumber Company; that the trustee of the Wolf Company had notified the lumber company said account was still owned by the bankrupt company and not to pay the same to Allender. Thereupon it was agreed the claim be paid to the trustee pending an adjudication of ownership. On reference of that question, the referee held the assignment to Allender by the Wolf Company was an illegal preference, and awarded the fund to its trustee. The court sustained objections to this report and awarded the fund

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1597 to date, & Rep't Indexes
to Allender; its opinion being reported in 164 Fed. 448. Thereupon the receiver appealed.

After argument and due consideration, we find no error in the court's conclusion. The questions of fact have had the painstaking examination characteristic of the judge of the court below, and a discussion of them would be a needless repetition. We content ourselves with saying the proofs do not satisfy us that Allender had reasonable cause to believe the Wolf Company intended by the assignment to give him a preference. And in that connection we refer to Grant v. National Bank, 97 U. S. 80, 24 L. Ed. 971, where Mr. Justice Bradley, speaking of the provision, "having reasonable cause to believe such person is insolvent," in Act March 2, 1867, c. 176, 14 Stat. 517, said:

"It is not enough that a creditor has some cause to suspect the insolvency of his debtor; but he must have such a knowledge of facts as to induce a reasonable belief of his debtor's insolvency, in order to invalidate a security taken for his debt. * * * A man may have many grounds of suspicion that his debtor is in failing circumstances, and yet have no cause for a well-grounded belief of the fact. He may be unwilling to trust him further. He may feel anxious about his claim, and have a strong desire to secure it; and yet such belief as the act requires may be wanting. Obtaining additional security, or receiving payment of a debt, under such circumstances, is not prohibited by law. * * * Hence the act, very wisely, as we think, instead of making a payment or a security void for a mere suspicion of the debtor's insolvency, requires, for that purpose, that his creditor should have some reasonable cause to believe him insolvent. He must have a knowledge of some fact or facts calculated to produce such a belief in the mind of an ordinarily intelligent man."

Applying the reasoning of that case to the present, we are of opinion there was proof of no such facts as to reasonably cause Allender to believe that the Wolf Company intended to give him a preference. That he was anxious about his claim and wanted more security is true; but this state of a creditor's mind is not the measure of proof the act requires.

This view of the case renders it unnecessary for us to pass on the question of whether this appeal lies, as we are of opinion it should be dismissed on the merits.

LIBERMAN et al. v. RUWELL et al.

(Circuit Court of Appeals, Third Circuit. May 18, 1909.)

No. 25.

1. PATENTS (§ 178*)—CONSTRUCTION—EQUIVALENT PARTS.

Where a patent depends for its novelty over the prior art upon a single limited feature of construction, the claims cannot be expanded by any doctrine of equivalents to cover a device which lacks that single essential feature.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 254½; Dec. Dig. § 178.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
2. PATENTS (§ 328*)—INFRINGEMENT—CIGAR ROLLING TABLE AND WRAPPER CUTTER.

The Liberman patent, No. 668,921, for a combined cigar rolling table and wrapper cutter, construed, and, as limited by the prior art, held not infringed.

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

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

For opinion below, see 165 Fed. 208.

John P. Croasdale, for appellants.

Charles Howson, for appellees.

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

GRAY, Circuit Judge. This is an appeal from the decree of the court below, dismissing the bill of complaint, in a suit brought upon letters patent No. 668,921, dated February 26, 1901, issued to Isadore Liberman, complainant's decedent, for certain improvements in a combined cigar rolling table and wrapper cutter. The opinion delivered by the court below, in dismissing the bill, is to be found in 165 Fed. 208. Approving the opinion of and conclusions reached by the learned judge of the court below, it is only necessary to add thereto certain observations suggested by points specially dwelt upon in the argument before this court.

The endless knife which projects through a suitable opening in the rolling table is, as described by the court below, an irregularly elliptically shaped boxlike structure, the top of the inclosing sides of which constitutes the knife edge, which, projecting slightly through the table, serves to cut the leaf spread over the table and the perforated platen, which rests upon springs just inside the knife edge of the box, and covers the space enclosed thereby. In the Williams patent of the prior art, this knife-edged box and the perforated platen enclosed were stationary, and the table moved vertically, so that alternately the knife might extend slightly above it or be flush with it, according as the cutting or wrapper rolling function of the machine was in use. The knife-edged sides of this boxlike structure were deep enough to inclose a considerable air space between the platen and the bottom of the box, and into the bottom of the chamber thus inclosed a suction tube, connected with an air pump, was introduced by which the air in the chamber being exhausted, the tobacco leaf was held securely on the perforated platen. In the patent in suit, which was for alleged improvements in a machine of this character, there is claimed a combination of the same forming and wrapping table, the same endless knife adapted to project through said table and also to lie flush therewith, but differing from the prior art, as exhibited in the Williams patent, by having the relative motion of the knife and table brought about by a vertically moving knife with a stationary table, and by having a structurally separate exhaust box carrying or supporting the knife.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
The peculiarity of the case, as noted in the opinion of the learned judge of the court below, is, that in a previous suit, in which the infringer's device was an exact reproduction of that of the patent in suit, the patent was declared valid and infringement, of course, decreed. As the Williams patent, to which we have just referred, was in the prior art, the scope of plaintiff's invention must be narrowed thereby, and his claims restricted to those particulars which differentiate it with respect to that art, though its patentable validity may not be questioned. All the elements of complainant's patent are old, including the separate exhaust box, but the essential thing claimed is the structurally separate exhaust box connected with and supporting the endless knife, and moving vertically therewith through the surface of the stationary table. In the defendant's machine, we have the stationary knife and exhaust box and vertically moving table of the Williams patent. It is to be remembered that the exhaust box or chamber of that patent consisted of the inclosed space below the knife edge, which could be made of any required dimensions by the deepening or shortening of the inclosing sides of said chamber. In the patent in suit, this chamber is practically enlarged by taking the bottom out of the exhaust chamber, inclosed by the sides of the knife, and resting the sides of the knife upon, and securing them to, a structurally separate exhaust chamber, thus constituting an enlarged exhaust chamber, differing in that respect from the Williams patent only in degree. But this structurally separate exhaust chamber was old in the art, and the defendant has adopted it in his device, so that he has a stationary exhaust box supporting a stationary knife and a movable table relatively thereto. The patentee thus describes his invention:

"My invention comprises improved means for raising the knife above the surface of the surrounding table during the act of cutting the wrapper and then lowering the same flush with the table."

This means is a vertically moving exhaust box pushing the knife above it to the required position above the surface of the table and withdrawing the same by reversed vertical motion. This vertically moving exhaust box and knife is not present in defendant's machine, and one element of the combination described in the patent, therefore, as essential, is lacking.

The doctrine of equivalents, as applied to the relative motion between the table and the knife, has no application here. In the first place, the table cannot have a relative motion with reference to the exhaust box, in the sense in which it has it with reference to the knife, and though a structurally separate exhaust box is old in the art, plaintiff claims that a vertically moving exhaust box supporting the knife is new. But, without dwelling on a distinction which may be merely verbal, it is only necessary to remark that, where a patent depends for its novelty over the prior art upon a single limited feature of construction, the claims cannot be expanded by any doctrine of equivalents to cover a device which lacks that single essential feature. Dealing with the application of the doctrine of equivalents, in Wagner Typewriter Co. v. Wyckoff et al., 151 Fed. 585, 81 C. C. A. 129, the Circuit Court of Appeals said:
"Such an argument would hardly be permissible were we concerned with a broad fundamental patent, but in a patent strictly limited to a specific construction, it is wholly irrelevant. Gathright obtained his second patent because he convinced the Patent Office officials that he had made an improvement in the mechanism of the first patent; and we are now asked to hold as an infringer one who does not use the improvement. This cannot be done."

The decree of the court below is affirmed.

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GENERAL ELECTRIC CO. v. SMITH.

(Circuit Court, D. Massachusetts. June 11, 1909.)

No. 424.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—ELECTRIC SAFETY-FUSE.

The Thalacker patent No. 502,541, for an electric safety-fuse, consisting of a combination of a main safety-fuse, a box or case inclosing the same, and a small auxiliary fuse, not fully inclosed, which blows at the same time as the main fuse, and the purpose of which is to indicate the blowing of the main fuse, was not anticipated and discloses invention, but is not infringed by a device which is without the combination and structurally different, except that it has an auxiliary fuse as an indicator.

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

In Equity. On final hearing.

William K. Richardson and A. D. Salinger, for complainant.

John P. Bartlett and Henry B. Brownell, for defendant.

BROWN, District Judge. This suit is for infringement of letters patent No. 502,541 to Carl Thalacker, dated August 1, 1893, for improvements in electric safety-fuses. Claims 1, 2, and 4 are in issue:

"Claim 1. In an electric safety-fuse, the combination of a main safety-fuse, an auxiliary safety-fuse, and a box or casing completely enveloping the main fuse, but so constructed as to permit the condition of the auxiliary fuse to be seen.

"(2) In an electric safety-fuse, the combination of a main fuse, an auxiliary fuse, and a casing completely enveloping the main fuse, but only partially enveloping the auxiliary fuse."

"(4) In an electric safety-fuse, the combination of a main fuse, an auxiliary fuse, overlying and underlying portions of insulating material, an inclosing casing, said casing provided with an opening through its top portion whereby the condition of the auxiliary fuse may be observed."

The object of inclosing the main safety-fuse is to prevent, when the fuse blows, the spattering of the metal of the fuse strip, and to confine the heated and burning metallic vapors and particles of the molten metal. When the main fuse is completely inclosed its condition cannot be easily observed, and this is a substantial objection, as is shown by the fact that inclosed fuses of the prior art were provided either with openings in the inclosing case or with a transparent cover of glass or mica, as well as by the fact that most of the different forms of inclosed fuses developed since the date of the Thalacker patent have some means of external indication to show when the invisible main fuse is blown.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes 170 F.—38
Thalacker’s specification says:

“Safety-fuses as hitherto constructed have consisted of a strip of fusible metal inserted between the divided ends of an electrical conductor. Such fuses are commonly unprotected by any covering. Hence, when they are ‘blown,’ the metal of the fuse strip is spattered over the surrounding parts, and it is not unusual for an arc to form between the remaining portions of the strip or the terminals of the conductors to which the strip is attached. Further, fuses so arranged are unreliable, as their fusing point is affected by the surrounding temperature, air currents, etc.

“In other constructions the fusible strips have been inclosed in a suitable tube or box, which arrangement obviated the objections stated, but was not suitable for use, as the condition of the fuse could not easily be observed.

“In order to make a safety-fuse which shall have none of the faults mentioned, I combine with a strip of fusible metal, completely inclosed in a non-conducting box or case, an auxiliary fusible strip so located and connected as to be seen at all times, and which will be destroyed when the main fuse, which is out of sight, is ‘blown.’”

The specification states further:

“The operation of my improved fuse is readily understood. When the main fuse is blown, the auxiliary fuse is likewise blown; the main fuse, however, being completely incased within the protecting cover of the material of which it is made cannot scatter, nor can an arc be formed, and the action of the fuse is no longer affected by variation in temperature. At the same time the condition of the main fuse will always be indicated by the condition of the auxiliary fuse, as seen through the opening in the casing.”

The feature of Thalacker’s invention which has been most discussed is the means provided for giving outward indication of the condition of the invisible main fuse. His inclosing box is provided with an opening which discloses, not a portion of the main fuse as in the prior art, but a portion of a small auxiliary fuse, of material which fuses when the main fuse blows, which is so small, and contains so slight an amount of fusible material, that no evil results ensue upon its destruction, though it is partially uncovered. Instead of partially uncovering the main fuse, as in the prior art, he inclosed the main fuse and added an auxiliary fuse that would blow upon the blowing of the main fuse, but which, unlike the main fuse, could be partially uncovered without objectionable results.

I find nothing in the prior art which anticipates this feature. It is true that an inclosed fuse, with means for giving external indication of its condition, is shown in the patents to Van Depoele, Nos. 417,122 and 429,981; but Van Depoele does not do this by an auxiliary fuse so small that it can be partially exposed for direct inspection. Upon the blowing of Van Depoele’s fuse it disrupts a fine wire attached to the fuse, and thus releases a pivoted wing held by the wire within the case, so that it drops down through a slot in the case and thus signals that the main fuse is blown. While these patents show that Thalacker was not first to provide an inclosed fuse with an exterior indicator, they contain no suggestion of the use of an auxiliary fuse for indication.

I am of the opinion that the Thalacker patent describes a patentable invention, and that the principal question in the case is as to the breadth of this invention and the proper scope of the claims in suit.

The complainant contends in effect that the use, in connection with an inclosed fuse, of a fuse-wire having the sole function of indicating
the condition of the main fuse, was broadly new in the art, and that
because the defendant's fuse has such a wire it infringes the Thalacker
patent despite structural differences. While it is quite true, as Prof.
Cross, the complainant's expert, says, that the Thalacker structure
"comprehends a completely inclosed main fuse combined with an aux-
iliary fuse of such character and construction as to be fused or
destroyed when the main fuse is blown," and that "the auxiliary fuse
is so placed and arranged as to give evidence by visual inspection
whether or not the main fuse has been destroyed," and while it is quite
true that the prior art contains no structure corresponding to this
description, I am of the opinion that the question of infringement
cannot be determined properly without a more particular considera-
tion of the character of the elements of the Thalacker combination
and of the mode in which these elements are combined.

It should be kept in mind that the Thalacker structure is designed
not merely for purposes of indication, but primarily for preventing
various faults in unprotected fuses, such as the spattering of the
metal of the fuse strip, arcing, and unreliability, due to the fact that
fusing points are affected by the surrounding temperature, air cur-
rents, etc. All this appears clearly in the specification. Indicating
means are secondary to the means provided to obviate the defects in
unprotected fuses. Thalacker has not made claims for an indicating
device designed to be applied to any form of inclosed fuse, but his
patent discloses what Prof. Cross describes as "a self-contained unitary
structure, capable of standardization and adjustment, apart from the
particular installment in which it is employed." Regarded as an arti-
cle of manufacture and sale, it is primarily a safety-fuse with a pro-
tecting cover to obviate spattering, etc., and, secondarily, an indicating
fuse.

When we employ the term "inclosed indicating fuse," we cover a
great variety of different structures, as may be seen by an examina-
tion of the various patents in evidence. Practical identity and patent-
able identity are not to be determined merely by reference to a broad
similarity in that they all have indicating means, but they must also
be compared in respect to their structure and to their adaptation to
perform the principal functions of a safety-fuse. To illustrate: An
impractical main fuse, with impractical devices for protection, does
not become a practical and useful article of manufacture though pro-
vided with an excellent indicator, and is in no practical sense similar
to a practical main fuse with practical devices for protection and an
equally excellent indicator. A worthless inclosed main fuse with a
good indicator is not the same thing as an excellent main fuse with
a good indicator. The difficulty I have found in the arguments is this
case is that they are so largely devoted to a comparison of the indica-
ting means, a single feature of the combination, and deal so slightly
with the question of the identity of the combinations. The latest case
in the Supreme Court relating to this subject which has come to my
attention is Leeds & Catlin Co. v. Victor Talking Machine Co. et al.
(April 19, 1909) 213 U. S. 301, 29 Sup. Ct. 495, 53 L. Ed. —, in
which it is said:
"A combination is a union of elements, which may be partly old and partly new, or wholly old or wholly new. But whether new or old, the combination is a means—an invention—distinct from them. They, if new, may be inventions, and the proper subjects of patents, or they may be covered by claims in the same patent with the combination.

"But whether put in the same patent with the combination or made the subjects of separate patents, they are not identical with the combination. To become that, they must become united under the same cooperative law. Certainly, one element is not the combination, nor in any proper sense can it be regarded as a substantive part of the invention represented by the combination, and it can make no difference whether the element was always free or becomes free by the expiration of a prior patent, foreign or domestic. In making a combination an inventor has the whole field of mechanics to draw from. This view is in accordance with the principles of the patent laws."

Considering the Thalacker combinations of the claims in suit, we find these elements:

1. A main safety-fuse.
2. An auxiliary fuse.
3. A casing, variously described as follows:
   (Claim 1) "Completely enveloping the main fuse, but so constructed as to permit the condition of the auxiliary fuse to be seen."
   (Claim 2) "Completely enveloping the main fuse, but only partially enveloping the auxiliary fuse."
   (Claim 4) "An inclosing casing, said casing provided with an opening through its top portion whereby the condition of the auxiliary fuse may be observed."

4. In claim 4 an additional element, "overlying and underlying portions of insulating material."

Thalacker's box or casing, and two thin strips of wood, vulcanite, indurated paper, or like material, one overlying and one underlying the main fuse, are the only means of protection against the faults of an open fuse. The auxiliary fuse and the opening in the box are solely for indication.

The defendant's argument lays considerable stress upon the word "auxiliary," as an indication that Thalacker intended to make a multiple fuse structure, and to support the argument that as multiple fuses were old, and as it was well known that when one strip of a multiple fuse blows the others blow as well, there could be no invention in leaving uncovered one of the strips of an inclosed multiple fuse. I am not impressed with the force of this argument. The patent affords no support to the idea that Thalacker first made a multiple fuse of ordinary type, and then simply uncovered one part to learn the condition of the other. On the contrary, it is quite evident that he made his auxiliary fuse of very small size to avoid spattering, and in order that it might safely be left uncovered when it blew. There can be little doubt that though he took advantage of the multiple fuse principle he did this for the sole purpose of indication, and regardless of the usual considerations which lead to the use of a multiple fuse. His auxiliary fuse by its construction, is well adapted to be exposed and left uncovered, and ill adapted to serve the function of one of the strips of an ordinary multiple fuse.

So far as the patent relates to the main safety-fuse, and to the
means of obviating the ill effects of the blowing of an uncovered fuse, it is doubtful if it discloses anything of patentable novelty or anything that has advanced the art. The Thalacker structure has never been manufactured or used, so far as the record discloses, so that the Thalacker patent has been characterized as a "paper patent." On the other hand, it is quite apparent from the testimony, and the numerous patents in evidence, that, aside from the feature of external indication, the defendant's safety-fuse is the result of a very extended series of experiments and of improvements which are quite independent of Thalacker. The complainant has put in evidence an article in the "Journal of the Franklin Institute" for January, 1909, and a paper presented to the American Institute of Electrical Engineers, March, 1900, both by Mr. Joseph Sachs, the defendant's expert, which show fully that the main problems in excess current protection and in the development of practical safety-fuses were quite independent of the problem of exterior indication of the condition of an inclosed fuse. It is stated that the satisfactory operation of an inclosed fuse depends upon many features: (1) the diameter, size, and form of the fusible strip; (2) length of active fusible strip; (3) the character and mass of the fuse environment; (4) the interior section and length of the inclosing casing—and that to these may be added the necessity for indication, compact size, and facility to manipulate and low cost.

The great practical difference between the defendant's structure and Thalacker's in all respects except that of indication is practically conceded. The question then arises whether the fact that Thalacker was first to use an auxiliary fuse as an indicator for an unimportant and impractical inclosed fuse is sufficient to prevent the use upon entirely different kinds of inclosed fuses of an auxiliary fuse or an auxiliary wire which will produce upon the surface of the inclosed fuse exterior indication. An examination of the defendant's structure emphasizes the injustice of giving so broad a scope to the claims of the patent. The defendant's fuse comprises a main fuse having two strips in multiple. These strips are surrounded by filling material in a loose condition. The casing is a round tube of red fiber, an insulating material; metallic end caps or ferrules fit closely over the open ends of the fiber tube, and act as closures for the open ends of the tube. Inside the fiber tube is a lining of asbestos paper fitting closely to the inside surface of the tube. Arcking or flashing or explosive disturbance is prevented, owing to the fact that, the strips being entirely surrounded by the loose powdered insulating material, the metallic vapors resulting from the melting and disruption of the strips are distributed through the interstices of the finely divided filling material, so that they are cooled and thus lose their explosive pressure and force, and such arc as might exist between the points of rupture in the strips would be broken up by the filling material intervening between these points. This filling is an element of the defendant's combination which has no corresponding element in claims 1 and 2 of the patent in suit. Claim 4 has the element "overlying and underlying portions of insulating material," but these are described in the specifications as "thin strips of wood, vulcanite, indurated paper, or similar material," and do not
perform the above-described functions of the loose powder in defendant's fuse.

The defendant's device is also provided with a shunt-indicating circuit by means of which the blowing of the main fuse is made known by a visible indicator at the surface. Upon the outer surface of the fiber tube is a cavity which is filled with a paste; in the metallic end cap is a hole which uncovers a portion of the paste in the cavity. This paste is the indicator. It is of very high resistance, and is of such composition that it chars or burns, and shows by its discoloration the condition of the main fuse. The defendant's auxiliary circuit is not like Thalacker's, a simple metallic strip of low resistance, made very attenuated in order to blow without spattering and thus to permit of uncovering for observation. It contains a very fine wire of German silver of high resistance, which does not melt or fuse, but which upon the blowing of the main fuse acts as a shunt. This wire serves to conduct the current to the paste indicator, which is also of high resistance, and of such special composition that it ignites only when by the blowing of the main fuse the high resistance of the wire is overcome, and sufficient current is forced through the auxiliary circuit to ignite and burn the highly resisting material in the external cavity of the fiber tube. The sleeve-like portion of the ferrule or cap forms a part of the high-resistance shunt circuit.

Mr. Sachs testifies:

"The continuation of the electric continuity from the end, 14, of the high-resistance German silver wire, through the very high-resistance ignitable joint, 17, is through the sleeve-like portion of the ferrule, connection therewith being made by the paste forming the ignitable joint, and the electrical continuity through the screw, 3, to the anchor piece, 4, to the flat contact blade at that end of the tube."

It is quite clear that the structure of the defendant's auxiliary circuit is not suggested by the Thalacker patent, and that it does not embody Thalacker's idea of providing an auxiliary metallic fuse of such small size that it could be safely exposed and left uncovered. It is also quite apparent that the defendant's device, considered both in respect to the means of inclosing the main fuse and of preventing the faults of an open fuse, and in respect to the means of producing exterior indication, is in no respect a mere copy of Thalacker's device.

The adoption of a high-resistance shunt circuit, which, as complainant suggests, was well known in the prior art (see patent to Wurts, 413,703), in conjunction with the new element, an ignitable paste conductor which gives indication by discoloration, is a wide departure from Thalacker. In judging of the identity of the combinations of Thalacker and of the defendant, we must keep in mind the rule that one element, or indeed all of the elements, are not the combination. "To be that—to be identical with the invention of the combination—they must be united by the same operative law." Leeds & Catlin Co. v. Victor Talking Machine Co. et al. (U. S. Sup. Ct., April 19, 1909). Thalacker's auxiliary fuse was constructed on the multiple principle, and was designed to be uncovered, just as the main fuses of the prior art had been uncovered. His case, with its opening, was practically that of the prior art, both as to the protection of the main fuse and
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to the observation of the interior. The defendant's auxiliary fuse was constructed upon the old shunt principle, and the adoption of this principle led to the adoption of the ignitable exterior indicator. As we have already shown, the means of preventing spattering and arcing, etc., are substantially different from Thalacker's.

Upon the whole case, I am of the opinion that neither upon the terms of the patent nor upon a consideration of Thalacker's contribution to the art, is he entitled to cover broadly the combination of a main fuse with any kind of inclosing means and any kind of an auxiliary indicating circuit. The claims are for specific combinations whose principal function is protection against excess current—indicating means being secondary and subordinate.

While the question seems to me somewhat novel, and is perhaps not free from doubt, I am inclined to the view that, though under some circumstances a combination designed to perform two distinct functions might be infringed by using the combination for either function, this is not the case where one function is clearly subordinate to the other. The secondary function, being merely of indication or signaling upon the performance of the main function, can hardly serve as a proper test of the substantial identity of two structures or combinations which were designed primarily for protection against excess current in the main circuit. I am satisfied by the testimony that in respect to the main fuse and the protection against the results of its blowing the defendant borrows nothing from Thalacker, and in this respect does not infringe. As to the use of an auxiliary circuit for purposes of indication, I am of the opinion that the mere fact that Thalacker was first to use in an inclosed safety-fuse an auxiliary circuit to indicate the condition of a main fuse does not entitle him to a monopoly of auxiliary circuits for indication of the condition of inclosed fuses, but only to cover such means for the application of this idea as are substantially similar to those shown in his patent.

One of the principal uses of the electric current is to give signals by actuating signaling devices, either visible or audible. Auxiliary circuits for signaling purposes had been previously used in connection with uninclosed safety-fuses; thus a lamp and a bell had been put into a shunt circuit to give an alarm upon the blowing of a fuse. In the patent to Morley, No. 622,511, 1899, is shown a device previously described in the Electrician of February 3, 1893. Claim 7 is for:

"The combination, with an ordinary fuse or cut-out adapted to carrying practically the whole of the current in the circuit with which it is to be used, of an additional fuse arranged as a shunt to the ordinary fuse, and comprising a fusible conductor, and a vessel or tube charged with finely divided nonconducting material, traversed by said fusible conductor, substantially as described."

This additional fuse in the shunt circuit is described as having a small portion left uncovered and visible to enable its condition to be observed.

It thus appears that in the prior art an inclosed main fuse had been provided with an external indicator, operated by the main fuse, and that uninclosed main fuses had been provided with auxiliary circuits to which were attached indicating means, to signal the condition of the
main fuse. Thalacker, therefore, was not first to provide an auxiliary circuit for indicating the condition of a main fuse, though apparently he was first to apply it for the purpose of indicating the condition of an inclosed main fuse.

It is, of course, more necessary that an inclosed fuse should be provided with indicating means than that an uninclosed fuse should be so provided; but since the prior art has shown the use of an auxiliary circuit for the purpose of indicating the condition of the main fuse, it would seem to be open to all inventors to devise means for suitably inclosing in a unitary structure not only a main fuse, but the auxiliary indicating fuse as well. In other words, the combination of an open main fuse and auxiliary indicating circuit being old, it was open to inventors other than Thalacker to devise means for suitably inclosing this combination. Thus, if a box should be placed over the unprotected fuse wire of the Mordey patent, we should have the combination of inclosed fuse and exterior indication by an auxiliary circuit; but this would not, in my opinion, be the Thalacker invention, though it would be within the broad interpretation which complainants put upon the Thalacker claims.

It is not the rule of the patent law that he who first applies one of the fundamental mechanical or electrical devices to a particular art thereby becomes entitled to a monopoly of that device for that art, regardless of the particular mode or means of its application. Felt & Tarrant Mfg. Co. v. Mechanical Accounting Co. (C. C.) 129 Fed. 386. Limiting the claims of the Thalacker patent to a scope commensurate with his specification, and regarding the inventions claimed as unitary structures designed for practical use as safety-fuses, I am of the opinion that, though the patent is valid, the defendant has borrowed nothing from Thalacker, and that the defendant’s safety-fuses are distinct combinations both in respect to fuse protection and to exterior indication of the condition of the main fuse, and are not infringements.

The bill will be dismissed.

HANCOCK v. BOYD & GETTY.

(Circuit Court, D. Kansas, Second Division. May 14, 1909.)

Nos. 1,047-1,050.

1. PATENTS (§ 18*)—INVENTION—SIMPLICITY OR OBVIOUSNESS OF DEVICE.

The fact that the distinguishing feature of a patented mechanical combination is simple and apparently an obvious improvement on prior structures does not negative invention which must be conceded where the structure as a whole is undoubtedly superior to any in the prior art, and was the first to achieve unqualified success both in results and commercially.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 18; Dec. Dig. § 18.7]

*For other cases see same topic & § numbers in Dec. & Am. Digs. 1907 to date, & Rep’r Indexes.
2. PATENTS (§ 58*)—SUITS FOR INFRINGEMENT—DEFENSE OF ANTICIPATION—BURDEN OF PROOF.

The granting of a patent is prima facie evidence of the novelty of the device described, and the burden of proof to establish anticipation rests upon the defendant alleging it.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 75; Dec. Dig. § 58.*]

3. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—ROTARY DISC PLOWS.

The Hardy patent, No. 556,972, for a rotary disc plow, the distinguishing feature in the combination of parts being the backward inclination of the plow disc from a vertical plane, so that the disc, when in operation, may carry the furrow slice on its face, may have a suction motion drawing it into the earth, and may present a cutting instead of a scraping edge to the soil at the bottom, was not anticipated, and taking the combination as a whole discloses invention. Nor is it invalid because the precise angle of inclination of the disc is not stated in the claims, such angle as stated in the specification being subject to adjustment to meet varying conditions. Claim 2 also held infringed.

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

In Equity. On final hearing. With this action has been consolidated in this court the actions of Nina Little Hancock against George C. Lorrey, against Kabler & Donaldson, and against Matthias Dick.

Chester Bradford and S. B. Cantey, for complainant.

H. H. Bliss and John H. Atwood, for defendants.

POLLOCK, District Judge. The above suits were instituted by M. T. Hancock against defendants therein named to enjoin infringement of claim No. 2 of letters patent numbered 556,972, applied for July 31, 1895, and issued to Clement A. Hardy March 24, 1896 (hereinafter referred to as the “Hardy patent”), and for an accounting. At the date of the commencement of these suits and many years prior thereto, Hancock was the owner of the rights granted by said letters patent, save in the territory of Texas and Oklahoma, and defendants had within six years prior thereto sold rotary disc plows within the jurisdiction of this court manufactured by the Moline Plow Company, Deere & Co., the Emerson Company, the La Crosse Plow Company, Grand De Tour Plow Company, the Kingman Plow Company, and the Eagle Manufacturing Company, which implements, as claimed in the bills of complaint, infringe upon claim 2 of the Hardy patent. Since the institution of these suits M. T. Hancock has deceased, and his widow, Nina Little Hancock, has been substituted as complainant in each of the suits. The record shows the suits are being prosecuted for the benefit of certain licensees under the Hardy patent as well as complainant, and the defense has been assumed by the Moline Plow Company of Moline, Ill., Deere & Co. of Moline, Ill., the Emerson Manufacturing Company of Rockford, Ill., the La Crosse Plow Company of La Crosse, Wis., the Kingman Plow Company of Peoria, Ill., and E. Bement & Sons of Lansing, Mich. B. F. Avery & Sons of Louisville, Ky., are also interested in and contributing toward the defense made. On issues joined an order of reference was made to a special master, who took the proofs, read and considered the same, witnessed field tests made, heard arguments of solicitors, and reported

*For other cases see same topic & ! NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
to the court his findings of fact and recommendations as to decree herein in accordance with the order of reference. The report shows careful consideration, examination, and thorough research of the record, and elaborate care in its preparation. Defendants have filed exceptions to this report, which exceptions have been fully presented in oral argument and on printed briefs of solicitors, and come now on for decision.

The decision of the cases presented directly or indirectly affects almost, if not all, the manufacturers, vendors, and users of what is known as rotary disc plows in this country; hence it is of large importance to the manufacturers, implement dealers, and the farming community, and far reaching in effect. In recognition of this fact, neither expense nor time, nor care has been spared in the preparation of these cases. They have been fully briefed and argued by eminent solicitors, skilled in the law of patents; and, were it not for the well-recognized fact that the presentation of the cases to this court and its decision therein while steps necessary to be taken in the progress of the cases to an ultimate decision by a higher tribunal yet wholly unimportant for any other reason, I should feel in duty bound to consider each exception taken to the report with some small measure of the care and detail with which they have been so elaborately and faithfully prepared and presented here. However, as the decision here made from the very nature of the cases will have no ultimate effect on the rights of the parties, but will serve only to pave the way for a review by another court, I shall content myself with a brief discussion in a memoranda decision of the more important questions presented in argument, leaving to the appropriate reviewing court of last resort to work out in elaborate detail all the questions presented, to the end that the conclusion there reached, which will ultimately settle the rights of all parties in interest, may be permanently recorded on the monuments of such tribunal.

The sole question of merit, as presented for decision, involves alone the validity of claim 2 of the Hardy patent. This claim reads as follows:

"2. In a rotary plow, the combination with a plow-beam, of a box-bearing arranged on the plow-beam, an axle rotatable in the box-bearing, a plow disc secured to the said axle, rotated solely by the natural draft thereof and the friction of the soil, set diagonally to the line of draft and inclined out of a vertical plane for cutting the furrow and turning the soil therefrom, a furrow-wheel mounted on an axle at the same side of the plow-beam as the plowing-disc and arranged in advance thereof, an arm pivoted to the rear portion of the plow-beam and provided with a caster-wheel arranged in the rear of the plowing-disc, and a stop device for limiting the swinging motion in one direction of the arm carrying the caster-wheel, said furrow-wheel and caster-wheel being inclined for resisting the side pressure of the plowing-disc, substantially as described."

In the discussion of the question presented, I shall consider as settled beyond dispute the title of Hancock to all rights granted by the patent, except as to the territory of Texas and Oklahoma, and the right of the present complainant to prosecute these suits. I shall also pass over as settled and concluded by the proofs the fact that the rotary disc plows manufactured and sold by all the companies and
persons engaged in the defense of these suits infringe upon the rights of complainant secured to her by the patent in suit if claim 2 of the patent be valid; for of this fact there can be no possible doubt, either from the proofs, or when the structure of such implements is compared with claim 2 of the patent. I shall further treat as settled and determined by both the proofs and the admissions of solicitors for defendants, as well, the practical utility of rotary disc plows manufactured in accordance with the specifications of the Hardy patent, and consider as in dispute here alone the validity of claim 2 of that patent.

The invalidity of this claim is predicated on two grounds—lack of invention and anticipation. An examination of the voluminous proofs and exhibits found in the record, and the briefs and arguments of solicitors for the respective parties, narrows the issue here presented down to a single proposition. That is: Was the conception of Hardy to incline the plow disc or discs out of a vertical plane, as expressed in his claim, invention? If so, was it anticipated? It must be, and is, conceded all the other elements of the claim in controversy were old and well known prior to the date of the Hardy patent, and it is this feature of the inclination of the plow disc out of a vertical plane—that is to say, a tilting of the plow disc backward at its top part—which constitutes the great virtue of the rotary disc plows of to-day. No intelligent manufacturer of disc plows would make one with this feature omitted, and, if manufactured, such a plow could not be sold, and would not be used. The reason for this is quite apparent to even a novice at this late day, for the plow disc rotating in a plane inclined backward from the vertical and at an angle with the line of draft at all points presents a cutting edge and not a pushing or scraping one in its point of contact with the earth; thus requiring less power to perform the work, and not compressing the soil. Again, with the plow disc moving in this plane, it carries the weight of the furrow slice on its face, and gives it a suction which of itself holds the plow in the ground, and obviates the use of heavy weights to force the plow disc into the soil. Prior to the advent of the Hardy patent, heavy weights were used to force the vertical disc into the earth, and, in case the soil was very dry and hard, could not be plowed at all by implements then in use. Conceding, as I think must be done from an examination of the entire record, the almost complete adaptability of the disc plow manufactured in accordance with the Hardy patent to the use for which it was designed under all conditions, and more especially in the plowing of a hard, dry soil; admitting, as must be done, disc plows manufactured according to the claim of the Hardy patent perform more and better work with less draft than any like implement there-tofore designed or made; and, again, conceding the very general use into which disc plows so constructed sprung after the advent of the Hardy patent, as is shown not only by the proofs in this case, but the admitted fact that all the rotary disc plows manufactured by defendant companies infringe upon rights protected by the Hardy patent if that patent be valid; and conceding, further, the only new element found in the claim of that combination patent is the inclination of the plow disc out of a vertical plane—and the questions remain to be an-
swered: Was this conception of Hardy invention, as that term is employed in the law? And, if so, was Hardy debarred by what the prior state of the art showed at the date of his invention from appropriating the idea as his own private monopoly? Of these questions in their order.

As has been seen, at this late day, with the completed implement before us, with a practical test made demonstrating the ease with which the work is performed by such implement, with a thorough knowledge of the ultimate end sought to be accomplished, the resistance which must be overcome in the doing of the work, and all the knowledge now at hand, it is almost inconceivable why in the experimental stage of designing and manufacturing rotary disc plows the advisability, or, I may say, the absolute necessity, for inclining the plow disc out of the vertical plane was not thought of by some one and employed before the Hardy idea was conceived. But, admitting the simplicity of the idea employed, its almost apparent necessity to accomplish the end sought, and the fact that the change made might have been discovered by mere accident, yet, if it be conceded the idea was new when first employed by Hardy, do these facts detract from its character as invention?

Mr. Justice Bradley, delivering the opinion of the court in Loom Co. v. Higgins, 105 U. S. 580, 26 L. Ed. 1177, said:

"It is further argued, however, that, supposing the device to be sufficiently described, they do not show any invention, and that the combination set forth in the fifth claim is a mere aggregation of old devices already well known, and therefore it is not patentable. This argument would be sound if the combination claimed by Webster was an obvious one for attaining the advantages proposed—one which would occur to any mechanic skilled in the art. But it is plain from the evidence, and from the very fact that it was not sooner adopted and used, that it did not for years occur in this light to even the most skillful persons. It may have been under their very eyes, they may almost be said to have stumbled over it; but they certainly failed to see it, to estimate its value, and to bring it into notice. Who was the first to see it, to understand its value, to give it shape and form, to bring it into notice and urge its adoption, is a question to which we shall shortly give our attention. At this point we are constrained to say that we cannot yield our assent to the argument that the combination of the different parts or elements for attaining the object in view was so obvious as to merit no title to invention. Now, that it has succeeded, it may seem very plain to any one, that he could have done it as well. This is often the case with inventions of the greatest merit. It may be laid down as the general rule, though perhaps not an invariable one, that, if a new combination and arrangement of known elements produces a new and beneficial result, never attained before, it is evidence of invention."

Mr. Justice Blatchford, delivering the opinion of the court in Consolidated Valve Co. v. Crosby Valve Co., 113 U. S. 137, 5 Sup. Ct. 513, 28 L. Ed. 939, said:

"Richardson's invention brought to success what prior inventors had assayed and partly accomplished. He used some things which had been used before, but he added just that which was necessary to make the whole a practically valuable and economical apparatus. The fact that the known valves were not used, and the speedy and extensive adoption of Richardson valves, are facts in harmony with the evidence that his valves contain just what the prior valves lack, and go to support the conclusion at which we have arrived on the question of novelty. When the Ideas necessary to success are made
known, and a structure embodying those ideas is given to the world, it is easy for the skillful mechanic to vary the form by mechanism which is equivalent, and is therefore in a case of this kind an infringement.”

In the Barbed Wire Patent Cases, 143 U. S. 275, 12 Sup. Ct. 443, 36 L. Ed. 154, Mr. Justice Brown, delivering the opinion of the court, after detailing the steps taken in the manufacture of barbed-wire fence, said:

“Under such circumstances, courts have not been reluctant to sustain a patent to the man who has taken the final step which has turned a failure into a success. In the law of patents it is the last step that wins. It may be strange that, considering the important results obtained by Kelly in his patent, it did not occur to him to substitute a curled wire in place of the diamond shape prong, but evidently it did not; and to the man to whom it did ought not to be denied the quality of inventor. There are many instances in the reported decisions of this court where a monopoly has been sustained in favor of the last of the series of inventors, all of whom were groping to attain a certain result, which only the last one of the number seemed able to grasp.”

In Keystone Manufacturing Co. v. Adams, 151 U. S. 139, 14 Sup. Ct. 295, 38 L. Ed. 103, Mr. Justice Shiras, delivering the opinion of the court, said:

“Where the patented invention consists of an improvement of machines previously existing, it is not always easy to point out what it is that distinguishes a new and successful machine from an old and ineffectual one. But when, in a class of machines so widely used as those in question, it is made to appear that at last, after repeated and futile attempts, a machine has been contrived which accomplishes the result desired, and when the Patent Office has granted a patent to the successful inventor, a court should not be ready to adopt a narrow or astute construction fatal to the grant.”

In Du Bois v. Kirk, 158 U. S. 58, 15 Sup. Ct. 729, 39 L. Ed. 895, Mr. Justice Brown, delivering the opinion of the court, said:

“The Kirk invention is undoubtedly a very simple one, and it seems strange that a similar method of relieving the pressure had never occurred to the builders of bear trap dams before; but the fact is that it did not, and that it was not one of those obvious improvements upon what had gone before which would suggest itself to an ordinary workman, or fall within the definition of mere mechanical skill. It was, in fact the application to an old device to meet a novel exigency, and to subserve a new purpose. That it is a useful improvement can scarcely be doubted. Indeed, in view of the fact that John Du Bois made application for a similar patent himself, and that he and the defendant since his death have constantly made use of the device which differs from that of Kirk only in the fact that he relieves all pressure by lowering the end of the forebay to a level beneath the apex of the dam, it does not lie in the defendant’s mouth to deny its utility. The presumptions at least are against him. Lehneuter v. Holthaus, 105 U. S. 94, 26 L. Ed. 939; Western Electric Co. v. La Rue, 139 U. S. 601, 11 Sup. Ct. 670, 35 L. Ed. 294; Gandy v. Main Beltiing Co., 143 U. S. 587, 12 Sup. Ct. 598, 36 L. Ed. 272.”

Judge Wallace, delivering the opinion of the court in International Tooth Crown Co. v. Richmond (C. C.) 30 Fed. 775, said:

“It is not difficult, after the fact, to show by argument how simple the accomplishment was, and by aggregating all the failures of others to point out the plain and easy road to success. This is the wisdom after the event that often forfeits invention, and levels it to the plane of mere mechanical skill. The ingenious argument in this case has not satisfied us that there was no invention in the improvement of Low.”
In Ballard v. McCluskey (C. C.) 58 Fed. 880, Judge Coxe, delivering the opinion, said:

"That the complainant's machine is an improvement over all similar machines which preceded it cannot very well be disputed. It is more easy of manipulation, more accurate in adjustment and operation, and more economical in result. Upon the evidence here presented it is able to do more work than any other machine and has practically taken possession of the market. It is, of course, true that many elements of the claims considered separately were old and several of them had previously been combined in similar machines. This is true in almost every instance where combinations are under consideration. It cannot be questioned that Titus was the first to construct the machine of the patent. His combination was new, and, though it may not produce a new result, it certainly produces an old result in a better way. It is not thought necessary to enter upon a discussion of the question how far invention lies in the various elements which make up the combination. An inventor should not be so treated. It is unfair. The combination should be considered in its entirety. If the machine is new, does better work than the machines which preceded it, a strong presumption of patentability is presented."

From a consideration of the proofs, exhibits, models, briefs, and arguments in this case in the light afforded by the foregoing authorities, and many others that may be cited, I am clearly of the opinion the conception formed in the mind of Hardy to incline the plow disc out of a vertical plane, as carried out by him in his combination of parts, judged from the results accomplished thereby, was invention, and the claim of the patent in controversy must be upheld unless anticipated in the prior state of the art.

It will be noticed the claim of Hardy's patent does not specify the exact angle from a vertical plane at which the plow disc shall be set. By reference to Figure 3 of the drawings accompanying his patent, and my measurements taken therefrom, it may be ascertained by a mathematical calculation the backward inclination from a vertical plane of a disc 24 inches in diameter (the size usually employed) will be about 6½ inches. Therefore it is contended by the defense that the claim in this respect is either void for indefiniteness, or that, if the plow discs 24 inches in diameter employed by defendants in the manufacture of their implement be set at a backward inclination from a vertical plane of more or less than 6½ inches, they do not infringe upon the rights granted by the Hardy patent, even if it be found valid.

Again, it is contended if any rotary disc plow be found manufactured or sold prior to the advent of the Hardy patent having the plow disc inclined backward from a vertical plane at any angle from any cause, accidental or otherwise, as the angle of backward inclination from a vertical plane is not definitely fixed in the claim of the Hardy patent in dispute, such prior manufactured or sold implement will show anticipation of the single element of the Hardy combination patent on which complainant relies. In so far as the defense thus made is asserted, it is not thought the precise backward inclination of the plow disc should be stated in the claim to uphold its validity, or to protect it against infringement by others; for, if Hardy was the first to discover the peculiar advantage obtained from tipping the plow disc backward from a vertical plane in order to carry the weight of the furrow slice on its face, to give the rotary action of the disc a cut-
ting instead of a scraping effect, and a suction motion into the soil, all beneficial in accomplishing the result desired, and he also was the first to embody this conception in his combination of elements, as stated in his claim, he is entitled to be protected, for the specifications and drawings accompanying a patent are employed for the purpose of rendering the principles of the patent plain and pointing out the best method of its use, and not for the purpose of limiting the scope of a general claim.

As said by Judge Sanborn in J. L. Owens Company v. Twin City Separator Company (December Term, 1908, Court of Appeals for this Circuit) 168 Fed. 259:

"But the description in a specification or drawing of a form or a composition or construction of a mechanical element, when that form, composition, or construction is not, and is not claimed to be, essential to the combination or improvement claimed, is the mere pointing out of the best mode in which the patentee contemplated applying the principle of his invention under section 4888, Rev. St. (U. S. Comp. St. 1901, p. 3383), and does not deprive him of protection for mechanical equivalents or indicate that he intended to give up all other modes of application. Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U. S. 405, 418, 28 Sup. Ct. 748, 52 L. Ed. 1122; National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co., 45 C. C. A. 544, 106 Fed. 693; City of Boston v. Allen, 91 Fed. 248, 33 C. C. A. 485."

So in the present case, as the essential thing claimed by Hardy is the backward inclination of the plow disc from a vertical plane, so that the disc when in operation may carry the furrow slice on its face, may have a suction motion drawing it into the earth, and may present a cutting instead of a scraping edge to the soil, the precise angle of inclination is one of adjustment under varying circumstances, and not essential to the validity of the claim itself. Therefore the single question remaining is that of anticipation.

This question was presented to the Circuit Court of the United States for the Eastern District of Tennessee, and on appeal from that court to the Court of Appeals for the Sixth Circuit, in the case of Sanders v. Hancock, 128 Fed. 424, 63 C. C. A. 166, where in an elaborate and exhaustive opinion delivered by Judge Severens for the court it was held the combination of the Hardy patent was not anticipated in the prior state of the art. Solicitors for the defense concede this in argument. However, they contend the decision made in that case is merely persuasive here, and further urge the case there was not fully presented to the court. It is therefore earnestly requested the entire matter should be here fully reconsidered. It is true, as shown by the record, in considering the prior state of the art, there was not before the court in the Sanders-Hancock Case the elaborate proofs, patents, models, and working implements presented here. Here the whole realm of knowledge as to the advancement of the art at the date of the advent of the Hardy patent has been carefully searched and drawn upon, with the result there is now before this court as tending to show the prior state of the art something like 42 patents, a large number of models, and many full-sized working implements not brought before the court in that case. However, it is thought to be neither possible nor profitable for this court in this memoranda to mention or attempt a description of all the prior pat-
ents, models, and working implements relied upon by the defense to show anticipation. They cover a period of almost a third of a century, and show the progress toward the completed implement of to-day was not made by leaps and bounds, but by gradual strides, as a brief reference to a few closely allied in principle with those manufactured in compliance with the Hardy patent will disclose. That necessity which is said to be the "mother of invention" perhaps more strongly demanded the use of some such completed implement as the present disc plow in the cultivation of what is known as the "black, waxy" lands of Texas than did any other section of our country. The soil of the "black, waxy" lands of that state, when dry, is extremely hard, tough, and difficult to plow. It was therefore in this section the nearest approach to the Hardy conception was reached prior to the Hardy patent in the use of what is known in the record as the Hancock plows and of the type called Scott, George, Aldrich, Shotwell, Payne, etc. These plows were manufactured at Marshall, Tex., for the Keating Implement Company of the city of Dallas, in that state, in 1894. These plows, with others of that date, were equipped with a wooden plow beam. A casting called a "6 box" was used to affix the axle of the plow disc to the beam. By reason of the plow disc being set at an angle with the line of draft, and the consequent heavy backward pressure on the lower or cutting edge of the disc, when in operation in a hard dry soil, the pressure warped or twisted the wooden beam of the plow so as to incline the plow disc forward at its top part out of a vertical plane, thus preventing its successful operation. To obviate this difficulty, as shown from the proofs and exhibits in evidence, the operator would drive a wedge between this casting and the beam, and thus incline the plow disc backward at its top to or beyond a vertical plane. This wedging is shown in the physical exhibit known as the Keeler plow. At this time Hardy, an expert designer of plows, was working for the Keating Implement & Machine Company at Dallas, and it was by him in experimenting discovered if the casting which affixed the plow disc to the beam was thickened in that part where the wedge had been used, it would incline the plow disc backward from a vertical plane, and when the pressure was applied to the lower edge of the disc in actual operation, the necessity for the wedging backward would be avoided. Therefore he caused what is known as the "B-6 box" to be made by the manufacturing company at Marshall, Tex., and it was thereafter used to some considerable extent. There can be no doubt from the proofs but that the use of this B-6 box did incline the top of the plow disc backward from a vertical plane, and there can be but little ground for denying that Hardy's experiment along this line with the B-6 box led his mind forward to the idea of inclining the plow disc in his combination patent backward from a vertical plane. In the specifications forming a part of his patent is found the following:

"My present invention has for its purpose the provision of the construction and combination of parts whereby the plow discs shall be drawn into the earth by their own action and by the weight of the soil lifted by the discs and carried on their face, and having a cutting action at the bottom of the furrow instead of a scraping, etc. • • • It is my purpose also to provide a plow of the type needed having one or more plowing discs of a concave form ar-
ranged diagonally to the line of draft, and having an adjustable inclination to the vertical, whereby said disc or discs are inclined rearwardly and across the line of draft at such an angle as will effect a clearance between the back edge of the disc and the bottom of the furrow, whereby I avoid unnecessary friction and cause the disc to be drawn into the soil by its own action, the inclination giving the disc suction and drawing it into the ground by the forward motion of the plow and the weight of the soil carried up by the disc," etc.

Whatever may have been the defects sought to be remedied or the end accomplished by the B-6 box, and the consequent inclination of the plow disc backward from a vertical plane, whether it was to obviate the necessity of wedging when the wooden beam became worn or warped by use, or whether it was at that time discovered by him, if the plow disc should be inclined backward from a vertical plane, better results would be obtained, is perhaps not very material here; for it is quite clear Hardy discovered and designed this B-6 box about May, 1894, and, while he may have carried the idea thus obtained forward into his patent, yet I conceive he would have the right to so do without rendering the claim in his patent subject to the objection of anticipation. Again, it is quite clear plows equipped with this B-6 box would not accomplish the same useful purposes of carrying the furrow slice on the face of the plow disc and give the disc the same cutting edge and suction in the earth obtained by the method of construction claimed and pointed out in the patent in dispute.

From an examination of the entire record, including all the patents, models, and working implements now in evidence before the court, and from a comparison thereof with plows manufactured in accordance with the claim of the Hardy patent I think it may be said many of them, by slight modifications and changes, might have been converted into the same useful implements constructed under the Hardy patent, and those completed working exhibits brought before the court to show infringement of complainant's rights under the patent, if such modifications and changes in the old had been made before the advent of the Hardy patent, this question of anticipation now under discussion would have been settled conclusively against the validity of that patent. While the question here presented is not free from doubt or difficulty, yet I am inclined to the opinion none of the prior patents or exhibits presented and relied upon by the defense to show anticipation make out that defense as it must be made out under the rule announced in the adjudicated cases. It is true some are very near in principle, but very near is not close enough to touch. As said by Mr. Justice Brown, delivering the opinion of the court in Topliff v. Topliff and Another, 145 U. S. 156, 12 Sup. Ct. 825, 36 L. Ed. 658:

"While it is possible that the Stringfellow and Surles patent might, by modification, be made to perform the function of equalizing the springs which it was the object of the Anger patent to secure, that was evidently not in the back mind of the patentees, and the patent is inoperative for that purpose. Their devices evidently approached very near the idea of an equalizer, but this idea did not apparently dawn upon them, nor was there anything in their patent which would have suggested it to a mechanic of ordinary intelligence unless he were examining it for that purpose. It is not sufficient to constitute an anticipation that the device relied upon might, by modification, be made to

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accomplish the function performed by the patent in question if it were not designed by its maker nor adapted, nor actually used for the performance of such functions."

The burden of proof rests with the defense to make out the claim of anticipation here relied upon. As said by Mr. Justice Swayne in Coffin v. Ogden, 85 U. S. 120, 21 L. Ed. 821:

"The invention or discovery relied upon as a defense must have been complete and capable of producing the result sought to be accomplished; and this must be shown by the defendant. The burden of proof rests upon him, and every reasonable doubt should be resolved against him. If the thing were embryotic or inchoate, if it rested in speculation or experiment, if the process pursued for its development had failed to reach the point of consummation, it cannot avail to defeat a patent founded upon a discovery or invention which was completed while in the other case there was only progress, however near that progress may have approximated to the end in view. The law requires not conjecture, but certainty. If the question relate to a machine, the conception must have been clothed in substantial forms which demonstrate at once its practical efficacy and utility. The prior knowledge and use by a single person is sufficient. The number is immaterial. Until his work is done, the inventor has given nothing to the public."

Or, as said by Mr. Justice Woods in Cantrell v. Wallick, 117 U. S. 689, 6 Sup. Ct. 970, 29 L. Ed. 1017:

"The burden of proof is upon the defendants to establish this defense; for the grant of letters patent is prima facie evidence that the patentee is the first inventor of the device described in the letters patent and of its novelty. Smith v. Goodyear Dental Vulcanite Co., 93 U. S. 486, 23 L. Ed. 952; Lehnbeuter v. Holthaus, 105 U. S. 94, 26 L. Ed. 939. Not only is the burden of proof to make good this defense upon the party setting it up, but it has been held that "every reasonable doubt should be resolved against him." Coffin v. Ogden, 18 Wall. 120, 21 L. Ed. 821; Washburn v. Gould, 3 Story, 122, Fed. Cas. No. 17,514."

Being of the opinion, as I am, that no prior combination of parts shown by any patent or working implement in the record before the court made the backward inclination of the plow disc from a vertical plane an essential element of its construction and successful operation, and that the Hardy patent not only does this, but in so doing for the first time in all the history of the art of plowing by means of rotary disc plows Hardy arrived at the true solution of the many difficult problems presented in the successful accomplishment of one of the most important businesses of life, I am forced to the conclusion the defense of anticipation is not made out, and cannot be sustained.

It follows the exceptions to the report of the master must be overruled. A decree will enter granting the injunction prayed against further infringement of claim 2 of the Hardy patent, and for the usual accounting of profits derived and damages sustained by reason of the infringement charged against defendants, now parties to the record.
QUEEN & CO. v. GREEN.  

(Circuit Court, E. D. Pennsylvania. June 14, 1909.)  

No. 73.  

1. PATENTS (§ 326*)—SUIT FOR INFRINGEMENT—ACTS CONSTITUTING VIOLATION OF INJUNCTION.  

A party against whom a preliminary injunction has issued, restraining him from infringement of a patent and from constructing or selling a device found to infringe, and which clearly infringed if the patent was valid, is guilty of contempt for violating the injunction, where he merely makes a formal and immaterial change in such device, which does not in any way change the principle of operation, and which was apparently adopted for the express purpose of evading the injunction.  

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 613–619; Dec. Dig. § 326.*]  

2. PATENTS (§ 326*)—SUITS FOR INFRINGEMENT—VIOLATION OF INJUNCTION.  

While the fact that a party, charged with contempt for violating an injunction against infringement of patent, acted under the advice of counsel, is to be considered in deciding whether he shall be punished, it is not a defense, if continued infringement is found.  

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 326.*]  

On Motion to Punish for Contempt.  
William Steell Jackson and E. Hayward Fairbanks, for complainant. H. E. Hart and Charles Howson, for defendant.  

J. B. McPHERSON, District Judge. A preliminary injunction was granted in this case in December, 1908 (165 Fed. 453), and was served upon the intervener, Green, who is the principal party defendant and is making the only contest against the patent. The injunction was served in January, 1909, and commands the defendant to—  

"* * * desist and refrain from further constructing or using or selling in any way or manner, directly or indirectly, the X-ray tubes described or mentioned in the said bill of complaint, or making, using, or selling, or causing to be made, used, or sold, any X-ray tubes made in accordance with or embodying or containing the inventions or improvements described and claimed in United States letters patent No. 594,036, or any part thereof, described in the said bill of complaint and in the affidavits of the complainant thereto annexed, until the hearing of the cause or the further order of the said court."

The two claims of the patent that are involved in the controversy are as follows:  

"2. In combination with a high-vacuum tube, a shunt-circuit arranged in proximity thereto, means connected with the above and set into operation by the current in the shunt-circuit to cause gas to enter said tube, and means for varying the pressure in the shunt-circuit.  

"3. The combination with a high-vacuum tube of a shunt-circuit arranged in proximity thereto, and means connected with the above and set into operation by the current in the shunt-circuit to cause gas to enter said tube."

At the argument of the motion for a preliminary injunction it was conceded that the device then in question presumptively infringed, and it was attempted to repel the presumption by proof of the only defense that was set up, namely, prior public use by the intervening defendant himself. Testimony is being taken on this point before a commission—  

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
er in preparation for final hearing, but meanwhile the defendant has been offering and selling the same device with a slight modification. The complainant avers that this modified apparatus is also an infringement, and the correctness of this averment must now be considered on the motion to punish for contempt. There is no dispute concerning the character of the new device, or its sale by the defendant. He relies wholly upon the contention that the automatic shunt-circuit which is admittedly used in the apparatus now attacked is not "in proximity" to the high-vacuum tube, and therefore does not infringe claims 2 and 3. Of course, if it does not infringe, he is not punishable for contempt; and it is also true that he might not be punishable if the new device presented a fairly debatable question. But neither situation is now before the court. As it seems to me, the apparatus complained of is a plain infringement, and I have no hesitation in adding that I believe it to have been devised in an effort to evade the injunction. All that the defendant has done is to move a part, and only a part, of the shunt-circuit three or four feet away from the vacuum tube, without changing in the slightest degree the method of operating the circuit or the function of any of its elements. He simply extends the circuit, and does so deliberately, as I think, in order to evade the command of the injunction. The effect is only to lengthen and change the shape of the regulator arm, and thereby to tap the current from the negative pole of the coil at a point somewhat farther from the vacuum tube. In my opinion this is an immaterial variation, and produces a device which is a clear equivalent of the patent. It seems to me as "palpably colorable" as the apparatus that was considered by the Court of Appeals in Lepper v. Randall, 113 Fed. 627, 51 C. C. A. 337, where Judge Dallas declared that:

"In no case is a patentee to be denied protection commensurate with the scope of his actual and distinctly described and claimed invention, by wholly excluding him from the benefit of the doctrine of equivalents."

Here, as there:

"The departure made by the defendant from the patent in suit is merely formal, and of such character as to suggest that it is a studied evasion of those described in the claim in issue."

If confirmation of the defendant's purpose should be desired, it may be found, I think, in the following circular notice which he has been recently sending out:

"Owing to Queen & Co. having obtained a preliminary injunction against us, which was granted on condition that they file a bond of $2,000 to protect us from loss pending final decision, we are not allowed to put on the swinging regulator arm. We inclose in the box, however, a little JOKER. This JOKER, by a little glue on the bottom, may be stuck onto the coil at about 6' away from the negative pole or wire. The JOKER is then connected to the regulator by means of a wire, and the regulation is adjusted by the movable pointer. This we find does not infringe the Queen patent, because it is not in juxtaposition or attached to the tube. We believe this method of regulation will be found more efficient, and certainly just as good. We shall continue the fight, however, for our priority on the shunt wire to a finish, and look for your indulgence in the meantime."

Comment upon this circular is hardly necessary, although I may add that the notice appears upon letter paper which contains a picture of
the infringing device that was preliminarily enjoined—a practice that was condemned by the Court of Appeals of the Second Circuit in Cary Mfg. Co. v. Acme, etc., Co., 108 Fed. 873, 48 C. C. A. 118.

It is true that the defendant consulted counsel and was advised that he might safely use the apparatus which is now under consideration; but, while the fact that such advice was taken is to be considered in deciding whether the defendant shall be punished at all, or (if at all) what the punishment shall be (Matthews v. Spangenberg [C. C.] 15 Fed. 813; Westinghouse El. Co. v. Sangamo El. Co. [C. C.] 128 Fed. 747; Goss Printing Co. v. Scott [C. C.] 134 Fed. 880), the mere fact that advice was sought and received is not a sufficient defense (Baté Refrigerating Co. v. Gillett [C. C.] 30 Fed. 683; Paxton v. Brinton [C. C.] 126 Fed. 542; Calculagraph Co. v. Wilson [C. C.] 136 Fed. 196).

Following the course pursued by Judge Dallas in Paxton v. Brinton, I find that the defendant Green has been guilty of contempt by selling a device which he had adequate reason to know was in violation of the preliminary decree of this court; and it is therefore ordered that he pay a fine of $100 and the costs of this proceeding for contempt on or before July 10, 1909, and in default of such payment that he stand committed until the fine and costs be paid, or until the further order of the court.

And it is also directed that the fine be paid over to the complainant as compensation for his time and outlay in prosecuting this application. Cary Mfg. Co. v. Acme, etc., Co., supra.

UNITED STATES v. LEE.

(District Court, S. D. Ohio, E. D. May 14, 1909.)

BAIL (§ 60*) — NATURE AND SCOPE OF REMEDY — PURPOSE IN GIVING RECOGNIZANCE.

It is within the discretion of a court or magistrate to refuse to accept a proffered criminal recognizance signed by a surety who has been fully indemnified against loss by third parties, and the bond should not be accepted where it appears that the indemnitors are not acting in good faith, in that it is not their purpose to secure the appearance of the accused, but to substitute the recognizance and indemnity for his person and enable him to flee from justice.

[Ed. Note.—For other cases, see Ball, Dec. Dig. § 60.*]

On Application for Acceptance of Bail Bond.

The accused, who is charged with unlawfully depositing, for mailing and delivery in the United States post office, an envelope containing lottery tickets, was ordered by the committing magistrate to give bond in the sum of $2,500 for his appearance before this court at its next term, and in default of the same to stand committed. A financially responsible individual and a solvent surety company were in turn rejected as surety, because each had been indemnified to the full amount of the bond. Application was then made to the court to accept one or the other, or both, of the proffered bondsmen. To indemnify them, a purse of $2,500 had been made up by three of Lee's fellow Chinamen, two of whom live in Ohio and one in Indiana. An interested fourth party came from New York City and has spent some days in an effort

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.
to secure Lee's release. The individual surety, if accepted, is to receive and hold $2,500 in cash to protect himself against loss. He asserts that he has no interest in, or care for, what the accused may do, and will not observe his movements or make any effort to produce him in court. The representative of the surety company testified that his company is to be fully indemnified, and, so far as he knows, it exercises no supervision over persons bailed under such circumstances. He has no personal knowledge of the accused, and would personally give no attention to his whereabouts, that being a matter for his company's consideration. The bond will not be executed if his employer will sustain a loss, or unless fully protected. He does not know the practice of the company, when it is not likely to sustain a loss, as to the apprehension of fugitives from justice for whom it has become bound. Two of the depositors of cash say they do not think that Lee will abscond, and that, if he does, they will try to find him. One of them, however, states that he has no expectation of recovering his money, and will be satisfied to lose it, if Lee escapes. The other does not care if he does abscond, and, if that occurs, he does not want his money, but is willing to lose it, and would rather sustain the loss of it than to see Lee sent to jail. The third indemnitor was silent as to what course he would pursue.

E. C. Turner and T. J. Abernathy, for defendant.
Arthur I. Vorys, for Surety Co.

SATER, District Judge (after stating the facts as above). In the theory of the law, by a recognizance of bail in a criminal action, the accused is committed to the custody of the sureties as to jailers of his own choosing, and is so far placed in their power that they may at any time arrest him upon the recognizance and surrender him to the court, and are bound, at their peril, to see that he obeys the court's order. Reese v. U. S., 9 Wall. 13, 19 L. Ed. 541; Taylor v. Taintor, 16 Wall. 366, 21 L. Ed. 287; section 1018, Rev. St. (U. S. Comp. St. 1901, p. 719). The purpose of a recognizance is not to enrich the treasury, but to serve the convenience of the party accused but not convicted, without interfering with or defeating the administration of justice. Sureties, therefore, should be persons of sufficient financial ability and of sufficient vigilance to secure the appearance and prevent the absconding of the accused. It is urged in argument that this case is distinguishable from United States v. Simmons (C. C.) 47 Fed. 575, in which a bail bond was refused on account of the sureties being indemnified by taking a bond from the accused and others. It is said that, the indemnitors in this case being third parties, the public will have the security of two persons instead of one, and that in view of the announcement in United States v. Greene (C. C.) 163 Fed. 442, the sureties should be accepted. The acceptance, as a surety on a criminal bond, of one who had been indemnified by a person other than the accused, was not before the court in that case, and the cases cited to sustain the text of 16 Am. & Eng. Ency. of Law (2d Ed.) 172, merely go to the point that a contract to indemnify a person on his becoming bail for a prisoner charged with a criminal offense is valid and enforceable if persons other than the prisoner are indemnitors. When indemnitors are not acting in good faith, and their purpose is to substitute the recognizance and the indemnity for the person of the accused and thereby enable him to flee from justice, the court or committing magistrate should not accept the recognizance.
One of the proffered sureties declares that he will make no effort to produce the accused in court, should he abscond. The surety company will become such only if fully indemnified against loss. Strictly, this means that it must be indemnified not only to the full extent of the bond, but against costs also, for, if the deposit by the indemnitors be for only the exact amount of the bond, the surety company would be liable for costs, should the accused become a fugitive from justice. Jones v. Orchard, 16 C. B. 614; 3 Am. & Eng. Ency. of Law (2d Ed.) 685. If the surety company endeavors to apprehend fugitives for whom it has become bound under circumstances such as are presented here, there is no proof of it. In view of the conduct of the indemnitors while testifying, and all the other circumstances developed at the hearing and surrounding the case, the two who last testified are entitled to slight credit for good faith or otherwise, and the other to but little more. There is, in my judgment, no probability of these three men, or any of them, surrendering the accused should he be about to abscond, or endeavoring to apprehend him should he succeed in so doing. They will be content to lose their money. Nor will there be any incentive to vigilance on the part of the sureties to produce the accused in court. The evidence gives no assurance, does not even justify the inference, that either of them would surrender him should he be about to escape, or seek to recapture him should he do so. Instead of the public having the security of at least two persons, the amount of the bond will be deposited in cash in lieu of the person of the accused, who will be at liberty to flee without fear of apprehension save from the government inspectors. When the circumstances point to bad faith on the part of the indemnitors, the right to bail guaranteed by section 1015, Rev. St. (U. S. Comp. St. 1901, p. 718), to an arrested party, does not prevent the court, in the exercise of sound discretion, from rejecting sureties who, however honorable they may be, become sureties from purely business reasons and apparently without assuming any of the responsibilities which the law imposes.

It is not necessary to a determination of this case to decide whether or not a person, natural or artificial, that has been fully indemnified against loss by a person other than the accused, should be accepted as surety on a criminal bond.

In view of the facts presented, the sureties offered are not accepted.

HUTCHINSON v. WEST JERSEY & S. R. CO.
(Circuit Court, E. D. Pennsylvania. May 27, 1909.)

No. 404.

DEATH ($ § 84*)—DAMAGES RECOVERABLE FOR WRONGFUL DEATH—NEW JERSEY STATUTE—"PECUNIARY INJURY RESULTING FROM SUCH DEATH."

Under Act N. J. March 3, 1848 (P. L. p. 151), as amended by Act March 31, 1897 (P. L. p. 134), authorizing the recovery, in case of wrongful death, of damages for the "pecuniary injury resulting from such death" to the wife and next of kin of the deceased, as construed by the Court of Errors and Appeals of the state, surgical expenses incurred by the father of a

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
minor child, who is also next of kin, in consequence of an injury which caused the death of such minor, are not recoverable.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 110; Dec. Dig. § 84.*
For other definitions, see Words and Phrases, vol. 6, pp. 5257, 5238.]

At Law. On motion for new trial.

Harris S. Sparhawk and Wilson, Rogers & McAdams, for plaintiff.
John Hampton Barnes, for defendant.

J. B. McPHERSON, District Judge. The plaintiff in this case is not only the administrator of his minor daughter, but is also her next of kin, and the suit is therefore brought for his individual benefit. The only point now to be determined is whether the jury should have been permitted to allow as an element of damage the amount paid by the plaintiff for surgical services rendered to the child in the effort to save her life after she had been injured by the defendant's negligence. The question must be decided according to the statute of New Jersey, for the injury was inflicted and the plaintiff's rights arose in that state. The statute provides as follows (Act March 3, 1848 [P. L. p. 151], amended by Act March 31, 1897 [P. L. p. 134]):

"Section 1. That whenever the death of a person shall be caused by a wrongful act, neglect, or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

"Sec. 2. Every such action shall be brought by and in the names of the personal representatives of such deceased person; and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportions provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages as they shall deem fair and just with reference to the pecuniary injury resulting from such death to the wife and next of kin of such deceased person. * * *"

Under this act the verdict is intended to compensate the "pecuniary injury resulting from such death," and to such pecuniary injury the jury must therefore be confined. Now, when a minor child is killed, as was the case at bar, the pecuniary injury resulting from the death is the lost value of the child's prospective services to the parent during minority. Nothing else is recoverable under the statute, as the Court of Errors and Appeals has expressly decided. In Consolidated Traction Co. v. Hone, 60 N. J. Law, 444, 38 Atl. 759, the court held that funeral expenses could not be recovered, and approved the followin quotation from Paulmier v. Railroad Co., 34 N. J. Law, 151:

"The pecuniary injury designated by the statute is nothing more than a deprivation of a reasonable expectation of a pecuniary advantage which would have resulted by a continuance of the life of the deceased, and it is upon this principle that our statute is to be applied."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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The Court of Errors and Appeals added:

"The damages recoverable are for those benefits only of which the next of
kin are deprived by the decedent not living, and are to be distributed among
the widow and next of kin to the exclusion of creditors. No part of the sum
recovered can be applied to the payment of funeral expenses."

This ruling is, I think, decisive. If there can be no recovery for
funeral expenses in an action brought upon the right given by the
statute, it is not easy to see how a recovery can be permitted for sur-
gical expenses that were incurred before the decedent’s death, and
were therefore not the consequence of that event; these expenses,
moreover, being for services which the father was himself primarily
bound to furnish without charge to the minor. The cases of Calla-
ghan v. Ice Co., 69 N. J. Law, 100, 54 Atl. 223, and Ferguson v. Tele-
phone Co., 71 N. J. Law, 59, 58 Atl. 74, are not in point. These were
suits that were not brought on the statutory right at all, but upon
the right growing out of the common-law relation of master and serv-
ant that exists between a father and his minor child.

A new trial is refused.

ZACEYFIA V. JOHN LANG PAPER CO.

(Circuit Court, E. D. Pennsylvania. June 1, 1909.)

No. 170.

1. TRIAL (§ 261*)—INSTRUCTIONS—REFUSAL OF REQUESTS.

A court is not required to give requested instructions which are incom-
plete in their scope and ask for positive charges in favor of a party upon
an imperfect presentation of the situation disclosed by the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 600; Dec. Dig. §
261.*]

2. TRIAL (§ 268*)—INSTRUCTIONS—REFUSAL OF REQUESTS.

A court is not required to read and specifically answer in the presence
of the jury points presented for instructions.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 662; Dec. Dig. §
268.*]

On Motions by Defendant for New Trial and for Judgment Not-
withstanding the Verdict.

Simon C. Raken and Thomas Leaming, for plaintiff.

W. W. Smithers and Frank P. Prichard, for defendant.

J. B. McPHERSON, District Judge. It is, I think, unnecessary to
discuss the questions raised by the defendant at the argument of these
motions. I have re-examined the evidence that was taken upon the
trial, and it seems to me quite clear that the case could not have been
withdrawn from the jury. The plaintiff, who was a comparatively in-
experienced young man, unable to speak the English language, was
directed by his superior to perform certain labor in what must be
described as an unusually hazardous place; and, although it is true
that he had previously done similar work upon several occasions, his
attention had never been called to the surrounding dangers, and he

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
had never been put upon his guard against them. As it seems to me, the instructions that were given to the jury submitted the questions of fact fairly to that tribunal, and, if this be so, I see no reason for interfering with the verdict.

To the complaint that the defendant's points were not specifically answered, I can only reply that the instructions asked for could not have been properly given, because (among other objections) they were incomplete in their scope and asked for positive instructions in favor of the defendant upon an imperfect presentation of the situation disclosed by the evidence. Perhaps it is not out of place to add that in my opinion the reading and answering of points gives practically no assistance to a jury. Points have great value as suggestions to the court concerning legal questions or aspects of the evidence that might otherwise be overlooked in the charge, but to expect a jury to understand at one hearing a series of subtly drawn and sometimes complicated points, which the judge himself after careful study often finds difficulty in comprehending and in fitting with discriminating answers, is to exhibit a confidence in the capacity of jurors that seems to me little short of temerity.

The motions are refused, and to the refusal to enter judgment in favor of the defendant notwithstanding the verdict an exception is sealed.

PEET v. FOWLER.
(Circuit Court, E. D. Pennsylvania. May 28, 1909.)

No. 574.

PROCESS ($ 118$)—SERVICE—EXEMPTION—ATTENDANCE AT COURT.

A receiver while in attendance on a court in another jurisdiction as plaintiff in an action therein, and also in obedience to a subpoena served on him by the defendant, and while going to and returning from such court, is privileged from the service of civil process on him in a suit against him in such jurisdiction.

[Ed. Note.—For other cases, see Process, Cent. Dig. $ 146$; Dec. Dig. $ 118$.]

On Motion to Quash Service of Summons.
See, also, 170 Fed. 620.

John McClintock, Jr., for plaintiff.
Charles Biddle, for defendant.

HOLLAND, District Judge. It is a well-established principle of law that parties to a suit, for the sake of public justice, are privileged from the service of process upon them in coming to, attending upon, and returning from the court, or as it is usually termed, eundo, mordando, et redeundo. This is an immunity of all persons under certain circumstances, on the principle that, where the law requires any duty of the citizen, it will protect him in the discharge of that duty, and the privilege extends to the service of a summons as well as a capias. The cases in point are collected in Troubat & Haley's Practice, § 236.

Mr. Schofield, receiver of the First National Bank of Manasquan,

*For other cases see same topic & $2$ numbers in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
had instituted a suit against the plaintiff in this court to recover on two notes. The case was called for trial on Monday, April 19, 1909, and the defendant, who is the successor in the receivership of Mr. Schofield, appeared here for the purpose of being substituted on the record as the plaintiff, and, in addition, he had been subpoenaed by the defendant in the other suit, who is the plaintiff here, to appear to testify in that suit. Upon his arrival here on April 19th, before he had been substituted, he was served with a summons in this suit. He was met in the corridor of the buildings in which the United States courts are held, and, upon request, walked into the marshal's office, where a summons was served upon him; at the same time a statement was made by the officer that a summons could not be served in or about the courts, but that it could be served in the marshal's office. Mr. Fowler refused, upon request, to accept service, for the reason, as he stated, that he did not think suit could be instituted against a receiver without permission of the court appointing him. At the conclusion of the trial, on the following day, a summons was again served in this suit upon the defendant as he was leaving his hotel for the train upon which he expected to go to his home, and a motion was immediately filed to set aside the service of the summons, upon the ground that his presence here was required in the conduct of the litigation in which he was plaintiff, and in answer to a subpoena served upon him by the defendants in that suit.

The evidence fails to establish that the defendant waived any right which he may have had under the circumstances. As he was here in answer to a subpoena and as plaintiff in a suit, he was privileged from service of civil process in coming to, attending upon, and returning from the court. Troubat & Haley's Practice, § 236; Ferré & Co. v. Pierce, 25 Pa. Ct. Rep. 112; Partridge v. Powell, 180 Pa. 22, 36 Atl. 419.

The cause of action is said to be the right to a fund of $22,000 which was deposited with the bank, of which Mr. Fowler is receiver, by a bridge company, in its own name. Mr. Peet claims not only that the deposit is his property, but that when this ownership is established he will be entitled to use it as a set-off against the bank's claim against him on the notes upon which the suit was brought and tried in this court. The motion for a new trial in that suit has been overruled, and judgment will be entered for the amount of the verdict; but a stay in the proceedings has been ordered in that suit so that the plaintiff in this case may file a bill in this court, or institute such other proceedings in this state or the courts of New Jersey as he may deem necessary to determine the question of his right to the deposit in question now in the possession of the Manasquan Bank.

It is claimed by the plaintiff that the defendant has avoided service in this matter, and is endeavoring to delay him in the determination of the question as to the ownership of this fund. I am not convinced that such is the fact, but this court has full power to protect the defendant in the judgment in the suit on the notes until the ownership of the deposit is settled.

It is therefore ordered that the service of the summons in this case be set aside.
FOWLER v. PEET.

(Circuit Court, E. D. Pennsylvania. May 28, 1909.)

No. 200.

1. BANKS AND BANKING (§ 77*)—ACTION BY RECEIVER ON NOTES—DEFENSES—AGREEMENT BY OFFICERS TO ACCEPT SUBSTITUTED SECURITIES.

An agreement by the officers of a bank holding notes of defendant to accept from a corporation satisfactory securities in substitution for such notes constitutes no defense to an action on the notes by a receiver for the bank, where no substitute securities were presented by the corporation prior to the bank's failure.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 176; Dec. Dig. § 77.*

Actions by and against receiver and agents of national banks, see note to McCartney v. Earle, 53 C. C. A. 398.]

2. JUDGMENT (§ 852*)—STAY OF PROCEEDINGS FOR ENFORCEMENT—EQUITABLE SET-OFF.

Where the defendant in an action at law in a federal court by the receiver of a bank claims an equitable set-off, proceedings for collection of the judgment recovered may properly be stayed to give him an opportunity to establish his claim in equity.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1564; Dec. Dig. § 852.*

Restraining enforcement of judgment pending establishment or enforcement of set-off or counterclaim, see note to Frye-Brulin Co. v. Meyer, 58 C. C. A. 532.]

At Law. On motion for new trial.

See, also, 170 Fed. 618.

Charles Biddle, for plaintiff.

John McClintock, Jr., for defendant.

HOLLAND, District Judge. I have made a careful review of the evidence in this case in connection with the reasons for a new trial filed by the defendant. The evidence in the cause establishes that the bank officials had agreed to accept satisfactory securities from the bridge company in substitution for the indebtedness of the defendant to the bank. The bridge company, in accordance with its agreement, had either paid or substituted securities for the entire amount of Mr. Peet's indebtedness, to wit, $19,950, with the exception of the amount of the notes in suit, to wit, $10,000; and it is also established by the evidence that as to these notes an official of the bridge company, upon several occasions, called at the bank and made inquiries about substituting other securities for these notes in a somewhat indefinite and vague manner. The bridge company, however, never appeared or presented either cash or other securities in payment of the notes, so that there never was any payment by the bridge company in accordance with the agreement, and, of course, Mr. Peet has never been relieved from liability on the notes, as this was to take place when the bridge company had either paid them in full or substituted other satisfactory securities. The bridge company never paid or gave other securities.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date. & Rep'r Indexes
The cases cited by the defendant in his brief have no application to this case other than to support the proposition that the bank was bound to carry out its agreement to accept satisfactory securities in lieu of the Peet notes, and there is no question but that at any time before the failure of the bank Peet and the bridge company could have compelled the bank to have lived up to its agreement. The motion for a new trial is therefore overruled.

It appears that Peet, in his defense, offered to show that the bank, prior to its failure, received $22,000 in money on deposit from the bridge company, which money belonged to the defendant. This sum of money, it is alleged, was a debt due the bridge company, and had been assigned by it to Mr. Peet in payment of an indebtedness due him from the company, and that shortly after the assignment the officers of the bridge company collected the same and deposited the amount in its name in the bank at Manasquan, and that this deposit is the property of the defendant. Being an equitable set-off, it could not be pleaded as a defense in a common-law action in the United States courts, and suit was instituted against the receiver of the bank of Manasquan, who was in attendance at the trial of this case. The summons was served in the corridor of the building in which the United States courts are held, and we think in violation of his privilege from service of any writ in a civil action while attending court. He was in attendance not only as plaintiff, but also in obedience to a subpoena served upon him by the other side. There is a motion pending in that case to set aside the service, which has been sustained and the service of the summons against the receiver set aside, but we are of the opinion that the defendant is entitled to a stay of further proceeding on the judgment in this case until the questions involved in the other are disposed of.

It is therefore ordered that all proceedings in the above case be stayed for a period of 30 days to enable the defendant to file a bill or institute such other proceedings as he may deem necessary in order that the questions as to his right to the fund above mentioned may be determined.

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WHITFIELD v. HAMMERSTEIN.
(Circuit Court, E. D. Pennsylvania. May 29, 1909.)
No. 462.

JUDGMENT (§ 199*)—NOTWITHSTANDING VERDICT—EFFECT OF EVIDENCE.
In an action by a servant to recover for a personal injury, on the ground that the master was negligent in the construction of a scaffold on which plaintiff, with other laborers, was required to work, where the evidence on such issue was conflicting, the court cannot enter a judgment for defendant notwithstanding the verdict.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 387; Dec. Dig. § 199.*]

At Law. On motions for new trial and for judgment notwithstanding the verdict.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'y Indexes
John J. McDevitt, Jr., and J. Edgar Butler, for plaintiff.
Julius C. Levi, for defendant.

J. B. McPHERSON, District Judge. An attentive examination of
the testimony taken at the trial, aided by the arguments of counsel, has
satisfied me that this case could not have been withdrawn from the
jury. The defendant undertook to furnish the materials and erect
a reasonably safe scaffold upon which the plaintiff with other labor-
ers was to work. The quality of the materials is not complained of.
It is the method of erection that is said to have been faulty, in view of
the load that the scaffold was called upon to bear. Originally the struc-
ture may have been fit; but it is clear that the strain upon it was in-
creased by the erection of the "horse scaffold," and it is not disputed
that the first time it was used after the added load was put upon it a
break occurred and several workmen were injured. The weak point
seems to have been that the put locks, or cross-supports under the plat-
form, were too far apart; for it is certain that the injury was caused by
the breaking of one of those supports, and the jury has found that the
distance was too great. Whatever the weight of the defendant's tes-
mimony on this point may have been, the jury has chosen to rely upon
the witnesses that testified in behalf of the plaintiff; and upon the
motion for judgment notwithstanding the verdict all that the court
can decide is that the question of negligence could not have been
taken away from the jury, and therefore cannot now be determined
in the defendant's favor. The motion for judgment is refused, and to-
such refusal an exception is sealed in behalf of the defendant.

The motion for a new trial was withdrawn at the argument; the
defendant relying wholly upon his motion for judgment notwith-
standing the verdict. A new trial is therefore formally refused.

JONES v. EDWARD B. SMITH & CO.
(Circuit Court, E. D. Pennsylvania. May 29, 1909.)
No. 25.

JUDGMENT (§ 199*)—NOTWITHSTANDING VERDICT—EFFECT OF EVIDENCE.
Where the question of the modification of a contract sued on depends
upon written evidence and also upon conflicting parol testimony, the whole
issue is one for the jury, and the court cannot enter judgment notwith-
standing the verdict.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 367; Dec. Dig.
§ 199.*]

At Law. On motions by defendants for new trial and for judg-
ment notwithstanding the verdict.
See, also, 158 Fed. 911.
Burr, Brown & Lloyd, for plaintiff.
Henry C. Boyer and Wm. A. Glasgow, Jr., for defendants.

J. B. McPHERSON, District Judge. As the question concerning
the asserted modification of the contract of January 25, 1906, de-
*For other cases see same topic & § NUMBERS in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
pended not only upon certain writings, but also on the conflicting parol testimony of several witnesses, it is not easy to see how the court could possibly have declined to submit the whole matter to the jury. That tribunal has found that the modification was made, and, while it is probably true that such change may turn out to be disadvantageous to the defendants' interest, I do not understand that this consideration furnishes the court with a sufficient reason for refusing to uphold the verdict. If the dispute concerning the asserted change depended solely upon the letter of February 9, 1906, it would no doubt be my duty to construe it and decide upon its effect; but, as the dispute appears also in the parol testimony, it was necessary that all the evidence, written and parol, should be submitted to the jury, and judgment notwithstanding the verdict cannot now be entered. As was said by the Supreme Court of Pennsylvania in Home Building Ass'n v. Kilpatrick, 140 Pa. 405, 81 Atl. 397:

"When matters of fact depending upon oral testimony are connected with, and necessary to, a proper understanding of the written evidence, the court is not bound to construe the latter as though it stood alone. An admixture of oral and written evidence draws the whole to the jury." See, also, Chicago Organ Co. v. McManigal, 8 Pa. Super. Ct. 638.

A similar remark may be made concerning the disputed question whether the issue of $600,000 was a merely "temporary financial expedient"—to use Mr. Anderson's phrase—or was intended to determine formally the amount of the mortgage to be put upon the property. This also depended upon written as well as upon parol evidence, and I do not see how it could have been withdrawn from the jury. I do not regard the fact as controlling that the mortgage was not a first lien. The plaintiff was willing to accept the bonds, even although they were not secured by a first mortgage, and the defendants can hardly object that the plaintiff offered to waive the priority of the lien and to take the bonds as they stood.

The motions for a new trial and for judgment notwithstanding the verdict are refused, and to the refusal of the motion for judgment an exception is sealed.

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PENNSYLVANIA STEEL CO. V. METROPOLITAN ST. RY. CO.

(Circuit Court, S. D. New York. May 22, 1909.)

Street Railroads (§ 57*)—Leases—Liability of Lessor for Property Purchased by Lessee.

Evidence held not to render the lessor of a street railroad liable for the purchase price of property sold to the lessee.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 57.*]

In Equity. On exceptions to master's report.

C. G. Galston, for the exceptions.
Wm. M. Chadbourne, for receivers of Metropolitan St. Ry. Co.
Dexter, Osborn & Fleming, for receiver of New York City Ry. Co.

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
LACOMBE, Circuit Judge. I concur with the special master in the conclusion that the claimant sold its cables to the New York City Railway Company, the lessee, and by such sale and delivery according to directions became a creditor of that company only, and that there is not sufficient evidence to warrant a finding that in these transactions the New York City Railway Company was an agent, purchasing on behalf of the Metropolitan Street Railway Company as its principal. The lease, which was not put in evidence before the special master, but which both sides submitted here quite clearly, indicates the relations between the companies. Its complicated provisions as to betterments may suggest some reason for the classification "Metropolitan Street Railway Construction Account" indicated by the three orders.

In reaching this conclusion it is not intended to express any opinion upon the question whether any equities in the property, corpus or income, now in the hands of receivers, arise in favor of the claimant by reason of the circumstance that the lessee and subsequently the receivers used these same cables in the operation of the lessor's property.

UNITED STATES v. DURIE.

(District Court, E. D. Pennsylvania. May 14, 1909.)

No. 17.

ALIENS (§ 21*)—CHINESE EXCLUSION ACTS—REPEAL BY IMPLICATION OF PROVISIONS OF PRIOR ACT.

Chinese Exclusion Act May 6, 1882, c. 126, § 2, 22 Stat. 59, as amended by Act July 5, 1884, c. 220, 23 Stat. 115 (U. S. Comp. St. 1901, p. 1306), which makes it a misdemeanor for the master of any vessel to knowingly bring within the United States on such vessel and land or attempt to land any Chinese laborer from any foreign port, was repealed by implication by Act Sept. 13, 1888, c. 1015, § 9, 25 Stat. 478 (U. S. Comp. St. 1901, p. 1316), which covers substantially the same offense, but prescribes a different punishment.

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

On Demurrer to Indictment.

J. Whitaker Thompson and Jasper Yeates Brinton, for the United States.

Francis S. Laws, for defendant.

J. B. McPHERSON, District Judge. It may be, that the argument now made by the government in support of the proposition that section 2 of the Chinese exclusion act of 1882 (Act May 6, 1882, c. 126, 22 Stat. 59), as amended by the act of 1884 (Act July 5, 1884, c. 220, 23 Stat. 115 [U. S. Comp. St. 1901, p. 1306]), was not impliedly repealed by the act of 1888 (Act Sept. 13, 1888, c. 1015, § 9, 25 Stat. 478 [U. S. Comp. St. 1901, p. 1316]) was not presented to Judge Cross in the district of New Jersey before he decided, in United States v. Wood, 168 Fed. 438, that such repeal had taken place. I accept the statement in the government's brief that the argument now offered is made for the first time; but this does not change the fact that I am asked,
in effect, to review Judge Cross's decision and to say that he would perhaps, or probably, have reached a different conclusion if he had taken into account the considerations that have been presented to me. It is clear, however, that, although the argument now made on behalf of the government may not have been presented to Judge Cross by counsel, it may have occurred to his own mind, and may have been rejected as not persuasive. But, without laying any weight on this possibility, I think it is enough to say that, in my opinion, the proper tribunal to review the ruling in United States v. Wood is the Circuit Court of Appeals or the Supreme Court. It is true that I am not bound by the decision of another District Court; but, however freely the right of dissent may in general be exercised, I think there are obvious reasons why dissent in the same circuit should be avoided as far as possible.

Following, therefore, the decision in United States v. Wood, the demurrer to the present indictment is sustained.

GUARANTY TRUST CO. OF NEW YORK v. METROPOLITAN ST. RY. CO. et al.

(Circuit Court, S. D. New York. May 14, 1909.)

Courts (§ 116)—Record—Amendment.

A motion for the nunc pro tunc amendment of the record in an equity cause for purposes of appeal overruled as unnecessary to save any rights of the moving party.

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

In Equity. On motion to amend record in a foreclosure suit.
For other opinions, see 166 Fed. 569; 168 Fed. 937; 170 Fed. 626.
Julian T. Davies, for Guaranty Trust Co.
Bronson Winthrop, for Morton Trust Co.
Arthur H. Masten, for receivers of Metropolitan St. Ry. Co.

LACOMBE, Circuit Judge. The complainant moves to amend the record of the cause: (1) By filing as part thereof nunc pro tunc as of March 3, 1909, the form of proposed decree submitted by the complainant to the court on that day. (2) By filing as part of the record in the cause nunc pro tunc as of March 13, 1909, the memorandum submitted by the complainant to the court on that day. Also to amend the decree: (3) By inserting nunc pro tunc as of March 18, 1909; in article 7 thereof, at the end of subdivision 2, the statement that an objection of the complainant, to the effect that by the terms of the decree complainant is deprived of its property without due process of law, was overruled. (4) By inserting nunc pro tunc as of March 18, 1909, in paragraph 10 thereof, a like statement of the overruling of a similar objection.

1. If the suggestions of complainant as to the form of decree were to be incorporated, the suggestions of all other parties as to such form should also be inserted. The result would be a confused mass of pro-

*For other cases see same topic & $ numbers in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
170 F.—40
posals and counter proposals, all preliminary to the decree, and which
would tend only to embarrass and confuse the appeal court. There is
no necessity for thus incumbering the record. The assignments of
error will point out whatever sins of omission or commission there
may be in the decree, and all errors of every sort will be properly be-
fore the Circuit Court of Appeals for correction.
2. The "memorandum" is in substance merely a statement of the
reasons why, in the opinion of complainant, a certain clause in the de-
cree was objectionable. The objection can be perfectly well expressed
in an assignment of error, and the reasons stated upon argument in
support of it.
3 and 4. The proposed amendments, if inserted, would make the
decree even more obnoxious than it now is to the requirements of the
36th equity rule. They are wholly unnecessary to save any rights of
complainant. Upon appeal the reviewing court can dispose of all ques-
tions presented by the assignments of error, including those which
concern constitutional provisions. It is not necessary, in order to pre-
sent such questions that some formal exception be reserved, as in the
case of a jury trial.
The motion is denied.

GUARANTY TRUST CO. OF NEW YORK v. METROPOLITAN ST. RY.
CO. et al.
(Circuit Court, S. D. New York. May 24, 1909.)
No. 149.
For former opinions, see 166 Fed. 569; 168 Fed. 937; 170 Fed. 625.
Davies, Stone & Auerbach, for complainant.
Masten & Nichols, for Metropolitan St. Ry. Co.

LACOMBE, Circuit Judge. Although the decree of foreclosure and sale
in this suit was entered March 18th, the mortgagee has so delayed the proce-
sion of the appeal that the last day on which motion could be made for a
hearing at the present session of the Circuit Court of Appeals has passed
without bringing the case to the attention of that court. The appeal, there-
fore, cannot be heard before the next term which opens October 11th. Un-
der these circumstances, sale could not be had before November 13th.
The special master will take the necessary steps to adjourn it accordingly.

PENNSYLVANIA STEEL CO. et al. v. NEW YORK CITY RY. CO.
(Circuit Court, S. D. New York. May 28, 1909.)

EQUITY (§ 410*)—FINDINGS OF MASTER—REVIEW ON EXCEPTIONS.
The finding of a special master adverse to a claim for damages, invol-
ving an issue of fact which depended upon the credibility of witnesses who
testified before him, confirmed.
[Ed. Note.—For other cases, see Equity, Dec. Dig. § 410.*]

In Equity. On exceptions to report of special master.
John M. Gardner, for claimants:
Royal H. Weller, for receivers of New York City Ry. Co.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
LACOMBE, Circuit Judge. This matter has been argued as if the cause had been taken from a jury and decided by the court as presenting questions of law only. That is an erroneous assumption. The master sits as a jury to pass upon all conflicting testimony, and after hearing the witnesses he "disallowed the claim." The question is one of the credibility of the witnesses. The special master saw and heard them on the stand, and evidently did not believe that the car had practically stopped, and that while plaintiff was about to step to the ground the conductor, although informed that he wished to alight, suddenly rang two bells and pushed him back against the dashboard. There is not sufficient in the record to warrant a reversal of this conclusion by a court which has not had the advantage of observing the demeanor of the witnesses on the stand. Indeed, it rather indicates that some of them have modified their testimony since it was given on the first trial, when the events were fresh in their memory.

The exceptions are overruled, and report confirmed.

STOCKTON v. OREGON SHORT LINE R. CO.
(Circuit Court, D. Idaho. April 29, 1909.)

1. QUIETING TITLE (§ 85*)—ACTIONS—CONSTRUCTION OF PLEADING.
An allegation in a bill or complaint to quiet title, that the plaintiff "has been and now is the owner seized in fee and entitled to the possession of," the premises in suit, by implication is an assertion of plaintiff's possession, and, so construed, is sufficient to support a suit in equity under the settled rule of the federal courts.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 73, 74; Dec. Dig. § 85.*]

2. REMOVAL OF CAUSES (§ 23*)—SUITS REMOVABLE—STATUTORY ACTION TO DETERMINE TITLE.
An action brought in a state court under Rev. Codes Idaho, § 4538, which provides that "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," is removable into a federal court where the citizenship and amount involved are such as to give that court jurisdiction. Such actions, while in all cases the same in form under the code procedure, may be essentially either equitable or legal, depending upon the facts in each particular case, which question must be determined by the court, whether state or federal, at some stage of the case, since, if legal, the right to trial by jury is guaranteed by the state Constitution, and must be awarded in the state as in the federal court.

[Ed. Note.—For other cases, see Removal of Causes, Dec. Dig. § 23.*]

3. REMOVAL OF CAUSES (§ 118*)—PROCEEDINGS—REPLEADING.
The right of removal is not to be determined by the form of action in the state court, but by the essential character of the case, and, regardless of form, the cause is removable if the federal court has jurisdiction upon either its equity or law side, and it may require the plaintiff to replead accordingly.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 250; Dec. Dig. § 118.]

On Demurrer by Defendant and Motion by Plaintiff to Remand to State Court.

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep't Index.
A. A. Sessions, for plaintiff.
P. L. Williams and D. Worth Clark, for defendant.

DIETRICH, District Judge. This action was commenced in the
state district court, and, upon petition of the defendant, was removed
to this court. Here the defendant filed a demurrer challenging the
jurisdiction of the court, and also the sufficiency of the complaint to
entitle the plaintiff to any relief. Shortly thereafter the plaintiff filed
a motion to remand, upon the broad ground that this court has no
jurisdiction. Certain general questions are thought to control both
the demurrer and the motion, and they have been submitted, and will
be considered, together.

The plaintiff alleges that he is a resident of Idaho, and that the de-
fendant is a corporation organized under the laws of the state of
Utah; "that for ten years or more last past the said plaintiff has
been, and now is, the owner, seised in fee, and entitled to the posses-
sion of, certain pieces, parcels, or tracts of land, situate in the village
of Parma, Canyon county, state of Idaho," the lands being particu-
larly described. It is further alleged that the defendant "claims own-
ership of said described lands, and an estate or interest in said pieces,
parcels, or tracts of land, adverse to said plaintiff, which said claim
is without right; that the said defendant has no estate, right, title,
or interest in and to said lands." It is further alleged that, by reason
of the adverse and unlawful claims of the defendant, plaintiff is
damaged in the sum of $1,950, "that being the value of said lands."-
Plaintiff prays that defendant be required to set forth the nature
of its claims, and that by the decree of the court it be adjudged that
the plaintiff is the owner of the premises, and that the defendant has
no estate or interest therein; and that the defendant be forever barred
from asserting any claim thereto. There is also a prayer for general
relief.

In its petition for removal, the defendant sets up the requisite di-
versity of citizenship, and also shows that the value of the matter in
dispute exceeds $2,000. Assuming that it is a suit in equity, the de-
fendant, on demurrer, makes the point that the plaintiff has not al-
leged his possession of the premises, and that, therefore he does not
exhibit facts sufficient to entitle him to equitable relief, reference
being made to the general rule in equity that a complainant in a suit
to quiet title must be in possession of the premises in controversy.
The point made upon motion to remand is that, assuming the defend-
ant's construction of the complaint to be correct, the bill should not
be dismissed, but the cause should be remanded to the state court,
where, under the Code, there is but one form of civil proceeding, and
where, therefore, the complaint states a cause of action of which the
court has jurisdiction. The complaint is said to have been drawn
with reference to section 4538 of the Revised Codes of Idaho, which
provides that:

"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 determin-
ing such adverse claim."
The position of the plaintiff seems to be that this statute confers upon a plaintiff rights which cannot be administered in a federal court, and that, therefore, an action brought thereunder in a state court is not removable. Cates v. Allen, 149 U. S. 451, 13 Sup. Ct. 883, 977, 37 L. Ed. 804; Gombert v. Lyon (C. C.) 80 Fed. 305. In maintaining the position here, plaintiff assumes the facts to be that he is not, and the defendant is, in possession of the premises; and that, in the state court, this was a suit in equity. There is, however, in the record no direct averment of possession. In the complaint it is alleged that the plaintiff "has been and now is the owner, seised in fee, and entitled to the possession," of the premises. By implication this language is to be deemed to be an assertion of the plaintiff’s possession. Gage v. Kaufman, 133 U. S. 471, 10 Sup. Ct. 406, 33 L. Ed. 725; Simmons Creek Coal Company v. Doran, 142 U. S. 449, 12 Sup. Ct. 239, 35 L. Ed. 1063. So construed, the complaint states facts sufficient to entitle the plaintiff to relief in equity, under a well-settled rule of the federal courts. Lawson v. United States Mining Company, 207 U. S. 1, 28 Sup. Ct. 15, 52 L. Ed. 65.

But taking a less liberal view of the complaint, if it be held that it does not disclose possession in the plaintiff, it must be conceded that the possession is not shown in either party; neither positively nor inferentially does it appear that defendant has possession. Upon such a construction of the pleadings, the questions submitted are ruled by Holland v. Challen, 110 U. S. 15, 3 Sup. Ct. 495, 28 L. Ed. 52. In either alternative, therefore, the complaint exhibits a case of equitable cognizance of which the federal courts have jurisdiction, and it follows that both the motion and the demurrer should be overruled.

In this view of the record, further discussion might properly be dispensed with, but the suggestion in the briefs of both parties that the actual facts in relation to the possession of the premises are not fairly disclosed by the complaint leads me to submit some observations upon the general question of the effect of the Idaho statute above quoted upon the jurisdiction of this court. There is no need to enter upon an explanation of the conditions out of which this and similar enactments have grown, or of the general purpose and scope thereof; the admirable exposition of the entire subject by Justice Field in Holland v. Challen, supra, leaves nothing to be added. Whether the statute be considered as operating only upon the remedy or as creating a new cause of action, the substantial result is that parties are enabled to have adjudicated certain controversies of which, without the statute, the courts could not take cognizance. It is not doubted that the state courts may protect the rights thus conferred and afford proper relief. For what reason is a federal court incompetent to administer like relief, both in proceedings there originally commenced, and in causes removed from the state courts? By Act March 3, 1875, c. 137, 18 Stat. 470 (U. S. Comp. St. 1901, p. 508), as amended, the Circuit Courts of the United States are given original cognizance, concurrent with the courts of the several states, "of all suits of a civil nature," at common law or in equity, where the matter in dispute exceeds $2,000 in value, and where there is a con-
troversy between citizens of different states. Where such a suit is commenced in the state court against a nonresident, the statute con-
fers upon him the right to remove the same into the proper Circuit
Court of the United States. Admittedly, an action brought within the
terms of the state statute is a "suit of a civil nature," and if the non-
resident defendant who seeks the removal thereof is to be denied a
right which the federal statutes, in the most general terms, seem to
confer, it ought to be only for substantial reasons involving the in-
ability of the court to administer the law and to do justice between
the parties.

The reason assigned for the supposed impotency of the federal
courts as compared with the state tribunals is that in the former there
is retained the distinction between actions at law and suits in equity,
whereas in the state courts there is but one form of civil action. Sec-

tion 1 of article 5 of the Constitution of Idaho provides that:

"The distinctions between actions at law and suits in equity, and the forms
of all such actions and suits, are hereby prohibited, and there shall be in this
state but one form of action for the enforcement or protection of private rights
or the redress of private wrongs, which shall be denominated a civil action."

This provision, however, relates only to distinctions of form and
differences of procedure; it does not purport to abolish or even to
alter those fundamental principles of law and of equity which are
recognized in all courts. As was said in Dewey v. Schreiber Imple-
ment Company, 12 Idaho, 280, 85 Pac. 921:

"We recognize the fact that the distinction between suits in equity and
actions at law has been prohibited, and that in this state there is but one form
of action for the enforcement or protection of private rights or redress of pri-
ivate wrongs, which is denominated as a 'civil action.' That, however, does
not abolish the rules of law or rules of equity; they remain, although the dis-
tinction between actions at law and suits in equity, and the forms of such ac-
tions and suits, are prohibited by our Constitution."

There is but a single kind of action; whatever be the nature of the
relief sought, the form of the pleadings is the same; the complaint
must contain a statement in ordinary and concise language of the
facts constituting the cause of action; that is the only requisite. But
it does not follow that the state courts, to any greater degree than the
federal courts, are relieved from the necessity of determining whether
the cause is essentially an action at law or a suit in equity. The
inquiry may arise later in the state than in the federal court, but it is
equally inevitable. Section 7 of article 1 of the Constitution of Idaho
guarantees that "the right of trial by jury shall remain inviolate";
and in section 1 of article 5 it is provided that "feigned issues are
prohibited, and the fact at issue shall be tried by order of court before
a jury."

These constitutional provisions have been construed by the Supreme
Court of the state, and it is held that they guarantee the right of trial
by jury only in actions at law, and that they have no application to
211, 96 Am. St. Rep. 256; Shields v. Johnson, 10 Idaho, 476, 79
Pac. 391. In an action at law, therefore, either party may, as of right,
demand that all issues of fact be submitted to a jury; but in suits
in equity such demand may be refused. While, without regard to form, the facts constituting plaintiff's cause of action may be set forth in ordinary and concise language, the essential distinction between law and equity perdures, and is a controlling consideration upon the vital question whether a party shall or shall not have a jury trial. In the federal courts, where the distinction between actions at law and suits in equity is recognized, it becomes necessary to determine the nature of the proceeding before the pleadings are settled; in the state courts such determination may await the trial.

Is there any general inherent difference between the equitable jurisdiction of the federal courts and that of the state courts? By section 723 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 583) it is provided that:

"Suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law."

But as was said in Wehrman v. Conklin, 155 U. S. 314, 15 Sup. Ct. 129, 39 L. Ed. 167, this section has never been regarded as anything more than a declaration of existing law. It "was intended to emphasize the rule and to impress it upon the attention of the courts." The same rule, therefore, which limits or defines the jurisdiction of a federal court of equity is controlling in considering the nature of suits in the state courts, except in so far as the rule may have been modified by the laws of the state, enlarging or curtailing such jurisdiction.

It will be noted that the Idaho statute does not in terms purport to enlarge the equitable jurisdiction of the state courts; nothing is said about actions at law or suits in equity; no procedure is prescribed. In general terms it declares the right of a party to have adjudicated any claim to or interest in real property when such claim or interest is controverted or questioned, whatever be its nature. It does not abolish existing remedies either at law or in equity. It embraces all conditions, including those where an action in ejectment or a suit to quiet title or to remove a cloud upon a title would, in the absence of the statute, afford adequate relief. It includes and adds to these ancient remedies. There is no evidence of any intention on the part of the Legislature to abrogate the general rule that suits in equity cannot be maintained where there is a plain, adequate, and complete remedy at law. Nor could such a purpose, if manifest, be sustained. To do so would, in effect, be to nullify the right of jury trial, solemnly guaranteed by the fundamental law of the state. If, the conditions being such that an action in ejectment may be maintained, a party may, instead of bringing such an action, institute a proceeding under the statute, and if all such proceedings are to be regarded as suits in equity, then by a simple bit of legislative legerdemain a defendant may not only be deprived of his right of removal to the federal court, but also of his constitutional right to a trial by jury, for, as we have seen, the Constitution guarantees such right only in actions at law. And, if in litigation of this class the Legislature may at will so extend the equitable jurisdiction of the state courts, no reason is apparent why all other controversies now adjudicated in courts of law may not
in like manner be made the subject of equitable cognizance, to the complete exclusion of the right of jury trial.

But, as already suggested, there is no evidence that the Legislature, in enacting the statute under consideration, attempted to exercise such extraordinary power or intended to make such a radical innovation. The enlargement of equitable jurisdiction contemplated by the statute was not in the direction of the field already occupied by courts of law, but of unoccupied territory. The statute does not substitute, it supplements; it provides a remedy where none existed theretofore. In so far as its general language embraces conditions under which an adequate remedy already existed either at law or in equity, it must be held to be declaratory only.

If this view be correct, it follows that no less in the state court, when trial by jury is demanded, than in the federal court, when the propriety or sufficiency of the pleadings is under consideration, there must be an answer to the question whether the cause is essentially an action at law or a suit in equity. The case at hand furnishes a concrete illustration. If it remains in this court, there must be a determination at the outset whether it shall proceed at law or in equity. If it is remanded to the state court, it may proceed without such determination up to the time of trial, for in that forum there is but one form of action. But when the defendant demands a jury trial, the precise question must be answered by a reference to substantially the same facts and the same general principles; the question is not simplified because postponed. If it is an action at law, the defendant is entitled to a jury; if a suit in equity, the demand may be refused. Newman v. Duane, 89 Cal. 597, 27 Pac. 66; Park v. Wilkinson, 21 Utah, 279, 60 Pac. 945; Angus v. Craven, 133 Cal. 691, 64 Pac. 1091; Haggin v. Kelly, 136 Cal. 481, 69 Pac. 140; Montana, etc., v. Boston, etc., 27 Mont. 288, 70 Pac. 1114; Id., 27 Mont. 536, 71 Pac. 1005.

What substantial reason then can be given for denying the right of removal in cases of this character? What injury will be suffered, or what right will be lost, by the defendant upon removal? If the facts are such that the plaintiff has no plain, adequate, and complete remedy at law, the case would, if it remained in the state court, proceed to trial and judgment without a jury. If transferred to this court, the court, upon its equity side, could assume jurisdiction, and the suit would likewise proceed to final decree without the interposition of a jury. Holland v. Challen, 110 U. S. 15, 3 Sup. Ct. 495, 28 L. Ed. 52; Frost v. Spitley, 121 U. S. 552, 7 Sup. Ct. 1129, 30 L. Ed. 1010; Whitehead v. Shattuck, 138 U. S. 146, 11 Sup. Ct. 276, 43 L. Ed. 873; Wehrman v. Conklin, 155 U. S. 314, 15 Sup. Ct. 129, 39 L. Ed. 167; Roberts v. Northern Pacific Railway Company, 158 U. S. 1, 15 Sup. Ct. 756, 39 L. Ed. 873; Lawson v. United States Mining Company, 207 U. S. 1, 28 Sup. Ct. 15, 52 L. Ed. 65; Darragh v. Wetter Manufacturing Company, 78 Fed. 7, 23 C. C. A. 609.

If, upon the other hand, the conditions are such that the plaintiff has a plain, adequate, and complete remedy at law, the cause should be deemed to be an action at law, in which case there would be a jury trial as of right in either court, and the procedure in the one forum
would not materially differ from that in the other. Rev. St. U. S. § 914 (U. S. Comp. St. 1901, p. 684). Some additional burden of pleading may be cast upon the plaintiff by the removal, but that is not an uncommon incident of removal, and cannot be considered a sufficient reason for denying the substantial right conferred by the federal statutes. Not infrequently it happens that in the state court relief both in equity and at law is sought in the same proceeding, where such practice is warranted by the Codes. But the inability of the federal court to entertain a complaint in that form has never been regarded as a serious obstacle to removal. Amended complaints may be filed, one upon the law side and the other upon the equity side of the court. Cir. Ct. Rule 19. While pleadings in the federal court are more formal, the procedure in the state court, where, in the same action, both equitable and legal relief is sought, is not without its complications. Stocker v. Kirtley, 6 Idaho, 795, 59 Pac. 891; Robertson v. Moore, 10 Idaho, 115, 77 Pac. 218; Lindstrom v. Hope Lumber Company, 12 Idaho, 714, 88 Pac. 92.

With much earnestness, counsel for the plaintiff insists that the federal court must entertain the complaint in the form in which it is filed in the state court, and that, if it has not jurisdiction of the proceeding in that form, it must remand; that there is no authority for requiring a plaintiff to replead upon removal, and the propriety, if not the validity, of rule 19, above referred to, is called into question. In Coosaw Mining Company v. South Carolina, 144 U. S. 550, 12 Sup. Ct. 689, 36 L. Ed. 537, a case removed from the state court, Justice Harlan says:

"The suit may have been cognizable in the state court, sitting in equity. But if it was not one of which the Circuit Court of the United States, sitting in equity, could properly take cognizance (Payne v. Hook, 7 Wall. 425, 430, 19 L. Ed. 260; Arrowsmith v. Gleason, 129 U. S. 86, 88, 9 Sup. Ct. 237, 32 L. Ed. 630), the pleadings, upon removal of the case from the state court, should have been reformed so as to make it a case to be tried at law."

In Wilson v. Smith (C. C.) 66 Fed. 81, Dallas, C. J., in ruling upon a motion to remand, said:

"That a state, by simply prescribing a peculiar form of procedure for its own courts, may in any case divest the rightful jurisdiction of those of the United States, is a doctrine to which I am wholly unable to assent, and which does not appear to be supported by any precedent or authority."

And again:

"Whether the jurisdiction of this court is upon its law side or its equity side will be determined by the essential character of the case, but the right of removal is not affected by any such question. That right exists if, upon either side, the requisite jurisdiction exists. Where a cause brought here by removal cannot be entertained upon the one side, it must be assigned to the other; but it is not to be remitted to the state court if, upon either side, the federal court is competent to retain and decide it."

And in Peters v. Equitable L. Ins. Co. (C. C.) 149 Fed. 290, cited for plaintiff, Lowell, C. J., in remanding the case, said:

"The defendant further contends that, even if it be admitted that the state statute has given the complainant a remedy in equity enforceable in the state courts, but unenforceable in a court which, like this, is unaffected by the statute, yet that the complainant may here be ordered to replead, and so may have
here an adequate remedy at law. If this court deemed the complainant's remedy obtainable at law to be adequate, doubtless it would retain jurisdiction of the cause, and would direct the complainant to replead; but, upon the whole, the remedy at law which this court can give to the complainant appears to be materially less effective than is the remedy obtainable in the state court through his bill in equity. That the Legislature of the state, by extending the equitable jurisdiction of the state courts to matters in which an adequate remedy at law is given to the suitor by the federal courts, cannot therefore deprive the citizen of another state of his right of removal to this court, is plain. But, on the other hand, if a state statute gives to any suitor a remedy in equity in the state courts better and more complete than that which this court can give him at law, and if, furthermore, the remedy thus given is one which this court cannot enforce in equity, the suitor has the right to carry on his litigation in the state court of equity, undisturbed by removal here."

With these views I am in accord. It is possible that an action may be brought in the state court under the Idaho statute, of which this court cannot assume jurisdiction; but it does not follow that, merely because a plaintiff refers to the section and asserts that his action is brought thereunder, the right of removal is defeated. Not the form, but the essential nature of the proceeding and of the relief sought, will control.

As already stated, the plaintiff's complaint here exhibits a case of equitable cognizance within the jurisdiction of this court. If, as is suggested in the briefs of both parties, the complaint does not truly or fully show the material facts, and if the defendant is actually in possession of the premises, the plaintiff may deem it wise to reform his pleading, for if he proceeds upon the equity side of the court he must fail, unless his proofs disclose a right of action cognizable in equity; there must be a correspondence of allegata and probata. The actual facts should be set forth from which it may be determined whether the court, ratione materiae, can entertain jurisdiction, and, if so, whether the cause should proceed upon the equity or upon the law side of the court, or possibly in part upon one side and in part upon the other.

An order will be entered denying the motion to remand, overruling the demurrer, and granting to the plaintiff 30 days in which to replead; also granting to the defendant 45 days in which to plead further; all new pleadings to be filed and served within the times prescribed.

In re ADLER.

(District Court, E. D. Oklahoma. November, 1908.)

1. Bankruptcy ($228*)—Withholding Assets—Orders—Review.
   A bankrupt's petition to review a referee's order requiring payment of money alleged to be withheld from the trustee raises the same questions as would be involved in a proceeding on citation for contempt, and hence the case would be so treated.
   [Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 387; Dec. Dig. § 228.*]

2. Bankruptcy ($136*)—Withheld Assets—Payment to Trustee—Order.
   A referee's order requiring a bankrupt to pay money alleged to have been withheld from the trustee is unsustainable, unless it is proven that

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
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the money directed to be delivered to the trustee is a part of the bankrupt's estate and that the bankrupt had it in his possession or under his control at the time the order of delivery is made, so that it may be enforced by contempt proceedings.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 235; Dec. Dig. § 138.*]


Where the bankrupt testified at the first meeting of creditors that he had no money or property in his possession or control for which he had not accounted, a referee's order directing that he pay to the trustee money alleged to have been withheld, based mainly on approximate estimates, inferences, and conjectures which raised a strong suspicion that assets had been withheld, but which did not constitute direct and conclusive proof thereof, was insufficient to sustain the order.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 235; Dec. Dig. § 138.*]

Bledsoe & Bledsoe, for bankrupt.
Potterf & Walker, for trustee.

CAMPBELL, District Judge. This matter comes up on petition of the bankrupt to review an order of the referee entered in this case on the 14th day of February, 1908, directing the bankrupt to turn over to the trustee herein, on or before the 35th day of said month, the sum of $1,000, which the referee certifies he finds the bankrupt has in his possession and control, and which he has failed to pay over to the trustee, $500 thereof being money which the referee finds to have been paid over to A. Handmaker, of Louisville, Ky., a brother-in-law of the bankrupt, prior to the institution of the bankrupt proceedings, and $500 which the referee estimates to be in the bankrupt's hands from sales made within the four months preceding the adjudication in bankruptcy.

The testimony relied upon is that of the bankrupt and others, taken at the first meeting of the creditors, which I have carefully read. The bankrupt denies, under oath, having any money or any property that has been sold and not disclosed, or that he has paid any person any money to be held for him until these proceedings are over. While the testimony indicates that the business was run in a most careless manner, to place the most charitable construction upon it, and many things were done in the last four months preceding bankruptcy which give grounds for suspicion of the good faith of the bankrupt, the only testimony which might be said to clearly indicate that the bankrupt had in his possession or under his control at the time of the institution of the bankruptcy proceedings money or property which he failed to account for is that of the witness Howard Martin, who details a conversation between himself and the bankrupt a few days before, at which time he testifies the bankrupt showed some money, the amount of which is not definitely stated, which he claimed to have gotten out of the M. & P. Bank on his personal check.

Ordinarily in cases of this character, where the bankrupt conceives the order of the referee to be invalid, he refuses to obey the order, whereupon the referee certifies the facts to the judge, for a summary hearing and punishment as for contempt, if he finds the fact warrants

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
it. While this case comes up on petition of the bankrupt to review the order of the referee, it practically raises the questions which would come up on a citation for contempt, for the reason that, unless the order is one the enforcement of which can properly be effected by imprisonment for contempt, it would be a futile order to make, and the case will therefore be treated as one in which an order has been disobeyed and is before this court in a contempt proceeding.

I have carefully examined the authorities cited by counsel in the briefs filed in this matter. So far as this district is concerned, the rules which must control this court in matters of this character have been very clearly laid down by the United States Circuit Court of Appeals for the Eighth Circuit, in the cases of In re Rosser, 4 Am. Bankr. Rep. 153, 101 Fed. 562, 41 C. C. A. 497, and Boyd v. Glucklich, 8 Am. Bankr. Rep. 393, 116 Fed. 131, 53 C. C. A. 451, a case similar in many respects to the one at bar. In the former case Judge Sanborn, speaking for the court, says:

"There can be no doubt that under the general rules of law and under these specific provisions of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]) the court and the referee were vested with the right and subjected to the duty of making the necessary orders to require the bankrupt and all other persons who had the possession and control of the property of the bankrupt estate to surrender and deliver it to the trustee. Such orders constitute one of the essential means by which the court and the referee are empowered to collect the estate of the bankrupt. It is a broad and comprehensive power, and great caution should be exercised to observe its limits and to issue it only lawful orders. But without its lawful exercise, the administration of the estates of bankrupts would in many cases be complicated and tedious, all the assets would be wasted in litigation, and the beneficent purpose of the bankruptcy law would fail of accomplishment. Two essential facts limit this power and condition its lawful exercise. They are that the money or property directed to be delivered to the trustee or other officer of the court is a part of the bankrupt estate, and that the bankrupt or person ordered to deliver it has it in his possession or under his control at the time that the order of delivery is made. If the property is not a part of the estate, obviously no lawful order for its delivery to the trustee can be made. If the money or property in controversy was a part of the estate of the bankrupt, but before the order for its delivery is made he has squandered, disposed of, or lost it, so that it is not in his control or possession, and he cannot obtain and deliver it at the time the order of delivery is made, or within a reasonable time thereafter, it cannot be a lawful order, because the court may not order one to do an impossibility and then punish him for refusal to perform it. The punishment of the bankrupt for such acts must be sought under the provisions of the bankruptcy law relative to the fraudulent concealment of the property of the estate and the making of false oaths relative thereto. But if it appears to the satisfaction of the referee or the court that property of the bankrupt estate is in the control or possession of the bankrupt, a lawful order for its delivery to the trustee may be made, and a refusal to obey this order may be punished as a contempt of court, both under the general law relative to contempt and under the specific provisions of the bankruptcy act."

It will be seen from the foregoing authority that not only must the money or property ordered to be turned over be a part of the bankrupt's estate, but it must also be established that it is in the possession or under the control of the bankrupt. As said by Judge Caldwell, in Boyd v. Glucklich, supra:

"Inability to comply with the command of the court is always a complete defense to a charge of a contempt. It cannot be imputed to any one that be
is guilty of a contempt of court for neglecting or refusing to do what it appears is out of his power to do. An order of commitment in such a case is void. The ability of the bankrupt to comply with the order of the court must be made to appear before he can be punished for contempt. And it must be made to appear by evidence which leaves no reasonable doubt in the mind of the court on that subject. Evidence which is merely persuasive cannot suffice. He cannot be imprisoned for the purpose of exploitation. Torture as a means of extracting evidence or forcing a confession is no longer allowable, either in criminal or civil proceedings. When imprisonment for debt was lawful, a creditor frequently imprisoned his debtor in the hope and expectation that his friends or relatives would pay the money required to release him from an imprisonment which otherwise would apparently end with his life. But no such practice is permissible under the bankruptcy act. In the printed record before us, which is all we have to consider, there is no direct evidence to show that the bankrupt has the money, save two or three small items mentioned in the referee's order. The referee's conclusion seems to have been reached mainly, if not altogether, by 'approximate' estimates, inferences, and conjectures, which, while they give rise to very strong suspicion, fall far short of direct and conclusive proofs. The sea of suspicion has no shore, and the court that embarks upon it is without rudder or compass. No man can be imprisoned for a constructive contempt on suspicion or conjectures, or upon inferences which may or may not be well founded. For this reason, from the earliest times the doctrine has obtained that when one accused of a constructive contempt in a court of law denies positively and specifically, under oath, the alleged contempt, the proceedings against him for contempt must be dismissed."

The bankrupt testified positively at the first meeting of creditors in this case that he had not any money or property in his possession or under his control for which he had not accounted. While other evidence in the case tends to contradict the bankrupt and throw suspicion upon the truth of his testimony, it does not do more than raise a suspicion in the mind of the court, and in view of all the testimony in this case, under the rules laid down by the authorities above cited, which are conclusive upon this court, it is my opinion that the order of the referee is not supported by sufficient testimony to warrant this court to order the imprisonment of the bankrupt for contempt for his failure to obey the referee's order. As pointed out by Judge Caldwell, in the case of Boyd v. Glucklich, supra, if the bankrupt has concealed from the trustee any of the property belonging to the estate, or has made a false oath in relation to this proceeding, in any manner, he is subject to criminal prosecution as provided by the bankruptcy act. This is a matter to be reached by regular procedure on the criminal side of the court.

If I am correct in the conclusion that the evidence upon which this order is based is not sufficient to warrant this court to order the bankrupt imprisoned for contempt, should he fail to obey it, then it follows that the order should not have been made. An order which cannot be enforced is a dead letter. The order will therefore be annulled and set aside. It is so ordered.
In re GRAY.
(District Court, E. D. Oklahoma. November, 1908.)

Where a conditional sale made in Oklahoma Territory provided for the delivery of goods in Indian Territory, it was not required to be recorded under Wilson’s Rev. & Ann. St. Okl. 1903, § 4170, requiring registration in the office of the register of deeds in and for the county wherein “the property shall be kept,” as such statute had no extraterritorial force in Indian Territory, by the laws of which the contract was governed.
[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1353; Dec. Dig. § 465.*]

Where a conditional sale is made in one state, and contemplates or expressly provides that the property is to be delivered or used in another state, it is governed by the laws of the latter.
[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1323; Dec. Dig. § 451.*]

Prior to Indian Territory being included in the state of Oklahoma, there was no law in such territory requiring conditional sale contracts to be recorded as a condition of their validity, either between the parties or as against third persons.
[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1353; Dec. Dig. § 465.*]

Where a conditional sale contract provided for the delivery of goods in Indian Territory, there being no local law therein inhibiting such contracts, the question as to whether the fact that the goods were furnished to the buyer for resale in the usual course of business invalidated them must be tested in bankruptcy proceedings against the buyer in accordance with the general law.
[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 178.*]

5. Sales ($472*)—Conditional Sales—Validity.
In the absence of a fraudulent intent, a conditional sale reserving title to the goods in the seller until the price is paid is not invalid as against creditors or purchasers because the goods were furnished for resale.
[Ed. Note.—For other cases, see Sales, Dec. Dig. § 472.*]

6. Sales ($469*)—Conditional Sales—Payment—“Money.”
A conditional sale contract required payment in 10 days either in cash or notes, declaring that all notes and open accounts shall be drawn payable at Oklahoma City, with 10 per cent. attorney’s fees added, and that on default in the payment of any installment the seller might consider the entire indebtedness due; the title to and the ownership of all the goods should be in the seller until the buyer’s indebtedness had been paid in money. Held, that the word “money” was used in contradiction to “notes,” and did not include notes, so that the acceptance of notes did not constitute a payment sufficient to vest title to the goods in the buyer.
[Ed. Note.—For other cases, see Sales, Dec. Dig. § 469.*
For other definitions, see Words and Phrases, vol. 5, pp. 4554–4565.]

7. Bankruptcy ($318*)—Claims Against Estate—Conditional Sales—Registration—Oklahoma Statutes.
Wilson’s Rev. & Ann. St. Okl. 1903, § 4179, declared that conditional sale contracts should be invalid against innocent purchasers or creditors of the buyer unless registered in the county where the property was

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep’t Indexes
kept. Enabling Act June 16, 1908, 34 Stat. 267, c. 3335, under which the
Indian Territory became the state of Oklahoma, provided that the laws
of Oklahoma Territory should apply to said state until changed by the
Legislature, but that no existing rights or contracts should be affected
by the change, but should continue as if no change in the form of govern-
ment had taken place. Held that, a contract of conditional sale of prop-
erty in the Indian Territory prior to statehood being valid without regis-
tration, the seller, on the territory becoming a state, was not required to
register it in order to enforce it in subsequent bankruptcy proceedings
against the buyer.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 318.*]

In Bankruptcy. Petition to review an order of a referee.
Crook, Kyle & Crockett, for trustee and petitioner.
McConnell & Bland, for intervener.

CAMPBELL, District Judge. On February 29, 1908, R. S. Gray
filed his petition in voluntary bankruptcy in this court, and was subse-
quently adjudicated a bankrupt, and a trustee duly appointed. Thereaf-
fer, on March 19, 1908, B. F. Avery & Sons, creditors of said bankrupt,
filed a petition with the referee, seeking to reclaim certain wagons and
other farming implements included with the bankrupt's goods of which
the trustee had taken possession. The wagons sought to be reclaimed
were held by the bankrupt under a contract, a copy of which is attach-
ed to the petition as "Exhibit B." The other articles sought to be re-
claimed were held by the bankrupt under a contract, a copy of which is
attached to petition as "Exhibit A." It is contended by the petitioner
that these are contracts of conditional sale, and that, under the terms
thereof, the title to the property sought to be reclaimed is in the peti-
tioner, and that the petitioner is therefore entitled to recover possess-
ion thereof from the trustee.

As appears from the order of the referee, dated April 14, 1908, after
a hearing on said petition at which the trustee and petitioner appeared
and presented their respective contentions, the referee found that the
petitioner sold the property sought to be reclaimed to R. S. Gray and
the Gray Mercantile Company, of which R. S. Gray was the sole own-
er and proprietor, under contracts that the title of said company should
remain in the petitioner until fully paid for; that said R. S. Gray was
given full and unlimited power to sell the property in the course of his
business as a merchant. The referee in effect finds that the contracts
consisted of conditional sales, and that subsequently the said petitioner
settled with the bankrupt and took his notes for the unpaid part of the
purchase price; that said notes were unconditional in their terms. The
referee finds that the action of the petitioner in delivering the goods to
the bankrupt and giving him permission to sell the same in the course
of his business as a merchant was a constructive fraud upon the rights
of other creditors, the said property having been delivered to the bank-
rupt for the purpose of sale, and not for the use or consumption. The
referee, therefore, denies the petition. The petitioner presents his peti-
tion to this court for review of the order of the referee.

The contracts of sale referred to differ in some particulars in their

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.
terms and conditions. It may be seriously questioned whether the contract originally made with the Kentucky Wagon Manufacturing Company, covering the wagons, and afterwards assigned to the petitioner, is not an agency contract, instead of a contract of conditional sale. John Deere Plow Co. v. McDavid, 14 Am. Bankr. Rep. 653, 137 Fed. 802, 70 C. C. A. 422.

But as the parties concede these instruments to be contracts of conditional sale, they will be so treated, and the question then arises as to their validity as such under the facts of this case, and the right of the petitioner, if any, under them. Does the fact that these contracts provide for the furnishing of goods to the bankrupt, giving him permission to sell the same in the course of his business as a merchant, for the purposes of sale and not for his own individual use or consumption, constitute a constructive fraud on the right of creditors? It is contended that these are Oklahoma Territory contracts, and the following provision of the Oklahoma Territory law is relied upon:

"That any and all instruments in writing, or promissory notes now in existence or hereafter executed, evidencing the conditional sale of personal property, and that retains the title to the same in the vendor until the purchase price is paid in full, shall be void as against innocent purchasers, or the creditors of the vendee, unless the original instrument or a true copy thereof, shall have been deposited in the office of the register of deeds in and for the county wherein the property shall be kept, and when so deposited, shall be subject to the law applicable to the filing of chattel mortgages; and any conditional, verbal sale of personal property, reserving to the vendor any title in the property sold, shall be void as to creditors and innocent purchasers for value." Wilson's Rev. & Ann. St. Okl. 1903, p. 906, § 4179.

The contract "Exhibit A," having been based upon a proposition directed to petitioner at Oklahoma City, Okl. T., and by its provisions to be accepted at that place, is clearly a contract entered into in Oklahoma Territory for the delivery of goods, however, at a point outside of the territory. It will be noted that the Oklahoma law provides that an instrument evidencing a conditional sale, or a copy, "shall be deposited in the office of the register of deeds in and for the county wherein the property shall be kept." The property covered by the contract in this case was to be kept at Bennington, Ind. T. The statute relied upon could have no extraterritorial effect, and clearly applied only to goods to be kept within Oklahoma Territory. The rights of the parties herein, at least until Oklahoma became a state, the effect of which will be noted hereafter, must be decided by the laws in force in Indian Territory at the time the contract was entered into and the goods delivered. In re Legg et al. (D. C.) 96 Fed. 328. "Where a conditional sale is made in one state, which contemplates or expressly provides that the property is to be delivered or used in another state, the law of the latter state governs." Loveland on Bankruptcy, 448, 449. In February, 1907, when these contracts were entered into, there was no law in force in Indian Territory requiring contracts of conditional sale of personal property to be recorded, as a condition of their validity, either between the parties thereto or as against their persons. So far, therefore, as the failure to record was concerned, this did not in any way affect the right of petitioner, as against the bankrupt, to recover the goods on default or condition broken, up to the time Oklahoma became a state.
Did the fact that the goods were furnished bankrupt for sale in the usual course of business invalidate these contracts? There being no local law of the Indian Territory inhibiting contracts of conditional sale, such as those in question, they must be tested under the general law. In American & English Encyclopedia of Law, vol. 6, p. 440, it is said:

"Sales of personal property on condition that title is not to vest in the purchaser until the payment of the purchase money, or upon some other condition, are of very frequent occurrence, and the validity of such sales as between the parties thereto is unquestioned. * * * In most jurisdictions, in the absence of fraud, the rule is the same as to third persons, though in some states it is held otherwise, and in a number of states all conditional sales must be recorded in order to be valid against third persons without notice."

In the case of Harkness v. Russell, 118 U. S. 663, 7 Sup. Ct. 51, 30 L. Ed. 285, Mr. Justice Bradley, in sustaining a contract of conditional sale, said:

"Such contracts are well known in the law, and often recognized, and when free from any fraudulent intent are not repugnant to any principle of justice or equity, even though possession of the property be given to the proposed purchaser. * * * The intent of the parties will be recognized and sanctioned where it is not contrary to the policy of the law. This policy, in England, is declared by statute. It has long been a provision of the English bankruptcy laws, beginning with 22 James I, c. 19, that if any person becoming bankrupt has in his possession, order, or disposition, by consent of the owner, any goods or chattels of which he is the reputed owner, or takes upon himself the sale, alteration, or disposition thereof as owner, such goods are to be sold for the benefit of his creditors. This law has had the effect of preventing or defeating conditional sales accompanied by voluntary delivery of possession, except in cases like those before referred to; so that very few decisions are to be found in the English books directly in point on the question under consideration. * * * This presumption of property in a bankrupt, arising from his possession and reputed ownership, became so deeply imbedded in the English law that in process of time many persons in the profession, not adverting to its origin in the statute of bankruptcy, were led to regard it as a doctrine of the common law; and hence, in some states in this country, where no such statute exists, the principles of the statute have been followed, and conditional sales of the kind now under consideration have been condemned, either as being fraudulent and void as against creditors, or as amounting in effect to absolute sales with a reserved lien or mortgage to secure the payment of the purchase money. This view is based on the notion that such sales are not allowed by law, and that the intent of the parties, however honestly formed, cannot legally be carried out. The insufficiency of this argument is demonstrated by the fact that the conditional sales are admissible in several acknowledged cases, and, therefore, there cannot be any rule of law against them as such. They may sometimes be used as a cover for fraud, and, when this is charged, all the circumstances of the case, included, will be open for the consideration of the jury. Where no fraud is intended, but the honest purpose of the parties is that the vendee shall not have the ownership of the goods until he has paid for them, there is no general principle of law to prevent their purpose from having effect. In this country, in states where no such statute as the English act referred to is in force, many decisions have been rendered sustaining conditional sales accompanied by delivery of possession, both as between the parties themselves and as to third persons."


170 F.—41
In the case of In re Dunlop, 19 Am. Bankr. Rep. 363, 156 Fed. 545, 86 C. C. A. 485, Judge Sanborn, of the Circuit Court of Appeals for the Eighth Circuit, said:

"The next contention of counsel for the trustees of the Western Company is that the agreement was fraudulent and voidable against the trustee, because it permitted the conditional vendor to sell the merchandise in regular course of business, but provided that the proceeds should be credited upon its notes, or accounts, or held as a collateral security therefor, and because it was not filed or recorded in due time in any public office; and they cite the authorities from New York, Illinois, and Oregon, which sustain that position.

** But the general rule and weight of authority in this country, the established rule of property in Minnesota, and the established rule in this court are otherwise. Trustees of bankrupt estates have no better title, in the absence of fraud, than the bankrupt and his creditors had at the time of the filing of the petition in bankruptcy."

There being no claim of fraudulent intent made in this case, it must be held to come clearly within the doctrine laid down by the cases above cited. The decisions of the United States Supreme Court and those of the Circuit Court of Appeals for the Eighth Circuit were controlling in the Indian Territory as to such matters when the goods in question were delivered under these contracts, and it therefore follows that as between the petitioner and the bankrupt, as well as third persons, these contracts were valid.

But it is contended that by accepting the notes of the bankrupt the petitioner has defeated its right to enforce the contracts. The testimony shows that no notes have been given for the unsold wagons covered by the contract with the Kentucky Wagon Manufacturing Company, so as to that contract the defense that notes have been accepted does not apply. In the other contract it is provided:

"(1) I, or we, agree, to make settlement in accordance with prices herein specified, within ten days from date of invoice, either in cash, less discount, if any, payable in Oklahoma City, Louisville, or New York exchange or by notes, in accordance with terms hereinafter specified; all notes to be drawn with exchange on New York and payable after maturity at Oklahoma City, Oklahoma.

"(2) All notes and open accounts owing by me or us to you for goods herein ordered, as well as for all subsequent purchases, shall be payable at Oklahoma City, Oklahoma, and ten per cent. attorney's fees shall be added to the principal and interest of any claim placed in attorney's hands for collection. Default in the payment of any installment or part of the indebtedness when due, shall at your option exercised at any time after said default, mature mine or our entire indebtedness, which shall then become due and payable on demand at Oklahoma City, Oklahoma.

"(3) The title to and ownership of all goods which may be shipped under this contract as well as of all other goods shipped by you to me or us, on subsequent orders, shall be your property until all my or our indebtedness to you shall have been paid in money; but nothing herein contained shall release me or us from making payments as herein agreed."

In American Encyclopedia of Law, vol. 6, p. 475, it is said:

"Where a sale is made on condition that the vendee shall give a note or other security for the price, the property and the goods so sold and delivered does not vest in the purchaser until the condition is complied with or waived. But title does not necessarily pass when a note is given before the note is paid."
To which is appended the following note:

"The giving of a note for a balance due on the price of property sold, with the reservation of title until payment, will not vest title in the vendee in the absence of an express agreement."

From a careful reading of the terms of the contract above quoted, it appears clear that it was not the intention of the parties that the title to the goods should pass upon the delivery of the notes referred to, but that the term "money" was used in contradistinction to the term "notes," the latter being but evidence of indebtedness, and that, when it was provided that title should not pass "until my or our indebtedness to you shall have been paid in money," the term "money" was not intended to include notes. It is therefore held that the condition necessary to pass the title under the terms of the contract was not fulfilled by giving of the notes in question. Of course, such of the notes as covered goods recovered of this trustee cannot be collected, the petitioner waiving its right to such collection by electing to take the goods in lieu thereof.

Under the enabling act of June 16, 1906, 34 Stat. 267, c. 3335, Indian Territory became the state of Oklahoma on November 16, 1907. By the terms of this act it was provided that:

"The laws in force in the territory of Oklahoma, as far as applicable, shall extend over and apply to said state until changed by the Legislature thereof."

In the state Constitution adopted pursuant to said enabling act are the following provisions:

"Sec. 449. Change from Present Government.—In order that no inconvenience may arise by reason of a change from the forms of government now existing in the Indian Territory and in the territory of Oklahoma, it is hereby declared as follows:

"Sec. 450. Existing Rights; Process.—Section 1. No existing rights, actions, suits, proceedings, contracts, or claims shall be affected by the change in the forms of government, but all shall continue as if no change in the forms of government had taken place. And all processes which may have been issued previous to the admission of the state into the Union under the authority of the territory of Oklahoma or under the authority of the laws in force in the Indian Territory shall be as valid as if issued in the name of the state.

"Sec. 451. Oklahoma Laws in Force.—Section 2. All laws in force in the territory of Oklahoma at the time of the admission of the state into the Union, which are not repugnant to this Constitution, and which are not locally inapplicable, shall be extended to and remain in force in the state of Oklahoma until they expire by their own limitation or are altered or repealed by law."

Did the general provision extending the laws of Oklahoma Territory over Indian Territory make the act heretofore quoted, relative to filing instruments of conditional sale, applicable to existing contracts of conditional sale in Indian Territory on and after November 16, 1907? At that time the petitioner herein had an existing right or claim under these contracts. We have decided that up to that time he was not required to file or record the instruments evidencing the contracts. If, then, upon the advent of statehood, it be held that the act requiring the filing of such contracts became applicable to Indian Territory, and may now be urged by the trustee as against petitioner's claim, it seems clear that, by the change in the form of government, petitioner was
subjected to the inconvenience of filing its said contracts as provided by the statute, or that, upon failure to do so, its existing rights or claims under said contracts were materially affected by the change. But this result the Constitution expressly provides shall not follow. In my opinion, to make such law applicable to such existing contracts would be repugnant to the Constitution, and therefore inapplicable under the provisions of section 451 above quoted.

It is therefore held that the failure of petitioner to file said contracts of conditional sale or copies thereof in the manner provided by the law of Oklahoma Territory, above quoted, does not defeat his right to recover from the trustee in this proceeding. The order of the referee herein is therefore annulled and set aside. So ordered.

HOBÉ-ПетерС LAND CO. v. FARR et al.

(Circuit Court, W. D. Wisconsin. June 23, 1908.)

No. 84.

1. TAXATION (§ 799*) — TAX TITLE — QUIETING TITLE — EQUITY JURISDICTION — ADEQUATE REMEDY AT LAW.

A federal court of equity has jurisdiction of a suit authorized by a statute of the state by an assignee of a mortgage who has foreclosed the same and received a certificate of purchase to the mortgaged property to cancel tax deeds thereon, and establish and quiet his own title, although out of possession which is constructively in defendants, where under the state law he cannot obtain the legal title until an action against the defendants would be barred by limitation, and has therefore no adequate remedy at law.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1555; Dec. Dig. § 799.*]

2. COURTS (§ 312*) — JURISDICTION OF FEDERAL COURT — SUIT BY ASSIGNEE — "SUIT TO RECOVER CONTENTS OF CHOICE IN ACTION."

Such a suit is not one to recover the contents of a chose in action within the meaning of the federal judiciary act (Act March 3, 1875. § 1, c. 137, 18 Stat. 470 [U. S. Comp. St. 1901, p. 508]), and the fact that the assignor of the mortgage could not have sued thereon in the federal court does not deprive it of jurisdiction therein.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 871; Dec. Dig. § 312.*]

3. MORTGAGES (§ 13*)—VALIDITY—TITLE OF MORTGAGOR.

An outstanding tax deed to land does not affect the validity of a mortgage made thereon by the general owner and containing covenants of warranty where such mortgagee subsequently acquired the tax title.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 15; Dec. Dig. § 13.*]

4. JUDGMENT (§ 683*)—PERSONS CONCLUDED—DEGREE CONSTRUED.

A decree foreclosing a tax deed under St. Wis. 1898, §§ 1197—1210, which by its terms barred the defendants, including a mortgagee, and all persons claiming under them after the filing of the lis pendens, of any interest in the property, following the terms of section 1206, does not conclude one claiming under such mortgagee by an assignment made before

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
the suit, but not recorded, who was not made a party, although the fact of the assignment was known to the plaintiff.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1206; Dec. Dig. § 683.*]


Where a state statute requires the repayment of all taxes with a certain rate of interest as a condition precedent to relief against a sale for taxes, such condition will be enforced in a federal court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 972; Dec. Dig. § 371.*

State laws as rules of decisions in federal courts, see note to Wilson v. Perrin, 11 C. C. A. 71; Hill v. Hite, 29 C. C. A. 553.]

Reid, Smart & Curtis, for complainant.
Wickham & Farr, for defendants.

SANBORN, District Judge. This is a bill filed by the assignee of a mortgage, and holding only an equitable title, against a number of defendants asserting title under tax deeds regular on their face, and carrying constructive and adverse possession of the lands covered by them, to establish the title and interest of complainant against the claims of the defendants, to bar defendants against having or claiming any right or title to the lands adverse to complainant, and to cancel said tax deeds and a judgment of foreclosure brought under the state statute to bar the original owners of the lands covered by the tax deeds, also to recover damages for injury to the premises and to obtain a preliminary injunction against waste or damage to such lands.

At the outset two objections going to the jurisdiction are raised: One of these objections is to the jurisdiction to the court as a court of equity, on the ground that the complainant has an adequate remedy at law by ejectment, and, although it has no title to the lands, yet it must obtain such title and sue in ejectment, and cannot, in any event, bring suit to establish its title in a court of equity, notwithstanding that such a remedy is given by the statute of Wisconsin. The statute referred to is section 3186, St. Wis. 1898, the last sentence of which reads as follows:

"And any person not having such title or possession but being the owner and holder of any lien or incumbrance on land, shall also have the same right of action as the owner in fee to test the legality and validity of any other claim, lien or incumbrance on such land or any part thereof."

The objection made to the general jurisdiction of the court is that inasmuch as the tax deeds carry the constructive or presumptive possession of the land, and the defendants must, therefore, be deemed to be in possession, a court of equity cannot take jurisdiction by the rule laid down in the case of Frost v. Spitley, 121 U. S. 553, 7 Sup. Ct. 1129, 30 L. Ed. 1010, where it is held that a person out of possession cannot maintain a bill to remove a cloud upon a title and quiet the title, whether his title is legal or equitable; for, if his title is legal, his remedy at law by ejectment is plain, adequate, and complete, and, if his title is equitable, he must acquire a legal title and then bring ejectment. The case of Morrison v. Marker (C. C.) 93 Fed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
is also relied on, where it was held that the purchaser of real estate at execution sale, who was not in possession, cannot maintain a suit in equity to set aside a prior conveyance made by the judgment debtor in fraud of creditors, as a cloud on the title of complainant, although such a suit was permitted by the state statute. The cases on this subject are extensively reviewed by Judge Hunt in Johnston v. Corson Mining Co., 157 Fed. 145, 84 C. C. A. 593. The case under consideration, however, seems to be distinguished from the cases cited, for the reason that complainant could not obtain a legal title before the three-year statute of limitations on the tax deeds would have run. The complainant was at the time of the filing of the bill the assignee of a mortgage, and the mortgage had been foreclosed and a certificate of sale issued and delivered thereunder, but under the statutes of the state complainant could not obtain a deed on foreclosure until after May 24, 1902, when the first of the tax deeds in question would have been of record for three years. Complainant therefore could not in any way comply with the rule laid down in Frost v. Spitley, and could not obtain the legal title in time to bring this suit with any possibility of success. It had no legal title, and therefore could not maintain ejectment, and its sole remedy was an action in equity. Under such circumstances, its remedy at law was neither plain, adequate, nor complete, and the case is an exception to the rule that a person out of possession cannot maintain a suit in equity to quiet title against a person in possession; and to the further rule that the equitable and legal titles must be joined in the complainant before beginning suit. The case falls rather within the exception established in the case of Big Six Development Co. v. Mitchell, 138 Fed. 279, 70 C. C. A. 569, 1 L. R. A. (N. S.) 332. Another objection going to the jurisdiction of the federal court as such is that this suit is to recover the contents of a chose in action, and that complainant’s assignor was a citizen of this state, and could not have brought the suit. As to this objection, it is clear that this is a suit to set aside tax deeds and a foreclosure decree, and it is no more a suit to recover the contents of a chose in action than an ejectment suit brought by one claiming under a patent would be a suit to recover the contents of the patent.

On the merits the facts are somewhat complicated. Complainant relies on a mortgage made April 12, 1892, for $28,000 to the Minnesota Lumber Company, recorded May 4, 1892, in the proper office. Defendants claim under a decree of foreclosure of a tax deed made to J. R. Farr May 24, 1899, and recorded the same day. If such decree binds the complainant and is valid, this suit must be dismissed. It is necessary, therefore, to examine the facts and the arguments of counsel to determine the law to be applied. The tax foreclosure suit was brought, and notice lis pendens filed, December 27, 1900. It was brought under St. Wis. §§ 1197–1210. These sections provide that the grantee of any tax deed may at any time within three years after the date of the conveyance commence an action against the person or persons owning the land described in the conveyance at the time of making the sale upon which conveyance was made, or against the person or persons claiming under such owner or owners, for the purpose of barring such former owner or owners, and those
claiming under them. The purpose of such suit is to establish the validity of the deed against those holding adverse interests. The defendants may answer, and certain defenses may be made without a deposit or payment of the taxes, but no defenses other than those specially mentioned can be set up, unless a deposit is made with the clerk of the court for the use of the complainant for the taxes on the land and 15 per cent. interest from the date of the certificate on which the deed was issued, and also all taxes paid by the complainant after that time, with interest at 15 per cent. The Farr tax deed was fair on its face, but there were certain defects in the prior proceedings which would have invalidated it had they been pleaded, and a deposit made as required by the statute. Section 1206 provides that the judgment shall forever bar the defendants and all others claiming under them, after the filing of the notice of the pendency of the action. At the time the tax foreclosure was begun, the Minnesota Lumber Company appeared from the record to be still the owner of the mortgage, but, as a matter of fact, that company had assigned the mortgage to I. B. Craig May 27, 1899, and the mortgage at that time was in the possession of the Ogema Lumber Company. This company did not represent the full equitable interest in the mortgage, but the balance of such interest was held by Craig and J. W. Murphy. The complainant in the foreclosure suit relied upon the record, and its attorney apparently acted upon the theory that it would be safe and lawful for him to make only such persons defendants as had an interest on the record. After he commenced the suit, he had some correspondence with the Ogema Lumber Company, and was informed that it was holder of the mortgage, and he suggested to it the propriety of becoming a party to the foreclosure proceeding, presumably by intervention. He did not, however, make that company a party. The complainant Farr also had notice that J. W. Murphy claimed some interest in the mortgage, but Murphy was not joined as a party. The attorney for Farr evidently relied upon section 3187, St. 1898, which provides for the filing of the notice of lis pendens in an action affecting the title to real property, and contains the following provision:

"From the time of such filing, in either case, the pendency of such action shall be constructive notice thereof to a purchaser or incumbrancer of the property affected thereby; and every purchaser or incumbrancer whose conveyance or incumbrance is not recorded or filed shall be deemed a subsequent purchaser or incumbrancer, and shall be bound by the proceedings in the action to the same extent and in the same manner as if he were a party thereto."

It is argued by the solicitor for the complainant that section 3187 has no application to the foreclosure of a tax deed, for the reason that section 1206, which is a part of the tax foreclosure statute, contains a different provision as to the effect of the decree. He invokes the ordinary rule that a special provision, relating to a particular subject-matter, supersedes a general provision relating to cases generally covering the same subject-matter; and he cites the cases of Webster v. Pierce, 108 Wis. 408, 83 N. W. 938, and Cypreanson v. Berge, 112 Wis. 260, 87 N. W. 1081. In these cases it was held that section 3187 has no application to actions of ejectment, because section 3088 contains a special and different provision relating to the effect of the
judgment. The decree made in the Farr foreclosure case provides that the Minnesota Lumber Company and all persons claiming under them after the filing of the notice of lis pendens be barred of all right, title, and interest in the said land. It will be seen that this decree does not on its face purport to bind a person like the Ogema Lumber Company, which claimed under the Minnesota Lumber Company, before and not after the filing of the notice of lis pendens, the language in the decree following the provision of section 1206, and not the provision of section 3187. Had this decree purported to bind all persons claiming under the Minnesota Lumber Company at any time, a different question as to the effect of such decree would arise.

Changes in the title of the original owner of the lands occurring prior to the tax foreclosure require notice. The original owner of the property was B. M. Holmes. The lands are in two sections, 13 and 20. On May 16, 1891, George B. Burrows took out a tax deed upon all the lands in section 13. This was before the mortgage by Holmes to the Minnesota Lumber Company, and it is claimed that that mortgage therefore does not pass any title to the lands in section 13. As to this claim, however, there seems to be no doubt that, as between Holmes and Burrows, Burrows' tax deed is merely to be regarded as a lien; it being the duty of Holmes to procure a quitclaim from Burrows, or in some way to discharge the lien of the tax deed, and on August 8, 1893, after the decree in the tax foreclosure suit, Burrows did quitclaim to Holmes all the land in section 13, except one 40 belonging to Daniel Bjorklund, who was made a party to the suit. Since no attack is made on the Burrows tax deed and the Wisconsin statute of limitations ran on that deed May 16, 1894, there would seem to be no question that Bjorklund has a good title to his 40, and that the bill of complaint as to him and his wife must be dismissed. I conclude, therefore, that the mortgage must be construed to have passed title to the lands on section 13, except the Bjorklund forty.

As to the lands in section 20, John G. Morner took out a tax deed May 22, 1894, after the mortgage of the Minnesota Lumber Company. On the 12th day of April, 1895, John G. Morner and wife made a quitclaim deed to B. M. Holmes of the land covered by the Morner tax deeds. This deed, however, has never been recorded. However, the effect of this deed was to divest the interest of Morner in the lands in section 20, and prevent the running of the statute of limitations in favor of that deed, even though it has never been recorded. Warren v. Putnam, 63 Wis. 410, 24 N. W. 58. After the Morner quitclaim, and on the 2d of January, 1901, by quitclaim deed recorded January 4, 1901, Rose Morner, sole heir of John G. Morner, quitclaimed to J. R. Farr all the lands in section 20. Presumptively Farr had no notice of the quitclaim deed from Morner to Holmes. Farr, in his answer in this case, pleads the Morner tax deed, alleges the same to be valid, and pleads the three years statute of limitations in its support. By the rule settled in the Warren Case above cited, the running of the statute of limitations was interrupted and the effect of the statute destroyed. If Farr had set up the validity of that deed and claimed as a bona fide purchaser, a different question would arise, but under the pleadings it seems clear that Farr cannot
claim by virtue of the statute of limitations, and that the Morner quit-claim to Holmes must be treated as a redemption of the lands from the tax, and as a payment of the tax represented by that deed. In respect to the position of defendants’ counsel that Holmes had no title to the lands in section 13 when he made the mortgage because of the tax deed to Burrows, it further appears that the mortgage contains covenant of warranty so that any after-acquired title vesting in Holmes would inure to the Minnesota Lumber Company and its assignees.

A further question is made of one 40 of the lands, being N. E. 1/4 of the N. E. 1/4 of section 13. As to this 40 no original government title was vested in Holmes, but it was covered by the Burrows tax deed, and passed by the quitclaim deed from Burrows to Holmes August 8, 1893, as above referred to. There is also some testimony in the record that Holmes for more than 10 years had adverse possession of this 40 as a pasture, under color of title, having acquired and fenced 12 or 15 acres of it. This evidence, and the force of the Burrows tax deed are sufficient to bring this 40 under the lien of the mortgage the same as the other lands, so that it will be affected by the result of this case the same as other lands on sections 13 and 20. This brings the case to a consideration of the effect of the Farr foreclosure of his tax deed. If that foreclosure did not bind the complainant, its lien by mortgage is good except as to the Bjorklund 40. The invalidity of this foreclosure was fully argued on the hearing and has been to some extent reargued in the briefs subsequently submitted. Upon the record, however, I do not find it necessary to consider many of the questions raised on the argument. The decree in that case purports to bind only the Minnesota Lumber Company and all persons claiming under it, after the filing of the notice of lis pendens. As above stated, the decree follows the language of section 1206. Under the terms of that decree and the provisions of section 1206, the holder of the mortgage at the time that decree was rendered was not bound by its very terms. I assume that the Supreme Court of Wisconsin, following the analogy of the Webster Case and the Cypreanson Case, above cited, would hold that the special provisions of section 1206 apply to the case of a tax foreclosure rather than the provisions of section 3187. But, be this as it may, it seems entirely clear that the tax foreclosure decree expressly excludes the Ogema Lumber Company as well as Craig and Murphy; Craig being the assignor of the complainant. The foreclosure decree is valid as far as it goes. I think that the amendment showing due proof of service on the Minnesota Lumber Company was valid and proper. The amendment simply supplies the record showing the facts sustaining the jurisdiction. Complainant took its title through the mortgage, with notice that such amendment might properly be made so that the record might truly show the fact. I think there can be no doubt that the foreclosure decree cannot be extended beyond its terms to include parties claiming under the Minnesota Lumber Company prior to the notice of lis pendens. The result is that the foreclosure decree, by its own terms, does not bind the complainant.
The question is raised by a supplementary brief, filed by the solicitor for the defendants, whether statutory foreclosure of the Minnesota Lumber Company mortgage is valid; the foreclosure proceedings being alleged defective. It appears in the record, however, that Craig, assignee of the mortgage, conveyed the lands in suit to the complainant, and that the mortgage was properly transferred to an attorney with instructions to foreclose it, and that a certificate of foreclosure and sale under this proceeding was made December 23, 1901, to I. B. Craig, above mentioned. The quitclaim deed and the foreclosure proceedings are sufficient, even though the foreclosure be technically invalid, to vest title of the mortgage interest in the complainant.

Another question is raised by the arguments and briefs depending upon the decision in Jackson Milling Co. v. Scott, 130 Wis. 267, 110 N. W. 184. It is held in that case that a person who might have been made a party to a suit, but was not, and who is injuriously affected by the decree, must obtain his rights by a petition in that case, and cannot maintain an independent action in the same or another court to avoid the effect of such judgment or decree. Even though this rule is applicable in a suit in federal court, yet it plainly is not to be applied to a case where the judgment or decree by its own terms does not affect the interest of such third person. In this case the tax foreclosure decree is expressly limited in its effect to the Minnesota Lumber Company and all persons claiming under it, after the filing of the lis pendens, thus excluding the complainant which claims under the Minnesota Lumber Company by assignment made to its assignors prior to the filing of the lis pendens. As a condition of the relief to be decreed in favor of complainant, it will be required to pay the taxes and interest mentioned in section 1210h, St. Wis. 1898. That section provides that, in actions to cancel tax deeds or remove cloud upon title for any reason not affecting the groundwork of the tax, the complainant must pay the taxes for the land so sold, and the amount paid by the tax grantee subsequent to the sale, with interest on all such amounts at 15 per cent. from the time of payment until the money is paid into court. On the hearing I thought that rate should be 6 per cent., and that such had been the practice of the court, but I find that in all the cases in which the 6 per cent. rule was applied the objections to tax certificates affected the groundwork of the tax and validity of the assessment itself. This statute fixes the rights of the parties, and is binding on the federal courts. The statute is the measure of those rights, and in passing upon them the federal courts are required to apply the statute and decisions of the state. I think that, while section 721 of the federal statute (U. S. Comp. St. 1901, p. 581) in its terms applies only to actions at law, yet actions in equity are fully within its principle. See the discussion of Mr. Rose in his work on Federal Procedure, § 10, and cases cited. The tax deeds in this case being objected to on grounds not going to the validity of the assessment nor affecting the groundwork of the tax, the taxes involved, with 15 per cent., must be paid as a condition of relief.

This leaves for consideration only the question of the right of defendants to have the value of their improvements. I think the defendant Anderson should be allowed something for improvements. This
question is fully presented in the brief of complainant's counsel, but is not argued by counsel for defendants. In regard to the defendants Hunt and Bolander, counsel for defendants claims that they have cut timber on the lands of the value of $373.50, and that this should be offset against any sum required to be deposited by complainant on account of taxes. This question has not been argued by defendants' counsel, who may file and serve on complainant's counsel further argument on this point, and as to the value of the improvements of Anderson.

HARDING v. STANDARD OIL CO. et al.

(Circuit Court, N. D. Illinois, E. D. May 15, 1909.)

No. 28,865.

1. REMOVAL OF CAUSES (§ 86*)—NONRESIDENCE OF BOTH PARTIES—JURISDICTION ACQUIRED BY FEDERAL COURT—AMENDMENT OF PETITION.

On the removal of a cause in which, as appears by the record, the parties are citizens of different states, but neither is an inhabitant of the district of suit, the federal court acquires general jurisdiction by virtue of the diversity of citizenship of the parties, and has power to permit the petition for removal to be amended to show that plaintiff is in fact a citizen and resident of the district of suit.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 178; Dec. Dig. § 86.*]

2. REMOVAL OF CAUSES (§ 86*)—SEPARABLE CONTROVERSY—AVERMENTS OF PETITION.

It is usual in a petition for removal which alleges a separable controversy to set out the nature of such controversy, but it is sufficient if it appears from the record that such controversy actually exists.

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

On Motion for Leave to Amend Petition for Removal.

George F. Harding and Wm. J. Ammen, for complainant.

SANBORN, District Judge. Motion for leave to amend original removal petition of Corn Products Company. The suit was commenced October 23, 1907, in the superior court of Cook county, Ill., and an amended bill was filed October 25, 1907. On November 5, 1907, the Corn Products Company filed its petition for removal on the ground of separable controversy. On the same day all the other defendants, corporate and individual, filed papers in the state court consenting to and petitioning for the removal. The removal petition, following the original and amended bills, alleged that complainant was a citizen of California, the four corporation defendants citizens of New Jersey, and making no allegation respecting the citizenship of the individual defendants; but stating that five of such defendants were not at the filing of the bill and petition either directors or officers of either of the corporate defendants. The petition stated that said suit presented a separable controversy between complainant and petitioner, and that

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
the matter in dispute "exceeds, exclusive of interest and costs, the sum or value of two thousand dollars." The nature of the separable controversy is not stated, and the individual defendants are assumed to be only nominal defendants. It seems to have been also assumed that the nature of the separable controversy sufficiently appears from the amended bill.

On the same day, November 5, 1907, notice was given to complainant's solicitor that the petition would be presented to Judge Ball of the superior court. On November 6, 1907, this court made an order directing the filing in this court of a transcript of the record of the state court and restraining the further prosecution of the suit by the complainant in the state court; and on the same day the removing defendant filed in this court, in support of and supplemental to the petition for removal, a verified statement alleging the citizenship of the individual defendants, showing that four of the defendants were, at the commencement of the suit, and still are, citizens of Illinois, and that the other individual defendants were citizens of states other than California and Illinois.

Before the proceedings above mentioned a similar suit had been filed in the state court by the Chicago Real Estate Loan & Trust Company against the Corn Products Company and others for the same relief as prayed in the Harding bill. That suit was removed to this court, and an injunction issued restraining complainant from further prosecuting the case in the state court. It was claimed by defendants that the bringing of the second suit was a violation of said injunction, and on contempt proceedings brought against Harding and others this court, by order of December 13, 1907, decided that they were in contempt, but they were discharged, but restrained from the further prosecution of the Harding suit. This injunction was issued on the theory that the Harding suit was really the same as the loan and trust company's suit.

After the removal of the Harding suit, and in the fall of 1907, Harding desired to make a motion to remand that suit; and on December 23, 1907, filed a motion to remand on eight grounds, being no separable controversy, no removable cause shown, no diverse citizenship, no statement of the particulars of the alleged separable controversy, that the Standard Oil Company did not unite in the petition (this is a mistake), and that the removal order is unlawful. The fifth clause of the motion to remand is as follows:

"Because the complainant in said cause was, at the time of the commencement of said suit and at the time of the presenting of said petition for removal therein to said superior court, and of the filing of the same therein, a citizen of the state of California, and a citizen of no other state, and at the times aforesaid was not a resident of the aforesaid district; and Charles L. Glass, Joy Morton, William J. Calhoun, and H. G. Herget, defendants in said cause, were, respectively, at the times aforesaid, citizens and residents of the state of Illinois, and the other defendants, respectively, were not, at the times aforesaid, citizens of said state of Illinois, or residents of said district, but were, at said times, citizens of states other than said state of Illinois, and not residents, respectively, of said district."

It is claimed by complainant that this motion to remand is based upon Ex parte Wisner, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264.
This is not clear, and the motion is quite different from the one filed in the Wisner Case. This is not important, except that the motion does not distinctly apprise defendants that the Wisner Case was relied on.

The Circuit Court regarded the motion to remand as unimportant because of the pendency of the prior case of the loan and trust company, and would not permit it to be brought on because of the injunction in the first case. Meanwhile, however, the loan and trust company moved for leave to dismiss the first suit. Leave was denied; but on appeal from the injunction order it was held by the Circuit Court of Appeals that it should have been granted. Harding v. Corn Products Co. (Jan. 19, 1909) 168 Fed. 658. The injunction order was reversed, and the bill ordered dismissed.

With the bill in the first suit dismissed, the Harding Case became the only one pending, and the importance of the removal and the motion to remand, having been before that of little importance, at once became matters of great importance and concern to the respective parties. In this situation, and on April 16, 1909, the Corn Products Company applied to this court for leave to amend its original petition for removal so as to allege that Harding was when the suit was commenced, and ever since had been, a citizen of Illinois. It was alleged in the petition for leave to amend that petitioner, in making its original removal petition, relied on and believed the statement of the bill that Harding was a citizen of California, and it did not discover the falsity of such statement until April 12, 1909. Complainant answered the petition, appearing specially and for the purpose only of objecting to the jurisdiction of the court, as stated in his petition to remand filed December 23, 1907; and insisting that the court has no jurisdiction, no power or authority to allow or entertain the motion to amend. Other objections are stated, and it is submitted that complainant is, and long has been, a citizen of California. It is also insisted that if the court has power to allow the amendment it should not do so, because complainant constantly insisted on the hearing of his motion to remand, but the court refused to hear him by reason of the injunction, and that if the motion could have been heard it must have resulted in the case being remanded, and, the injunction having been erroneous, complainant should not be thus prejudiced by a situation which prevented him from obtaining a hearing. But the injunction only became erroneous by reason of the refusal of this court to dismiss the first case, on motions made before the injunction order of December 13, 1907, was entered. Complainant at once appealed from that order, and nothing could be done, as a matter of course, while the appeal was pending, in respect to the motion to remand. It seems, therefore, that the motion for leave to amend should be granted, if the power of amendment exists. Defendant relies on Wilbur v. Red Jacket, etc., Co. (C. C.) 153 Fed. 662, a case very much like this, for its procedure in bringing its petition for leave to amend.

In regard to the question of power, it is insisted that no jurisdiction is shown by the original petition for removal, because the suit is not brought in the district of the residence of either the plaintiff or defendant; and since Harding has not consented to sue here, and has waived nothing, the case is not now removable under Ex parte Wisner and
In re Moore, 209 U. S. 490, 28 Sup. Ct. 585, 706, 52 L. Ed. 904. On the other hand, it is urged that, as the original petition showed diverse citizenship, the general jurisdiction was complete, and the question is one of venue only, of the power of this particular court to proceed. The lower federal courts are hopelessly divided on this precise question, but the practice under the act of 1789 seems to have been clear.

The judiciary act of September 24, 1789, 1 Stat. 78, c. 20, § 11, contained the provision that no civil suit should be brought against an inhabitant of the United States in any other district than that whereof he was an inhabitant, or in which he should be found at the time of serving the writ. Under this act the question arose whether, in cases of diverse citizenship, or of an alien against a citizen, it was necessary to allege that the defendant was an inhabitant of or found within the district in which suit was brought. In Gracie v. Palmer, 8 Wheat. 699, 5 L. Ed. 719, suit was brought in the District of Pennsylvania by aliens against citizens of New York, and it did not appear that they were inhabitants of nor found in Pennsylvania. On error to the Supreme Court a motion to dismiss was made by Mr. Webster for want of jurisdiction. In overruling the motion, Chief Justice Marshall stated that the uniform construction under the clause of the act referred to had been that it was not necessary to aver on the record that the defendant was an inhabitant of or found within the district, and that it was sufficient if the court appeared to have jurisdiction by the citizenship or alienage of the parties. And in Cooley v. McArthur (C. C.) 35 Fed. 372, the precise point here presented was decided by Judge Brown, on a motion to remand, in favor of the jurisdiction. To the same effect are Express Co. v. Todd, 56 Fed. 104, 5 C. C. A. 432, and Scott v. Hoover (C. C.) 99 Fed. 249.

Before the decision of Ex parte Wisner in 1906, the decisions of the Circuit Courts of Appeal, and of the Circuit Courts, while by no means uniform, were generally in support of the right of removal, even against the plaintiff’s objection. The argument in favor of the removal is stated by Judge Newman in Rome Petroleum & Iron Co. v. Hughes Specialty Well Drilling Co. (C. C.) 130 Fed. 555. The argument is that the place of bringing suit or maintaining it is one of venue, not of jurisdiction, and that the language of section 1 of the removal act, that no civil suit shall be brought by any original process or proceeding in any other district than that whereof defendant is an inhabitant, was intended to exclude removal cases, they not being brought by original process in the federal courts; that section 2, providing for removal only of cases of which the federal courts are given jurisdiction by section 1, refers only to the first part of section 1, by which the jurisdiction is conferred, and not to the clause relating to the district in which suit may be brought. Judge Newman, therefore, denied a motion to remand a case brought in Georgia by a citizen of South Dakota against a citizen of South Carolina. Judge Newman cites, in support of the ruling that the section refers to the first part of section 1 alone, the language of the Chief Justice, in Railroad Co. v. Davidson, 157 U. S. 201, 15 Sup. Ct. 563, 39 L. Ed. 672; while the Chief Justice himself, in the Wisner Case, cites the same case as
holding the very opposite. This illustrates the very unsatisfactory situation in which this court finds itself in attempting to decide whether this particular case was removed by the presentation of the removal papers to the state court, and the docketing and injunction order of this court thereon.

Since the decision of the Wisner and Moore Cases there can be no question of the duty to remand on application of a plaintiff who has waived nothing, in the usual case, in the absence of any application to amend. But the narrow and unusual question here presented is whether a federal Circuit Court can possibly have any jurisdiction whatever of such a case as this until the plaintiff consents. If it can, then amendment may be permitted to show that jurisdiction actually exists unaided by consent or waiver; but if not, then a remand is inevitable. Powers v. Chesapeake, etc., Co., 169 U. S. 93, 18 Sup. Ct. 264, 42 L. Ed. 673; Crehore v. Ohio, etc., Co., 131 U. S. 240, 9 Sup. Ct. 692, 33 L. Ed. 144; Kinney v. Columbia, etc., Ass'n, 191 U. S. 78, 24 Sup. Ct. 30, 48 L. Ed. 193. Suppose a citizen of Maine sues a citizen of Vermont in the District of New Hampshire, and gets valid service of process. Defendant, relying on the Wisner and Moore Cases, makes default, and plaintiff takes judgment. Is the judgment valid or absolutely void? Again, suppose in this case Harding makes no general appearance in the federal court, but continues to prosecute the case in the state court, can he be punished for contempt of the docketing and injunction order? In view of the confusion surrounding this question arising from the decisions under the acts of 1887-1888 (Act March 3, 1887, c. 373, 24 Stat. 552, as amended by Act Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508]), it is refreshing to refer to the plain, satisfactory, and uniform construction of the similar clause of the original act of 1789, as stated by Chief Justice Marshall in Gracie v. Palmer, supra. And in view of such construction, and that a decision in favor of the jurisdiction may be readily reviewed, while a decision against it cannot, the power to amend the petition should be affirmed, and the petition to amend granted, if the individual defendants were merely formal parties defendant. That they were such seems clear to me from the cases of Geer v. Mathiesen Alkali Works, 190 U. S. 428, 23 Sup. Ct. 807, 47 L. Ed. 1122, and Lamm v. Parrott Co. (C. C.) 111 Fed. 241.

The venue or place of bringing suit in the federal courts is now governed mainly by section 1 of the acts of 1887-88, 25 Stat. 433; but partly by the original judiciary act of 1789, partly by section 8 of the act of March 3, 1875, c. 137, 18 Stat. 472, (U. S. Comp. St. 1901, p. 513), relating to suits to enforce legal or equitable liens or claims to property, or to remove incumbrances, liens, or clouds on titles, and partly by acts relating to special actions, such as patent suits, penalties, forfeitures, nonadmiralty seizures, etc. It has also been held in some of the federal courts that section 11 of the act of 1789 is still in force so far as concerns suits in the exclusive federal jurisdiction, on the theory that the acts of 1875 and 1887-88 relate only to suits in the concurrent jurisdiction of the state and federal courts, leaving suits in the exclusive federal jurisdiction to be governed by section 11 of
the act of 1789, providing that no civil suit shall be brought against an
inhabitant of the United States in any other district than that where-
of he is an inhabitant, or in which he shall be found at the time of
serving the writ. This rule was applied to copyright suits in Lederer
v. Rankin (C. C.) 90 Fed. 449. The reasoning is not very satisfactory
to my mind, because the language of section 11 just quoted occurs in
the same section, which makes the federal jurisdiction concurrent with
that of the states, and is no broader than the cognate provisions of the
acts of 1875 and 1887–88. Section 9 of the original act gives exclu-
sive admiralty jurisdiction to the District Court, in the district where
the seizures are made, apparently leaving all other cases in the ex-
cluive jurisdiction to be governed by section 11. It may therefore
be properly held that all cases are now governed by the acts of 1887–88,
amending the act of 1875, which amended section 11 of the act of
1789, except admiralty cases and those governed by special statutes,
like patent cases, forfeitures, seizures on land, commerce cases, etc.

The acts of 1887–88 provide that no civil suit shall be brought be-
fore a Circuit or District Court against any person by any original
process or proceeding in any other district than that whereof he is an
inhabitant, but that in diverse citizenship cases it may be in the district
of the residence of either plaintiff or defendant. In other words, in
cases of federal questions, between citizens and aliens, citizens and for-
eign states, suits by the United States, by foreign consuls and vice
consuls, and all other cases not founded on diversity of citizenship,
the venue is controlled by the citizenship or inhabitancy of the de-
fendant, and not by the district where he may be found; and in those
of diverse citizenship by that of either party. It seems quite clear,
therefore, that the settled construction as to jurisdictional allegations
announced by Chief Justice Marshall in Gracie v. Palmer, applying to
section 11 of the act of 1789, should be applied at least to the explicit
amendments of that section in the acts of 1875 and 1887–88, so far as
all cases other than those of diverse citizenship are concerned; and, by
analogy, should also be applied to those cases as well.

A further question is raised as to the sufficiency of the statement in
the removal petition of a separable controversy. It is usual in such
petitions, and generally considered necessary, to allege the nature of the
controversy; but if it appears from the record that such a contro-
versy actually existed, it is enough. This court, by its docketing and
restraining order of November 6, 1907, took jurisdiction of the case,
thus sustaining its jurisdiction. This it had the power to do. That
order was made more than two terms since, and cannot now be re-
viewed in this proceeding or any other in this court. This was de-
cided in Des Moines Nav. Co. v. Iowa Homestead Co., 123 U. S. 552,
8 Sup. Ct. 217, 31 L. Ed. 202, approved by the Supreme Court in
Chesapeake & O. R. Co. v. McCabe (by decision filed April 6, 1909)
213 U. S. 207, 29 Sup. Ct. 430, 53 L. Ed. —.

I think, therefore, that the petition to amend should be granted. If
it were disallowed, and the case remanded, there could be no review.
389, 40 L. Ed. 536. Even where the state court proceeds to judgment against defendant, the question of removal cannot be reviewed. Whitcomb v. Smithson, 175 U. S. 635, 20 Sup. Ct. 248, 44 L. Ed. 303. On the other hand complainant has two remedies, mandamus in the Supreme Court to compel remand, or, if a decree goes against him, he may have the question reviewed on appeal. Ex parte Wisner, supra. Leave to file the amended petition is granted.

HULTBERG v. ANDERSON et al.

(Circuit Court, D. Kansas, First Division. January 7, 1909.)

No. 8,009.

1. COURTS (§ 312*)—JURISDICTION OF FEDERAL COURTS—SUITS BY ASSIGNEE.

Where the assignee of a cause of action has reduced the same to judgment, in a subsequent action on the judgment in a federal court the citizenship of the original assignor is wholly immaterial on the question of the jurisdiction of such court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 873; Dec. Dig. § 312.*]

2. COURTS (§ 307*)—JURISDICTION OF FEDERAL COURTS—LOCAL SUITS.

A creditors' suit in a federal court by a judgment creditor to subject property within the district standing in the name of others to the payment of complainant's judgment is a local suit, of which, under the provisions of Act March 3, 1875, c. 137, § 8, 18 Stat. 472 (U. S. Comp. St. 1901, p. 513), the court has jurisdiction, notwithstanding the fact that neither complainant nor the judgment defendant is a citizen or resident of the district.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 307.*]

3. LIMITATION OF ACTIONS (§ 65*)—ACCRUAL OF RIGHT OF ACTION—CREDITORS' SUITS.

Under the law of Kansas by which a creditor cannot maintain a suit to subject property standing in the name of third persons to his demand until he has reduced the same to judgment, limitation does not begin to run against such a suit until such judgment is rendered.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 346; Dec. Dig. § 65.*]

4. COURTS (§ 282*)—FEDERAL COURTS—JURISDICTION—ADEQUATE REMEDY AT LAW.

Where a creditor has reduced his demand to judgment in a state court and exhausted his remedy at law therein, the fact that he might invoke the equity powers of such court, in which the distinction between law and equity is abolished by statute, does not give him a legal remedy which will defeat his right to maintain a creditors' suit in a federal court.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 282.*]

5. EQUITY (§ 150*)—PLEADING—MULTIFARIOUSNESS OF BILL.

A bill by a judgment creditor to subject property alleged to have been fraudulently conveyed by the debtor to the payment of his judgment is not multifarious because different persons, each of whom holds a portion of the property, are joined as defendants.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 371-379; Dec. Dig. § 150.*]

In Equity. On demurrers to bill.

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

170 F.—42
Harris F. Williams, David Ritchie, and E. C. Little, for plaintiff.
G. W. Hurd, E. Allen Frost, John J. Healy, and G. F. Gratton, for defendants.

POLLOCK, District Judge. Complainant, as assignee of the Swedish Evangelical Mission Covenant of America, on the 13th day of June, 1904, by the consideration of the circuit court of Cook county, Ill., in an action at law, procured a judgment against defendant Peter H. Anderson. From this judgment error was prosecuted to the Supreme Court of that state, without supersedeas, and by that court the judgment was affirmed.

On the 20th day of June, 1904, the judgment creditor therein, complainant herein, commenced his action at law in the district court of Dickinson county, this state, to recover judgment on the Illinois judgment. Property belonging to the judgment debtor, Peter H. Anderson, in the jurisdiction of that court, was attached, garnishment proceedings were commenced, and on the 31st day of January, 1907, by the consideration of that court, a judgment was duly entered in favor of the plaintiff therein against Peter H. Anderson in the sum of $264,708 and costs of action. An execution was duly issued thereon, and a small sum collected by the sale of all of the property of the judgment debtor which could be found by the sheriff of that county standing in the name of the judgment debtor. This amount was applied on the judgment. Thereafter an alias execution was issued and returned by the sheriff nulla bona. It is charged in the bill the attachments issued were levied upon property claimed to be that of the judgment debtor but standing in the name of other persons. To the summons in garnishment the garnishees answered by a general denial.

Thereafter, and on the 7th day of September, 1907, the judgment creditor, complainant herein, a citizen and resident of the state of California, commenced this suit against the judgment debtor and his wife, citizens and residents of the state of Illinois, and those persons citizens of this state holding the legal title and possession of the lands averred to have been purchased with the money of Peter H. Anderson, theretofore attached in the action at law, to subject such lands to the payment of complainant's judgment; also, against those persons citizens and residents of this state against whom garnishment proceedings had been instituted in the law action in the state court, who, it is averred, hold money or property of the judgment debtor applicable to the payment of said judgment, to subject such personal property to the payment of the judgment.

To this bill defendant Andrew J. Anderson has filed a disclaimer as to certain property therein described, and plea of the statute of limitations of the state of Kansas in bar of the suit, and also a demurrer to the bill. Defendant Jennie K. Anderson filed her plea of the statute of limitations of the state of Kansas in bar of the suit; also a demurrer to the bill. Defendants who were summoned as garnishees in the law action in the state court, who, it is averred, have in their possession personal property or money belonging to the defendant Peter H. Anderson, have demurred to the bill, as have defendants Minnie Peterson, John R. Peterson, Matilda Hanson, Charles
Hanson, Annie Peterson, Oscar Hanson, Maggie Anderson Hjelm, Matilda C. Anderson, Ernst Linde, Albert Anderson, Nellie Anderson Hanson, C. P. Peterson, and G. E. H. Peterson, partners as Peterson Bros. Other defendants have answered herein. These separate pleas and demurrers were set down for hearing, and fully presented in oral argument and submitted on briefs of solicitors for the respective parties. The judgment debtor and his wife, defendants herein, being non-residents of this district and citizens of the state of Illinois, were brought in by constructive notice, as personal service of subpoena could not be made on them, and a decree pro confesso was entered against them on the 23d day of November, 1908.

Thereafter, and on the 25th day of November, 1908, they filed their so-called separate pleas to the jurisdiction of the court. These pleas are before the court on motion of complainant to strike out because filed after decree pro confesso taken against them without leave of court, and also because not certified by solicitors in compliance with the equity rules.

The pleas, motions, and demurrers, so stated, are now before the court for decision.

In so far as the separate pleas of defendants Peter H. Anderson and wife are concerned, and the motions to strike out because not certified as required by the rules, and because filed after decree pro confesso taken against the pleaders without leave of court, it is apparent such exceptions to the pleas might properly be sustained and the so-called pleas stricken out. However, as the pleas set forth matters going to an absolute want of jurisdiction in the court to proceed with the controversy at all, they will be examined and ruled on their merits also.

The matter set forth in the pleas is this: As shown on the face of the bill, complainant is, and was at the date of the commencement of the suit, a citizen and resident of the state of California. The defendants filing the separate pleas and the Swedish Evangelical Mission Covenant of America, assignor of complainant of the cause of action reduced to judgment in the state court of Illinois, are, and were at the date of the commencement of the suit, citizens of the state of Illinois. Therefore, it is contended the controversy presented by the bill is not within the jurisdiction of this court.

As the so-called pleas do not bring on the record any new matter, as is the office of a plea, but the challenge to the jurisdiction of the court is based on the bill itself, the so-called pleas may and will be treated as demurrers to the bill for want of jurisdiction.

The bill avers the cause of action on which the Illinois judgment was rendered was assigned complainant by the Swedish Evangelical Mission Covenant of America before judgment thereon. That in an action at law commenced in the district court of Dickinson county, this state, on such judgment, a new judgment was rendered against the judgment debtor by consideration of that court, hence complainant is the sole judgment creditor. Therefore, the citizenship of the assignor of the cause of action becomes wholly immaterial, although it may still be beneficially interested therein. McMullen v. Ritchie (C. C.) 64 Fed. 253; Harrison v. Hallum, 5 Cold. (Tenn.) 525; Hale
v. Horne, 21 Grat. (Va.) 112. A satisfaction of the judgment sought to be enforced in this suit by payment to complainant will be a satisfaction as to all parties claiming any beneficial interest therein. Therefore, in my judgment, both the assignor of complainant of the cause of action on which the judgments were rendered, and its citizenship, may be safely omitted from a consideration of the matter presented.

Again, complainant is a citizen of California, defendants Anderson and wife are citizens of Illinois; therefore, if this were a personal action against them, it is entirely clear it could not be maintained in this court without their consent. Ex parte Wisner, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264; In re Moore, 209 U. S. 490, 28 Sup. Ct. 585, 706, 52 L. Ed. 904; Western Loan Co. v. Butte & Boston Min. Co., 210 U. S. 368, 28 Sup. Ct. 720, 52 L. Ed. 1101. However, the purpose of this suit is not to obtain a personal judgment against Peter H. Anderson, for this complainant already has by the consideration of the district court of Dickinson county. The object and purpose of this suit is to subject property, real and personal, belonging to Anderson, standing in the name of others, to the satisfaction of this personal judgment already obtained. This will require the setting aside of contracts and conveyances made by or caused to have been made by Anderson in fraud of the rights of complainant, and to enforce liens obtained by complainant thereon. It is therefore a local and not a transitory controversy, and may be brought and maintained in this court under the provisions of section 8 of Act March 3, 1875, c. 137, 18 Stat. 472 (U. S. Comp. St. 1901, p. 513), unrepelled by the present judiciary act, notwithstanding the fact neither the complainant nor the Andersons are citizens, residents, or inhabitants of this district, and without their consent. Spencer et al. v. Kansas City Stockyards Company (C. C.) 56 Fed. 741; Lancaster v. Ashville Street Ry. Co. et al. (C. C.) 90 Fed. 129; Seybert v. Shamokin & Mt. C. Electric Ry. Co. et al. (C. C.) 110 Fed. 810.

It therefore follows, if the so-called pleas of Peter Anderson and wife should be treated as demurrers to the bill for want of jurisdiction, properly filed, the same must be overruled and denied. But as they were filed after decree pro confesso, taken without leave of court, the exception taken thereto by complainant in the nature of motions to strike the same out will be sustained.

This brings me to a consideration of the pleas in bar and demurrers filed by other defendants. In so far as the pleas in bar based on the statute of limitations of this state are concerned, it may be observed, it is quite well settled by the decisions of the Supreme Court of this state complainant was in no position to question the title of defendants before judgment obtained against his debtor Anderson, for the all-sufficient reason he might never be successful in obtaining such judgment. Neither could he proceed to the subjection of such property to the satisfaction of his demand until reduced to judgment by a court of this state, or a showing made that no such judgment could be obtained. National Tube Works v. Ballou, 146 U. S. 517, 13 Sup. Ct. 165, 36 L. Ed. 1070. There appears to have been no delay in commencing the action at law in the state court of Illinois,
and as soon as judgment was there obtained an action on such judgment was commenced in this state against the judgment debtor, and the only method possible in such law action to bring the property in dispute before the court was taken by the issuance and levy of an attachment thereon. While courts of equity will usually give force to state statutes of limitations on the ground of laches, yet, when it would be manifestly inequitable and unjust to do so, such pleas have been denied. I am not inclined, in view of the entire record in this suit, to sustain the pleas made, or to hold on this plea complainant without equity because of his laches in beginning this suit, preferring rather to rule that question on completed issues and full proofs. The pleas in bar are therefore denied.

Coming now to the separate demurrers filed to the bill, it may be said complainant shows by his bill to have pushed his demand against his judgment debtor in a law court of this state as far as a court of law had the power to grant him relief. He was therefore compelled to resort to a court of purely equitable cognizance, such as this, or to call into requisition the equitable powers of the state court, where the distinction between law and equity are abolished by statute and the procedure is fixed by law. He could proceed no further in the law action. Being thus confronted he brought this present suit. It is obvious the demurrer for want of equity, therefore, because of adequate remedy at law, is not well taken and must be overruled. And it is just as obvious the law action brought by him and pending in the state court no more bars his right to resort to the equity powers of this court than it presents an insuperable objection to his calling for the interposition of the equity powers possessed by the state court. Stanton et al. v. Embrey, Administrator, 93 U. S. 548, 23 L. Ed. 983, and cases cited.

The only remaining ground of demurrer to the bill is that of multifariousness. The avoidance of a multiplicity of suits is one of the many grounds for the interposition of the powers of a court of equity. As has been seen, the relief here sought by complainant in the bill presented is the subjection of the property of the judgment debtor to the payment of a single demand reduced to judgment. The fact that this property of the judgment debtor is found in the hands of many, instead of one person, does not render the bill multifarious. The object, scope, and purpose of the bill is the accomplishment of a single result, not many. It is therefore not multifarious in purpose. Von Auw v. Chicago Toy & Fancy Goods Co. (C. C.) 69 Fed. 448; Carter v. Hobbs (D. C.) 92 Fed. 594; Norcross v. Nathan (D. C.) 90 Fed. 414. Had complainant, instead of resorting to this court, where all of the parties asserted to be in the possession and control of property belonging to his judgment debtor may be brought in, and where all questions touching his rights thereto may be fully investigated, determined, and decreed in one suit, been compelled to pursue his remedy singly against such defendants in the state court, under the procedure there obtaining, it is manifest his action against each defendant would have constituted a separate trial therein. Thus an interminable multiplicity of suits or actions would have arisen, and his remedy would be neither complete, adequate, nor efficient, all of
which is avoided here by this one suit, where all matters touching
his rights may be investigated and decreed.

It follows, the separate demurrers and pleas, and each and all of
them, must be overruled and denied. It is so ordered.

Defendants, excepting the judgment debtor, Peter H. Anderson,
and his wife, may answer the bill by the February rules, if so advised
by their solicitors. Failing to so do, the bill will stand confessed
against them. The judgment debtor and his wife may, if so advised
by their solicitors, sufficient grounds appearing, within 15 days from
this date, apply to this court for a vacation of the decree pro confesso
entered against them, and for leave to answer the bill. If no such
application be made within the time fixed, a final decree may enter in
due course of procedure.

WOOLNER & CO. et al. v. RENNICK et al.
(Circuit Court, S. D. Illinois, N. D. September 14, 1908.)

No. 129

1. Internal Revenue (§ 40)—Misbranding of Liquors—Scope of Statute.
Rev. St. § 3449 (U. S. Comp. St. 1901, p. 2277), making it a penal offense
for any person to ship or remove any spirituous or fermented liquors or
wines under any other than the proper name or brand by which they are
known to the trade, is intended to prevent frauds on the revenue, and has
no application to marks or brands placed on packages by Government
officers.

[Ed. Note.—For other cases, see Internal Revenue, Dec. Dig. § 40.*]

2. Food (§ 7*)—Regulations for Branding Liquors—Imitation Liquors—
“Rectifiers.”
Rev. St. § 3244 (U. S. Comp. St. 1907, p. 2096), in defining rectifiers, in
cludes “every person who, without rectifying, purifying or refining dis-
tilled spirits, shall, by mixing such spirits, wine or other liquor with any
materials manufacture any spurious imitation or compound liquors for
sale under the name of whisky, brandy * * * or any other name.”
Held, that in view of such statutory recognition of the manufacture of
“imitation whisky,” etc., and of the process of such manufacture, the regu-
lation promulgated by the Commissioner of Internal Revenue May 5,
1908, for the guidance of officers and employees of the department which
directs that “alcohol, commercial alcohol or high wines which have been
manipulated by the aid of artificial flavors, colors or extracts, or other-
wise, so as to resemble some particular kind of potable spirits, will be
marked with the name of such spirits preceded by the word ‘imitation,’ as
for example ‘Imitation Whisky,’” is a proper and reasonable regulation,
having also in view the provisions of Food & Drugs Act June 30,
1906, c. 3915, 34 Stat. 768 (U. S. Comp. St. Supp. 1907, p. 928), notwith-
standing the fact that such compounds may have been previously sold in
the trade under the name of the liquors they imitate.

[Ed. Note.—For other cases, see Food, Dec. Dig. § 7.*
For other definitions, see Words and Phrases, vol. 7, p. 6022.]

8. Words and Phrases—“Whisky”—“Neutral Spirits.”
Whisky, within the purview of Food & Drugs Act June 30, 1906, c.
3915, 34 Stat. 768 (U. S. Comp. St. Supp. 1907, p. 928), is the product of
sound grain, distilled at a low temperature so as to retain in the distillate
the congenic properties of the grain, which give to the liquor, when
matured by aging in charred casks, its desirable potable character. Neu-

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
tral spirits, which are distilled at a high temperature, may be made from different materials and do not contain such properties, and which are not rendered potable by aging, although reduced by water to potable strength and from which most of the fusel oil has been removed, are not whisky nor a like substance with whisky.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 8, p. 7445.]

In Equity. Suit for injunction.


HUMPHREY, District Judge. The present application is for a preliminary injunction restraining certain officers and agents of the Internal Revenue Department from marking as “Imitation Whisky” potable distilled spirits from grain, of approximately 100 proof, which have been rectified so as to remove most of the fusel oil and aldehydes.

The complainants are engaged in the business of rectifying distilled spirits, and the defendants are acting under printed regulations promulgated May 5, 1908, by the Commissioner of Internal Revenue, as follows:

“(4) Alcohol, commercial alcohol or high wines which have been manipulated by the aid of artificial flavors, colors or extracts, or otherwise, so as to resemble some particular kind of potable spirits, will be marked with the name of such spirits preceded by the word 'Imitation,' as for example, 'Imitation Whisky.'”

The contention of complainants is: First. That the regulation of May 5, 1908, is in violation of section 3449 of the Revised Statutes (U. S. Comp. St. 1901, p. 2777); that the product in question has, for a long time, been known to the trade as whisky; that the complainants, as owners of same, would be prohibited by section 3449 from shipping it under any other name than whisky, “that being the name known to the trade,” and therefore the commissioner has no power to require a mark or brand which does not conform to the trade-name. Second. That the regulation is unreasonable, and therefore illegal. Third. That the injunction should issue under the rule known as “balance of convenience.”

Section 3449 is not in point. That section was passed by Congress to prevent frauds on the revenue, and to assist revenue officers in discovering such frauds. It has no reference whatever to marks or brands placed upon packages by government officers. The authorities are numerous and clear upon this question.

The argument on behalf of complainants that the new regulation is unreasonable, and therefore void, raises the real question in the case. Powers requiring judgment and discretion, when conferred by law upon executive officers, must be exercised with reason. When found to be clearly reasonable, the courts will not interfere with officers acting under discretionary powers. When found to be clearly unreasonable, such action will be held void.
That there is a product called "whisky," and also a product called "imitation whisky," the law itself clearly contemplates, and section 3244 (U. S. Comp. St. 1901, p. 2096), in defining what is meant by the business of rectifying, denominates the maker of imitation whisky and other imitation liquors as a rectifier, and in passing upon the question whether the regulation of May 5, 1908, is reasonable or unreasonable, it is necessary to determine the fact whether the commissioner in that regulation has correctly defined an imitation whisky. That counsel have regarded this as the crucial question in the case is evidenced by the fact that both parties have presented to the court numerous affidavits upon the subject. Complainants present 69 of such affidavits, and the defendants a lesser number. These affidavits are from rectifiers and distillers, members of the wholesale and retail liquor trade, and scientists and chemists of high rank. They do not agree. Indeed, it may be said that some of them present diametrically opposite views more or less elaborately stated.

In brief, the affidavits for complainants tend to support the proposition that a distilled spirit from grain reduced by water to potable strength from which most of the fusel oil has been removed by rectification is whisky, and that all distilled spirits from grain are "like substances," without reference to differences in their percentage of alcohol or of secondary products present therein.

The affidavits presented for defendants tend to support the view that whisky is a product made by the proper distilling of a fermented mash of grain with such care and at such low temperature as to retain the congenic ingredients of the grain, aged under a normal temperature for not less than four years in charred oak casks. Thus broadly in statement do the chemists disagree. They are more or less persuasive to the court according to the soundness of scientific reasoning given in support of their statements.

The convincing weight of testimony on this subject given by such men as Profs. Frear of Pennsylvania, Scovill of Kentucky, Tolman and Adams of Washington, D. C., Shepherd of South Dakota, Jenkins of Maine, Fischer of Wisconsin, and many other state analysts and chemists of repute, is to the effect that neutral spirits reduced by water to potable strength, from which most of the fusel oil has been removed, is not a like substance with whisky. Among the various reasons given for this conclusion are the following: Whisky can only be made from sound grain, while neutral spirits can be made from moldy, heated, or unsound grain, or from various other substances, as fruits or vegetables. Whisky is made at a low temperature, say, 150 to 155 degrees, so as to retain in the distillate the congenic properties of the grain, the oil, the flavor, the higher alcohols and aldehydes, the esters, acids, and salts, which, when modified by further treatment, give to whisky its desirable potable character—a character which alcohol never possesses. Neutral spirits are made at a very high temperature for the very purpose of carrying off, so far as possible to do so, every property of the distillate, except alcohol and water. Whisky is aged and matured for not less than four years in charred oak barrels. Neutral spirits require no aging, but may pass immediately in-
to consumption. The maturing of the product in charred barrels modifies and corrects its raw, biting taste. The action of the congeneric properties of the grain so retained in the liquor on each other, and the action of the charred wood on all by the lapse of years, results in a flavor, an aroma, a color, a blending of inherent constituents resulting in a beverage agreeable to the sight, to the smell, and to the taste. In neutral spirits the name signifies the character. There is neither taste, smell, nor color, and no amount of aging in charred or uncharred barrels will change it without the addition of foreign matter. The time required for maturing whisky, resulting in a loss of perhaps 30 per cent. in quantity by evaporation and absorption, adds greatly to the expense of making it over neutral spirits, which require no maturing and suffer no loss of quantity thereby.

The record also shows that diluted spirits treated with artificial coloring matter and essences are not sold to the trade as such, but are always presented under such labels, terms, and descriptions as import age and maturity, and which the consumer identifies with the genuine product whisky. The regulation is in all respects reasonable, and is therefore legal. The fact that this practice has, to some extent, prevailed for many years, does not show in the complainants any right which the court should protect. It shows rather that the Commissioner of Internal Revenue has been tardy in promulgating a regulation which he had legal power to enforce even before Congress gave emphasis to the subject by the enactment of Food & Drugs Act June 30, 1906, c. 3915, 34 Stat. 768 (U. S. Comp. St. Supp. 1907, p. 928).

The preliminary injunction will be denied.

CHICAGO, B. & Q. R. CO. et al. v. BOARD OF SUP'RS OF APPA-
NOOSE COUNTY (three similar cases).

(Circuit Court, S. D. Iowa, E. D. July 27, 1908.)

No. 263.

1. COURTS ($ 366*)—FEDERAL COURTS—AUTHORITY OF DECISIONS OF STATE COURTS.

A decision by the Supreme Court of a state construing the Constitution or statutes of the state, rendered after a suit in a federal court, involving rights previously accrued or liabilities incurred under such Constitution or statutes, has been tried and submitted for decision, is not binding on such federal court in the case, but it is entitled to exercise its independent judgment.

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

2. EMINENT DOMAIN ($ 2*)—STATUTORY PROVISIONS—CONSTITUTIONALITY.

The Iowa statute of 1904 (Acts 30th Gen. Assem. 1904, p. 61, c. 68), which authorizes county boards of supervisors to create drainage districts and to drain lands and change natural water courses to promote the public health, convenience and general welfare, and which, as amended in 1907

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
(Acts 32d Gen. Assem. 1907, p. 100, c. 95), provides that any railroad company whose right of way shall be crossed by any drainage ditch or channel shall not be allowed damages on account of bridging the same, is not unconstitutional as taking the property of the railroad company without compensation, the state having the right in the exercise of its police powers, for the purposes expressed in such act, to impose expense or burdens on property without the allowance of an equivalent by way of damages.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 4–8; Dec. Dig. § 2.]


Under the Iowa drainage law (Acts 30th Gen. Assem. 1904, p. 61, c. 68), which authorizes the supervisors of a county to create drainage districts, to construct ditches or change water courses, and to appoint commissioners to classify lands within such districts and assess the benefits, the findings of fact of such tribunals are conclusive, and their action can be reviewed by the courts only as to questions of law, and upon the question of the amount of benefits assessed, which by the express terms of the statute is reviewable on appeal.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 84–86; Dec. Dig. § 82.*]


An assessment of about $10,000 against the property of a railroad company for benefits accruing to such property from the construction by public authority of a new channel down the valley of a river to prevent overflows, in which valley the railroad company had approximately eight miles of track which had previously been overflowed in times of high water and damaged and traffic delayed, considered, and, on the evidence, held not excessive.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 75; Dec. Dig. § 69.*]

H. H. Trimble, for the railroad companies.

Clarence A. Baker, for the Board of Supervisors and Drainage District.

SMITH McPHerson, District Judge. The Chariton river runs from north to south across Appanoose county, Iowa, its course being tortuous and winding through the valley, which is from two to three miles in width. The stream is subject to overflow, at times covering practically all the bottom lands. The Chicago, Burlington & Quincy Railroad Company owns two lines of railroad, crossing said bottom lands in an easterly and westerly direction, two miles more or less apart, crossing the river on bridges built several years since, and across the bottom land on embankments, and at one or more depressions on trestles. One of these roads is known as the Keokuk & Western Railroad, and the other as the Chicago, Burlington & Kansas City Railroad. In 1904 the Iowa Legislature enacted a statute (chapter 68, p. 61, Acts 30th Gen. Assem.) entitled, “An act to promote the public health, convenience and general welfare by leveeing, ditching the lands of the state * * * for the changing of natural water courses to secure the better drainage * * * and providing for the assessment and costs therefor,” etc.

The statute provides that the board of supervisors of the county may create a drainage district. The board of supervisors appoints three commissioners to classify the lands benefited and assess the benefits,
giving the owners notice of a time and place for hearing said report, after which the levies are made to defray the expenses of said ditch or change of the water course. The lands are to be classified by tracts of 40 acres or less, according to the legal or recognized subdivisions. From the action of the commissioners and board of supervisors, an appeal may be taken to the state District Court. The drainage district being designated as No. 1 was created by the board of supervisors in 1905, and soon thereafter commissioners were appointed, resulting in the assessment of the Chicago, Burlington & Kansas City Company in the sum of $3,000, and the Keokuk & Western Company in the sum of $4,000, making the sum of $7,000 against the Chicago, Burlington & Quincy Railroad Company, the owner. The Chicago, Burlington & Quincy Railroad Company was only an operating company, and has no interest in these cases.

In 1907, additional assessments were made against the railroad company, aggregating $2,333.33. The company filed claims for damages on account of bridging the new channel in both places, claiming in excess of $30,000, and was allowed about $200. Appeals to the state district court were taken, and afterwards the cases were removed to this court. So that in this court there are four cases; one as to each road covering both assessments of alleged benefits, and one as to each road covering alleged damages on account of the bridging.

The Legislature in 1907 (chapter 95, p. 100, Acts 32d Gen. Assem.) amended the former statute hereinbefore referred to. One section provides that the company shall make said ditch or channel across its right of way, the expenses therefor being allowed the company as its damages, but it shall be allowed no damages on account of bridging. The statutes in question are consistent with the state Constitution, as held by the state Supreme Court, and at a time before any rights or burdens imposed in the present litigation. Ross v. Board of Supervisors, 128 Iowa, 427, 104 N. W. 503, 1 L. R. A. (N. S.) 137; Sisson v. Board of Supervisors, 128 Iowa, 442, 104 N. W. 454, 70 L. R. A. 440. Therefore this court will not consider that question. And that the statute of the Thirty-Second General Assembly is retroactive is not a valid objection thereto, as recognized by all the profession, and the cases cited in the opinion of the Ross Case above referred to on page 432 of 128 Iowa, page 503 of 104 N. W., and page 137 of 1 L. R. A. (N. S.), clearly demonstrate. The regularity of the proceedings here- in so closely follows the statutes that any argument with reference thereto would carry us into many details with but little interest, and serve no purpose.

The substantial questions in the cases are two in number.

1. Is the railroad company entitled to compensation for erecting a bridge where each of its roads cross the new ditch or channel? The company claims that, when it built its roads, it erected bridges for each across the Chariton river, and has maintained them ever since. And now to compel it to erect another bridge for each road at an expense of near $40,000, without reimbursing it, is claimed to be taking it without compensation, and therefore void as being unconstitutional. I have given this question the consideration its great importance demands. As will be noticed, the title of the statute, as to
the purpose thereof, is for the public health, convenience, and general welfare of the public. While it enhances the value of property, the purposes are those for health and convenience. And it is known by all persons that a swampland, marshy, and overflowed country is not healthy, and at times such a country is impassable, and at other times is inconvenient for the people to cross. And such a country drained eliminates those things, and is conducive to the welfare. And, in bringing those desired situations about, the expense is distributed against those who will be benefited as much or more than the burden assessed against them. So that, generally speaking, those who bear the expense suffer no injury, but are largely benefited thereby. But the railway company contends that, after having built its bridges across Chariton river, it should not now be required to build another bridge for each of its roads without being reimbursed. Reliance is made upon the case of Mason City & Ft. Dodge Railroad v. Board of Supervisors (by the Iowa Supreme Court, June 10, 1908), as reported in 116 N. W. 805, in which it was held that the railroad company should be given damages for the cost of the additional bridge occasioned by the ditch. The following observations are pertinent to that case, by reason of which it is not to be followed by this court in this case. It was not only decided after the benefits were created and the burdens imposed in the cases at bar, but was decided after the cases were submitted for decision. Under these circumstances a national court will not follow blindly the decision of the highest court of the state in construing state statutes or a state Constitution. City of Ottumwa v. City Co., 119 Fed. 315, 56 C. C. A. 219, 59 L. R. A. 604.

In the case at bar, the territory now drained and heretofore drained is nearly 500,000 acres. The water from that territory all went down Chariton river, except in high water, when it went out over the bottom, and in time back into and down the river. In the cited case by the Iowa Supreme Court, it inferentially at least, and I think fairly, appears that additional drainage and surface waters were carried down the valley as compared with prior waters. But the substantial reason for not following that case is the failure therein to observe and give weight to the two or more decisions of the Supreme Court of the United States, contented with mentioning and attempting to distinguish the one case in the lower court (212 Ill. 103, 72 N. E. 219), and failing to observe the decision on appeal as reported in Chicago, B. & Q. R. Co. v. People, 200 U. S. 561, 26 Sup. Ct. 341, 50 L. Ed. 596.

That regard be had to the public welfare, as the "highest law," is an old-time maxim, sound in principle, and of the greatest importance to all persons including owners of property. And with like thought the Supreme Court of the United States decided the case of Chicago, Burlington & Quincy Railroad Co. v. People of Illinois, 200 U. S. 561, 26 Sup. Ct. 341, 50 L. Ed. 596. That case is not only a most interesting discussion of these questions, but, being an authority binding on this court, it must be followed if in point, and it is to be seen whether in point or not. Rob Roy creek in Illinois, a natural and living stream, was bridged by the railroad company sufficiently high and wide to then, and for years thereafter, carry the water through. Sub-
sequently the drainage board adopted plans requiring a larger opening. And it was held:

"(1) The rights of a railroad company to bridge over a natural water course crossing its right of way, acquired under its general corporate power, are not superior and paramount to the right of the public to use that water course for draining lands.

"(2) Although the opening may be sufficient at the time the bridge is built to carry the waters, yet there is an implied duty on the part of the company to maintain an opening adequate and effectual for such increase in the volume of the water as may result from reasonable regulations established from time to time by public authority for the drainage of the adjacent territory.

"(3) It is the duty of the railway company at its own expense to erect and maintain a new bridge of such capacity as to carry the water through."

The three propositions just enumerated were decided by that court in that case, and I submit there are no distinctions of a controlling character between that case and those now for decision. If, in the case now in hand, the drainage board had planned the ditch to cross the right of way of the company at the point of the old channel, or side by side thereof, then the strongest glass would not enable any one to see a difference between the cited case and the cases at bar. But it is urged with earnestness that, because the ditch is a mile or more away from the old channel, the case is not in point, and that is a distinction I fail to see. By locating the ditch a mile distant, the company will either have two short bridges for each road to maintain, or, if all the water is turned from the old channel into the new one, the company will still have but the one bridge with an opening to carry the water.

In Chicago, Burlington & Quincy Railroad v. City of Chicago, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979, it was held that the company could recover but nominal damages for the opening of a new street across the right of way of the company, notwithstanding the large expense incurred thereby to the company. In the case of R. R. v. Bristol, 151 U. S. 556, 14 Sup. Ct. 437, 38 L. Ed. 269, the Supreme Court held that, although the state consented when the road was constructed that the grade crossings could be put in, later the road should be compelled at its expense to take out the grade crossings and put in viaducts or subways. Other cases are cited in the opinion referred to, but these suffice. Whatever promotes the health, the safety, the convenience, and the welfare, limited to certain lines, is an exercise of the police power, for which property without compensation can be taken, and expense and burdens can be imposed without an allowance of the equivalent by way of damages. Believing that the cases at bar are in all respects in principle like the cases passed on by the Supreme Court, the company is denied all damages, other than removing the embankment for the ditch. And for this, damages were allowed by the board of supervisors.

2. The other and remaining question is, Can the drainage authorities assess the railroad company for real or supposed benefits because of the new channel, and, if so, are the assessments in these cases fair and equitable? And this question is in some respects quite different from the other, as, of course, if there are no benefits, there can be no assessments. When a tribunal is empowered or directed to pass up-
on questions of fact, such findings are final and conclusive as to the facts, but not as to matters of law. Therefore the findings of the engineer and board as to the necessities of a new channel, to the end that the public health, convenience, and welfare would be promoted, and as to the location and benefits, and depth and breadth, of the new channel, are all findings of fact concerning which the courts can make no inquiry, much less review or set aside. Ryan v. Varga, 37 Iowa, 78; Slack v. Blackburn, 64 Iowa, 373, 20 N. W. 478; Martin v. Mott, 12 Wheat. 19, 6 L. Ed. 537; Commissioners v. Aspinwall, 21 How. 539, 16 L. Ed. 208; Enterprise v. Zumstein, 67 Fed. 1000, 15 C. C. A. 153; cases cited in People's Bank v. Gilson (C. C.) 140 Fed. 1.

Of course, if the board exceeds its authority, or errs in matters of law, the courts will review. So that all questions in the case were before the board for decision, and its findings of fact will not be reviewed, save only the question of benefits, and if the railroad company were benefited at all, then the amount of benefits in the first instance would be determined by the board, with the right of appeal to the courts only as to the amount. And that the company would be benefited in some sum, cannot be doubted from the evidence. Counsel for the company at the argument conceded some benefits, but vigorously contended that such benefits would be fairly measured by a few hundred dollars, instead of approximately $10,000 as fixed by the county authorities. Heretofore the railroad tracks have been overflowed, requiring the tracks to be repaired, and traffic delayed and suspended. So that the question is, What shall be the assessment because it is obvious that the overflow will be less with the channel straightened.

Practical men, as well as men educated as civil engineers, have testified in the case. Farmers residing in the neighborhood testified to what has occurred with reference to overflows, and washing of the company's embankments and tracks. What the benefits to the company will be, necessarily is in a measure the subject of a conjecture in part. Many phases of the work of a civil engineer can be stated with precision, for the reason that mathematics is an exact science. Other phases must be determined by opinion, and the opinion formed from observation and experience. It follows that the benefits to the railroad company from its eight miles approximately of railroad within the drainage district cannot be stated with certainty. The character of soil of the area drained, as to what per cent. of the rainfall will go into the ground, that depending on whether the ground is frozen or not, and depending still further on the time the rain is falling, and what rains have preceded, and to what extent, if any, the ground is already saturated, the season having much to do with the evaporation, and perhaps other things, make it impossible of precise calculation. Then, again, the worth of money as to rates of interest vary, as is known by all. But the assessments against the railroad company are calculated with as much definiteness as those against the farm lands.

But taking all things into account, it can be stated in fairness that the benefits to the company as a minimum will be $25,000. This be-
ing so, it cannot be judicially declared that the assessments should be modified. The result is that in the four cases judgments and decrees will be entered in harmony with the motion of the board of supervisors.

UNITED STATES v. MANSOUR.

(District Court, S. D. New York. August 18, 1908.)

1. JURY (§ 19)—TRIAL BY JURY—SUITE FOR CANCELLATION OF CERTIFICATE OF NATURALIZATION.

A suit for the cancellation of a certificate of naturalization, brought under Act June 29, 1906, c. 3592, § 15, 34 Stat. 601 (U. S. Comp. St. Supp. 1907, p. 427), is not one in which defendant is entitled as of right to a jury trial.

[Ed. Note.—For other cases, see Jury, Dec. Dig. § 19.*]

2. ALIENS (§ 71 1/4)—NATURALIZATION—CANCELLATION OF CERTIFICATE—CONSTITUTIONALITY OF STATUTE.

The provision of Act June 29, 1906, c. 3592, § 15, 34 Stat. 601 (U. S. Comp. St. Supp. 1907, p. 427), authorizing any court, authorized to naturalize aliens in the district where a naturalized citizen may reside at the time of bringing the suit, to entertain a suit for the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud, or that it was illegally procured, although it confers jurisdiction to cancel certificates granted by other courts, is not unconstitutional, but was within the power of Congress.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 71 1/4.*]

3. ALIENS (§ 71)—NATURALIZATION—CANCELLATION OF CERTIFICATE—FRAUD.

A certificate of citizenship granted to an alien who had not been a bona fide resident of the United States for the next preceding five years, and who did not intend to become such resident, but desired the citizenship for his protection in a foreign country, will be canceled for fraud.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 71.*]

Petition to cancel and set aside defendant's certificate of naturalization as having been illegally or fraudulently procured, brought under authority of act of Congress approved June 29, 1906 (Act June 29, 1906, c. 3592, 34 Stat. 596 [U. S. Comp. St. Supp. 1907, p. 419]).

On May 4, 1901, the defendant received a certificate of naturalization from the District Court of the United States for the Eastern District of New York. He obtained it without a “first paper,” on the ground that he had first come to this country when under 18. The court record, therefore, consists only of the depositions of applicant and witness taken on the 3d of May, and the oath of allegiance and order of admission taken and entered on the day following. None of the court officers concerned in the application has any recollection of the applicant or his witness.

The present petition or complaint asserts in substance two reasons for revoking or cancelling this grant of naturalization: (1) That Mansour himself never took or subscribed the oath of renunciation and allegiance, but procured another to impersonate him throughout the proceedings, in violation of fundamental rules of honesty in any legal proceeding, as well as of Rev. St. § 2165 (U. S. Comp. St. 1901, p. 1329); and (2) that Mansour had not on the 4th of May, 1901, resided within the United States for the continued term of five years, as required by Rev. St. § 2170 (U. S. Comp. St. 1901, p. 1353).

Upon these two issues much testimony has been taken, for the most part in open court, and from witnesses who have not impressed the court as either accurate or desirous of telling the truth. It is established, or asserted and

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
not denied, that Mansour is a Levantine Hebrew, born in Syria in 1875, and one of a numerous family of brothers, who, severally or jointly, have during the times under investigation sojourned and transacted business in Manchester, England, Cairo, Hayti, New York, and perhaps Marseilles. Before his naturalization this Mansour went frequently to Hayti, and on the day he received his certificate he left the United States, and at least as early as 1902 became a resident of Port-au-Prince, Hayti, there remaining until 1906, when he was compelled to leave by governmental interference with his business, and under circumstances which he conceives entitle him to redress through diplomatic channels. On leaving Hayti he came to New York, and presented a claim against the Haytian Republic to the Secretary of State, whereof the foundation, of course, is his American citizenship. This suit is really a proceeding to test Mansour’s right to have his demand championed (if just) by the United States, and has been pressed by the agents of Hayti, who have very obviously furnished the information and witnesses on which the complainant relies. This finding is made on request of defendant, although I do not deem it material. According to defendant’s own story, he came to New York at the age of 15, in 1890, on a ship he does not remember, and under an Italian name he has also forgotten, the name being that written in a passage ticket bought from a broker. He then spoke Arabic, classic or “high” Hebrew (“the Hebrew of the Bible”), a little Italian and a little French, but he spoke, read, or wrote no English at all. From 1890 to 1901 he lodged in the Hebrew quarter of the East Side of this city, and peddled such articles as he could carry over his arm (e.g., tablecloths), confining his operations to the quarter in which he lodged, “selling only to Jewish people.” It was there and among these people he learned English, and by 1901 he spoke (so he testifies) as he did at the trial. But the Yiddish jargon he never learned. His absences from New York during these 11 years were confessedly frequent. He first declared that he remained in New York until 1895 or 1896, and then, on the formation of the Haytian firm of Isaac Mansour Frères, began to go to Hayti for two or three months in each year, so continuing until 1901, when on the day of his admission to citizenship he left the country; later in his evidence, however, Mansour declared that he went to Hayti every year after 1890. The business of Isaac Mansour Frères seems to have been considerable, “a bright business” in defendant’s phrase, yet, when in New York, this rather important merchant walked Hester, Essex, and Chrystie streets peddling (inter alia) tablecloths at $2.50 each, from a supply carried over his arm.

To call this story difficult of belief is a moderate statement. A cloud of witnesses have been produced to show where Mansour lodged, and what he traded in, during these 11 years. It would be useless to digest their evidence in detail, but from it I draw the following inferences:

(a) These witnesses knew nothing of Mansour’s English and Haytian connections; (b) they did not know him at all well; (c) their dates do not wholly agree with Mansour’s, nor with each other’s, and the lack of agreement is so great as to impeach their accuracy; and (d) what knowledge of defendant they had seems to end about 1899—this last observation, however, does not apply to the three Tonkins and one Kraemer, to whom reference will be made later.

From this evidence I find that Mansour did spend much of his time in New York between 1890 and 1899, and in 1901 spoke and wrote English. It is further obvious from his appearance and demeanor in court that he is a man of intelligence and shrewdness, writing French more readily than English, and speaking such English as was never learned on the East Side of New York. His accent, intonation, and choice of words are all those of one who learned French first and then English from Englishmen, rather than from any Americans, not to speak of those who practice the dialect of the Bowery, with foreign-born tongues.

Taking the personation charge: The complainant avers that, when Mansour desired a naturalization certificate, he hired one Sersock to make the application in his name, answer the necessary questions, and write the name Mansour as required; and hired also one Araman to represent himself as Joseph T. Dina, a business associate of Mansours, and as Dina serve as
witness and write Dina's name at the foot of the usual deposition. Serock and Araman have been produced, and they swear to this story. In 1901 Araman was 18 years old, and so ignorant that he says he copied the name Joseph T. Dino from his cuff, being unable to trust his own ability to write from memory. Serock's age has not been testified to, but from his appearance in 1908 he was less than 18 in 1901; while his story of the occurrences in Brooklyn on May 3 and 4, 1901, cannot be accurate in all its details. Neither of these confessed criminals testified with any appearance of sincerity, and I remain of the opinion expressed at the hearing, that, while their tale might be true, it was not true because they testified to it. It is, moreover, in the light of the findings above made, nearly incredible. No matter how infirm Mansour's residence may have been, nor how improper his motives for wishing to go through the form of naturalization, he did not need the assistance of two boys of 18 to personate a man of 26, nor the help of lads of intelligence far less than his own, whose writing was worse than his rapid and vigorous French script. The prosecution feels this, and has introduced the testimony of distinguished handwriting experts, to show that the round, unformed schoolboy American hand, in which defendant's name is signed to the court records, is that of Serock. And other experts have testified for the defense. What these gentlemen have expressed their opinions about, however, is this: Given specimens of Serock's and Mansour's handwriting of 1907-08, which does the 1901 court record most resemble? On this question I think the prosecution has much the best of it, but the opportunities for error are so great, in view of the lapse of time, and the youth of Serock in 1901, that I am not willing to rest judgment upon the expert testimony. On the contrary, I find the balance of evidence to incline in defendant's favor on this personation question, by reason of the testimony of Kraemer—with some support from Wiederhoef and Rosenfeld, whose rather vague recollections seem at all events disinterested. Kraemer is a familiar New York figure, a small politician, just the sort of man who would naturally stand sponsor to or supervise the naturalization of any resident or alleged resident of his neighborhood. He seemed to me the most credible witness produced, and, principally from his testimony, I am of opinion that the prosecution has not proved by a fair preponderance of credible evidence that Mansour did not on May 3 and 4, 1901, personally take the necessary oaths and sign the necessary documents preliminary to his naturalization.

On the issue of residence, my view of some of the evidence has been already stated.

Mansour's story of where, when, and how he learned English is utterly incredible, and a fair knowledge of English of the same kind as he now uses is attributed to him as early as 1891 by some of his own witnesses. Again, for some reason he wishes to conceal something regarding his frequent visits to Haiti prior to 1901; for he says he traveled under assumed names which he has forgotten and on ships he does not remember. This cannot be wholly believed; but the position taken so obviously renders further investigation through ships' manifests, etc., impossible, as to suggest a reason for forgetfulness. These difficulties in Mansour's statement have been legitimately used by the prosecution as arguments that he was not in New York at all during most of the time he swears to. Undoubtedly it is strange that a man of his obvious intelligence and superior attainments, should after 11 years' residence in New York, be able to produce as acquaintances only the ignorant and humble persons who have appeared (for the most part) as witnesses, several of whom could only talk with Mansour (it is said) in the English he says he was then learning, yet the English of the witnesses left no trace in defendant's speech, and defendant must be supposed to have consorted of choice with persons beneath him in intelligence and acquisitions and from whom he could not even learn the language of the country. This part of Mansour's tale is improbable, but not impossible, and, remembering that the burden of proof is not on him, I am not justified in rejecting a substantially uncontradicted story for improbability only.

Therefore it is accepted as true that defendant spent the major portion of his time in New York from 1880 to 1899. After 1899 he says he lived with the Tonkins until the early part of

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1901, when he admits going to Hayti, whence he returned on April 29th, to be naturalized on May 4th, and to definitely leave the United States on the same day. The Tonkins are unworthy of belief. The husband admitted telling the government examiner that Mansour lived with him two years (i.e., 1897-98), and in open court he swore to four years; while the wife first said two years, and then expanded it to four. As before noted, a departure of Mansour from New York about 1899 fits in with the recollection of most of the witnesses who only pretend to remember defendant as a peddler; while here again I fall back on the testimony of Kraemer, this time as turning the scale against defendant. Kraemer most positively swore that Mansour told him he was going to leave the United States to go into business and better business for himself, that this was about a year and a half before he again appeared and requested Kraemer to see him through his naturalization matter, and he then stated that after getting his papers he was going away again. I believe to be the truth, and accordingly find that, while Mansour sojourned in New York most of the time from 1890 to 1899 (about), there is no evidence of any intention on his part to remain; but there is also no evidence of intention to permanently depart. In 1899 or thereabouts he permanently abandoned New York, and took personal charge of the business of Isaac Mansour Frères in Hayti; in 1901 he was, as he informed the custom's inspector on April 29th, a resident of Port-au-Prince; he never at any time resided at 144 Hamilton avenue, Brooklyn; and from about 1899 until 1906 he neither sojourned for any length of time in the United States, nor had in this country any domicile, residence, or habitation. When he applied for and obtained naturalization, it was for the purpose of protection in Hayti, and not in order to participate in the government of this republic; nor had he when naturalized any intention of settling or living or residing within its limits.


HOUGH, District Judge (after stating the facts as above). The second cause of action set forth in the petition is dismissed for total lack of evidence.

The third and fourth causes of action are dismissed, because not sustained by a fair preponderance of credible testimony.

The first cause of action presents the question of residence, and, under the findings of fact above made, an order or judgment must be entered canceling Mansour's certificate of naturalization, unless: (1) This proceeding is one in which defendant is entitled as of right to a jury trial, which has been duly demanded and refused; or (2) the act under which the case is brought be unconstitutional.

First. The method of trying any cause or suit must depend on either: (a) Constitutional direction, (b) legal requirement of (b') statute law or (b'') controlling decision, or (c) judicial discretion. It has not been asserted that the Constitution touches this branch of the matter.

The act under which the case is brought is silent as to the method of trial, and this, so far as I am informed, is the first trial under the fifteenth section thereof. There are therefore no directly controlling authorities. The proceeding, however, if not sui generis, somewhat resembles a bill to revoke or set aside a grant or patent, or to cancel and vacate a judgment, and such causes are not of right triable by jury. So far as I have discretion in the matter, cases such as this will always be tried without a jury. If the enforcement of the fifteenth section of the act is to depend on the hurried hit or miss of
a jury trial, the section might as well be repealed, and it is also true that owing to the technicalities still tolerated, if not encouraged, in our jury procedure, jury cases always occupy more court time than the same number of equity trials; and this court certainly has no time to spare.

Second. The unconstitutionality of an act of Congress may well be left, in all but most extraordinary cases, to the higher courts, as was done in Spreckels Co. v. McClain, 113 Fed. 244, 51 C. C. A. 201. As, however, the discussion has been extended, and I recognize the attractiveness to many professional minds of much of defendant’s argument, my own inclination in the matter will be briefly noted.

(1) It is asserted that the fifteenth section of the statute is obnoxious to the “ex post facto” clause of the Constitution. It seems to me that said section is not within the definition of Calder v. Bull, 3 Dall. 386, 1 L. Ed. 648, nor does it inflict a penalty or punishment, within the extension of the rule created by Ex parte Garland, 4 Wall. 333, 18 L. Ed. 366.

(2) The remaining objections to the act do not seem to me to raise a constitutional question. Thus it is said to be monstrous that any court other than the one which entered the judgment or decree should set it aside at the instance of one of the parties thereto, it not being pretended that the proceeding in which the judgment was entered was beyond the first court’s jurisdiction. This is familiar law, and has been applied in naturalization matters. U. S. v. Gleason, 90 Fed. 778, 33 C. C. A. 272. But no reason has been pointed out why Congress, having general and exclusive power over naturalization, should not vary this rule, and authorize the action to be brought, not in a jurisdiction from which the defendant may long have removed, but in the place where he presently resides.

It is further objected that, since the order granting Mansour citizenship is a judgment or decree entered after a hearing and the taking of testimony, there was on such hearing an opportunity to try the very issue here raised, and, Mansour having prevailed, all mere errors are cured; while the United States as a party to that judgment is estopped from showing even its fraudulent procurement, because the judgment itself is the highest evidence that there was none. For this view of the binding sanctity of judgments many cases have been cited, the strongest of which is Greene v. Greene, 2 Gray (Mass.) 361, 61 Am. Dec. 454.

Well known as is this line of decisions, it remains true that courts granting naturalization have for generations revoked or canceled their own grants or judgments, when convinced that they had been imposed upon, or deceived, but only upon application of the government. The numerous cases are collected in House Doc. 326, 59th Cong. p. 131 et seq. (a letter from Secretary Root to Congress on the subject of citizenship and expatriation). This long-continued practice is not reconcilable with the view that declares a certificate of naturalization to be a judgment; but since the present act the question is academic, for here again Congress has declared that fraud or illegality shall be enough to set aside the judgment (if it be one), and no reason is sug-
gested why the statute does not overrule the decisions (if they are applicable).

Finally, the court is asked to consider the cases holding that a naturalized citizen is as much a citizen as any other, and to observe that the provisions of the act regarding the effect of five years' residence abroad constitute, as to naturalized aliens, an unconstitutional attack upon their rights as citizens. I decline to do this; the question is not involved in this case, and, even if there be force in the contention made, the expatriation clauses of the section are clearly separable from the words authorizing and directing this proceeding.

There having been personal fraud by Mansour in the procurement of his certificate of naturalization, in that he falsely swore to the necessary residential facts, the prayer of the petition is granted.

UNITED STATES v. MANSOUR.
(District Court, S. D. New York. May 25, 1909.)

ALIENS (§ 71½*)—NATURALIZATION—SUIT FOR CANCELLATION OF CERTIFICATE—PLEADING.
A suit for the cancellation of a certificate of naturalization under Act June 29, 1906, c. 3592, § 15, 34 Stat. 601 (U. S. Comp. St. Supp. 1907, p. 427), is a special proceeding, and, while the proof must be of the kind and force required to set aside a judgment, the pleadings and procedure may be molded in any way best calculated to meet the ends of justice.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 71½.*]

On Demurrer to Petition to Cancel Defendant's Certificate of Naturalization.
Douglass & Armitage, for demurrant.

Hough, District Judge. It seems quite unnecessary to elaborate the views expressed in the previous Mansour Case, 170 Fed. 671, regarding proceedings of this nature.

It was, and still is, my opinion that the proceeding is one in the nature of a bill in equity to set aside a judgment. But it does not follow that all the formalities of equity procedure must be observed. Nor is it important to try to assign the petition which the act of Congress (Act June 29, 1906, c. 3592, § 15, 34 Stat. 601 [U. S. Comp. St. Supp. 1907, p. 427]) provides for to the category either of a complaint at common law or a bill in equity. In form it is neither, being exactly what the act calls for, a petition; and the petition in this case seems to me to set up the necessary statutory facts. Because the requisite proof must (perhaps) be of the kind and force which would be required to set aside a judgment, it does not follow that the issue under which such proof is to be adduced must be framed in the manner prescribed either by common law or equity procedure. The act leaves the court to model the procedure in any way that seems

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
to subserve the ends of justice. So far as I am concerned, it seems best to make it as simple as possible.

The form followed in this case is approved, and the demurrer overruled.

In re WESTERN INV. CO.
(District Court, E. D. Oklahoma. November, 1908.)

1. Bankruptcy ($100*)—Adjudication—Validity.
   Where a creditor did not offer to plead to the original bankruptcy petition, but expressed himself as willing that the adjudication should stand, only desiring a change of referee, the adjudication was not invalidated because it was made without the issuance of a subpoena and the lapse of time incident to awaiting the return day and five days thereafter.

   [Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 60, 142; Dec. Dig. § 100.*]

2. Bankruptcy ($100*)—Voluntary Appearance—Waiver of Process.
   Bankruptcy Act July 1, 1898, c. 541, § 18, 30 Stat. 551 (U. S. Comp. St. 1901, p. 3429), providing for process, pleadings, etc., in bankruptcy, does not preclude a waiver of process and an adjudication on the same day the petition is filed on the bankrupt's voluntary appearance and answer admitting bankruptcy.

   [Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 141; Dec. Dig. § 100.*]

   Bankruptcy Act July 1, 1898, c. 541, § 22, 30 Stat. 552 (U. S. Comp. St. 1901, p. 3431), provides that the judge may refer the proceeding generally to any referee within the territorial jurisdiction of the court, if the convenience of the parties in interest will be served thereby, or for cause, or if the bankrupt does not do business, reside, or have his domicile in the district. Held, that the judge is thereby authorized in his discretion to refer the proceedings to any referee within the territorial jurisdiction of the court to subserve the convenience of the parties, none of the referees in the district being personally disqualified.

   [Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 222.*]

W. A. Brigham, for petitioner Weer.
Hutchings, Murphy & German, for other petitioners.
Allen & Pinson, for bankrupt.

CAMPBELL, District Judge. On May 6, 1908, the Farmers' & Merchants' Bank of Coweta, Okl., and other petitioning creditors filed in this court their petition praying that the Western Investment Company, a mercantile corporation of Coweta, Wagoner county, Okl., be adjudged a bankrupt. Among other things set forth in said petition is the following:

"And your petitioners further represent that said the Western Investment Company is insolvent, and that within four months next preceding the date of this petition the said the Western Investment Company committed an act of bankruptcy, in that it did heretofore, to wit, on the 6th day of May, A. D. 1908, admit in writing its inability to pay its debts and its willingness to be adjudged a bankrupt on that ground, the said admission having been signed by W. C. Edwards, president of said corporation, and is in words and figures as follows, to wit:

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep't Indexes.
"The board of directors of the Western Investment Company, having by resolution duly passed at a regular meeting of said board, resolved and declared that it was unable to pay its debts and was willing to be adjudged a bankrupt on that ground, as president of said company, which is a corporation organized and doing business as a mercantile company, I hereby declare that said company is unable to pay its debts and is willing to be adjudged a bankrupt on that ground. In witness whereof I have hereunto set my hand this sixth day of May, 1908.

[Signed]

W. C. Edwards, President,

—the foregoing notice and declaration having been on the 6th day of May, 1908, delivered to each of the foregoing petitioning creditors, each of them having received a notice and declaration which was in words and figures identical with that copied above."

On the same day the bankrupt filed its "Appearance and Waiver of Process," which (omitting caption) is as follows:

"Comes now the Western Investment Company, a corporation, by W. C. Edwards, its president, and enters the personal appearance of the said corporation in the above-entitled cause, and hereby waives the issuance and service of subpoena and of a copy of the petition of the petitioning creditors upon said corporation.

"And the said corporation represents unto the court that the averments contained in said creditors' petition are true, and it admits that it is insolvent, and that it has committed an act of bankruptcy in the passage of a resolution admitting its inability to pay its debts and consenting that it may be adjudged a bankrupt on that ground; and it hereby waives all the legal requirements, and consents that an adjudication that it is a bankrupt may be entered by the court in the above-entitled cause immediately."

Thereupon, upon presentation to the court, an order of adjudication was entered, directing that the matter be referred to Ezra Brainerd, referee at Muskogee, Muskogee county, Okl. The referee in bankruptcy for the referee district in which Wagoner county is situated is W. O. Rittenhouse, of Wagoner, in said county. John A. Weer, claiming to be a judgment creditor of said bankrupt by virtue of a judgment for $20,142.57, rendered on the 2d day of May, 1908, in the district court of said Wagoner county, filed in this court on May 15, 1908, his petition praying an order of the court discharging said Ezra Brainerd, referee, and a reference of the cause of W. O. Rittenhouse, the referee in said Wagoner county. In the meantime, the referee, Brainerd, has appointed a receiver in said cause, pending election of a trustee, and has set the first meeting of creditors for May 28, 1908, at Muskogee, and has issued notices accordingly. A response to said petition is filed by all the petitioning creditors originally instituting the proceedings, representing that the convenience of the parties in interest will be best subserved by permitting the cause to continue in the hands of the referee at Muskogee, and praying that the prayer of the petition be denied.

During the hearing of this matter, counsel for petitioner raised the point that the adjudication was improvidently made, and contending that subpoena should first have issued and that five days after the return day thereof should have been allowed to elapse to permit such creditors as might desire to appear and plead to the petition before adjudication; citing In re Humbert Co. (D. C.) 4 Am. Bankr. Rep. 76, 100 Fed. 439. While it may be, as indicated by the case cited, that such would be the better practice, still, in view of the fact that
petitioner does not offer to plead to the original petition, but expresses himself as willing that the adjudication shall stand, but only desires a change of referees, that objection can have no bearing on this case. The adjudication is not in any way invalidated by reason of having been made without the issuance of subpæna and the lapse of time incident to awaiting the return day and five days thereafter.

"Nor can there be want of jurisdiction over the subject-matter because the adjudication was had on the same day that the petition and answer were filed. There is nothing in section 18 of the bankruptcy act of July 1, 1898, c. 541, 30 Stat. 551 (U. S. Comp. St. 1901, p. 3429), which precludes a waiver of process, a voluntary appearance of the bankrupt, and an answer admitting bankruptcy on the day the petition is filed. An adjudication on a voluntary appearance and an answer admitting the averments of the petition would certainly conclude the bankrupt who entered the appearance and filed the answer. It may be when an adjudication has been made without service of process, and before the expiration of 15 days, that the creditors might, upon seasonable application, procure an order vacating the adjudication so far as to allow them to plead and be heard in opposition to the petition. But such right must be exercised with reasonable promptness after actual or constructive notice of the adjudication. In the present case neither the bankrupt nor any creditor is objecting to the adjudication. Their acquiescence shows that they are content." In re Columbia Real Estate Co. (D. C.) 4 Am. Bankr. Rep. 419, 101 Fed. 985.

The bankruptcy act (section 22) provides as follows:

"After a person has been adjudged a bankrupt the judge may cause the trustee to proceed with the administration of the estate or refer it (1) generally to the referee or specially with only limited authority to act in the premises or to consider and report upon specified issues; or (2) to any referee within the territorial jurisdiction of the court, if the convenience of the parties in interest will be served thereby, or for cause, or if the bankrupt does not do business, reside, or have his domicile in the district."

It will be noted that the court may refer the cause "to any referee within the territorial jurisdiction of the court, if the convenience of the parties in interest will be served thereby, or for cause," etc. It is a matter within the discretion of the court, guided by what appears to be the convenience of the parties in interest. As said in Collier on Bankruptcy, p. 259:

"The judge is not bound to refer the case to the referee whose district includes the bankrupt's domicile. Thus, cases often arise where a majority of creditors reside in one referee district and the bankrupt in another. It would then be clearly 'for the convenience of parties in interest' to refer the case to the referee where the creditors reside. So, also, when a referee is disqualified, as by being the attorney for the bankrupt or by relationship, the reference will be ordered elsewhere 'for cause.' Likewise, if, in the words of the statute, 'the bankrupt does not do business, reside or have his domicile in the district.' The only real limitations as to the personnel of the referee, then, seems to be that he must be (a) a duly appointed referee in bankruptcy, and (b) of the same jurisdiction as the court."

Both the referee at Wagoner and the referee at Muskogee I know to be gentlemen of integrity and ability, and, whether this cause shall remain at Muskogee or shall be transferred to Wagoner, it will, in either event, so far as the referee is concerned, be conscientiously and capably conducted, and the question is therefore purely a question of convenience of interested parties. On the part of petitioner, the only interested party appearing is the petitioner himself, who, as heretofore
stated, appears as a judgment creditor in the sum of $30,142.57. As opposed to the petitioner and praying that the cause remain with the referee at Muskogee, the bankrupt appears, by its attorney, and also appear the petitioning creditors in the original petition in bankruptcy, representing amounts largely in excess of the amount represented by the petitioner herein, one of whom is the First National Bank of Wagoner. It appears that, as the trains now run, Muskogee and Coweta are more accessible to each other than Wagoner and Coweta, with the consequent items of time consumed and necessary railroad fare and hotel bills in favor of Muskogee. It is also reasonably to be expected from the character and magnitude of this case that appeals will be taken from time to time from the referee to the judge, which will no doubt be facilitated if the cause is pending in Muskogee rather than at a distance. After a careful consideration of this matter, I am convinced that, considering all the parties in interest, their convenience will be best served by permitting this cause to remain with the referee at Muskogee, and, so finding, it is my duty under the law to deny the prayer of the petition herein.

It is therefore ordered that the prayer of petitioner be denied, and that Ezra Brainerd, referee at Muskogee, proceed with the cause.

UNITED STATES v. SIMON.
(Circuit Court, D. Massachusetts. May 25, 1909.)

No 3.

1. ALIENS (§ 67*)—NATURALIZATION—CANCELLATION OF NATURALIZATION CERTIFICATE—JURISDICTION OF COURTS.

Naturalization Act June 29, 1906, c. 3592, § 15, 34 Stat. 601 (U. S. Comp. St. Supp. 1907, p. 427), which makes it the duty of district attorneys on affidavit showing good cause therefor to institute proceedings to cancel the certificate of naturalization of any naturalized citizen on the ground of fraud or on the ground that such certificate was illegally procured “in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit,” confers jurisdiction on such court to cancel a certificate, whether granted by that or any other court, state or federal.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 67.*]

2. ALIENS (§ 71½*)—NATURALIZATION—CANCELLATION OF CERTIFICATE—CONSTITUTIONALITY OF STATUTE.


[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 71½.*]

3. ALIENS (§ 71*)—NATURALIZATION—CERTIFICATE ILLEGALLY OBTAINED.

The continuous residence of an alien in the United States for five years, necessary for his naturalization, is broken by a physical absence from the United States for seven months, during which time he obtains naturalization into another allegiance, and a certificate of naturalization into the United States granted under such circumstances is subject to cancellation either on the ground of fraud, if he misrepresented the facts, or on the ground that it was illegally procured.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 71.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
The Assistant United States Attorney, for naturalization.
William H. Lewis, for the United States.
Guy A. Ham, for defendant.

LOWELL, Circuit Judge. The United States filed a petition to vacate the respondent's naturalization, upon the ground that it was illegally procured, in that Simon "had not resided continuously in the United States for a period of five years immediately preceding the date of his petition for citizenship."

From the agreed statement of facts, it appeared that Simon, being a Russian, came to Canada in August, 1890, and there remained until January 26, 1896, when he "migrated" to New York. On June, 1896, he returned to Canada for the purpose of closing up some business interests that he had left there when he came to the United States. At the time he left the United States, he intended to return, and went to Canada merely for the purpose indicated above.

On June 18, 1896, while in Montreal, Simon filed a petition for British naturalization. In his "oath of residence" appended thereto, he swore that "in the period of seven years preceding this date (of the petition) I have resided seven years in the Dominion of Canada with intent to settle therein without having been during such seven years a stated resident in any foreign country." This was a false statement, but apparently it imposed upon the Canadian court. On the same day, he took the oath of allegiance to Queen Victoria, though the certificate of naturalization bears date September 21, 1906.

"On January 20, 1897, he returned to New York, since which time he has lived in the United States." On March 10, 1899, he made his preliminary declaration at Salem, Mass., in the First district court of Essex county. His petition alleged that he was an alien, born in Russia; that in January, 1896, "it was then and still is bona fide his intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state or sovereignty whatsoever, and particularly to Nicholas II, Czar of Russia, into whose allegiance he was born, and to Victoria, Queen of the United Kingdom of Great Britain and Ireland, into whose allegiance he was naturalized, whose subject he has heretofore been."

As he owed no British allegiance in January, 1896, the statement was untrue, though Simon may have erred from a confusion of his wavering intentions and multiplied allegiances. The preliminary declaration was duly recorded, and on April 20, 1901, Simon was naturalized in the same court. His former citizenship was not stated in the certificate of naturalization, nor the form of his renunciation of allegiance.


"That it shall be the duty of the United States district attorney 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 the suit, for the purpose of setting aside and cancelling the certificate of citizenship on the ground of fraud or on the ground that such certificate of citizenship was illegally procured."
The respondent contends that this court is without jurisdiction to vacate an order or decree of naturalization granted by another court which had jurisdiction of the subject-matter. But the language of the statute explicitly contradicts this contention. The act gives jurisdiction to cancel the naturalization certificate, not to the court which granted it, but to any court of naturalization in the district of the residence of the naturalized person. Whether any jurisdiction theretofore existing in the former court is thus taken away need not be discussed here.

The respondent further contends that the act of 1906, as thus construed, is unconstitutional. To put the matter most favorably for the respondent, unconstitutionality is not so clear as to warrant a court of first instance in so holding. United States v. Gleason, 90 Fed. 778, 33 C. C. A. 272, and Pintsch Co. v. Bergin (C. C.) 84 Fed. 140, were decided before the passage of the act of 1906.

The petition does not allege Simon's fraud, but at the hearing it was assumed on both sides that this ground of illegality was open to the United States. So far as the United States relies upon fraud, it is bound to prove the fraud. This might have been inferred sufficiently from the admitted facts, were it not that the preliminary declaration made in the state court in 1899 expressly stated that Simon was naturalized into British allegiance. Presumably this declaration was before the state court and was considered by it when Simon was naturalized. Upon the evidence presented to this court it cannot know certainly upon what theory the state court proceeded in naturalizing Simon. While admitting the fact of his British naturalization, he may yet have misrepresented its date or surrounding circumstances so as to justify the action of the state court upon the facts shown to it. As the burden of proof rests upon the government, however, this inference is not cogent enough to warrant this court in finding that Simon willfully imposed upon the state court or obtained his naturalization by fraud. If, however, the state court was not imposed on, but acted with full knowledge of the facts, it must have found as a fact that Simon's residence in the United States for five years preceding his naturalization of April 20, 1901, was substantially unbroken. Therefore it must have ruled as matter of law that the British naturalization, which was obtained upon his application within these five years, did not interrupt the running of the statutory period of his residence in the United States. If the state court proceeded upon this ground, I must hold that it erred in matter of law, and so that Simon's naturalization was "illegally procured." Inasmuch as Simon's naturalization, as stated, was procured either (1) by his false and fraudulent narration of the facts connected with his British naturalization, or (2) by the error of the state court in ruling that the evidence warranted a finding that Simon had resided without interruption in the United States during five years prior to his naturalization, that naturalization was procured fraudulently or otherwise illegally.

This court need not now decide that an applicant for naturalization must have had and retained the intention of becoming an American citizen during every moment of the five-year period. It does
hold as matter of law that the continuous residence of five years in
the United States necessary for naturalization is interrupted by a
physical absence of seven months from the United States, during
which time the alien obtains admission into another allegiance. In
his Canadian oath of residence Simon substantially denied that, on
June 18, 1906, his residence was in the United States. So far as
residence involves an element of intention, he cannot now be allowed
to contradict his own oath. Van Dyne on Naturalization, 95–105. It
may be observed that the agreed facts here state no intention of taking
up a continuous residence in the United States at the time of Simon’s
first arrival in New York, while his oath of residence taken in Canada
expressly denies this intention. It is true that when he returned to
Canada “he intended to return” to the United States, but this intend-
ed return may have been merely a return for a short period.

It should be added that the United States contended at the argu-
ment that this court has jurisdiction to cancel a certificate not only
because it was procured by fraud or by error of law, but also be-
cause the court of naturalization erred in its findings of fact. This
contention need not be disposed of at this time. As Simon’s nat-
uralization in the state court was procured either fraudulently or
otherwise illegally, cancellation of the certificate is ordered.

In re SCHACHTER et al.

(District Court, S. D. New York. May 14, 1909.)

1. Bankruptcy (§ 409*)—Grounds for Refusal of Discharge—Failure to
Keep Books.

St. 1901, p. 3427), as amended Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 (U. S.
Comp. St. Supp. 1907, p. 1028), any failure by a bankrupt to keep books
“with intent to conceal his financial condition” defeats his right to a dis-
charge, whatever its actual effect on creditors may have been.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 752; Dec. Dig.
§ 409.*]

2. Bankruptcy (§ 409*)—Grounds for Refusal of Discharge—Failure to
Keep Books.

The failure of a mercantile firm to make any entry in its books of a
comparatively important purchase of goods a short time before its bank-
ruptcy, of a kind different from those in which it generally dealt, held
to have presumptively been with intent to conceal its financial condition,
and to deprive the partners of the right to a discharge.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 752; Dec.
Dig. § 409.*]

3. Bankruptcy (§ 408*)—Grounds for Refusal of Discharge—Partnership
Concealment of Assets by One Partner.

The concealment of firm assets by one member of a partnership alone
will not deprive another partner of his right to a discharge.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 735; Dec. Dig.
§ 408.*]

4. Bankruptcy (§ 414*)—Right to Discharge—Failure to Keep Books—
Burden of Proof.

To entitle a member of a partnership to a discharge notwithstanding
the fact that the firm failed to keep proper books with the intent on the

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep’t Indexes
part of some member to conceal its financial condition, the burden rests on him to prove that he was innocent of participation therein.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 720; Dec. Dig. § 414.*]

In Bankruptcy. On applications for discharge.

Mr. Levis, for creditors.
Mr. Goldsmith, for bankrupts.

HOUGH, District Judge. It is found by the master that about four months before bankruptcy the firm of M. Schachter & Son, composed of the above-named bankrupts, loaned to a brother (one Samuel Schachter) $850; that he with this money purchased in bulk a stock of goods from Haupt Bros. (who promptly became bankrupt themselves); and that thereafter Samuel Schachter sold the said goods to this bankrupt firm for $950, whereupon the firm canceled its loan to Samuel and paid him $100 additional. No entry of any kind regarding this transaction was made in the books of the firm, and the goods thus bought were not of the kind in which the partnership habitually dealt. This transaction has been the subject of investigation in this court before now. Re Haupt Bros. (D. C.) 18 Am. Bankr. Rep. 585, 153 Fed. 239.

That the transaction in question has been declared a fraud upon the creditors of Haupt Bros. is of course not important, but if it be assumed (for the purposes of argument) that the Schachters regarded the operation as a legitimate business enterprise, it was by no means inconsiderable in view of the volume of their transactions, and the question therefore arises whether this omission from their books of account was done "with intent to conceal their financial condition." The master's report states that there was no "intention to conceal financial condition," because a knowledge of this purchase would have been of no benefit to the creditors. The same might be said of almost any omission to make entries in a merchant's books of account. The statute does not proscribe only such entries or omissions as are detrimental to creditors, but any failure to keep books "with intent to conceal financial condition." Re Hanna (C. C. A.; Feb. 16, 1909) 168 Fed. 238. No reasonable excuse for this failure to enter an important transaction is assigned by either of the bankrupts, and the court is left to infer intent from what the bankrupts actually did and the motives reasonably to be assigned for their acts. What they actually did was to keep a set of books which failed to show the receipt of goods presumably worth more than $950, and the expenditure of this not inconsiderable sum of money. What motive could exist for this course of action? None has been or can be assigned except a desire to conceal as much as possible the fact that they were dealing in goods unsuitable to their ostensible business, and procured in pursuance of an agreement branded as fraudulent by the courts, whatever might have been their view of the morality of the transaction. These may have been very good reasons from some points of view, but such reasons or motives could not exist without a resulting intent and desire

*For other cases see same topic & § number in Dec. & Am. Digs. 1927 to date, & Rep't Indexes
to conceal the financial condition that necessarily followed this investment. It seems to me, therefore, that the act committed by the bankrupts is entirely within the Hanna decision, supra, and that the discharge must be refused under the specification alleging failure to keep books.

The master advises the refusal of a discharge to Abraham Schachter on the ground of active concealment of assets, i.e., appropriation thereof by himself. I see no reason for disturbing the master's finding that Abraham alone was concerned in the concealment of assets. I believe it to be settled in this district that, where one of several partners has alone committed such fraud as requires the refusal of a discharge in bankruptcy, his act will injure only himself (so far as the right to discharge is concerned), even though his partners as well as himself will remain civilly liable for the pecuniary consequences of the fraud wrought by one. Re Dresser (D. C.) 13 Am. Bankr. Rep. at 637, 144 Fed. 318. I therefore concur in the master's finding that Meyer Schachter should not be refused discharge by reason of the acts of Abraham in concealing goods.

It remains, however, to consider whether Meyer can escape the consequences of a failure to properly keep the firm books, even though (as found by the master) he knew nothing about the books, was engaged in the manufacturing portion of the business alone, and left the countinghouse wholly to Abraham. It may be that a firm business can be so separated into departments that some partners are wholly ignorant not only of what is done, but what ought to be done, in departments not their own. And it may follow from this that one partner may be so ignorant of bookkeeping as to escape the effects in bankruptcy of a failure to keep or properly keep the books of his own business. But the courts must start with the general proposition that the act of one partner in respect of partnership transactions is, if not the act of all, at least an act for which all are responsible. Any partner claiming exemption from this rule must at least accept the burden of proof and affirmatively show his innocence or ignorance of the wrongdoing of his fellow. It is seldom that this court varies a finding of fact made by a referee or special master; but in this case I am unable to discover any evidence upon which the master's finding of innocence and ignorance on the part of Meyer Schachter can be sustained.

At the hearing on the specifications Meyer did not testify at all, and the evidence on which the finding is based appears to be that of Abraham Schachter, who, being himself convicted of wrongful omissions from the books of account which he supervised in conjunction with the above-named brother, Samuel, and also of personal concealment of assets, deposed, in substance, as follows:

"I had charge of the business conducted by M. Schachter & Son. My father (Meyer) was in the factory when he was downtown; he wasn't well. I kept the books of account; my father didn't have anything to do with the keeping of the books. The entries in the books are most of them in my handwriting, and, when not in mine, in the handwriting of my brother, Sam."

A reference to the testimony of Meyer Schachter taken before the commissioner under section 21a, Bankr. Act July 1, 1898, c. 541, 30
Stat. 552 (U. S. Comp. St. 1901, p. 3430), shows him to be a man who had successfully conducted business before the establishment of this bankrupt firm, who maintained bank accounts and invested his savings. Without expressing any opinion as to how far any member of a firm which fails to keep books of account or properly keep books of account with the intent on the part of any of the partners to conceal the firm's financial condition can escape the consequences of this act, I am of opinion, that the testimony in this case affords no basis for a finding that Meyer Schachter knew nothing of the bookkeeping sins, whether of commission or omission, of the firm of which he was the head.

When it was once shown that the books were wrong and that a wrongful intent existed on the part of one partner, the burden of proof was on the other partner to show his innocence. This burden Meyer Schachter has not even endeavored to bear, and his discharge must be refused on the ground of failure to keep proper books, and the discharge of Abraham Schachter be likewise refused on that ground, as well as upon the ground reported by the master of active concealment of assets.

UNITED STATES v. DWYER.

(Circuit Court, D. Massachusetts. May 18, 1909.)

ALIENS (§ 71½*)—NATURALIZATION—CANCELLATION OF CERTIFICATE—ILLEGAL PROCUREMENT.

A certificate of naturalization will not be canceled, as having been illegally procured, on the ground that the holder had not during the 5 years immediately preceding his application behaved as a man of good moral character, on a showing that prior to such 5-year period he had several times, and once thereafter, been arrested and convicted for drunkenness, where it is clearly shown that he reformed, and had remained sober for more than 4½ years prior to his application.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 71½.*]

John W. McAnarney, for Dwyer.

LOWELL, Circuit Judge. The United States seeks to cancel a certificate of naturalization issued to Dwyer, upon the ground that:

"Said certificate of citizenship was illegally procured, in that said Dwyer had not for five years immediately preceding the date of his application for citizenship behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same."

Dwyer came to this country under the age of 18. For many years after his arrival, he was a drunkard. Some 15 convictions were proved against him in the course of about 10 years. For these offenses he was sometimes imprisoned and sometimes fined. The last sentence was on March 6, 1903. He was naturalized in this court March 2, 1908. Before his naturalization, according to the excellent practice

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
now adopted, he submitted to examination by the assistant United States district attorney in charge of naturalization. By him Dwyer was asked as follows:

"Q. How many times were you arrested in the old country, if at all? A. None. Q. How many times in this country, if ever? A. Once. Q. Character of offense? A. Was arrested for drunkenness about five years ago, and was fined §5. This was at Taunton."

There was abundant and undisputed testimony that soon after the date of Dwyer's last sentence for drunkenness, from June, 1903, at the latest, he reformed altogether, and had been uniformly sober for nearly five years before his naturalization. Testimony to this effect is ordinarily to be received with suspicion; but in Dwyer's case it was convincing. In other respects nothing was proved against his character, and evidence concerning his general respectability was considerable and uncontradicted. Section 4, cl. 4, of the naturalization act requires that:

"It shall be made to appear to the satisfaction of the court * * * that during that time [i. e., five years] he [the applicant] has behaved as a man of good character."

Even if this court is authorized by the act to review findings of fact made by itself or by another court, yet the government has not here shown sufficiently that the finding of fact concerning Dwyer's behavior and character was erroneous. As applied to all but the first three months of the period, the finding was undoubtedly correct. For more than four years and a half Dwyer had been a reformed man. During the first three months of the five-year period he may have been carrying on, albeit unsuccessfully, the struggle for reform in which he afterwards prevailed. The time of failure included within the five-year period was so short that I am not disposed to cancel a naturalization which could immediately be obtained anew. "A person may be under indictment, may plead guilty, may serve a sentence, and during this time so live that he could be considered to be of good moral character, if the sentence were for a crime of which repentance and rectitude of life could show a reformation of character." In re Di Clerico. (D. C.) 158 Fed. 905, 907. Dwyer's statement made to the district attorney was not altogether ingenuous, and the trouble into which it has brought him has not been altogether undeserved. But the statement does not show fraud so clearly as to warrant a cancellation of the certificate, even if a cancellation on the ground of fraud is open to the United States under the pleadings.

Petition for cancellation denied.
In re BATTEN.

(Bankruptcy Court, E. D. Virginia. April 22, 1909.)

Bankruptcy (§ 339*)—Homestead Exemption.
The fact that a bankrupt had waived his right of homestead in favor of certain creditors, as authorized by the laws of the state, does not authorize the court of bankruptcy to refuse to allow and set aside the homestead. Quere: Can the bankrupt's right to homestead be assailed in a bankruptcy court, for fraud, by exception to the trustee's report?
[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 339.*]

In Bankruptcy. On review of order of referee disallowing homestead exemption.
J. H. Corbitt, for bankrupt.
Lee Britt and Robert W. Withers, for creditors.

WADDELL, District Judge. This proceeding is now before the court upon an appeal taken by the bankrupt from the action of the referee in declining to approve the trustee's action setting aside the bankrupt's homestead and declaring invalid the homestead deed claiming the same. The conclusion reached by the court is that the action of the referee should be reversed, and the bankrupt allowed his homestead, assuming the claim is to property out of which the homestead can be set aside.

The Constitution of Virginia guarantees to the bankrupt his right of homestead, and under the law he can waive the benefit of the same as to such of his debts as he desires. The effect of the position taken by the creditors in this case, and the action of the referee, would be to deprive the homestead claimant of his right of waiver of exemption. Assuming that the making of the homestead deed, the waiver of the homestead exemption, and the confession of judgment on such waiver debt by the bankrupt can be assailed in a bankruptcy court, for fraud in connection with the transaction, by exception to the trustee's report setting apart the exemption, it does not appear that the facts in this case warrant the setting aside of such homestead deed, or the ignoring of the homestead waiver note. While it is true the making of the particular note in this case, the claiming of the homestead deed, and the subsequent going into bankruptcy were all within a short time, still it does not follow that there was fraud in what was done; and especially is this true, as the testimony shows that the homestead waiver note, given before the bankruptcy, was very largely to take the place of other notes that had long been held by the homestead waiver creditor against the bankrupt, which themselves contained the waiver.

To deny the homestead in this case would be practically to refuse to set aside the same in any case where there existed homestead waiver debts in amounts sufficient to consume the homestead estate, and would involve necessarily the administration of the homestead estate by the bankruptcy court, which, under the decisions of the Supreme Court of the United States, belongs to the state and not to the federal courts.

*For other cases see same topic & § Number in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
BRAY et al. v. UNITED STATES FIDELITY & GUARANTY CO. et al.

(Circuit Court of Appeals, Fourth Circuit. June 3, 1909.)

No. 812.

Bankruptcy (§ 294*)—Jurisdiction of Courts—Exclusive Jurisdiction of District Court to Administer Estate.

A Circuit Court of the United States is without jurisdiction of a suit the object of which is to determine liens upon, and priorities in the distribution of, a bankrupt's estate in process of administration by a District Court, the jurisdiction of the latter court in such matter being original and exclusive, and it is immaterial that the property, which is in the custody of the bankruptcy court, is within the territorial jurisdiction of the Circuit Court, or that the suit was instituted by leave of the bankruptcy court.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 412; Dec. Dig. § 294.*

Jurisdiction of federal courts in suits relating to bankruptcy, see note to Bailey v. Mosher, 11 C. C. A. 313.]

Appeal from the Circuit Court of the United States for the Northern District of West Virginia, at Parkersburg.

The Evansville Contract Company, a corporation under the laws of the state of Indiana, entered into four several contracts with the United States for improvements to be made by the contract company in the Ohio, Big Sandy, and Congaree rivers. One of these contracts was for the construction of a dam in Big Sandy river, Ky., another for the construction of a dam in the Congaree river, S. C., another for the construction of dam No. 3 in the Ohio river at Coraopolis, Ohio, and still another for the construction of dam No. 18 in the Ohio river near Parkersburg, W. Va. It was a requirement of each of the contracts with the government that the contract company should give a bond for the performance of the contract, and in compliance with this requirement the said company, with the United States Fidelity & Guaranty Company as surety, gave four bonds, one dated November 13, 1900, in the penalty of $50,000, for the construction of the dam in the Big Sandy river; another dated October 2, 1902, in the penalty of $30,000, for the construction of the dam in the Congaree river; another dated September 19, 1903, in the penalty of $50,000, for the construction of dam No. 3 in the Ohio river; and still another dated November 21, 1904, in the penalty of $90,000, for the construction of dam No. 18 in the Ohio river. The United States Fidelity & Guaranty Company is a Maryland corporation with its principal office in the city of Baltimore, where it is engaged in a fidelity, insurance, and surety business. In order to procure the United States Fidelity & Guaranty Company to become surety on the several bonds above mentioned, the contract company executed an agreement of indemnity in which it bound itself to indemnify the Fidelity & Guaranty Company against all loss, costs, damages, charges, and expenses whatever resulting from any of its acts, default, or negligence that the United States Fidelity & Guaranty Company might sustain or incur by reason of having executed said bonds or any continuation thereof. It was further a part of the indemnity agreement that, in the event the contract company was unable to complete or carry on the contracts, the said company would assign to the fidelity and guaranty company, and did assign, such plant as the contract company might own or have upon the work, and, in addition thereto, such vouchers or other evidence of payment of all costs and expenses whatever incurred by the fidelity and guaranty company in adjusting loss or in completing the contract. It was also a part of the agreement of indemnity that, in case of breach or default on the part of the contract company in any provisions of the contract, the fidelity and guaranty company should be subrogated to all the rights and properties as principal in the contract, and that

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep't Indexes 170 F.—44
deferred payments and any and all moneys and property due and payable to the contract company at the time of the breach or default, and that which thereafter became due and payable on account of the contract, should be credited upon any claim that might be made upon the fidelity and guaranty company by reason of being surety upon the bond. The conditions of each of the four bonds on which the fidelity and guaranty company was surety were the same, and as follows:

"Now, therefore, if the above bounden, the Evansville Contract Co., 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 Evansville Contract Company, to be observed and performed according to the true intent and meaning of the said contract, and as well during any period of extension of said contract that may be granted on the part of the United States as during the original term of the same and shall promptly make full payments to all persons supplying it labor or materials in the prosecution of the work provided for in said contract, then the above obligation shall be void and of no effect; otherwise to remain in full force and virtue."

The provision in the condition of the bonds in regard to the payment for labor and material is by virtue of Act Aug. 13, 1894, c. 280, 28 Stat. 272 (U. S. Comp. St. 1901, p. 2523), which reads as follows:

"That hereafter any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work or for repairs upon any public building or public work, shall be required before commencing such work to execute the usual penal bond, with good and sufficient sureties, with the additional obligations that such contractor or contractors shall promptly make payments to all persons supplying him or them labor and materials in the prosecution of the work provided for in such contract; and any person or persons making application therefor, and furnishing affidavit to the department under the direction of which said work is being, or has been, prosecuted, that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, shall be furnished with a certified copy of said contract and bond, upon which said person or persons supplying such labor and materials shall have a right of action, and shall be authorized to bring suit in the name of the United States for his or their use and benefit against said contractor and sureties and to prosecute the same to final judgment and execution: Provided, that such action and its prosecution shall involve the United States in no expense."

It may be stated also that it was a stipulation in each of the contracts with the government that the latter should retain a certain percentage of the contract price until the work was completed, and in case of default by the contractor the government had the right to take possession of the work and plant and prosecute the work to completion. After the contract company had entered into these several contracts with the United States and had given the bonds hereinbefore set forth, and after the work had been proceeded with to some extent, the contract company became largely involved in debt and unable to meet its obligations, and as a consequence, upon the petition of creditors the said contract company, was, by the District Court of the United States for the Northern District of West Virginia, adjudged a bankrupt on the 27th day of February, 1904. At a meeting of the creditors M. J. Bray, C. D. Doison, and Alfred Helne were chosen as trustees of the bankrupt. The creditors of the bankrupt then set about to make an arrangement by which the trustees of the bankrupt estate might complete the work under the contracts made by the contract company with the United States, but the fidelity and guaranty company objected to such arrangement, unless indemnity was provided by which it would be relieved from liability on the several bonds upon which it was surety. After some negotiations the following agreement was entered into between the United States Fidelity & Guaranty Company and the several banks named therein, to wit:

"Memorandum of agreement, made this eleventh day of April, 1904, between the United States Fidelity and Guaranty Company, a corporation under the laws of Maryland, of the first part, and the City National Bank of Evansville, Indiana, and the First National Bank of Evansville, Indiana, the Citi-
zens' National Bank of Evansville, Indiana, the Second National Bank of Parkersburg, West Virginia, and the Farmers' and Mechanics' National Bank of Parkersburg, West Virginia, the Farmers' Bank of Rockport, Indiana, the First National Bank of Rockport, Indiana, all being corporations, of the second part.

"Witnesseth, that upon the execution and delivery unto the party of the first part by the parties of the second part of a bond of the parties of the second part to indemnify and save harmless the said United States Fidelity and Guaranty Company, from all loss, charge, damage and liability heretofore accrued or hereafter accruing against it by reason of its suretyship or liability on four several bonds executed by the Evansville Contract Company to the government of the United States or to any of its proper officers on which the party of the first part herein is surety, which bond of indemnity shall be in the aggregate sum of seventy-five thousand ($75,000) dollars, and each of the parties of the second part herein is to be bound thereby to pay such proportion of said sum of seventy-five thousand ($75,000) dollars as the amount of its claim or indebtedness against the Evansville Contract Company bears to the total aggregate of such claims or indebtedness held by them respectively—then, upon the delivery of such bond duly executed the party of the first part herein covenants and agrees as follows:

"First. That the party of the first part will consent to the performance by the trustees appointed in bankruptcy in the District Court of the United States for the Northern District of West Virginia, for the estate and in the matter of the said Evansville Contract Company, bankrupt—of the contracts between the said Contract Company and the government of the United States or its officers in the said bond to be mentioned and set forth.

"Second. The party of the first part will consent to the payment to the said trustees of all moneys accrued and accruing under said contracts in the same manner and to the same extent that the said Evansville Contract Company would be entitled to receive the same if it had continued its business and had continued to perform the said contracts.

"Third. The party of the first part will consent that under the orders of the said bankrupt court the said trustees may borrow money and issue trustees' certificates therefor, to such an amount as the court may authorize, and that moneys so borrowed and certificates so issued may be made a first lien upon the assets of the said bankrupt, and the party of the first part agrees generally that it will make and execute such consents, papers and writings as may be required of it as surety by the government, to facilitate and to continue by the said trustees the performance of the business and contracts of said bankrupt and to enable the said trustees to proseute and to finish such contracts and to enjoy all benefits that may flow therefrom and from the performance thereof.

"Fourth. The party of the first part reserves the right and makes this contract with the understanding that it does not waive its right to collect the premiums on its several bonds as security for the Evansville Contract Company, and also reserves the right to take such measures as it may be advised for the collection of such premiums, if default is made in the payment thereof."

And thereupon the banks executed the following bond:

"Know all men by these presents: That we, the City National Bank of Evansville, Indiana, the Citizens' National Bank of Evansville, Indiana, the Second National Bank of Parkersburg, W. Va., the Farmers' & Mechanics' National Bank of Parkersburg, W. Va., the Farmers' Bank of Rockport, Indiana, the First National Bank of Rockport, Indiana, all being corporations, are held and bound unto the United States Fidelity and Guaranty Company, a corporation existing under the laws of the state of Maryland, in the aggregate sum of seventy-five thousand ($75,000) dollars, and each of the said obligors binds itself severally and not for any other person, to pay such proportion of said sum of seventy-five thousand ($75,000) dollars as the amount of its claim or indebtedness against the Evansville Contract Company bears to the total aggregate of such claims or indebtedness, as shown below.

"Sealed with our seals and dated this fourth day of April, 1904.

"The condition of the obligation is such that whereas, the Evansville Contract Company, a corporation under the laws of Indiana, and a debtor to
above obligors, has entered into four several contracts with the government
of the United States, through its appropriate officers, and the said Evansville
Contract Company has given bonds for the performance of said contracts
and for the payment of all persons supplying labor or materials in the pro-
secution of the work provided in said contracts, on each of which bonds, the
United States Fidelity and Guaranty Company, is surety, which bonds are
more particularly described as follows:

"(1) Bond executed September 19, 1903, in the penalty of fifty thousand
($50,000) dollars, covering contract for building dam No. 3 in the Ohio river
at Coraopolis, Pennsylvania.

"(2) Bond executed November 21, 1904, for ninety thousand ($90,000) dol-
lars, covering building of dam No. 18 in the Ohio river near Parkersburg, West
Virginia.

"(3) Bond executed October 2, 1902, for thirty thousand ($30,000) dollars,
covering building of dam in the Congaree river, at Columbia, South Carolina.

"(4) Bond executed November 13, 1900, for thirty thousand ($30,000) dol-
lars, covering building of dam No. 2 in Big Sandy river, Kentucky.

"A copy of each of said bonds is herewith filed as part hereof.

"And whereas, after the work had been commenced under each of said sev-
eral contracts, and partially completed, an order was made in the District
Court of the United States for the Northern District of West Virginia, on the
27th day of February, 1904, adjudging the Evansville Contract Company to be
a bankrupt, and

"Whereas, on the 15th day of March, 1904, M. J. Bray, Alfred Heine and
C. D. Dotson, were appointed trustees of the said Evansville Contract
Company, in bankruptcy, and

"Whereas, at a meeting of the creditors of said bankrupt, it was, on petition
of said trustees, ordered, among other things, that the trustees should be au-
thorized to conduct the business of the Evansville Contract Company and to
finish the contract theretofore undertaken by the said bankrupt, and for that
purpose to borrow money in amount not exceeding seventy-five thousand ($75,-
000) dollars, and to issue trustees' certificates therefor, and

"Whereas, the undersigned creditors of said bankrupt believe it to be to
the interest of the creditors that such contracts be finished by said trustees,
and that money be borrowed by the trustees according to the order or de-
cree of the bankrupt court, and the United States Fidelity and Guaranty
Company is unwilling that that course should be taken unless it be indemni-
"Now, therefore, if the above obligors shall and will in all respects indemni-
fy and save harmless the said United States Fidelity and Guaranty Company
from all loss, charge, damage, and liability heretofore accrued, or hereafter
accruing, against it by reason of its suretyship, or liability, on said bonds,
and on each of them, then this obligation is to be void; otherwise to remain in
full force and virtue."

The debt and claims referred to in this bond, for the purpose of reckoning
the proportion above mentioned, are as follows:

<table>
<thead>
<tr>
<th>Bank Name</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>The City National Bank of Evansville, Ind.</td>
<td>$ 5,000 00</td>
</tr>
<tr>
<td>The First National Bank of Evansville, Ind.</td>
<td>24,000 00</td>
</tr>
<tr>
<td>The Citizens' National Bank of Evansville, Ind.</td>
<td>24,000 00</td>
</tr>
<tr>
<td>The Farmers' &amp; Mechanics' National Bank of Parkersburg, W. Va.</td>
<td>20,000 00</td>
</tr>
<tr>
<td>The Second National Bank of Parkersburg, W. Va.</td>
<td>25,000 00</td>
</tr>
<tr>
<td>The Farmers' Bank of Rockport, Ind.</td>
<td>10,000 00</td>
</tr>
<tr>
<td>The First National Bank of Rockport, Ind.</td>
<td>7,000 00</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>$115,000 00</strong></td>
</tr>
</tbody>
</table>

In pursuance of the order made by the referee, the trustees took charge of
the work under the contracts which the contract company had with the
United States and prosecuted and completed the same, and received from the
government the contract price therefor. On or about the 19th of December,
1905, after the trustees had completed all of the contracts, had sold the bank-
rupt's property and collected all assets, they filed a report with the referee
that the amounts received from the government and from the sale of the plant and property of the bankrupt, after deducting disbursements, left the sum of $36,692.96, subject to allowance for cost of administration thereafter to be determined. It further appeared from the report that the operations of the trustees had not resulted in profit, and that the funds in their hands would not pay the debts. The funds belonging to the estate as above stated were deposited in the Second National Bank of Parkersburg, W. Va., and in the Farmers’ & Mechanics’ National Bank of Parkersburg, W. Va., one-half thereof being deposited in each of the said banks, where it still remains. In the course of the proceedings Helene, one of the trustees, died, Dotson, another trustee, resigned, and M. J. Bray was in March, 1906, appointed sole trustee of the bankrupt estate.

Jacob Eichel, a citizen and resident of Indiana, was president of the Evansville Contract Company, and, after the arrangement was entered into and the order made by the referee for the trustees to continue work under the contracts, said Eichel was employed to superintend the work, and acted in this capacity until the work was completed. A number of claims for material furnished to the contractor and for labor performed in the construction of the work under the government contracts, before the adjudication in bankruptcy, were presented to the referee, and he on November 19, 1904, entered a decree establishing the following as preferred claims in the distribution of the bankrupt’s estate:

<table>
<thead>
<tr>
<th>Company</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>D. A. Rardin, Athens, O.</td>
<td>$327.00</td>
</tr>
<tr>
<td>Duncan &amp; Porter Co., Allegheny, Pa.</td>
<td>460.00</td>
</tr>
<tr>
<td>Riter-Conley Co., Pittsburgh, Pa.</td>
<td>4,858.25</td>
</tr>
<tr>
<td>The Parkersburg Mill Co., Parkersburg, W. Va.</td>
<td>5,005.59</td>
</tr>
<tr>
<td>The Monongahela River Consolidated Coal &amp; Coke Co., Pittsburgh, Pa.</td>
<td>4,582.98</td>
</tr>
<tr>
<td>Pittsburg Trolley Pole Co., Pittsburg, Pa.</td>
<td>634.20</td>
</tr>
<tr>
<td>The Nicola Brothers Co.</td>
<td>1,139.77</td>
</tr>
<tr>
<td>C. D. Dotson, Parkersburg, W. Va.</td>
<td>2,054.08</td>
</tr>
<tr>
<td>C. C. Martin &amp; Co., Parkersburg, W. Va.</td>
<td>372.15</td>
</tr>
<tr>
<td>The Variety Iron Works, Cleveland, O.</td>
<td>7,348.00</td>
</tr>
<tr>
<td>E. L. Oles</td>
<td>148.20</td>
</tr>
<tr>
<td>Southeastern Lime &amp; Cement Co.</td>
<td>2,806.00</td>
</tr>
<tr>
<td>Clydesdale Stone Company, Pittsburgh, Pa.</td>
<td>6,185.85</td>
</tr>
<tr>
<td>Withers &amp; Van Devender, Parkersburg, W. Va.</td>
<td>3,000.00</td>
</tr>
<tr>
<td>E. K. Neale, Ben Lomond, W. Va.</td>
<td>1,045.50</td>
</tr>
<tr>
<td>Lombard Iron Works, Augusta, Ga.</td>
<td>2,107.82</td>
</tr>
</tbody>
</table>

The total amount of said claims, as will be seen, being... $42,164.89

On the 12th of December, 1904, Phillip W. Frey served notice upon M. J. Bray, the trustee, that he was the owner by assignment of all of the above-mentioned claims except one of $4,858.25 due to the Riter-Conley Company of Pittsburg, Pa., and directed the trustee to pay from the assets of the bankrupt in his hands certain notes given by the said Frey to the City National Bank of Evansville, Ind., to which the aforesaid claims were attached as collateral, and also to pay to the said bank one-half of the remainder due upon the said claims after the discharge of the notes aforesaid. It appears further from the record that, before the trustee had complied with this direction, Laura Eichel, the wife of Jacob Eichel, became the owner of the claims held by Bray, the total of which being $35,063.82, and that she bought the same at a discount, paying $27,037.39 therefor. In order to raise the money to purchase these claims, Laura Eichel borrowed from M. J. Bray $27,037.39, and gave a note to the said Bray for this amount on December 31, 1906, payable on demand at the City National Bank of Evansville, Ind., to bear interest at the rate of 3 per cent, payable semiannually, the said note being signed by the said Laura Eichel and her husband, Jacob Eichel. In connection with this transaction, it was agreed that, as the said Bray had furnished Laura Eichel the money to buy the claims and had loaned it to her at the low rate of 3 per cent. interest, he, the said Bray, was to retain one-half of the excess paid upon the said claims over and above the amount of the note which had been given to him for the money as above stated. It further appears in the record that on the
3d of February, 1906, the United States Fidelity & Guaranty Company, the complainant in the present action, filed a petition in the bankruptcy matter of the Evansville Contract Company pending in the District Court of the United States for the Northern District of West Virginia and before George W. Johnson, referee.

In this petition is recited in substance the execution of the several bonds as surety for the Evansville Contract Company for the performance of the contracts, together with the condition of the said bonds, also that petitioner believes that several persons have supplied labor and materials in the prosecution of the work provided for in each of the contracts, and that the holders and owners of claims on that account have proved the same in the bankruptcy matter, but that petitioner does not know the facts in regard thereto, nor the names of the holders of such claims, nor the amounts to which they are actually entitled constituting a liability on petitioner's bonds as surety. The petitioner also recites the agreement of indemnity referred to before made by the contract company in connection with the execution of the said bonds. It is further set out in the petition that the petitioner acquired a lien by the terms of the indemnity upon the plant and property of the bankrupt about each of the several works included in the contracts, and also a lien upon all funds and moneys earned by or arising from the said contracts in the hands of the government and due and owing under the said contracts; that each of these liens was in existence at the time of the adjudication in bankruptcy, and still continues as far as may be necessary for the indemnity of the petitioner upon any and all liabilities whatever arising upon each and all of said bonds. The petition proceeds further to allege that after the bankruptcy the agreement allowing the trustees to proceed with the work was made, and that in order to indemnify the petitioner against loss by reason of its suretyship the bond was executed by the banks, as before stated, and, further, that the trustees proceeded with the work and completed it, and that they had in hand as a net result of proceeds of the work and sale of the property in December, 1905, about $38,000. The petition further refers to the decree establishing the preference of claims for labor and material as hereinbefore set out, and says that petitioner does neither affirm nor deny the correctness of any one of said claims, and reserves the right to attack or defend against each and all of them, if so advised, in case any demand is made upon petitioner on account thereof or in case any recourse is sought by any of them upon your petitioner's bonds. The petitioner then insists that the whole amount of money in the hands of the court will not be sufficient to satisfy the claims of the class referred to, and that petitioner has a lien on all of said funds for its indemnity, and is advised that equity will protect such lien. The petition further alleges that petitioner is advised that it is entitled to intervene and assert the lien on the fund in the hands of the court and require that the fund in the court's hands shall be applied to the satisfaction of the debts and claims against the bankrupt for which the petitioner is liable, and that petitioner is also entitled to obtain the protection of the court for its right, and also for the protection of the several banks which signed the bond of indemnity. The prayer of the petition was that petitioner be permitted to file it, and that the trustees, together with the several banks named, be made parties defendant, and that the rights and lien of the petitioner be respected and enforced upon the funds in the hands of the trustees and under the control of the court; that the court ascertain what persons hold claims for materials furnished and labor performed in the prosecution of the several contracts, and what persons are entitled to enforce any liability upon any of the bonds executed by petitioner; that the court ascertain the amount of such claims, and cause the funds in the hands of the court to be applied upon such claims and in satisfaction thereof, etc.

About this time a man by the name of John G. Eigenmann filed notice with the trustees objecting to the order of the 19th of November, 1904, entered by the referee, preferring the claims for labor and materials, and the trustees filed their petition with the referee asking that the said decree be reopened, and that the claims theretofore preferred should be re-examined and the facts in regard thereto inquired into. Thereupon the referee, on the 12th day of February, 1906, entered an order that the said claims be re-ex-
BRAY V. UNITED STATES FIDELITY & GUARANTY CO. 695

amined, and instructed the trustees to file the necessary pleadings to raise the question as to whether or not the claims heretofore allowed are properly pre-
ferred claims, and for the re-examination and consideration of the said claims.
It appears, however, that on September 11, 1906, Eigenmann withdrew his op-
position to the preference of these claims in the distribution of the bankrupt
estate. About this time suits were brought upon a number of these claims in the
Circuit Court of the United States for the Western District of Pennsyl-
vania, and suits were brought upon others in the court of common pleas, Alle-
gheny county, Pa. These suits, all of which were brought under the provisions
of the second paragraph of the act of August 13, 1894, are styled as follows:

"United States of America, for Use of [here giving the name of the original
owner of the claim], Then for the Use of Phillip W. Frey, and Now for
the Use of Laura Etchel, v. United States Fidelity & Guaranty Company,
a Corporation."

These suits were pending in the Circuit Court of the United States for the
Western District of Pennsylvania and also in the state court aforesaid, and
some of them were at issue and ready for trial when on the 21st day of Sep-
ember, 1907, the United States Fidelity & Guaranty Company presented its
petition to the District Court of the United States for the Northern District
of West Virginia in the Matter of the Evansville Contract Company, Bank-
rupt, and moved the court to be allowed to file a bill (which accompanied the
petition) in the Circuit Court of the United States for the Northern District
of West Virginia against M. J. Bray and other persons named in the petition,
whereupon the said District Court on the said date made the following order:

"Upon consideration whereof it is ordered, adjudged and decreed that leave
and permission be and are granted unto the United States Fidelity & Guar-
anty Company to file such bill in the Circuit Court of the United States for
this district, and that the same shall not be deemed to be in contempt or
derogation of the powers and jurisdiction of this court, but rather as aux-
cillary thereto."

Thereupon on the 21st day of September, 1907, the United States Fidelity
& Guaranty Company filed on the equity side of the docket in the Circuit
Court of the United States for the Northern District of West Virginia a bill
of complaint which is the basis of the present controversy.

The bill sets out substantially many of the facts contained in the foregoing
statement, particularly that the contract company had entered into the four se-
veral contracts mentioned; the agreement of indemnity executed by said com-
pany to the complainant; the fact that complainant executed the several bonds
described and conditions thereof; that the contract company undertook the
work and failed, and was adjudged bankrupt; that the bond of indemnity
was given by the banks to complainant to the end that the trustees might
complete the work under the contracts; that the work was completed, and,
after receiving the price from the government and making a sale of the bank-
rupt's property, there was in the hands of the trustees about $33,000. Upon
this amount complainant claimed a first lien to the extent that it might
be liable for claims due for materials and labor furnished the contract com-
pany.

The bill further charges that complainant is informed that claims of this
character were outstanding at the time of bankruptcy to the amount of about
$40,000, but that all of said claims had been bought up by Phillip W. Frey,
the general counsel of the trustees in bankruptcy, and in conjunction with
M. J. Bray, trustee, and Jacob Etchel, and that the three persons named had
colluded and conspired together in violation of their fiduciary and trust re-
lations and had acquired these claims (the same being all the labor and ma-
terial claims due from the contract company, except two, one due the Riter-
Conley Company and the other due the Nicolle Lumber Company) at a
large discount, and that the said claims had, by showing which these parties
made before the referee upon the testimony of Jacob Etchel and Alfred
Heine, been adjudged as preferred in 'the distribution of the bankrupt's
estate.

The bill further charges that these three parties, namely, Frey, Bray, and
Etchel, had by conspiracy and collusion been instrumental in fixing the claims.
which they had bought as entitled to the first payment out of the assets of the bankrupt, etc.

The bill further charges that Laura Eichel was only a figurehead in the purchase of the claims, and that Jacob Eichel, Bray, and Frey were the parties really in interest. It is also stated in the bill that the Farmers' & Mechanics' National Bank and the Second National Bank of Parkersburg, W. Va., had sold their respective claims of $20,000 and $25,000 to Jacob Eichel at a large percentage of their face, etc.; that this sale affected the profits which were expected to accrue from the completion of the contracts by the trustees; also that Eichel had acquired in his own name, or that of his wife, the claims of all the other banks which executed the indemnity bond of April 4, 1904; that the First National Bank of Evansville had gone into liquidation, and that the security of the complainant on the indemnity bond is being endangered thereby, and that Eichel had agreed to indemnify the First National Bank and the Citizens' National Bank representing $48,000 of the $115,000 shown as the indebtedness of the contract company to the banks which signed the indemnity bond; that Bray had contracted to indemnify the First National Bank of Evansville against liability on the said bond; and that all of the banks which signed the bond had in some way been indemnified against liability except the Second National Bank and the Farmers' & Mechanics' National Bank of Parkersburg, W. Va.

The bill further charges that Bray, Frey, and Eichel purchased the material claims because of an understanding and combination as aforesaid, and at the time when they intended that the same would be paid first and in preference to all others. Also charges the pendency of the suits in the courts in Pennsylvania.

The complainant then insists that each of the banks named had the benefit of their contract, and each of them is bound and estopped to deny its proportion of liability according to the terms of the bond; that the net funds in the hands of the trustees after the payment of premiums due complainant and such unadjusted costs should first be applied to the satisfaction of whatever claims have the right of recourse against complainant as surety on the bonds of the contract company; that no claims held by M. J. Bray or Jacob Eichel or Laura Eichel, or by any agents, servant, or attorney of theirs, shall be paid in an amount in excess of the sum actually expended therefor.

In addition to these, the prayer of the bill is that an accounting be had to the end that the court may ascertain what claims are proper charges for material furnished under the contracts; that each of the banks which signed the bonds is interested in the application of the funds in the hands of the trustee for the satisfaction of the claims for which complainant is liable, and for that reason the said banks should be made parties defendant; that without the interference of the Circuit Court litigation and controversy with regard to the subject-matter of the bill would result in a multiplicity of suits and a grievous wrong and hardship to complainant; that the District Court in bankruptcy has not settled and adjusted any such matters, and has no jurisdiction or means to apply the requisite remedies to administer complete justice in one comprehensive suit, and that complainant is remediless without intervention of the Circuit Court, and therefore the further prayer is that the court take full jurisdiction of all the persons and parties and administer complete justice between them, that the writ of injunction be issued directed against Jacob Eichel, M. J. Bray, and Laura Eichel to enjoin them from instituting, prosecuting, or maintaining any action or suits before mentioned pending in the state or district of Pennsylvania, and from instituting any action or actions against complainant on account of any claim or claims arising out of its suretyship on any of the bonds given as surety for the contract company, and, further, that the complainant be relieved from all liability on the said bonds by the application of the funds in the hands of the trustee and by the parties to the contract of indemnity of April 4, 1904, and that complainant is entitled to all the rights and remedies that the parties hereto or any of them have against each other for indemnity or contributions.

The complainant made defendants in its bill M. J. Bray, trustee, Jacob Eichel, and Laura Eichel, all of whom are citizens and residents of the state.
of Indiana, the City National Bank of Evansville, Ind., the Citizens' National Bank of Evansville, Ind., the First National Bank of Evansville, Ind., the First National Bank of Rockport, Ind., all national banking associations located in the respective towns named, and being citizens and residents of the state of Indiana, the Second National Bank of Parkersburg, W. Va., the Farmers' & Mechanics' National Bank of Parkersburg, W. Va., banking associations under the laws of the United States located in the city of Parkersburg, W. Va., and citizens and residents of the state of West Virginia in the Northern district thereof; the Farmers' Bank of Rockport, Ind., a corporation under the laws of the state of Indiana, and as such a citizen and resident of the state of Indiana, the Riter-Conley Company, a Pennsylvania corporation doing business in the city of Pittsburgh, a citizen and resident of the state of Pennsylvania, and the Nicolette Lumber Company, a corporation under the laws of the state of West Virginia and a citizen and resident of the said state.

Upon the filing of complainant's bill a writ of subpoena was granted and a temporary restraining order was issued enjoining M. J. Bray, Jacob Eichel, and Laura Eichel from prosecuting any suit or action against the United States Fidelity & Guaranty Company upon any claims mentioned in the bill upon which suits had been brought in the court of common pleas, Allegheny county, Pa., or in the Circuit Court of the United States for the Western District of Pennsylvania, and from instituting any suit or action upon any such claims. The 19th of November, 1907, was designated by the court as the date for hearing the motion for permanent injunction. On the return day the defendants demurred to the bill. The demurrers were overruled, and the injunction against Bray, Jacob Eichel, and Laura Eichel was made permanent. Thereupon the defendants, with the exception of the Riter-Conley Company and the Nicolette Lumber Company above named, appealed to this court.

William M. Hall and J. A. Dupuy (V. B. Archer, on the briefs), for appellants.
B. M. Ambler (Van Winkle & Ambler, on the briefs), for appellees.

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

BOYD, District Judge (after stating the facts as above). The facts in this case are given at length and in detail to the end that the entire controversy between the parties may be clearly presented, and thus enable us to more readily determine such question of law as may be necessary to dispose of the appeal. Although there are many propositions discussed by counsel, we think the only question to be decided in order to dispose of the case here is that of jurisdiction, and it is our opinion that the Circuit Court did not have jurisdiction to entertain complainant's bill.

If otherwise complainant had the right to assert a lien upon the property of the bankrupt contract company, such right could not be availed of by a suit in the Circuit Court, the object of which was to reach and determine priorities in the distribution of assets in the custody of the bankrupt court. Practically the effect of complainant's suit in the Circuit Court is to stay proceedings in the matter of the Evansville Contract Company, bankrupt, in the District Court, and to undertake to determine priorities or preferences in an estate in the custody and control of the latter court. This the Circuit Court is not empowered to do, for the jurisdiction of the District Courts in bankruptcy in this respect is original and exclusive.
Complainant's counsel insist that, as the fund sought to be subject-
ted to the complainant's lien is within the territorial limits of the
district, jurisdiction of the Circuit Court therefore attaches; but this
fund which constitutes the res in this case is the estate of the bank-
r upt in the hands of the trustees, and in our opinion property or funds
in custodia legis under the orders and decrees of a court of competent
jurisdiction cannot be made the basis of jurisdiction in another court
in an effort to establish liens upon such fund or property or other-
wise deal with it. The District Court sitting in bankruptcy having
this entire fund in custody and having complete jurisdiction to admin-
ister it, the Circuit Court has no power by its decree or order to in-
terfere with it, nor is this want of power supplied by the order of
the District Court permitting complainant's bill to be filed, for, if the
Circuit Court was without jurisdiction, the District Court is not au-
thorized to confer it.

The bankruptcy act provides (Act July 1, 1898, c. 541, § 2, 30 Stat.
545, 546 [U. S. Comp. St. pp. 3420, 3421]), that:

"The District Courts of the United States * * * are hereby made courts
of bankruptcy, and are hereby invested, within their respective territorial
limits as now established, or as they may be hereafter changed, with such
jurisdiction at law and in equity as will enable them to exercise original
jurisdiction in bankruptcy proceedings, in vacation, in chambers and during
their respective terms, as they are now or may be hereafter held."

And, among the powers specifically mentioned, to—

"allow claims, disallow claims, reconsider allowed or disallowed, and to allow
or disallow them against bankrupt estates."

And in the section conferring specific power on the bankruptcy court
it is enacted:

"Nothing in this section contained shall be construed to deprive a court of
bankruptcy of any power it would possess were certain specific powers not
herein enumerated."

Mr. Loveland in his work on Bankruptcy (2d Ed.) p. 70, com-
menting on this last clause, says:

"It was evidently the intention of Congress to establish a complete system
of bankruptcy proceedings, and to confer on the courts of bankruptcy, con-
stituted by the act, special jurisdiction over the whole subject and extending
to all matters, acts and things to be done under and in virtue of bank-
r uptcy."

In view of the provisions of the bankrupt act and the decisions
which are many relating to its construction, the conclusion is irresist-
ible that it is the province of the bankrupt court to administer the
funds held by it in a proceeding in bankruptcy, and, as was said by
this court in New River Coal Land Company v. Ruffner Bros. (C.
C. A.) 165 Fed. 881:

"The powers of the District Court in bankruptcy are ample to adminis-
ter an estate with due regard to priorities or vested liens, and to protect all
interests in such estate, whether they be legal or equitable."

What was said by this court in that case is substantially a reitera-
tion of the law as laid down by the Supreme Court of the United

It is not necessary to consider any other of the various questions presented by the assignments of error and argued by counsel. Our opinion being that the Circuit Court was without jurisdiction, the demurrers to the bill should have been sustained. The refusal to do this was error, and it was also error to grant the injunction. The decree of the Circuit Court is therefore reversed, and the case will be remanded to the end that the injunction granted may be dissolved and complainant’s bill dismissed.

Reversed.

MAHR v. UNION PAC. R. CO.

(Circuit Court of Appeals, Ninth Circuit. May 17, 1900.)

No. 1,559.

RELEASE (§ 24*)—RIGHT TO CONTEST VALIDITY—NECESSITY OF RESTORING CONSIDERATION.

Where a plaintiff suing at law to recover damages seeks to avoid the effect of a settlement and release on the ground of his mental incapacity at the time the release was executed, conceding that he may raise such issue in an action at law, he must return or tender a return of the money received in settlement.

[Ed. Note.—For other cases, see Release, Cent. Dlg. § 45; Dec. Dlg. § 24.*]

In Error to the Circuit Court of the United States for the Southern Division of the Eastern District of Washington.

See, also, 140 Fed. 921.

The plaintiff in error brought suit to recover damages for personal injuries which he alleged he sustained at Lookout in the state of Wyoming on September 28, 1904, while being carried as a passenger on a freight train belonging to the defendant in error.

It appears that the plaintiff was being carried by defendant in a freight car under an agreement to transport and carry various articles of household furniture and domestic animals, together with plaintiff, from Denver, Colo., to Walla Walla, Wash.; that on September 27, 1904, the car in which plaintiff and his property were being carried was wrecked and the property damaged. The plaintiff and his property were thereupon transferred to another car, and on September 28th, when the freight train arrived at Lookout Station in the state of Wyoming, it entered upon a siding for the purpose of permitting the passage of an east-bound passenger train. While the freight train was on the siding the sliding door to the car in which plaintiff was being carried was open; after the passage of the east-bound passenger train the freight train started to move out and stopped for the closing of an open switch ahead. Plaintiff had gone to the open doorway of the car to speak to the conductor, and by reason of the sudden jar or jerk incident to the starting or stopping of the train the sliding door of the car closed and caught the plaintiff in the doorway, and he was injured about the head. He was taken to the Wyoming hospital at Rock Springs, arriving there on the evening of the day of the injury. On the 13th of October, 1904, he was discharged from the hospital, and he continued on his journey to the original point of destination near Walla Walla in the state of Washington.

The present suit was commenced on February 18, 1905. Defendant’s answer was filed on September 20, 1905, in which it was alleged that on October

*For other cases see same topic & § NUMBER in Dec. & Am. Dlgs. 1907 to date, & Rep’t Indexes
11, 1904, plaintiff's claim for the personal injuries alleged in the complaint had been compromised, settled, and paid for the sum of $50, and on the same day there had also been a settlement of plaintiff's claim for losses and damages to property and the payment of $50 on that account. Releases in accordance with the terms of settlement discharging the defendant from all liabilities therefor in each case were set up in the answer.

On October 2, 1905, plaintiff filed his reply, in which he alleged with respect to each of the releases set out in the answer that the instrument, release, or agreement therein set out was signed and executed by plaintiff, if signed and executed at all by plaintiff, while plaintiff was in the hospital suffering from injuries described in plaintiff's complaint, and that plaintiff was at said time on account of said injuries mentally incompetent to understand the nature or effect of said instrument; that plaintiff's mental condition was such as rendered him incapable of understanding, and he did not understand, the nature, effect, or contents of such instrument. Plaintiff admitted that he had received the sum of $50 from the defendant on account of the personal injuries sustained by him as alleged in the complaint.

In an amended reply filed June 6, 1906, the plaintiff denied the allegation of the answer relating to the compromise and settlement of plaintiff's claim, except he admitted "on or about the 11th day of October, 1904, defendant paid to plaintiff the sum of fifty (50) dollars, but plaintiff denies each and every other allegation in said paragraph contained." In this amended reply plaintiff alleges that he had offered to return to the defendant the sum of $50 so received by him, together with interest thereon, and had tendered the same to Lester S. Wilson, one of the attorneys for the defendant, and that said Wilson, on behalf of the defendant, had refused and declined to receive the same, and plaintiff tendered the same in court.

Upon the trial the evidence on the part of the plaintiff tended to show that the injuries he received were about the head; there were several bruises and cuts above the right ear; a perforation of the drum of the left ear, and as a result of such injuries there was a paralysis of the nerves and muscles of the left side of the face; an injury to the jaw so that the teeth did not approximate; lips partially paralyzed; inability to close his left eye; and when the plaintiff was received at the hospital at Rock Springs on the day of the injury he was in a dazed condition. The plaintiff testified that he knew nothing after the injury, and knew nothing about the settlement or execution of the release.

The evidence on the part of the defendant tended to show that, while the plaintiff appeared a little dazed and confused the first few days after he was received at the hospital, that condition soon passed away, and there was nothing to draw attention to him in any way, but what he was rational and knew what he was doing. After the first three or four days he had a perfect and clear understanding of what he was doing, and took care of himself without watching; he could go as he pleased.

It was in evidence that James B. McCracken, a claim adjuster, representing the defendant visited the plaintiff on October 11, 1904, in the hospital at Rock Springs, and took plaintiff's statement concerning the accident of September 27th, when plaintiff's property was damaged, and the accident of September 28th, when plaintiff himself was injured. Plaintiff at that time stated in detail and estimated the damage to his property at $95, and stated the injury to himself. This statement was introduced in evidence. The claim adjuster testified that in the negotiations between the plaintiff and himself for a settlement he stated to plaintiff that he thought the accident was due to plaintiff's own fault, and that he was not authorized to pay plaintiff, anything, but, if plaintiff had any proposition that he wished to submit to the railroad company, he would submit it,—telegraph it to the company to see if the company would make a payment—and plaintiff said that he thought the company ought to pay him $50 even if it was his own fault, and even if the company was not liable for his injuries to cover his lost time and expenses. The claim adjuster told plaintiff that he would communicate with the company and would come to the plaintiff later in the day and would tell him what the answer of the company was on the subject; he told plaintiff that he thought that it was too high for the damage to his horses, and thought he had overdrawn the damage; he did not think they were damaged more than $50, and plaintiff expressed a
willingness to accept $50 for the damage to his personal property; the damage to his personal property, and the damage the plaintiff was speaking of, was the accident that happened before the accident that caused plaintiff's injuries. After the conversation between the claim adjuster and plaintiff the former telegraphed to the company and received a message which authorized him to say to the plaintiff that the company would pay him $100, and authorized the adjuster to settle for the personal injury matter and issue to plaintiff a draft on the treasurer, which was done, and the $50 for the other matter would come in later in a voucher from the freight department; that the $100 was to pay for both the injury and the damage, for the moveables that were injured in the former accident, and the $50 for the personal injury of plaintiff that occurred later. After receiving the message from the company the claim adjuster went to the hospital and saw the plaintiff and told him the company would pay him the amount he had expressed a willingness to take—$50 for each of the accidents—and that he would give plaintiff that draft, and would prepare and make a voucher and release and order him a draft on the treasurer for the $50, and the freight matter would come in a separate voucher some time later, the claim adjuster did not handle the freight claim, and at that time the plaintiff executed a general form of release for his personal injuries, and was paid the $50 by draft and executed a voucher release.

The release was as follows:

"Received, Rock Springs, Wyo., Oct. 11 A. D. 1904, of Union Pacific Railroad Company, fifty no/100 dollars, in full payment of the above account.

"In consideration of the payment of said sum of money, I, Ernest Mahr, of College Place, in the county of Walla Walla and state of Washington, hereby remise, release, and forever discharge the said company, its operated, leased, controlled, and auxiliary lines and companies, of and from all manner of actions, cause of actions, suits, debts, and sums of money, dues, claims, and demands whatsoever, in law or equity, which I ever had or now have against said company or companies, by reason of any matter, cause or thing whatsoever, whether the same arose upon contract or upon tort from the beginning of the world to this day. In case the said sum of money is paid for or on account of any claim against any other company, or for or on account of any legal obligation or liability of any other company, or for or on account of sums of money, dues, claims and demands whatsoever in law or equity, which I ever had or now have against any such other company, I expressly admit and agree that said Union Pacific Railroad Company is fully authorized to make such payment for and on behalf of such other company, and to adjust and settle my claim against it, and I hereby remise, release and forever discharge the company for and on behalf of which the said sum of money is paid from all claims and demands whatsoever as hereinbefore more fully set forth.

"In testimony whereof, I have hereunto set my hand this 11th day of October, 1904.

Ernest Mahr.

"Witness: J. Edwards, M. D.

"Note:—The receipt at the bottom of this voucher must be dated and signed by the payee, or by his authorized agent, and the signature must be witnessed. When signed by an agent, the authority for doing so must be attached to the voucher or filed with this company.

"Stamped signature or signature in pencil will not be accepted.

"Should there be any mistake in the voucher, it should be returned to the local treasurer for correction.

"B. McCracken.

Ernest Mahr."

The house surgeon at the hospital, Dr. Edwards, was present when this settlement was made and was a witness to the release. He testified that plaintiff understood what he was signing when he signed the release.

At the conclusion of the evidence the defendant moved the court to instruct the jury to return a verdict for the defendant upon the grounds: First, that no negligence of the defendant had been shown with respect to the matters alleged in the complaint; second, that the plaintiff had been guilty of contributory negligence; third, that the evidence showed that if any liability rested on the defendant the same had been released; and, fourth, the evidence on the whole case entitled the defendant to a directed verdict. The court there-
upon directed the jury to return a verdict for the defendant, and a verdict was entered accordingly. The case comes to this court upon writ of error.

John H. McDonald and Otto B. Rupp, for plaintiff in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). The suit involves plaintiff's claim of damages for personal injuries and the validity of the settlement and release of that claim. The claim for loss and damage to plaintiff's property and the settlement and release of that claim is not a subject of controversy. The objection to the release of the claim of damages for personal injuries is that there was evidence on the part of the plaintiff tending to show that the release was executed by the plaintiff at a time when by reason of his injuries his mental condition was such that he was incapable of understanding, and he did not understand, the nature, effect, or contents of the instrument.

With respect to the settlement, payment, and release of the claim, no charge of fraud, mistake, misrepresentation, trick, artifice, or deceit on the part of the defendant or any of its agents or employés was alleged or proven. There was no evidence that plaintiff had brought suit in equity to set aside the release, nor was there any evidence offered in support of the allegation of plaintiff's amended reply that he had offered to return the money he had received in settlement of his claim, or that he tendered the same in court.

In Hartshorn v. Day, 19 How. 211, 222, 15 L. Ed. 605, the Supreme Court said:

"Evidence was given on the trial in the court below for the purpose of proving that the agreement of the 6th of September was procured from Chaffee by the fraudulent representations of Judson, which was objected to, but admitted.

"The general rule is that, in an action upon a sealed instrument in a court of law, failure of consideration, or fraud in the consideration, for the purpose of avoiding the obligation, is not admissible as between parties and privies to the deed; and, more especially, where there has been a part execution of the contract. The difficulties are in adjusting the rights and equities of the parties in a court of law: and hence, in the states where the two systems of jurisprudence prevail, of equity and the common law, a court of law refuses to open the question of fraud in the consideration, or in the transaction out of which the consideration arises, in a suit upon the sealed instrument, but turns the party over to a court of equity, where the instrument can be set aside upon such terms as, under all the circumstances, may be equitable and just between the parties. A court of law can hold no middle course; the question is limited to the validity or invalidity of the deed.

"Fraud in the execution of the instrument has always been admitted in a court of law, as where it has been misread, or some other fraud or imposition has been practiced upon the party in procuring his signature and seal. The fraud in this aspect goes to the question whether or not the instrument ever had any legal existence.

"It is said that fraud vitiates all contracts, and even records, which is doubtless true in a general sense. But it must be reached in some regular and authoritative mode; and this may depend upon the forum in which it is presented, and also upon the parties to the litigation."

In George v. Tate, 102 U. S. 564, 570, 26 L. Ed. 232, the action was at law upon a bond. The defendants set up a defense that they
were induced to sign the bond by false and fraudulent representations. The Supreme Court said:

"Proof of fraudulent representations by Myers & Green, beyond the recitals in the bond, to induce its execution by the plaintiff in error, was properly rejected.

"It is well settled that the only fraud permissible to be proved at law in these cases is fraud touching the execution of the instrument, such as misreading, the surreptitious substitution of one paper for another, or obtaining by some other trick or device an instrument which the party did not intend to give. Hartshorn v. Day, 19 How. 211, 15 L. Ed. 605; Osterhout v. Shoemaker and Others, 3 Hill (N. Y.) 513; Belden v. Davies, 2 Hall (N. Y.) 433; Franchot v. Leach, 5 Cow. (N. Y.) 506. The remedy is by a direct proceeding to avoid the instrument. Irving v. Humphrey, 1 Hopk. Ch. (N. Y.) 284."

In Union Pacific Railway Co. v. Harris, 158 U. S. 326, 15 Sup. Ct. 843, 39 L. Ed. 1003, the action was brought by a passenger to recover damages from the railway company for injuries caused by a collision with a freight car which had escaped from the side track and run upon the main track, so that when the train upon which plaintiff was a passenger came along on the main track it ran into the freight car and the injuries complained of were inflicted. The defendant in its answer denied all negligence, and in a supplemental answer set up a written release in bar of the action, executed four days after the accident. To this supplemental answer a replication was filed averring, as ground of avoidance of such release, that plaintiff's mind at the time of its execution was so enfeebled by opiates, shock, and pain that he was unable to enter into contractual relations; that the minds of the parties never met on the principal subject embraced in the release, namely, the damages for which the action was brought; and that the release was obtained through misrepresentation and fraud. The defendant moved the court to instruct the jury that upon the evidence the release was a complete bar to the action, which instruction the court declined to give, and defendant excepted. With respect to this motion, the Supreme Court of the United States said:

"As there was evidence tending to sustain plaintiff's contention in relation to the validity of the release, the instruction was properly refused."

In Wagner v. National Ins. Co., 90 Fed. 395, 33 C. C. A. 121, Judge Taft, speaking for the Circuit Court of Appeals for the Sixth Circuit, refers to this case as approving the practice that a release can be avoided in a suit at law by replication, in which plaintiff sets up fraud in the procurement of the release. Judge Taft makes the further observation "that probably, on the evidence brought out in that case, a replication of non est factum might have been supported." But the feature of that case to be noticed here is that plaintiff had set up in his replication that the release had been obtained through misrepresentation and fraud, and there was evidence tending to sustain the replication.

In the present case there was no such issue, and no evidence tending to support such an issue, but plaintiff's amended reply was in the nature of a plea of non est factum, possibly because of Judge Taft's observation in the Wagner Case, and this plea was set up for the obvious purpose of avoiding a suit in equity to set aside the release.
Assuming that it had that effect, notwithstanding the absence of mistake, misrepresentation, or fraud, did it also have the effect of relieving the plaintiff of the necessity of repaying or tendering to the defendant the money received in the supposed settlement, and for which the release was executed?

In the Harris Case the trial court charged the jury that if they made any allowance to the plaintiff they should deduct from it what he had received. It is contended by the plaintiff in error that this instruction, which was approved by the affirmance of the judgment in the Supreme Court, is authority for the plaintiff’s right to maintain this action without returning or tendering the return of the money he received in settlement of his claim. But it appears from the Harris Case in the Circuit Court of Appeals as reported in 63 Fed. 800, 12 C. C. A. 598, and in the Supreme Court, 158 U. S. 326, 15 Sup. Ct. 843, 39 L. Ed. 1003, and in a subsequent reference to the case in Texas Ry. Co. v. Dashiell, 198 U. S. 521, 529, 25 Sup. Ct. 737, 49 L. Ed. 1150, that the question of tender was not raised or considered in either of the appellate courts. In 158 U. S. 326, 330, 15 Sup. Ct. 843, 844, 39 L. Ed. 1003, the Chief Justice said, “Upon the issues joined the validity of the release was a matter to be left to the jury;” and on page 333, of 158 U. S., on page 845, of 15 Sup. Ct. (39 L. Ed. 1003), the Chief Justice said further:

“To various parts of the charge defendant excepted, but we deem it unnecessary to go over these exceptions in detail, as the charge as a whole was in accordance with the great weight of authority upon the subject, and was correct upon the issues joined and the evidence thereon.”

In Texas & Pacific Ry. Co. v. Dashiell, 198 U. S. 521, 529, 25 Sup. Ct. 737, 740, 49 L. Ed. 1150, the court again refers to the Harris Case in the following language:

“A written release was set up in bar of an action for damages against the railway company. Several defenses were made to the release, among others, ‘that the minds of the parties never met on the principal subject embraced in the release, namely, the damages for which the action was brought.’ This defense was complicated in the instructions of the court with the defenses of fraud and mental incompetency to understand the terms and extent of the release, and it is difficult to make satisfactory extracts from the charge of the trial court. Enough, however, appears to show that the court submitted to the jury the fact of mistake of injuries received as bearing on the effect of the release, and this action was affirmed by this court."

It is clear from these references that all the Supreme Court decided in the Harris Case was that upon the issues joined (which did not include the question of tender) the evidence was sufficient to go to the jury.

In Hill v. Northern Pacific Railway Co., 113 Fed. 914, 51 C. C. A. 544, this court held that it was unnecessary in that case to decide whether the question of fraud leading up to and inducing the execution of a release might be inquired into and determined in an action at law in a federal court, for the reason that, conceding that it might be, good faith and fair dealing would require the plaintiff, as a condition precedent to the presentation and maintenance of such an issue, to return or offer to return the money received in consideration of the release.
In Price v. Connors, 146 Fed. 503, 77 C. C. A. 17, the action was for damages for personal injury sustained as a result of a gunshot wound. The defendants to the action set up as an affirmative defense in their answer that the plaintiff, for and in consideration of the sum of $500 paid to him by them, had released and discharged them from all liability for the alleged cause of action. In plaintiff's reply he alleged that if such a release was in existence it was obtained by the defendants collusively acting together for the purpose of cheating and defrauding the plaintiff out of his rights, and by taking advantage of plaintiff while he was intoxicated to such an extent as to be wholly unfit for the transaction of any business. In the trial court the jury was instructed, in effect, that, if a person who has been injured by the negligent act of another is fraudulently induced to sign a release for the damages sustained and accept a sum of money in settlement thereof, such release will not operate as a bar to the prosecution for damages to recover for such injury, and it would not be necessary that plaintiff should tender back the money so received or repay the sum to the defendant, but the jury should, in case they return a verdict for the plaintiff, deduct such sum from the damage assessed. This latter instruction was held to be error by this court, reaffirming the doctrine of Hill v. Northern Pacific Railway Co., supra. We see no reason why the plaintiff would not be held to the same rule in the present case. Indeed, plaintiff's amended reply appears to have been framed under the impression that such was the law, but, failing in proof, he now seeks to justify his action upon the authority of cases that have not been followed by this court.

There are numerous cases sustaining the rule that, where a person suing to recover damages seeks to ignore a previous settlement and release on the ground that the settlement was affected and the release obtained by mistake, imposition, or fraud, he must return or tender a return of the money received before he can maintain an action at law. The following recent cases are in point: Lyons v. Allen, 11 App. Cas. (D. C.) 543; Drohan v. L. S. & M. S. Ry. Co., 162 Mass. 435, 38 N. E. 1116; Gibson v. Western New York & P. R. Co., 164 Pa. 142, 30 Atl. 308, 44 Am. St. Rep. 586; Strodder v. Stone Mountain Granite Co., 94 Ga. 626, 19 S. E. 1022; Morris v. Great Northern Ry. Co., 67 Minn. 74, 69 N. W. 628; Och v. Mo., Kan. & Texas R. Co., 130 Mo. 27, 31 S. W. 962, 36 L. R. A. 442; Niederhauser v. Detroit Citizens' St. Ry. Co., 131 Mich. 550, 91 N. W. 1028; Highlands v. Cumberland Valley Farmers' Mut. Ins. Co., 203 Pa. 134, 52 Atl. 130; Louisville & N. R. Co. v. McElroy, 100 Ky. 153, 37 S. W. 844; Lomax v. Southwest Missouri Electric R. Co., 119 Mo. App. 192, 95 S. W. 945.

The judgment of the Circuit Court is affirmed.

170 F. 45
GILBERT TRANSP. CO. v. BORDEN.
(Circuit Court of Appeals, First Circuit. May 28, 1909.)

No. 787.


A provision in a charter party for "customary dispatch" in discharging has reference to the local custom at the port of discharge.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 43.*
For other definitions, see Words and Phrases, vol. 2, p. 1806.
Quick dispatch, see note to Harrison v. Smith, 14 C. C. A. 657; Randall Sprague, 21 C. C. A. 342.]

2. Shipping (§ 172*)—Demurrage—Right of Consignee to Designate Wharf for Discharging—Awaiting Turn to Discharge.

The consignee of a cargo of lumber who had a wharf in connection with his lumber yard had the right to require the vessel to discharge at such wharf without liability for demurrage because of delay in awaiting her turn, where the charter party provided for "customary dispatch" in discharging and the custom of the port required her to await her turn without demurrage.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 172.*

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

Robert E. Goodwin (Eugene P. Carver and Carver, Wardner & Goodwin, on the brief), for appellant.

Richard P. Borden (Slade & Borden, on the brief), for appellee.

Before COLT, PUTNAM, and LOWELL, Circuit Judges.

LOWELL, Circuit Judge. This was a libel for the demurrage at Fall River of the schooner William L. Walker, which had brought a cargo of lumber to that place. She was under charter for a voyage—"from Brunswick, Georgia, to Philadelphia, New York, or good Sound port. One port only for discharging, orders on signing bills lading. * * * It is agreed that at the rate of not less than forty thousand (40M) feet per running day (Sundays and legal holidays excepted) shall be allowed for loading commencing from the time the captain or agent reports vessel ready and prepared to receive cargo, and customary dispatch for discharging."

As stated by the learned District Judge:

"The schooner arrived at Fall River June 10th, was ready to discharge, and so reported to the claimant on June 11th. Not until June 20th was a discharging berth at the wharf assigned to her. She went into it on that day, began discharging June 21st, and finished July 3d. In the assignment of a berth, she had her turn with other vessels, bringing cargoes deliverable to the claimant, whose arrivals had preceded hers. Between June 11th and June 20th she was awaiting her turn, while such other vessels were being discharged, and that part of her detention was caused by the fact that she was obliged thus to await her turn."

It is agreed that the customary rate of discharging pine lumber at Fall River from a schooner like the Walker, after she is once in the discharging berth, is 35,000 feet per day.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
The libellant contends (1) that the words "customary dispatch" negative any custom at Fall River that vessels shall await their turn without reimbursement for the delay thus caused; (2) that the custom of Fall River, even if applicable, excludes this delay; (3) that upon any interpretation of the charter party the claimant unreasonably delayed the discharge of the Walker by requiring her to await her turn at its wharf instead of sending her to some other wharf in Fall River.

1. The libellant agreed to accept customary dispatch, i.e., dispatch according to custom. As there is no degree of dispatch for the discharge of lumber customary generally without regard to place, it follows that the custom referred to in the charter party is necessarily local in the port of discharge, in this case the port of Fall River. An agreement for "dispatch," without qualification, may exclude waiting turn. Keen v. Audenried, Fed. Cas. No. 7,639. But the word "customary" must be given its fair meaning by way of qualification. Postl-thewaite v. Freeland, L. R. 5 App. Cas. 621; Hulthen v. Stewart (1903) A. C. 389; Smith v. Yellow Pine Lumber Co. (D. C.) 2 Fed. 396; Lindsay v. Cusimano (C. C.) 12 Fed. 504. We are thus referred to the custom of the port of Fall River. The libellant contended that this construction of the words "customary dispatch" made them without any effect. In their absence, the custom of the port would fix the rate of discharge. But the charter party fixes the rate of loading, irrespective of custom, and a reference to the custom of the port in fixing the rate of discharge was natural, even if unnecessary. Scrutton on Charter Parties (6th Ed.) p. 259. The custom of Fall River is controlling.

2. There is some conflict of testimony concerning the custom of Fall River as affecting a vessel awaiting her turn. This evidence is stated and reviewed in the opinion of the learned District Judge, and we agree with his conclusion. The custom of Fall River requires a vessel like the Walker to await her turn.

3. The consignee was a lumber dealer whose yard appears to have been connected with his wharf. Upon the evidence it is at least doubtful if there was any other wharf in Fall River generally suitable for the discharge of the Walker's cargo. But even if such a wharf existed, the consignee could not reasonably be expected to accept delivery at a wharf from which the lumber must be hauled to his lumber yard for a considerable distance and at very considerable expense. Under ordinary circumstances it had the right to require the Walker to await her turn at its own wharf. Niver Coal Co. v. Cheronia, 142 Fed. 402, 406, 73 C. C. A. 502, 506, 5 L. R. A. (N. S.) 126, and cases cited. There we observed:

"The same series of decisions has also established the further proposition that, aside from any peculiar custom, the consignee has a right, to a certain extent, to select a particular wharf or berth for discharge of the vessel, although that berth or wharf may be occupied when the vessel is ready to unload, for that reason delaying her; and this, not only under charter parties like those now before us containing the words 'as ordered,' but also where neither these words nor an equivalent expression are found. This is not only the settled law in England, but it is the apparent law in the United States."

The decree of the District Court is affirmed, and the appellee recovers his costs of appeal.
NOTE.—The following is the opinion of Dodge, District Judge, in the court below:

DODGE, District Judge. Libel for demurrage. The libelant's schooner William L. Walker brought this lumber from Brunswick, Ga., to Fall River, Mass., under a bill of lading dated May 4, 1907, in which Robert R. Sizer & Co. of New York are the shippers named, and by the terms of which the lumber was to be delivered at the port of Fall River to them or assigns, "he or they paying freight for the said lumber, with all conditions as per charter party." The charter party thus referred to is dated April 2, 1907, at New York. It is between Sizer & Co. and the schooner's agent, and it contains the following provisions regarding demurrage:

"It is agreed that at the rate of not less than forty thousand feet per running day (Sundays and legal holidays excepted) shall be allowed for loading, commencing from the time the captain or agent reports vessel ready and prepared to receive cargo, and customary dispatch for discharging. If to New York under the rules of the Maritime Exchange of the port of New York. And that for each and every day's detention by default of the said party of the second part or agent, $56 per day, day by day, shall be paid," etc.

The voyage agreed upon was to be from Brunswick to "Philadelphia, New York, or good Sound port." The bill of lading agreeing to deliver the cargo at Fall River appears to have been signed by the master without objection, and neither party has contended here that Fall River is not to be considered a "good Sound port" for the purposes of the case.

Sizer & Co. assigned the bill of lading to the claimant in this case, who carries on business at Fall River as Cook, Borden & Co. The claimant accepted it at an exchange. He occupies a wharf in that part of which cargoes of lumber consigned to Cook, Borden & Co. are received. The schooner arrived at Fall River June 10th, was ready to discharge, and so reported to the claimant on June 11th. Not until June 20th was a discharging berth at the wharf assigned to her. She went into it on that day, began discharging June 21st, and finished July 3d. In the assignment of a berth, she had her turn with other vessels bringing cargoes deliverable to the claimant, whose arrivals had preceded hers. Between June 11th and June 20th she was awaiting her turn, while such other vessels were being discharged, and that part of her detention was caused by the fact that she was obliged thus to await her turn. Once in the discharging berth, it is not claimed that the rate at which her cargo was thereafter received (an average of 35,000 feet per day at least) was less than "customary."

If the charter party conditions entitled the schooner upon her arrival to no quicker "dispatch" in discharging than was given her as above stated, no demurrage is recoverable. But if, as the libelant contends, "customary dispatch" meant that the agreed time for discharge was to include 24 hours after report for providing her with a berth, and one day thereafter for every 35,000 feet of her cargo—not counting Sundays or holidays—and that it was to expire at the end of the period so reckoned, the agreed time expired June 24th, and eight days' demurrage at the charter rate are due, in all §48.

If the language of the charter party had been that the vessel should have "dispatch" or "prompt dispatch" or "quick dispatch" in discharging, the consignee would have been obliged to provide a berth for the vessel upon her arrival at which she would not have to wait for her turn, and he would have been liable for delay caused by his failure to do so. Under an agreement for "dispatch," the consignee has no right to select a wharf already fully occupied, but is bound to receive the cargo as soon as the vessel is ready to deliver it. Keep v. Audenried, 5 Ben. 535, Fed. Cas. No. 7,659; Sleeper v. Pulg, 10 Ben. 151, Fed. Cas. No. 12,940, affirmed on appeal, 17 Blatchf. 36, Fed. Cas. No. 12,941. A fortiori, when "prompt dispatch" or "quick dispatch" has been promised. Davis v. Wallace, 3 Cliff. 123, Fed. Cas. No. 3,657; Thacher v. Boston Gaslight Co., 2 Lowell, 361, Fed. Cas. No. 13,850; Ten Thousand and Eighty-Two Oak Ties (D. C.) 87 Fed. 935.

An agreement for "customary dispatch," however, while it excludes customs allowing the consignee, though able to receive, to postpone doing so simply for his own advantage, may allow delays not allowable under agreements of the kinds above referred to, and may include delay through customs
of the port which he cannot control, such as the time allowed for finding a berth, or the order in which vessels are to come to the wharf. Smith v. Yellow Pine Lumber (D. C.) 2 Fed. 396; Lindsay v. Cusimano (D. C.) 10 Fed. 302, affirmed on appeal (C. C.) 12 Fed. 503; Milburn v. 55,000 Boxes of Oranges, 57 Fed. 236, 6 C. C. A. 317.

Both parties have impliedly recognized Fall River as one of the "good Sound ports" at which the cargo was to be discharged according to the charter party. A custom, therefore, of good Sound ports in general, so well established that the parties can be presumed to have contracted in view of it, requiring consignees to provide a discharging berth within 24 hours after report, would settle the meaning of "customary dispatch" for the purposes of this case. The burden is on the libelant to show the existence of such a custom.

It claims to derive some assistance in doing so from the fact that "customary dispatch" as it stands in this charter party forms part of a clause which purports to regulate with some care the time to be allowed for loading and for discharging, and to do this in connection with an agreement that the charterer shall pay at a fixed rate for delay caused by his default beyond the time allowed. But, while the clause referred to obliges the charterer to load within a time capable of being definitely ascertained by calculation, it contains no more specific provision as to the time within which he must discharge than is contained in the words "customary dispatch for discharging"; and there is strong authority for holding that agreements for usual or customary dispatch are not sufficient to bind the charterer to any fixed time, not even to the time usually occupied under ordinary circumstances, but that they leave him excuse for delays due to circumstances not within his control. Carver, Carriage by Sea (4th Ed.) § 614; Hulthen v. Stewart (1903) A. C. 389, there cited.

The charterer relies also on the fact that the same clause contains an agreement that the rules of the Maritime Exchange of New York are to govern, if that port is selected as the port of discharge. What those rules provide regarding the discharge of lumber from southern ports appears from Bowen v. Sizer (D. C.) 93 Fed. 227; Randolph v. Wiley (D. C.) 118 Fed. 77; Smith v. Sizer (D. C.) 134 Fed. 328. By rule 4 the consignee has one calendar day after report in which to provide a berth, and by rule 5 one running day is allowed thereafter for each 25, 30 or 35 M feet of cargo, according to the kind of lumber composing it. But in Randolph v. Wiley it was said that the provisions of these rules were not shown to have become the custom of New York, though sometimes used as a guide (118 Fed. 80); and in Smith v. Sizer it was held that an agreement for discharge at New York "as customary" could not be construed as making the rules applicable. Even if the rules could be taken as expressing the custom of New York, and whatever the difficulty of supposing that the parties intended to have the discharge within the time fixed by them if made there, but within a time otherwise fixed or not definitely fixed at all if made elsewhere—the fact that the charter party terms do provide a method of limiting the time at New York, but leave it to be fixed only by "custom" elsewhere, renders it impossible to say that the charter party in any way recognizes the New York rules or the New York custom as the standard for other ports.

The libelant has sought to prove the custom of Sound ports and of Fall River to be as it claims by the evidence of witnesses familiar with the business of chartering vessels to bring cargoes of southern lumber to those ports and to other northern ports. The evidence has not seemed to me sufficient for the purpose. I think it shows at most that cargoes are frequently carried to those ports under agreements that the vessel shall be discharged substantially in accordance with the New York rules, or, in other words, in accordance with what the libelant claims to be the custom. I do not think it goes far enough to establish the existence of such a custom at those ports in the sense necessary to warrant the finding that it is what this charter party means by "customary dispatch.

The claimant's evidence, on the other hand, was that the custom of Fall River requires vessels to wait their turn in discharging. The facts appear to be that the claimant is the only concern there having a wharf at which lumber cargoes brought in vessels not belonging to the occupant are received. At the claimant's wharf cargoes of lumber have been for several years received,
vessels bringing them have been required to discharge, in turn, and no demurrage has been paid for delay so caused. These facts at least prevent the finding that the custom at Fall River is as the libelant contends, and, as above held, no custom of Sound ports has been proved which might be regarded as adopted when the vessel was loaded for Fall River under this charter party. It further appeared that no other wharf in Fall River to which the vessel might have been ordered upon her arrival was provided with facilities for the discharge of such a cargo. It is true that "customary dispatch" in a general port like New York is held to refer to the general customs of the port, and not to the special usage of the charterer in his business, or his special means of dispatching a ship. See Eleven Hundred Tons of Coal (C. C.) 12 Fed. 185, 187. But what is the rule when, as in that case (in which demurrage was claimed for delay in loading), there were no usages to which the charterer could refer except those of the shipper? It was said that the agreement to load according to the custom of the port referred to the shipper's usages, or to nothing. So here as to the usages of the consignee.

It was urged on the libelant's behalf that it is to be presumed that "customary dispatch" was intended to secure to the vessel something more than the right to discharge in her turn, to which she would be in any case entitled, even if the charter party and bill of lading had contained no stipulations at all relating to her discharge, as in Bartlett v. Cargo of Lumber (D. C.) 41 Fed. 50; Bellatty v. Curtis (D. C.) 41 Fed. 479; The Viola (D. C.) 90 Fed. 750. Under some circumstances I think such a presumption might be held to exist, and might be entitled to some weight. See Crowley v. Hurd (decided in this court, July 13, 1900) 172 Fed. 122. But in this case the agreement for customary dispatch does not stand as part of an express agreement in regard to "lay days for discharging," and there is no evidence tending to show that any custom whereby the time for discharge can be definitely fixed has ever been recognized by the consignee as applicable to this contract. In the absence of any such evidence and of sufficient proof that the custom asserted by the libelant is so far the custom of New York, or of the Sound ports generally, that both parties can be held on that ground to have adopted it, I am unable, whatever the force of the presumption referred to, to hold that the meaning of "customary dispatch" contended for was the meaning of their agreement. In order to make it certain that the vessel is not to be held to await her turn in ports where the practice of discharge in turn is followed, she should insist upon an express agreement for discharge according to the rules of the New York Maritime Exchange, or within the time which they allow.

The libel must therefore be dismissed, with costs. In view of this result, there is no occasion to consider the other grounds of defense relied on by the claimant, or the claim of damage to the cargo set up in the answer by way of recoupment.

MILLER et al. v. MARGERIE.

(Circuit Court of Appeals, Ninth Circuit. May 23, 1900.)

No. 1,692.

JUDGMENT (§ 570*)—JUDGMENTS OPERATIVE AS BAR—JUDGMENT ON DEMURRER—DEFECTIVE PLEADING.

A decree dismissing a suit in equity on demurrer on the ground that the bill failed to allege essential facts is not one on the merits, and cannot be pleaded in bar to the cause of action stated by an amended bill, which supplies such omissions.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1028–1045; Dec. Dig. § 570.]

Appeal from the District Court of the United States for Division No. 1 of the District of Alaska.

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
E. M. Barnes, for appellants.
Malony & Cobb, for appellee.

Before GILBERT and ROSS, Circuit Judges, and HUNT, District Judge.

HUNT, District Judge. In 1906 complainants instituted an action in equity in the District Court of Alaska, wherein they prayed for a decree adjudging defendant to hold lot 4, block B, of the town of Juneau, in trust for complainants. General relief was also asked. The bill alleged that a trustee of the town site of Juneau was duly appointed under the provisions of an act of Congress approved March 3, 1891 (26 Stat. 1099, c. 561, § 11), entitled "An act to repeal timber culture laws and for other purposes." U. S. Comp. St. 1901, p. 1487. It also alleged that exclusive possession of the lot was in complainants and their grantors from 1885 until a time thereafter named in the bill, and that in May, 1903, "defendant falsely and fraudulently, and without intent to impose upon said trustee," represented to him "that he, the defendant, and his grantors were the owners of, and in possession of, and entitled to the possession of, said lot on the 13th day of October, 1903, ever since had been and then were such owners, and were at all times in the possession of said lot; that said trustee did on the ______ day of May, 1903, at his office in Juneau, Alaska, actually hear and determine on said false statements as aforesaid the said questions of said occupancy and ownership of said lot," and acting under the belief that such statements so made were true made a deed of the lot involved to defendant. Complainants then set up that neither of the complainants "had any knowledge of said hearing, or any opportunity to learn of said hearing, or any opportunity to deny said false statements, or any part thereof, or to prove said statements, or any part thereof, false, at any time or place."

Defendant demurred generally, setting forth that the bill failed to show how or by what means complainants were prevented from having knowledge of the hearing before the trustee of the town site, and that it failed to show that such want of knowledge or opportunity to be heard before the trustee was induced or caused by defendant. The trial court sustained the demurrer and rendered judgment, dismissing the action. Complainants appealed, and the decree was affirmed. Miller et al. v. Margerie, 149 Fed. 694, 79 C. C. A. 382. In a discussion of the bill, Judge De Haven cited the section of the Act of Congress referred to, and which relates to the disposition of lots by a town site trustee in Alaska, and said:

"There is no allegation in the bill that the trustee failed to give the notice required by the regulations of the Secretary of the Interior, or, if such notice was given, that the failure of the complainants to be informed thereof and to appear before the trustee with their proofs was the result of fraudulent conduct upon the part of the defendant, or of some accidental cause which would be recognized by a court of equity as sufficient ground upon which to hold that they ought not to be concluded by the action of the trustee in conveying the lot in controversy to defendant. The demurrer directed specific attention to these defects in the bill, and was properly sustained. It is not sufficient to allege generally that the complainants did not have knowledge of the hearing before the trustee, or opportunity to.
prove that the representations made by the defendant to the trustee in obtaining the legal title to the lot described in the bill were false; but the particular facts and circumstances which prevented them from having notice of the proceedings and opportunity to protect their rights should be set out in the bill, so as to enable the court to determine from the facts so alleged whether the complainants show themselves to have been prevented by fraud or accident from appearing before the trustee and establishing their right to acquire title to the lot which is the subject of controversy in this action."

Complainants thereafter filed an amended bill in the lower court, seeking to cure the omissions in the original bill and to meet the views expressed by this court. To the amended bill defendant filed his answer, pleading, among other defenses, res judicata, setting up the former judgment of the court upon the demurrer. Complainants then demurred to that part of the answer containing the plea of res judicata. The District Court overruled the demurrer and gave complainants 10 days to reply. Complainants elected to stand upon the demurrer, whereupon judgment of dismissal was entered against complainants. Complainants have appealed, and argue that the lower court erred in sustaining the plea of res judicata.

The former decision of this court was confined to the question of the sufficiency of the complainants' bill. It was not held as a matter of law that, if there had been no notice at all given by the trustee of a time when he would hear and determine the respective claims of complainants and defendant to the lot in question, as was required by the regulations of the Secretary of the Interior (12 Land Dec. Dep. Int. 583), and that if failure to give such notice was the result of acts amounting to deception and fraudulent conduct upon the part of defendant, and that if complainants in fact never knew of the claims of the defendant, and because of lack of any knowledge and notice of any claim to the lots by defendant had no opportunity to prove that certain representations of fact which were made by the defendant to the trustee were false, and were made with intention to deceive the trustee of the town site and to defraud complainants of their rights to the lot involved, and did deceive him and did injure complainants, and that but for such fraud and deception and for lack of knowledge and opportunity to be heard the trustee would not have made a deed to complainants to the lot, there could be no recovery against defendant.

These are the matters, however, which complainants now set forth, in addition to all that was pleaded in the former bill. They now allege that defendant's representations of continuous possession on and after October, 1893, not only were wholly false, and were made to impose upon the trustee and to induce him to make a deed, but that they were wrongfully made to withhold from these complainants any knowledge of the hearing required to be had by law of the claim of defendant to the property. It is also expressly averred that the trustee fixed no time or place for hearing any claims of either of plaintiffs or defendant to said lot, that he gave no notice whatsoever, gave no opportunity to plaintiffs, or either of them, to present their interest in and to said lot, or any part thereof, in accordance with any principle of law or equity applicable to said case or hearing, or at all, observed no rules whatsoever for contests before registers and receivers of the local land
offices, printed or published no notice, whatsoever, all owing to the false and fraudulent statements of this defendant.

The further plea is that the trustee heard and determined the matter upon the alleged false and fraudulent statements made by defendant, and that neither of the complainants, by reason of the matters set forth, had any knowledge of the hearing or any opportunity to deny or to prove at any time or place the falsity of the alleged statements of the defendant, and that plaintiffs had no knowledge of any claim whatsoever by defendant to the lot in controversy until after the trustee had issued patent therefor. It is also pleaded that at all times mentioned in the bill the evidences of complainants' titles were duly recorded in the United States commissioner's (ex officio recorder's) office at Juneau, and that therefore the trustee "at all the times of said claim to said lots being so made by said defendant well knew of plaintiffs' claim thereto, and that plaintiffs and defendant each claimed said lot," and that defendant solely by the alleged false and fraudulent statements obtained title to the said lot.

Considering these averments, the bill filed in the present suit fairly supplies the principal defects in the original bill, and the lower court ought to have sustained the demurrer to the plea of res judicata. While a judgment upon a demurrer may be and often is a judgment on the merits, and is wholly conclusive, yet, as we have seen, the former judgment herein did not go to the real merits of the question that complainants tried to present. They failed only because their pleading did not allege all essential facts. Analogy is found between such a defective pleading and a case where there has been a judgment of nonsuit. A party may go to trial and establish some facts, but does not establish all that are necessary to make a prima facie case. Nonsuit is granted. A new action is begun by a complaint that is good. Defendant cannot plead the judgment of nonsuit as a bar to the second action, for the decision on the first trial has gone no farther than to hold that the plaintiff failed to prove some one or more facts essential to his recovery. So in a judgment rendered as a consequence of sustaining a demurrer, where there has been an insufficient pleading as in the present case, complainant may supply the omissions of his bill by a good pleading, just as plaintiff was permitted to make sufficient proof where he had failed before. Freeman on Judgments, § 267; Black on Judgments, § 707.

In Gilman v. Rives, 35 U. S. 298, 9 L. Ed. 432, the Supreme Court, through Justice Story, held that:

"A judgment that a declaration is bad in substance (which alone, and not matter of form is the ground of a general demurrer) can never be pleaded as a bar to a good declaration for the same cause of action. The judgment is in no just sense a judgment upon the merits."

In Gould v. Evansville, etc., R. R. Co., 91 U. S. 526, 23 L. Ed. 416, the Supreme Court deduced these rules from the authorities:

"(1) That a judgment rendered upon demurrer to the declaration, or to a material pleading, setting forth the facts, is equally conclusive of the matters confessed by the demurrer as a verdict finding the same facts would be, since the matters in controversy are established in the former case, as well as in the latter, by matter of record, and the rule is that facts thus
established can never after be contested between the same parties or those in privity with them. (2) That if judgment is rendered for the defendant on demurrer to the declaration, or to a material pleading in chief, the plaintiff can never after maintain against the same defendant, or his privies, any similar or concurrent action for the same cause upon the same grounds as were disclosed in the first declaration, for the reason that the judgment upon such a demurrer determines the merits of the cause, and a final judgment deciding the right must put an end to the dispute, else the litigation would be endless. Rex v. Kingston, 20 State Trials, 583; Hutchin v. Campbell, 2 W. Bl. 831; Clearwater v. Meredith, 1 Wall. 43, 17 L. Ed. 604; Gould on Plead. § 42; Ricardo v. Garcia, 12 Cl. & Fin. 400. Support to those propositions is found everywhere; but it is equally well settled that, if the plaintiff fails on demurrer in his first action from the omission of an essential allegation in his declaration which is fully supplied in the second suit, the judgment in the first suit is no bar to the second, although the respective actions were instituted to enforce the same right, for the reason that the merits of the case, as disclosed in the second declaration, were not heard and decided in the first action. Aurora City v. West, 7 Wall. 90, 19 L. Ed. 42; Gilman v. Rives, 10 Pet. 298, 9 L. Ed. 432; Richardson v. Barton, 24 How. 188, 16 L. Ed. 625."

In Cromwell v. County of Sac, 94 U. S. 351–364, 24 L. Ed. 195, it was said:

"Allegations of an essential character may be omitted in the first declaration and be supplied in the second, in which event the judgment on demurrer in the first suit is not a bar to the second, for the reason that the merits of the cause as disclosed in the second declaration were not heard and decided in the first action. Gilman v. Rives, 10 Pet. 298, 9 L. Ed. 432; Richardson v. Barton, 24 How. 188, 16 L. Ed. 625; Aurora City v. West, 7 Wall. 90, 19 L. Ed. 42." Bissell v. Spring Valley Township, 124 U. S. 223, 8 Sup. Ct. 495, 31 L. Ed. 411; City of North Muskegon v. Clark, 62 Fed. 694, 10 C. C. A. 591; Spicer v. United States, 5 Ct. Cl. 34; O'Hara v. Parker, 27 Or. 156, 39 Pac. 1004.

In Alabama, etc., Ry. Co. v. McCrearren, 75 Miss. 687, 23 South. 423, 876, where plaintiff sued in tort, it was contended that a plea of res judicata would lie where plaintiff after declining to amend her complaint, and after appeal to the Supreme Court of the state, sought to prosecute her amended complaint for the same injury; but the court well said:

"There is no merit whatever in this contention, for it is, in effect, this, viz.: That no one can appeal from the judgment of an inferior court upon the insufficiency of a pleading to this court without being held subject to the penalty of having awarded against him final judgment, if the insufficiency of the pleading shall be affirmed by us. We do not so understand the law. In our opinion, one may appeal from an unfavorable judgment on his pleading, and the risk taken is that of having a cost bill to pay, and not that of having final judgment upon the merits of the controversy ineffectually sought to be presented by a bad plea pronounced against him, if the appellate court shall concur in the unfavorable judgment appealed from."

Tested by the principles upheld in the authorities cited, which are not in conflict with Lindsley v. Union Silver Star Mining Co., 115 Fed. 46, 52 C. C. A. 640, our conclusion is that the matter put directly in issue now is not the same that was put in issue in the former suit, and that the merits of the controversy as disclosed in the last bill were not considered or decided in the first case. It follows that, inasmuch as the judgment pleaded was not a bar to this suit, the court erred in entering judgment for the defendant.
COHEN v. UNITED STATES.

The judgment is reversed, and the cause is remanded to the District Court for the District of Alaska, Division No. 1, with directions to proceed in accordance with the views herein expressed.

COHEN v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. May 5, 1900.)

No. 835.

BANKRUPTCY (§ 495*)—OFFENSES AGAINST BANKRUPTCY LAWS—EVIDENCE.

In the prosecution of a bankrupt for concealing property from his trustee, the schedules filed by him are not admissible in evidence against him, being within the provision of Rev. St. § 860 (U. S. Comp. St. 1901, p. 661), that no pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding, shall be given in evidence in any criminal proceeding.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 495.*]

In Error to the District Court of the United States for the District of South Carolina.

F. L. Willcox (Henry E. Davis, Walter H. Wells, and Willcox & Willcox, on briefs), for plaintiff in error.


Before GOFF and FRITCHARD, Circuit Judges, and MORRIS, District Judge.

GOFF, Circuit Judge. The plaintiff in error was indicted for knowingly and fraudulently concealing certain personal property belonging to his estate as a bankrupt, which should have been returned and delivered to his trustee in bankruptcy. On trial duly had, he was convicted and sentenced to imprisonment for the term of six months. The assignments of error relate to the admission during the trial of certain evidence offered by the district attorney for the consideration of the jury.

Over the objection of the plaintiff in error, the court below permitted the defendant in error to offer in evidence the schedules attached to the voluntary petition which had been filed by him in bankruptcy. These schedules were objected to, on the insistence that under the bankrupt law no testimony of the bankrupt is admissible against him in a criminal proceeding, and that, as the schedules constituted such testimony given by him, they came within the exemption of said law, and on the further ground that they constituted evidence obtained from the plaintiff in error by means of a judicial proceeding, and therefore, by virtue of section 860 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 661), were inadmissible.

The bankrupt act requires the bankrupt to submit to an examination concerning the conduct of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and all other matters which may affect

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep's Indexes
the administration and settlement of his estate, but provides that no testimony given by him shall be offered in evidence against him in any criminal proceeding. It requires him to prepare, make oath to, and file with his petition a schedule of his property, showing the amount and kind thereof. Section 860 of the Revised Statutes reads as follows:

“No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture: Provided, that this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid.”

It was necessary for the defendant in error, in order to prove the allegations of the indictment, to show that certain property mentioned in the indictment was at one time in the possession of and owned by the plaintiff in error and that thereafter it was by him concealed from his trustee. For the purpose of doing this the schedules in bankruptcy were introduced. The bankrupt act, recognizing the well-established rule that admissions of a party obtained by force, threats, or duress, or by judicial proceedings, should not be used against him, provided that the testimony given by him in the proceedings connected with his bankruptcy should not be used as evidence in any criminal case against him. No one can be compelled to testify against himself. The immunity referred to is in accordance with the provisions of the fifth amendment to the Constitution of the United States, and with it should have a liberal construction. By that amendment all citizens of the United States are given immunity from self-incrimination, and, independent of the legislation mentioned, this constitutional provision makes it contrary to the principles of our government to convict any one of crime by compelling the production of his private books and papers, or by resorting to the use of discoveries founded on his oath, required of him in judicial proceedings.

Whatever the rule may be in the criminal courts of the states of the Union, concerning which it may be conceded there is conflict, certainly it must be admitted that in the federal courts the exemption from compulsory self-incrimination is secured by the Constitution of the United States. The language used in section 7, subd. 9, of the bankrupt act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 548 [U. S. Comp. St. 1901, p. 3425]), “but no testimony given by him shall be offered in evidence against him in any criminal proceeding,” is simply the recognition of the fact that the law requires the bankrupt to give his testimony in the proceedings by which he petitions for his discharge, and having thus forced him to testify, or to forego the benefits of the law, it proceeds to provide the immunity usual under such circumstances. The words we have quoted are not to be held as modifying or rendering inapplicable the provisions of said section 860 to cases of this character. Rather are they in aid of that section, and even if the contention of the district attorney that the immunity granted in the bankrupt act was only intended to apply to the oral testimony of the bankrupt could be sustained, nevertheless said section 860
would prevent the use of the bankrupt's schedules in a criminal prosecution. This question was in substance considered and decided in the Circuit Court of Appeals, First Circuit, in Johnson v. United States, 163 Fed. 30, 89 C. C. A. 508, 18 L. R. A. (N. S.) 1194; Mr. Justice Holmes speaking for the court, and holding that the schedules in bankruptcy are protected by Rev. St. § 860, and that it was error to admit them in evidence in a criminal prosecution.

In the case we now consider, the schedules were used by the prosecution for the purpose of showing that the property described in them was returned by the accused as all of the property owned by him at the time of the filing of his petition in bankruptcy, thereby tending to show, in connection with other testimony offered to prove his ownership of other property, an intent on his part to aid in the concealment charged in the indictment. Such evidence was not only within the prohibition of the provisions of the bankrupt act, but was contrary to the exemption afforded by the Revised Statutes quoted, which is even more comprehensive than the constitutional guarantee we have referred to. The schedules should not have been considered by the jury, and, while it is not for us to determine as to their force and effect relative to the different counts of the indictment, still we can properly say that in the light of the other evidence found in the record the jury must have been greatly impressed by the information they furnished.

It becomes unnecessary to consider the other assignments of error. The judgment complained of will be reversed, the verdict of the jury will be set aside, and the cause remanded for such further proceedings as may be proper.

Reversed.

NORTHERN LUMBER & FIBRE CO. v. PAQUETTE.

(Circuit Court of Appeals, First Circuit. May 27, 1909.)

No. 808.

MASTER AND SERVANT (§§ 288, 289)—MASTER'S LIABILITY FOR INJURY TO SERVANT—ACTIONS—QUESTIONS FOR JURY.

Where plaintiff, a young man 21 years old, who had never worked with machinery, was set to work in defendant's pulp mill, without instructions or warning, to operate a machine for taking the bark from logs and slabs which he was required to hold against the cutting knives of a rapidly revolving disk, and lost some of his fingers by their coming in contact with the knives owing to the "jumping" of a slab, which was liable to occur at intervals because of knots in the slabs, but which he had not before seen, the questions of his assumption of risk and contributory negligence were properly submitted to the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1068-1132; Dec. Dig. §§ 288, 289.]

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

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
Merrill Shurtleff (Drew, Jordan, Shurtleff & Morris, on the brief), for plaintiff in error.
Henry F. Hollis, for defendant in error.

Before COLT, PUTNAM, and LOWELL, Circuit Judges.

LOWELL, Circuit Judge. The defendant in error, hereinafter called the plaintiff, sued the plaintiff in error, hereinafter called the defendant, to recover for injuries received in the defendant's pulp mill while he was operating a machine called a "barker." This was used to remove the bark from logs and slabs. Four knives were set radially upon a circular disk projecting slightly from its surface; the disk made from 1,000 to 1,200 revolutions a minute. The side of the log or slab carrying the bark was pressed against the revolving disk so that the knives removed the bark and, to some extent, smoothed the surface of the log or slab.

The plaintiff was 21 years old. He came from a farm to the defendant's pulp mill about two weeks before the accident. He had been a logger in the woods, but had not before worked on machinery. During these two weeks he had been "lugging wood to use into the stove," "feeding the rack," and "cutting slabs" on a circular saw. Two or three times before the accident he had worked on the barker without difficulty from three-quarters of an hour to an hour. In the middle of the night he was roused from his bed by the night boss, and was set to work on the barker. About two hours later he barked a slab which still carried the spikes formerly driven into it. The sparks flew, and the knives were dulled. There was evidence tending to show that slabs having knots in them "jumped" more than others when held against the barker; also that the jumping was greater when the knives were dull. The operator was then compelled to increase his pressure on the slab against the disk. The jumping was generally away from the barker against the operator's pressure, but, two or three hours after the plaintiff's encountering the nails, a slab which he was pressing against the barker was thrown violently from the disk, his hands came in contact with the knives, and he lost three or four fingers. There was evidence that this more violent jumping occurred infrequently, once or twice a week. The plaintiff had never seen it, and testified that he had not been warned about it. The defendant asked the court to direct a verdict in its favor. The learned judge refused, and the defendant duly excepted. The jury found a verdict for the plaintiff, and the defendant brought this writ of error.

In this court the defendant rested its case upon the plaintiff's alleged assumption of the risk involved in the operation of the barker, and his alleged contributory negligence.

But the plaintiff had little experience of machinery, and had worked but little upon the machine in question when he was aroused at midnight, five or six hours before the accident happened. That the barker was in some respects dangerous he knew; that logs and slabs did not always lie quiet against the revolving disk his experience had proved. He found himself compelled to hold them there by the ex-
ercise of some force, but the evidence warranted the jury in finding that he did not know, when the dulled knives came in contact with knots or like obstacles, that the slab would occasionally be flung from the barker with great and extraordinary force beyond his strength to hold the slab in place, so that the protection given his hands by the slab might be suddenly removed and his fingers cut off. This danger called for a warning, and there was evidence that no warning had been given. Under all these circumstances, we are not able to say that the learned judge of the court below erred in submitting to the jury, under instructions otherwise unobjectionable, the question of the plaintiff's assumption of risk and contributory negligence. Exceptions overruled.

The judgment of the Circuit Court is affirmed, and the defendant in error recovers his costs in this court.

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In re KORONSKY.

(Circuit Court of Appeals, Second Circuit. May 19, 1909.)

No. 267.


A fine imposed by a state court of New York for contempt, committed by willfully presenting to the court false affidavits, is not a debt which is released by a discharge in bankruptcy under Bankr. Act July 1, 1898, c. 541, § 17a, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3428), and a court of bankruptcy will not stay proceedings against the bankrupt for its enforcement.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 649–654; Dec. Dig. § 391.*]

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

This cause comes here upon petition to revise and reverse an order made in the bankruptcy court, Southern district of New York. The order sought to be revised was entered upon notice; it denied a motion to vacate a prior order of the same court, made ex parte, enjoining further proceedings for the enforcement of a contempt order of the City Court of the City of New York fining the bankrupt $1,759.46.


Allen & Sabine (Yorke Allen, of counsel), for petitioner.

Horace London, for respondent.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. It is manifest from the record that the particular contempt of which Koronsky was found guilty and for which he was fined was a deceit practiced upon the court. Having been served with summons and complaint, he failed to appear or answer, and, when judgment was entered against him by default, mov-
ed to vacate the same on the ground that he had never been served. This motion was made on perjurious affidavits, including his own. The original order in the City Court has since been affirmed by the Appellate Term. Manifestly the offense was one peculiarly against the court, and of the sort where the punishment of the offender is a vindication of the dignity of the court; it does not lose that character because the statute authorizes the court to turn over the amount of the fine when collected to some person pecuniarily aggrieved by the offender's conduct. See Spalding v. New York, 4 How. (U. S.) 21, 11 L. Ed. 858, where it was held that fines for such offenses are not dischargeable under Bankr. Act Aug. 19, 1841, c. 9, 5 Stat. 440, the language of which is substantially like that of the present act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]).

The District Judge apparently felt himself constrained to the conclusion that the Spalding Case did not apply, in view of the express terms of sections 8 and 14 of the New York Code of Civil Procedure; which Code was passed long subsequent to the making of the order which was reviewed in that case. Apparently his attention was not called to the fact that the statute law of the state when Spalding was punished contained provisions in all important respects the same as those now in force. In 2 Rev. St. N. Y. (3d Ed.) pt. 3, c. 3, tit. 2, art. 1, § 10, will be found the original of section 8 of the Code, and in part 3, c. 8, tit. 13, § 1, will be found the original of section 14 of the Code.

As to offenses against a court of the nature of a contempt, we are unable to appreciate any distinction in character between the willful disobedience of a court's mandate and the endeavor to deceive the court by false testimony willfully given by the offender; if any there be, the latter is the more offensive.

The state court should be left free to enforce the penalty it has imposed.

Order reversed.
IN RE HALL.

(District Court S. D. New York. June 7, 1902.)

BANKRUPTCY (§ 391*)—STAY OF PROCEEDINGS AGAINST BANKRUPT—"DISCHARGEABLE DEBTS"—FINE FOR CONTEMPT.

A fine imposed on a bankrupt, although after the filing of the petition against him, by a state court for a criminal contempt is not a dischargeable debt under Bankr. Act July 1, 1898, c. 541, § 17a, 30 Stat. 559 (U. S. Comp. St. 1901, p. 3428), and proceedings for its enforcement will not be stayed by the court of bankruptcy, if the contempt have itself occurred prior to the filing of the petition.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 649–654; Dec. Dig. § 391.*]

In Bankruptcy. On motion to vacate stay.

Louis J. Rosett, for bankrupt.

James Foster Milliken, for judgment creditor.

HAND, District Judge. In re Koronsky (C. C. A.) 170 Fed. 719, governs this case, although it is true that the contempt there preceded the filing of the petition. That makes no difference, because though the stay would prevent any further steps from being taken in the action, yet if, prior to the stay, the bankrupt had actually disobeyed the order of the court, his punishment must be entirely for the court. It can make no difference that the court has not fixed this punishment prior to the stay itself.

It is also true that in the case at bar the attorney may have been in contempt for moving the bankrupt's punishment, but this is not a motion to punish him for disobedience of that order. I do not think, therefore, that the case at bar is distinguishable.

The bankrupt asserts, however, that he permitted the order punishing him to be entered, because he relied upon the stay, that he had a good excuse for failing to obey the order of the state court, and that he should not now, having acted in reliance upon the order of this court, be deprived of its protection. The matter is one of jurisdiction, and this court cannot retain jurisdiction, even in the interests of equity. No doubt, if the facts are as the bankrupt asserts in his papers, the state court will give him a fair hearing upon a motion to reopen that order, but whether it does or not can make no difference in the disposition of this motion, for I cannot assume an improper jurisdiction in order to prevent the chance of another court's dealing unfairly with the bankrupt. I must assume that the state court is quite as able to consider his excuse as the court of bankruptcy, and he will without doubt be able to get from that court such modification of its order as in justice he should. He has lost nothing by the lapse of time, since an appeal would have been quite fruitless, and his only effective course is to reopen the order, which course is still free to him.

The motion for a reargument is granted, and the stay is vacated in so far as it forbids the creditor Montgomery from proceeding to enforce the punishment of the bankrupt for contempt of the order of the state court.

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

170 F.—46
(Circuit Court, E. D. Pennsylvania. June 14, 1909.)

No. 522.

MASTER AND SERVANT (§ 236*)—MASTER’S LIABILITY FOR INJURY TO SERVANT—
CONTRIBUTORY NEGLIGENCE—RAILROAD TRACKS.

Plaintiff, a track laborer on defendant’s railroad, at about quitting time
for the day, was directed by his foreman to gather up some coats and
tools which were across the tracks, and when recrossing and walking be-
tween the rails was struck from behind by an engine and injured. The
engine was moving slowly, and plaintiff could have seen it. Held that,
being in a place of known danger, with nothing to prevent him from us-
ing his senses for his protection, he was not justified in relying on the
foreman or the trainmen to give him warning, but was guilty of con-
tributory negligence as matter of law, which precluded his recovery, con-
ceding the negligence of defendant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 723-
742; Dec. Dig. § 236.*]

At Law. On motion to strike off nonsuit.
See, also, 166 Fed. 378.
John J. McDevitt, Jr., for plaintiff.
Wm. Clarke Mason, for defendant.

Holland, District Judge. The plaintiff in this case was a laborer
employed by the defendant, and was engaged at work as a member of a
gang of trackmen upon the right of way of the defendant company.
At the time of the injury he was at some distance from the other mem-
bers of his gang picking up tools along the track, and walking with
his back toward the engine which struck him. The case had been
tried before Judge McPherson at the preceding term and a compul-
sory nonsuit entered on substantially the same testimony which the
plaintiff submitted in this trial. The evidence here is given more in
detail, but there are no new facts introduced to relieve the plaintiff
of the contributory negligence of which Judge McPherson held he
was guilty. In that case it was considered unimportant to construe
the Pennsylvania employer’s liability act of June 10, 1907 (P. L. 523),
or to consider the fellow servant rule as modified by the previous
warnings given by the foreman to the men in his gang. From the
following it will appear clearly upon what ground the court granted
the nonsuit at the former trial:

“My reason for holding that this statute is not now controlling, and that
any modification of the fellow servant rule that may be due to the previous
warnings given by the foreman is equally ineffective, is based upon what I
regard as an inevitable conclusion from the testimony, namely, the plaintiff
is chargeable with contributory negligence. If this be true, neither the stat-
ute nor the modified rule above referred to will avail to support a recovery.
The facts are few and clearly established. The plaintiff had been working
all day with other laborers upon the tracks of the defendant company. With-
in a few minutes of 6 o’clock he was directed by the foreman to cease the
work he had been doing, and in preparation for quitting to cross the tracks
for the purpose of fetching some coats that had apparently been laid along-
side the railroad, and also to look about for loose tools. He crossed the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep’r Indexes
tracks in safety, picked up a coat or two, stepped again upon the tracks to recross them, and while walking between the rails was struck by an engine whose appearance and approach he did not observe. The engine gave no signal, and the foreman gave no warning, and for present purposes I assume that the company was negligent. Nevertheless, I think that the nonsuit was properly entered, because the plaintiff's contributory negligence seems to be clear. He was no longer engaged in the work upon the tracks, where he may have been entitled to expect that the foreman would look out for his safety and would give warning of the approach of danger. His faculties were no longer employed upon that labor, which might fairly be regarded as so absorbing that he could not properly be asked to care for himself. He was simply walking in a place of known and obvious danger; but he was free to look and listen for the approach of a train or an engine, and, if he had exercised the commonest precaution in this respect, the injury could not have been inflicted. The engine was not moving rapidly. It had come a very short distance, and could not possibly have gained much speed; but he had left wholly unguarded the quarter from which it approached, for his back was turned toward that direction, although he was walking between the rails and was necessarily liable to be struck by a moving car or engine. These are the brief and simple facts, and to my mind they witness so positively to the contributory negligence of the plaintiff that to state them seems to be sufficient. Plainly, if he had done no more than turn his head to look along the tracks before he undertook to cross them, he could not have helped seeing the engine only a few yards away. If he looked and saw it, he was reckless in turning his back upon it without making sure that it was not moving or about to move. If he did not look at all, he was certainly negligent in blindly taking the risk of being able to use the tracks with safety. There was nothing about the act in which he was engaged that prevented him from turning his head or using his eyes, and I see no escape from the conclusion that his deplorable injury was due to his own failure to employ such elementary care as the situation obviously required."

The evidence offered at this trial is substantially the same, and what was said in the opinion on the motion to take off the nonsuit in the former case is applicable to the facts established here; and for the reasons there stated the motion in this case is overruled.

LESHER et al. v. RADEL.
(Circuit Court, D. Rhode Island. June 8, 1909.)
No. 2,693.
ATTORNEY AND CLIENT (§ 99)—RECEIVING PAYMENT OF JUDGMENT—AUTHORITY TO DISCHARGE JUDGMENT.
An attorney, who has recovered a money judgment in favor of his client, has general authority to receive money, or a certified check, which is the equivalent of money, in payment of the judgment, and to satisfy the same of record, but has no right, without express authority, to accept as part payment outstanding notes of his client held by the defendant; and where he does so, and satisfies the judgment, the satisfaction will to that extent be set aside on motion of the plaintiff and on return of such notes.
[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 200, 201; Dec. Dig. § 99.]
Authority of attorney after judgment, see note to Brown v. Arnold, 67 C. C. A. 130.

On Motion to Set Aside Satisfaction of Judgment.

*For other cases see same topic & $ NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
William H. Thornley, Peter G. Gerry, and Gardner, Pirce & Thornley, for plaintiffs.
T. F. I. McDonnell, for defendant.

BROWN, District Judge. This is a motion to set aside an entry of satisfaction of judgment.

The judgment was for the sum of $16,651.31. The attorneys for the plaintiff received in payment of this judgment the sum of $12,833.31 by certified check, and for the balance, $3,818, they accepted two notes of Thomas M. Lesher, dated respectively September 17, 1901, and January 15, 1889, allowing interest thereon.

It seems well settled that an attorney of record, by virtue of his general authority, has the right to receive the amount due on judgment and satisfy the judgment. It also seems clear that he has no right, without the express authority of his client, to receive individual notes in satisfaction of the judgment. Upon a money judgment he is, by virtue of his general authority, entitled to receive money, but not to recognize as valid, or as the equivalent of money, outstanding notes of his client held by the judgment debtor.

So far as the entry of satisfaction of judgment was based upon these notes, with interest thereon, it was unauthorized. I am of the opinion, however, that the receipt of the sum of $12,833.31, in the form of a certified check on the Old National Bank of Providence, was a money payment which the attorney, under his general authority, might receive.

In support of the motion it is urged that under his general powers the attorney had no authority to effect a compromise of his client's claim, and it is contended that in this case the attorney entered into an agreement of compromise without authority. The facts in this case fail to show that any attempt was made by the attorney to compromise the plaintiff's claim to the full amount of the judgment. There was no dispute as to the amount of the judgment, nor as to its validity.

In Fire Insurance Company v. Wickham, 141 U. S. 564, 577, 12 Sup. Ct. 84, 87, 35 L. Ed. 860, it was said:

"If there be a bona fide dispute as to the amount due, such dispute may be the subject of a compromise and payment of a certain sum as a satisfaction of the entire claim; but where the larger sum is admitted to be due, or the circumstances of the case show that there was no good reason to doubt that it was due, the release of the whole upon payment of a part will not be treated as a compromise, but will be treated as without consideration and void."


The transaction lacks all the elements of a compromise. Throughout the judgment was treated as a liquidated amount due from the defendant, which was to be paid in full. The notes which the attorneys accepted in payment were taken at their face value, with interest. Neither claim was diminished, and the validity or amount of the judgment was not in question. The simple fact is that the attorneys received the plaintiff's notes at their face value as the equivalent of cash. This they had no authority to do; and under the circumstances develop-
ed by the evidence upon the oral hearing of the motion the validity of
these notes is by no means free from doubt.
I am of the opinion that the entry of satisfaction of judgment should
be so amended as to show a satisfaction only to the extent of $12,833.31,
and that the record should be amended so as to show an unsatis-
fied balance of $3,818. The notes of Thomas M. Lesher should, of
course, be returned to the defendant Radel, in order that he may take
such steps in this court or elsewhere as he may be advised are neces-
sary to establish his rights upon these notes.
A draft order may be presented accordingly.

SOUTHERN PAC. CO. v. BARTINE et al.
(Circuit Court, D. Nevada. March 3, 1909.)

Const. Nev. art. 4, § 17, which provides that "each law enacted by the
Legislature shall embrace but one subject and matters properly connected
therewith which subject shall be briefly expressed in the title," applies
to the subject and not to the effect of a law, and if the necessary effect
of a statute is to repeal previous legislation on the same subject it does
no violence to such provision by failing to specifically express such re-
peal in its title, nor is it necessary that a general provision expressly re-
pealing prior inconsistent legislation on the same subject should be men-
tioned in the title.
[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 153.*]

2. Statutes (§ 64*)—Effect of Partial Invalidity.
The inclusion in a statute of a section foreign to the subject of the act
and not mentioned in its title does not invalidate the remainder of the
act, although it may itself be void.
[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 195; Dec. Dig.
§ 64.*]

The provision of Cons. Nev. art. 4, § 17, that "no law shall be revised
or amended by reference to its title only, but in such cases the act as re-
vised or section as amended shall be re-enacted and published at length,"
does not apply to a new act which is complete in itself and which does not
purport to be amendatory of any previous act and does not require a re-
ference to any other law to discover its scope or meaning. Such an act is
not amendatory within the meaning of the provision, although in general
terms it repeals all acts and parts of acts inconsistent with its provisions.
[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 141.*]

Act Nev. March 5, 1907 (St. Nev. 1907, p. 73, c. 44), entitled "An act to
regulate railroads," etc., is not amendatory, but is a complete act cover-
ing the entire subject, which is not unconstitutional because it does not
re-enact or publish at length former statutes, but which supersedes and
by implication repeals all former legislation on the subject.
[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 141.*]

5. Constitutional Law (§ 242*)—Equal Protection of Laws—Regulation
of Railroad Charges.
The provision of such act that the maximum rates therein fixed shall
not apply to any railroad until such road shall have been constructed and
in operation for two years between the points where it shall commence to
deliver freights does not render it unconstitutional as making a classifica-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
tion which denies to some roads the equal protection of the laws, such classification being reasonable and not arbitrary and within the power of the Legislature.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 242.*]

6. STATUTES (§ 79*)—GENERAL LAWS—UNIFORMITY OF OPERATION.

The provisions of such act classifying railroads for rate-fixing purposes by excepting from the rates fixed therein newly built roads, permitting higher rates to be charged by narrow-gauge roads, and authorizing the state railroad commission to alter rates with respect to particular roads when deemed just, do not violate Const. Nev. art. 4, § 21, providing that "where a general law can be made applicable all laws shall be general and of uniform operation throughout the state."

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 77½–78½; Dec. Dig. § 76.*]

7. CONSTITUTIONAL LAW (§ 58*)—DISTRIBUTION OF GOVERNMENTAL POWERS—ENCOACHMENT ON EXECUTIVE.

The provision of Act Nev. March 5, 1907 (St. Nev. 1907, p. 73, c. 44), that the Governor, Lieutenant Governor, and Attorney General of the state shall constitute a railroad board for the purpose of appointing the members of a railroad commission thereby created, is not the appointment of such state officers to a new office and a violation of the state Constitution as the exercise of an executive function, but merely imposes new duties on such officers, and is a valid exercise of legislative power, especially in view of the fact that the Constitution nowhere vests the Governor with sole appointive power, but merely provides that he shall be the "chief executive," and also provides in article 15, § 10, that "all officers whose election or appointment is not otherwise provided for shall be chosen or appointed as may be prescribed by law."

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 88; Dec. Dig. § 58.*]

8. CARRIERS (§ 12*)—REGULATION OF CHARGES—POWERS.

A state has power, either through its Legislature or a commission, to regulate the rates of charge of common carriers on intrastate business, subject to the limitation that such rates must be reasonable and afford to the carrier just and reasonable compensation for the services performed and for the use of the property devoted to the business, estimated at its fair valuation.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 11; Dec. Dig. § 12.*]

9. CARRIERS (§ 12*)—STATUTES REGULATING CHARGES—EVIDENCE OF REASONABLENESS.

In estimating the value of the property of a railroad company for the purpose of determining the reasonableness of rates fixed by a state, neither the market value of its stocks and bonds, the cost of construction, nor the cost of reproduction of the property is absolutely controlling, but each should be regarded as a fact tending to show fair value, and, if one only of such facts is shown, it may be assumed that it represents such value.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 12.*]

10. EVIDENCE (§ 508*)—OPINIONS—EXPERTS—FREIGHT RATES—REASONABLENESS.

In determining the reasonableness of freight rates fixed by a state on intrastate business, as applied to a railroad doing both intrastate and interstate business, it must be recognized that the cost of handling local shipments is relatively greater than through shipments, and, it being impossible to determine the exact ratio of difference, the opinions of experts based upon the facts of each particular case are admissible on the question.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 508.*]

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

In a suit for an injunction in a federal court the amount in dispute for jurisdictional purposes is the value of the right to be protected, and where the requisite value is alleged and not denied it is immaterial how much, or whether any, actual loss has been sustained.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 329.*

Jurisdiction of Circuit Courts as determined by the amount in controversy, see notes to Auer v. Lombard, 19 C. C. A. 75; Tennent—Stribling Shoe Co. v. Roper, 30 C. C. A. 459.]


It does not necessarily follow that a schedule of maximum freight rates is confiscatory and unconstitutional because it fails to yield to a railroad company a reasonable return on the investment. Such rates must be reasonable not only to the company but also to the public, and the fact that they do not prove remunerative to a new road built through a sparsely settled country where there is at present little local business does not require the few people and the small business to pay such rates as will make the road immediately profitable to its stockholders.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 12.*]


In suits by various railroad companies to enjoin the enforcement of Act Nev. March 5, 1907 (St. Nev. 1907, p. 73, c. 44), creating a Railroad Commission and authorizing it to establish freight rates on intrastate business, not higher than those prescribed in a schedule of maximum rates therein contained, evidence considered, and, except in the case of one complainant, held insufficient to show that such maximum rates, if adopted and enforced, would be unconstitutional as confiscatory.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 12.*]


The fixing of railroad rates by a state through whatever body, and although preceded by an investigation judicial in form, is a legislative and not a judicial act, and a statute authorizing the fixing of rates by a Railroad Commission is not invalid as an attempt to confer judicial power on the commission in violation of a provision of the state Constitution.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 52.*]


Act Nev. March 5, 1907 (St. Nev. 1907, p. 73, c. 44), creating a Railroad Commission, and authorizing it, after investigation and on a finding that rates charged by any railroad company are unreasonable or unjustly discriminatory, to fix just and reasonable rates to be charged by such company, is not unconstitutional as denying to some railroad companies the equal protection of the laws because the rates so prescribed may not be the same as to all companies.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 242.*]

16. Carriers (§ 18*)—Subjects of Reliefs.

Act Nev. March 5, 1907 (St. Nev. 1907, p. 73, c. 44), provides for the appointment of a Railroad Commission, and authorizes such commission, if, after an investigation, it shall determine that the freight rates charged by any railroad on intrastate business are unreasonable or unjustly discriminatory, to fix just and reasonable rates to be charged by such road not exceeding those prescribed in a schedule contained in the act. It also provides for proceedings by the Attorney General on request of the commission to enforce its orders, and their review by the courts at suit of the railroad companies. Held, that a suit will not lie in a federal court.

*For other cases see same topic & § Number in Dec. & Am. Digs. 1907 to date, & Repr’s Indexes
to enjoin the exercise by the board of its legislative power to fix rates, but that such court could only review rates, after they had been finally fixed, as to their constitutionality and validity.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 18.]

In Equity. With this case has been consolidated in this court the cases of the Nevada & California Railway Company, the San Pedro, Los Angeles & Salt Lake Railroad Company, the Eureka & Palisade Railway Company, the Tonopah & Goldfield Railroad Company, and the Virginia & Truckee Railway against the same defendants.

March 22, 1865 (St. 1865, p. 427, c. 146), the Legislature of the state of Nevada passed an act entitled “An act to provide for the incorporation of railroad companies, and the management of the affairs thereof, and other matters relating thereto.” The first 16 sections of the act deal with the formation and organization of railroad companies and the powers, rights, and duties of directors and stockholders. Sections 17 to 39 deal with the corporate powers, including the right of eminent domain and the attendant procedure. The corporations are expressly empowered in section 17 “to regulate the time and manner in which passengers and property shall be transported, and the tolls and compensation to be paid therefor, within the limits prescribed by law.”

The consolidation of railroad companies is authorized by section 40. Sections 43 and 44 provide for certain filings with the Secretary of State and for the making of reports. Sections 40 to 50 go into the details of regulation, providing for fences, and for liability for stock injured or killed, requiring the ringing of a bell under penalty, prescribing requirements as to passengers, and the receipt and checking of their baggage, and, in respect to the running of trains, their time, their accommodations, and fixing upon the company the obligation to receive, transport, and discharge passengers and property at, from and to points on their line on payment of fares or freight; also providing for the payment of damages in case of failure to receive and transport property at the appointed times and places, and relieving the corporation from liability to passengers injured in violation of the printed regulations of the company, posted in a conspicuous place; and giving conductors authority to eject passengers who refuse to pay fare. Section 50 requires certain trainmen to wear a particular kind of badge. Section 51 provides the maximum rates and charges for passenger and freight traffic, including the specification of a minimum for any freight shipment for any distance. The section is in terms as follows:

“It shall be unlawful for any such railroad company to charge more than ten cents per mile for each passenger, and twenty cents per mile for each ton of freight transported on its road; and for every transgression of such limitation the company shall be liable to the party suffering thereby treble the entire amount of the fare or freight so charged to such party; provided, that in no case shall the company be required to receive less than thirty-five cents for any one lot of freight for any distance.”

Section 52 provides a penalty for intoxication of certain employees, and sections 53 to 57 provide for the completion of the road within a certain time, require the use of a certain class of iron for tracks, and fix penalties in respect to the properties of the corporations, and the operation and management of the same. Section 58 extends the act to certain street railways.

The original act contained no clause repealing conflicting statutes, but in 1871, by way of amendment to section 57 of this act, two subsequently adopted amendatory acts, one approved March 9, 1866 (St. 1866, p. 251, c. 109), and the other February 16, 1869 (St. 1869, p. 65, c. 23), were repealed. St. Nev. 1871, p. 65, c. 21.

In 1879 (St. Nev. 1879, p. 28, c. 19) another act was passed by the Legislature of the state of Nevada, entitled “An act to prevent discrimination in fares and freights by railroad companies whose railroads run through the state of Nevada, or by railroad companies, the terminus or termini of whose railroads are within the state of Nevada.” This act prohibits discrimination.

*For other cases see same topic & § NUMBER in Dec. & Am. Diggs. 1907 to date, & Rep't Indexes
either in charges or services. It also prohibits rebates, drawbacks, combinations to prevent continuous carriage, and charging more per car load or part thereof, of similar property, per mile for a shorter than for a longer distance in one continuous carriage. The act requires carriers to adopt and post schedules of freight rates, which shall remain in full force until another schedule has been substituted and posted, for at least five days, and it was made unlawful "to charge or receive more or less compensation for the carriage, receiving, delivering, loading, unloading, handling" of property "than shall be specified in such schedule as may at the time be in force." By section 6, the provisions of this act were made to apply to all property, and the receiving, delivering, loading, unloading, handling, storing, or carriage of the same on one actually or substantially continuous carriage, and whether carried on one railroad or partly on several railroads. And it was expressly provided by said section that each and every railroad company, as aforesaid, shall fix its own rate or rates of its schedule, and such rate or rates of the schedule so fixed shall not govern or affect the rate or rates of any other railroad company; and provided, further, that such rate or rates in such schedules so fixed shall not exceed the rate or rates now allowed to be charged by law. Sections 7 and 8 provide that every person, company, corporation, or officer, receiver, trustee, lessor, or agent of any company or person engaged in transporting property by railroad in Nevada who violates any provision of the act shall forfeit and pay to the person injured thereby a sum equal to three times the damage suffered, and shall also forfeit and pay a penalty of not less than $2,000. The act does not refer to any previous act, nor does it contain any repealing clause whatever.

March 5, 1907, the Legislature of the state of Nevada passed an act entitled: "An act to regulate railroads, telegraph and telephone companies and other common carriers in this state, creating a Railroad Commission, constituting the Governor, the Lieutenant Governor, and the Attorney General a railroad board for the appointment and removal of the Railroad Commissioners, prevent the imposition of unreasonable rates, prevent unjust discrimination, insure an adequate railway service, and fixing maximum freight charges." St. Nev. 1907, p. 73, c. 44.

The act, in so far as it is material to this proceeding, is as follows:

"Section 1. A Railroad Commission is hereby created, to be composed of three commissioners. The Governor, the Lieutenant-Governor, and the Attorney-General shall constitute a railroad board for the purpose of appointing such commissioners. A majority of the members of said railroad board may perform all the duties required of such board. Within thirty days after the passage of this act the said railroad board shall appoint such commissioners and determine the term of each and they shall hold until their successors are appointed. The term of one such appointee shall terminate on the first Monday in February, 1909; the term of the second such appointee shall terminate on the first Monday in February, 1910; and the term of the third such appointee shall terminate on the first Monday in February, 1911. On the second Monday in January, 1909, and annually thereafter, there shall be appointed in the same manner, one commissioner for the term of three years from the first Monday in February of each year. Each commissioner so appointed shall hold office until his successor is appointed and qualified. Any vacancy shall be filled by appointment by the railroad board."

Subdivision "a" prescribes the qualifications of the commissioners. "b" provides that commissioners, for inefficiency, neglect of duty, or malfeasance, may be removed by the railroad board. "c" provides that the commissioners shall have no pecuniary railroad interests. "d" provides that:

"Whenever a complaint is made to the commission of a violation of any of the provisions of this act, or of any order of the commission, it shall, within four months, commence an investigation of said charge and shall determine the same within six months, unless the person preferring said charges shall agree in writing to a longer time. A failure to comply with this provision shall ipso facto render the office of each of the commissioners vacant, and the railroad board shall appoint new commissioners as provided for by this act."

Subdivision "e" provides that one commissioner must devote his entire time to the duties of the office; "f" that commissioners must take the official oath;
"g" provides a salary of $5,000 per annum for the commissioner who devotes his entire time, and $2,500 for each of the others. "h," "i," and "j" provide for the meeting and organization of the commission, the election of a chairman, and the appointment, salary, qualifications, and duties of the secretary.

"k" provides that the commissioners shall be known collectively as "Railroad Commission of Nevada," and in that name may sue and be sued, and it shall have an official seal by which it shall authenticate its proceedings. "l" requires the commission to keep its office at Carson, though it may hold sessions at other places.

"m" The commission shall have the power to adopt and publish rules to govern its proceedings, and to regulate the mode and manner of all investigations and hearings of railroads and other parties before it, and all hearings shall be open to the public.

The commission is authorized to confer by correspondence, or by attending conventions, with the railroad commissioners of other states, and with the Interstate Commerce Commission.

Section 2 defines the term "railroad," and extends the provisions and penalties of the act so far as applicable, and the supervision and control of the commission to express companies, telegraph and telephone companies.

Section 3 requires every railroad to furnish adequate facilities; charges must be reasonable, and every unjust and unreasonable charge is unlawful.

Section 4 requires every railroad to file with the commission schedules of all fares and freight, and copies of all rules and regulations which in any manner affect the rates, also its charges for delay in unloading cars, and for any other service in connection with the transportation of persons or property. Subdivisions "a," "b," "c," and "d" provide that no change shall be made in the schedule except upon 30 days' notice. The commission may dispense with the 30 days notice and reduce it to three. Notice of change of rates must be posted, and the posted schedule must be adhered to; the commission may prescribe changes in the form in which the schedules are issued, and such form is designed by the statute to conform approximately to the forms prescribed by the Interstate Commerce Commission.

Section 5 provides that joint rates must be reasonable. A joint rate may be less than the combination of locals.

Section 6 permits concentration, commodity, transit, and other special contract rates, but such rates must be open to all shippers of a like kind of traffic under similar circumstances and conditions; such rates shall be under the supervision of the commission.

Sec. 7. The classification of freight, commonly known as the 'Western Classification No. 41,' issued by the Western Classification Committee, and taking effect October 1, 1906, and adopted by the Oregon Short Line Railroad Company, the Southern Pacific Company, Pacific System, San Pedro, Los Angeles and Salt Lake Railroad, and other roads, shall be adopted by the commission as the classification of freight, and shall be uniform upon all railroads in this state.

"a" The commission shall not fix a greater rate, nor shall it allow any broad or standard-gauge road to charge a greater rate than that fixed for the following classifications:

"Class 1—Eight cents a ton a mile.
"Class 2—Seven and four-tenths cents a ton a mile.
"Class 3—Six and four-tenths cents a ton a mile.
"Class 4—Five and two-tenths cents a ton a mile.
"Class 5—Four and six-tenths cents a ton a mile.
"Class A—Four and six-tenths cents a ton a mile.
"Class B—Three and six-tenths cents a ton a mile.
"Class C—Three and one-tenth cents a ton a mile.
"Class D—Two and seven-tenths cents a ton a mile.
"Class E—Two and seven-tenths cents a ton a mile.

"b" All other property classified higher than class one, and known as class one and one-half times first class; double first class; three times first class; and four times first class, shall not exceed twenty cents a ton a mile.

"c" The commission shall not fix a greater rate nor shall it allow any broad or standard-gauge road to charge a greater rate for the following classes or grades of ore than that fixed herein:
“Rough stone of all kinds, iron ore, limestone, or other ore, stone or mineral, commonly used as fluxes, one-half cent a ton a mile.

“Ores not exceeding $20 a ton in value, one cent a ton a mile.

“Ores not exceeding $30 a ton in value, one and one-tenth of a cent a ton a mile.

“Ores not exceeding $40 a ton in value, one and one-fourth cents a ton a mile.

“Ores not exceeding $50 a ton in value, one and thirty-five hundredths cents a ton a mile.

“Ores not exceeding $60 a ton in value, one and one-half cents a ton a mile.

“Ores not exceeding $70 a ton in value, one and three-fourths cents a ton a mile.

“Ores not exceeding $80 a ton in value, one and nine-tenths cents a ton a mile.

“Ores not exceeding $100 a ton in value, two cents a ton a mile.

“All other ores shall not be charged at a greater rate than two cents a ton a mile.

“(d) Nothing contained herein shall be construed as preventing the commission fixing a less rate than those mentioned nor prevent it from fixing rates upon all articles not mentioned in the classification adopted hereon for articles usually classed as special commodities.

“(e) All narrow-gauge railroads may be permitted by the commission to charge a rate not to exceed one hundred and fifty per cent higher than those mentioned for broad-gauge railroads.

“(f) Provided, that the maximum rates herein fixed shall not apply to any railroad until the said road shall have been constructed and in operation for two years between the points where they shall commence to deliver freights; provided further, that all hauls of less than fifty miles may be charged as if actually hauled fifty miles, but where the haul is fifteen miles, or less, then the commission shall fix such rates as it may deem fair and just.”

Section 8 provides that in certain cases passengers or freight may be transported free, or at reduced rates.

Section 9 requires adequate depots, buildings, switches and side tracks.

Section 10 requires railroads to furnish suitable cars, and in case of car shortage to make an equitable distribution of car supply, preference being given to shipments of live stock and perishable property.

“(a) The commission shall have the power to enforce reasonable regulations for furnishing cars to shippers, and switching the same, and for the loading and unloading thereof, and the weighing of the cars and freight offered for shipment over any line of railroad.”

Section 11 requires railroads to furnish proper facilities as between themselves for the interchange of traffic.

“Sec. 12. Upon complaint of any firm, person, corporation or association, or of any mercantile, agricultural or manufacturing society, or of any body politic or municipal organization, that any of the rates, charges or classifications, or any joint rate or rates are in any respect unreasonable or unjustly discriminatory, or that any regulation or practice whatsoever affecting the transportation of persons or property, or any service in connection therewith, are in any respect unreasonable or unjustly discriminatory, or that any service is inadequate, the commission may notify the railroad complained of that complaint has been made, and ten days after such notice has been given the commission may proceed to investigate the same as hereinafter provided, but before proceeding to make such investigation the commission shall give the railroad and the complainants ten days’ notice of the time and place when and where such matters will be considered and determined, and said parties shall be entitled to be heard and shall have process to enforce the attendance of witnesses. If upon such investigation the rate or rates, or any regulation, practice or service complained of shall be found to be unreasonable or unjustly discriminatory, or the service shall be found to be inadequate, the commission shall have power to fix and order substituted therefor such rate or rates, fares, charges or classifications, as it shall have determined to be just and reasonable and which shall be charged, imposed and followed in the future, and shall also have power to make such orders respecting such regu-
lation, practice or service, as it shall have determined to be reasonable and which shall be observed and followed in the future."

Subdivision "a" provides for separate hearings on each rate complained of. "(b) Whenever the commission shall believe that any rate or rates or charge or charges may be unreasonable or unjustly discriminatory, and that investigation relating thereto should be made, it may, upon its own motion, investigate the same. Before making such investigation it shall present to the railroad a statement in writing, setting forth the rate or charge to be investigated. Thereafter, on ten days' notice to the railroad of the time and place of such investigation, the commission may proceed to investigate such rate or charge in the same manner and make like orders in respect thereto as if such investigation had been made upon complaint."

"c" permits any railroad to make complaint.

Section 13 empowers each commissioner to administer oaths, to certify to official acts, to issue subpoenas, and to compel the attendance of witnesses and the production of documents and testimony, and makes it the duty of the district court of any county thereof to compel obedience to the orders of the commission. Subdivision "a" provides for fees and mileage of witnesses. "b" provides for taking depositions. "c" provides that complete records of all proceedings before the commission shall be kept.

"Sec. 14. Whenever, upon an investigation made under the provisions of this act, the commissioner shall find any existing rate or rates, fares, charges or classification, or any joint rate or rates or any regulation or practice whatsoever affecting the transportation of persons or property, or any service in connection therewith, are unreasonable or unjustly discriminatory, or any service is inadequate, it shall, determine and by order fix a reasonable rate, fare, charge, classification or a joint rate to be imposed, observed and followed in future, in lieu of that found to be unreasonable or unjustly discriminatory, and it shall determine and by order fix a reasonable regulation, practice or service to be imposed, observed and followed in the future, in lieu of that found to be unreasonable or unjustly discriminatory or inadequate, as the case may be, and it shall cause a certified copy of each such order to be delivered to an officer or station agent of the railroad affected thereby, which order shall of its own force take effect and become operative thirty days after the service thereof. All railroads to which the order applies shall make such changes on their schedule on file as may be necessary to make the same conform to said order, and no change shall thereafter be made by any railroad in any such rates, fares, or charges, or in any joint rate or rates, without the approval of the commission. Certified copies of all other orders of the commission shall be delivered to the railroads affected thereby in like manner, and the same shall take effect within such time thereafter as the commission shall prescribe."

Subdivision "a" provides for the rescission or alteration by the commission of its own orders.

"Sec. 15. All rates, fares, charges, classifications and joint rates fixed by the commission shall be in force, and shall be prima facie lawful, for a period of one year from the date the same takes effect, and until changed or modified by the commission, or in pursuance of section 16 of this act. All regulations, practices and service prescribed by the commission shall be in force and shall be prima facie reasonable, unless suspended or found otherwise in an action brought for that purpose, pursuant to the provisions of section 16 of this act, or until changed or modified by the commission as provided for in paragraph "a," section 14, of this act.

"Sec. 16. Any railroad or other party in interest being dissatisfied with any order of the commission fixing any rate or rates, fares, charges, classifications, joint rate or rates, or any order fixing any regulations, practices or services, may, within ninety (90) days, commence an action in the district court of the proper county, against the commission as defendant to vacate and set aside any such order on the ground that the rate or rates, fares, charges, classifications, joint rate or rates, fixed in such order is unlawful or unreasonable, or that any such regulation, practice or service, fixed in such order is unreasonable, in which action the adverse parties shall be served with a summons and copy of the complaint. The commission shall file its answer, and on leave of
court, any interested party may file the answer to said complaint within thirty (30) days, after the service thereof, whereupon said action shall be at issue and stand ready for trial upon twenty (20) days' notice by either party. All actions brought under this section shall have precedence over any civil cause of a different nature pending in such court, and the court shall always be deemed open for the trial thereof, and the same shall be tried and determined as other civil actions; any party to such action may introduce original evidence in addition to the transcript of the evidence offered to said commission.

"(a) No injunction shall issue suspending or staying any order of the commission except upon application to the court or judge thereof, notice to the commission having been first given and hearing having been had thereon; provided, that all rates fixed by the commission shall be deemed reasonable and just, and shall remain in full force and effect until final determination by the courts, upon appeal.

"(b) If, upon the trial of such action, evidence shall be introduced by the plaintiff which is found by the court to be different from that offered upon the hearing before the commission, or additional thereto, the court before proceeding to render judgment, unless the parties to such action stipulate in writing to the contrary, shall transmit a copy of such evidence to the commission, and shall stay further proceedings in said action for fifteen (15) days from the date of such transmission. Upon receipt of such evidence the commission shall consider the same, and may alter, modify, amend or rescind its order relating to such rate or rates, fares, charges, classifications, joint rate or rates, regulation, practice or service complained of in said action, and shall report its action thereon to said court within ten days from the receipt of such evidence.

"(c) If the commission shall rescind its order complained of, the action shall be dismissed; if it shall alter, modify or amend the same, such altered, modified or amended order shall take the place of the original order complained of, and judgment shall be rendered thereon, as though made by the commission in the first instance. If the original order shall not be rescinded or changed by the commission, judgment shall be rendered upon such original order.

"(d) Either party to said action within sixty (60) days after service of a copy of the order or judgment of the court may appeal or take the case up on error as in other civil actions. Where an appeal is taken the cause shall, on the return of the papers to the higher court, be immediately placed on the calendar of the then pending term, and shall be assigned and brought to a hearing in the same manner as other causes on the calendar.

"(e) In all actions under this section the burden of proof shall be upon the plaintiff to show by clear and satisfactory evidence that the order of the commission complained of is unlawful or unreasonable, as the case may be."

Section 17 provides that the practice in court proceedings shall be the same as the practice in civil proceedings, and empowers the sheriff to execute any process under this act. Subdivision "a" provides that no person shall be excused from testifying because his testimony may tend to incriminate him. "b" makes certified copies of orders by the commission prima facie evidence.

Section 18 authorizes the commission to inquire into the management of the business of all railroads, to require written statements from railroads, inspect the books and papers of any railroad, to examine under oath any officer, agent, or employee of such railroad in relation to any matter which is the subject of complaint and investigation, and to require by order or subpoena the production of any books, papers, or accounts relating to such subject.

"Any railroad failing or refusing to comply with any such order or subpoena within a reasonable time shall, for each day it shall so fail or refuse, forfeit and pay into the state treasury a sum of not less than one hundred dollars nor more than one thousand dollars, to be recovered in a civil action brought in the name of the Railroad Commission of Nevada."

Section 19 provides that every railroad when so required by the commission shall submit copies of all its contracts relating to transportation of persons and property, and annually shall file with the commission a list of all railroad tickets and passes and mileage books issued for other than actual bona fide money consideration at full rates.

Section 20 requires each railroad to file annually with the commission a full report of its business.
"Sec. 21. The commission shall have power, and on complaint of any person it is hereby made its duty, to investigate all or any freight rates on interstate traffic on railroads in this state, and when the same are, in the opinion of the commission, excessive or discriminatory, or are levied or laid in violation of the Interstate commerce law, or in conflict with the rulings, orders or regulations of the Interstate Commerce Commission, the commission shall present the facts to the railroad, with a request to make such changes as the commission may advise, and if such changes are not made within a reasonable time, the commission shall apply by petition to the Interstate Commerce Commission for relief. All freight tariffs issued by any such railroad relating to interstate traffic in this state shall be filed in the office of the commission within thirty days after the passage of this act, and all such tariffs thereafter issued shall be filed with the commission when issued."

Section 22 defines unjust discrimination, and declares that any railroad guilty thereof shall forfeit and pay into the state treasury not less than $100 nor more than $5,000 for such offense, "and any agent or officer so offending shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than fifty dollars nor more than one thousand dollars for each offense."

Section 23 provides that it shall be unlawful for any common carrier, subject to the provisions of the act, to give any undue or unreasonable preference or advantage.

Section 24 provides that it shall be unlawful for any person, firm, or corporation knowingly to receive any rebate, concession, or discrimination.

"Any person, firm or corporation violating the provisions of this section shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than fifty dollars nor more than one thousand dollars for each offense."

Section 25 prohibits the giving of passes to state, district, county, or municipal officers of this state, and provides the penalties therefor.

"Sec. 26. If any railroad shall do or cause to be done or permit to be done any matter, act or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter or thing required to be done by it, such railroad shall be liable to the person, firm or corporation injured thereby in treble the amount of damages sustained in consequence of such violation, provided, that any recovery as in this section provided shall in no manner affect the recovery by the state of the penalty prescribed for such violation.

"Sec. 27. Any officer, agent or employee of any railroad who shall wilfully fail or refuse to fill out and return any blanks as required by this act, or shall wilfully fail or refuse to answer any questions therein propounded, or shall knowingly or wilfully give a false answer to any such questions, or shall evade the answer to any such questions, where the fact inquired of is within his knowledge, or who shall, upon proper demand, wilfully fail or refuse to exhibit to any commissioner or any commissioners, or any person authorized to examine the same, any book, paper or account of such railroad, which is in his possession or under his control, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars for each such offense, and a penalty of not less than five hundred dollars nor more than one thousand dollars shall be recovered from the railroad for each such offense when such officer, agent, or employee acted in obedience to the direction, instructions or request of such railroad or any general officer thereof.

"Sec. 28. If any railroad shall violate any provision of this act, or shall do any act herein prohibited, or shall fail, or refuse to perform any duty enjoined upon it, or upon failure of any railroad to place in operation any rate or joint rate, or do any other act herein prohibited, for which a penalty has not been provided, or shall fail, neglect or refuse to obey any lawful requirement or order made by the commission or any court (upon its application), for every such violation, failure or refusal, such railroad or railroads shall forfeit and pay into the state treasury a sum of not less than one hundred dollars nor more than ten thousand dollars for each such offense. In construing and enforcing the provisions of this section, the act, omission or failure of any officer, agent, or other person acting for or employed by any
railroad, acting within the scope of his employment shall in every case be
deemed to be the act, omission or failure of such railroad."

Section 29 provides that the commission may regulate all practices affecting
transportation which it finds to be unreasonable or unjustly discrimina-
tory, whether defined in this act or not.
Section 30 provides for the investigation of fatal railroad accidents.
Section 31 makes it the duty of the commission to inquire into any neglect
or violation of the laws of Nevada by any railroad or its agents, to enforce
the provisions of the laws relating to railroads, and to report all violations
thereof to the Attorney General. The Attorney General and prosecuting
attorneys are required to assist the commission.
Section 32 provides for investigation by the commission of claims against
railroads for damages to property.
Section 33 provides that technicalities shall be ignored.
"Sec. 34. This act shall not have the effect to release or waive any right
of action by the state or by any person for any right, penalty, or forfeiture
which may have arisen or which may hereafter arise under any law of this
state; and all penalties and forfeitures accruing under this act, shall be
cumulative and a suit for, and recovery of one, shall not be a bar to the re-
covery of any other penalty.
"Sec. 35. In addition to all the other remedies provided by this act for the
prevention and punishment of any and all violations as to the provisions
hereof and all orders of the commission, the commission can compel com-
pliance with the provisions of this act, and of the orders of the commission
by proceedings in mandamus, injunction or by other civil remedies.
"Sec. 36. Every railroad in this state, shall, within sixty days after the
passage of this act, file in the office of the commission copies of all schedules
of rates, including joint rates in force on its line or lines, between points
within this state on the date this act takes effect.
"Sec. 37. Each section of this act and every part of each section is hereby
declared to be independent sections and parts of sections and the holding of
any section or part thereof to be void or ineffectual for any cause shall not
be deemed to affect any other section or any part thereof.
"Sec. 38. All acts and parts of acts in conflict with this act are hereby
repealed."

William F. Herrin and P. F. Dunne, for Southern Pac. Co. and
Nevada & California Ry. Co.
W. R. Kelly, A. S. Halsted, and Samuel Platt, for San Pedro, Los
Angeles & Salt Lake R. Co.
Campbell, Metson & Brown and Campbell, Metson, Drew, Oatman
& Mackenzie, for Tonopah & Goldfield R. Co.
Curtis H. Lindley and Samuel Platt, for Eureka & Palisade Ry. Co.
M. A. Murphy, for Virginia & Truckee Ry. Co.
Richard C. Stoddard, Atty. Gen., and H. F. Bartine, for defendants

FARRINGTON, District Judge (after stating the facts as above).
These suits were brought to prevent enforcement of the so-called
"Railroad Commission Law" on the ground that it is repugnant to the
federal and to the state Constitutions. Substantially the same is-
issues are raised in each case, therefore all will be considered together.
1. The title of the act (St. 1907, p. 73, c. 44) is as follows:
"An act to regulate railroads, telegraph and telephone companies and other
common carriers in this state, creating a Railroad Commission, constitu-
ting the Governor, the Lieutenant-Governor, and the Attorney-General
a railroad board for the appointment and removal of the railroad com-
missoners, prevent the imposition of unreasonable rates, prevent unjust
discrimination, insure an adequate railway service, and fixing maximum
freight charges."
In brief, the act provides for the creation of a Railroad Commission, charges it with the administration and enforcement of the law, defines its powers and duties, fixes the compensation of its members, fixes maximum freight rates, empowers the commission to establish rates after investigation, prohibits unjust discrimination, provides methods of procedure to enforce the law, and fixes penalties for its violation. It empowers the commission to investigate infractions of the interstate commerce law, and apply to the railroads and to the Interstate Commerce Commission for relief. It also empowers the commission to investigate fatal accidents in railroad service. In section 37 it attempts to control the interpretation of the act itself by declaring that each section and every part of each section is independent, and the invalidity of any section or any part thereof shall not be deemed to affect any other section or part thereof. And finally, in section 38, it states that "All acts and parts of acts in conflict with this act are hereby repealed."

The act is unquestionably in conflict with previous legislation on the same subject. Thus the maximum compensation of 20 cents per ton mile provided in section 51 of the act of 1865 (St. 1865, p. 427, c. 146) is not in harmony with the elaborate scheme of maximum freight charges set out in section 7 of the act of 1907, where the rates range from one-half of one cent per mile for transporting one ton of rough stone to 20 cents per mile for hauling each ton of four times first-class freight.

The act of 1879 provides that each and every railroad shall fix its own rates, and that the rates so fixed shall not govern or affect the rate or rates of any other railroad company, provided such rates shall not exceed the rates now allowed by law. The act of 1907 permits the Railroad Commission, after investigation and a finding that former rates are unreasonable or unjustly discriminatory, to fix new rates, which must be reasonable but cannot exceed the prescribed maxima. Again, several sections of the act of 1907 cover practically the same ground embraced in the act of 1879, but with substantially different methods of procedure and different penalties.

Section 17 of article 4 of the Constitution of Nevada reads thus:

"Each law enacted by the Legislature shall embrace but one subject and matters properly connected therewith, which subject shall be briefly expressed in the title; and no law shall be revised or amended by reference to its title only; but, in such case, the act as revised, or section as amended, shall be re-enacted and published at length."

The design of the first of these provisions is not to contract the field of legislation, but to prevent the union in the same act of subjects having no necessary or proper connection. Each subject of legislation must stand alone, and, if enacted into law, it should succeed by reason of its own merits. Otherwise, by bringing into one bill divers disconnected subjects, and by combining the advocates of each in support of all, it might be possible to force the adoption of measures no one of which could pass on its own merits.

If it were permissible to insert in the same statute incongruous matters, some of which need not be expressed in the title, legislators might inadvertently vote for measures which they could not and would not
knowingly approve. So, also, unwise and vicious schemes might thus become law before there was opportunity to oppose them by protest or petition, or through the public press. The people are entitled to timely and adequate notice of all contemplated legislation. State v. Ah Sam, 15 Nev. 27, 32, 27 Am. Rep. 454; State v. Com’rs Humboldt Co., 21 Nev. 235, 237, 29 Pac. 974; People v. Mahaney, 13 Mich. 481, 494; State v. Hyde, 129 Ind. 296, 28 N. E. 186, 13 L. R. A. 79, 80.

In the title of the act of 1907 there is no suggestion of revising, amending, or repealing earlier legislation. The railroad acts of 1865 and 1879 are not referred to, nor is there any mention of the rule of construction formulated in section 37 of the act. In this the act is said to violate the first clause of the constitutional provision above recited. In other words, the act embraces not one, but several subjects, of which two are not expressed in the title.

A valid statute may embrace many matters and a multitude of details, but they must all relate to one general subject, which must itself be expressed in the title. Whether this subject shall be comprehensive or restrictive rests with the Legislature. The subject and the title may be broad enough to embrace the whole field of criminal law. In such a case the definition and punishment of larceny, embezzlement, and burglary might properly be included in the same act, but, if the act be entitled “An act to define and punish larceny,” any attempt to include therein a definition of murder would be improper.

The details of a legislative act need not be specifically stated in its title, but matter germane to the subject as expressed in the title, and adapted to the accomplishment of the object in view, may properly be included in the act. State v. Atherton, 19 Nev. 332, 344, 10 Pac. 901. Thus it is proper to create in the same act the machinery by which the act is to be enforced, to prescribe the penalties for its infraction, and to remove obstacles in the way of its execution. If such matters are properly connected with the subject as expressed in the title, it is unnecessary that they should also have special mention in the title. It would be difficult to conceive of a matter more germane to an act and to the object to be accomplished thereby than the repeal of conflicting legislation. In such a case the practical working of the new statute would be aided by repeal of the old law.

Where a statute by implication amends or repeals a former law, such repeal is the effect and not the subject of the statute; and it is the subject, not the effect of a law, which is required to be briefly expressed in its title. If the necessary effect of the statute is to repeal previous legislation on the same subject, it does no violence to the Constitution by failing to express specifically such repeal in its title. 1 Lewis’ Sutherland, Stat. Constr. pp. 223, 224; Cooley, Const. Lim. (7th Ed.) p. 208; People v. Mahaney, 13 Mich. 481, 494; Timm v. Harrison, 109 Ill. 593, 596; City of Winona v. School Dist., 40 Minn. 13, 41 N. W. 539, 3 L. R. A. 46, 12 Am. St. Rep. 687; Gabbert v. Jeffersonville R. R. Co., 11 Ind. 365, 71 Am. Dec. 358; Yellow River Imp. Co. v. Arnold, 46 Wis. 214, 232, 49 N. W. 971; Union Trust Co. v. Trumbull, 137 Ill. 146, 27 N. E. 24; Crookston v. Bd. of Co. Com’rs, 79 Minn. 283, 82 N. W. 586, 79 Am. St. Rep. 453, 454, 480.

170 F.—47
In City of Winona v. School District, supra, the court remarks very pertinently:

"If the title of an act embraces only one subject, we apprehend it was never claimed that every other act which it repeals or alters by implication must be mentioned in the title of the new act. Any such rule would be neither within the reason of the Constitution, nor practicable. It would compel the Legislature in every instance to search the entire body of our statute law to ascertain what acts might be inconsistent with or repugnant to the provisions of the proposed act—a work, in many cases, so difficult as to amount to an impossibility."

Judge Cooley, in his work on Constitutional Limitations, p. 208, says:

"The repeal of a statute on a given subject, it is held, is properly connected with the subject-matter of a new statute on the same subject; and therefore a repealing section in the new statute is valid, notwithstanding the title is silent on that subject."

It is unnecessary to express any opinion as to whether the matter contained in section 37 relating to the construction of the act is germane to the subject expressed in its title. That section neither increases, diminishes, nor modifies the powers and duties imposed upon defendants. There is no allegation that its provisions are to be enforced by defendants in any manner or to the detriment of complainants. If it be foreign to the subject of the act, a conclusion which I cannot admit, it may be eliminated, and the balance of the act will stand. Cooley, Const. Lim. (7th Ed.) p. 211; 1 Lewis' Sutherland, Stat. Constr. p. 251; State v. Silver, 9 Nev. 227, 231; State v. Hoadley, 20 Nev. 317, 22 Pac. 99; State v. Beck, 25 Nev. 68, 81, 56 Pac. 1008.

2. It is also contended that the railroad commission act is unconstitutional because it is an amendatory statute, and as such it fails to conform to the constitutional provision, which declares that:

"No law shall be revised or amended by reference to its title only, but in such cases the act as revised or section as amended shall be re-enacted and published at length."

The Supreme Court of Nevada has interpreted this as requiring not only that the act or section as amended shall be re-enacted and published at length, but that "the title of the act to be amended should be referred to." State v. Hallock, 19 Nev. 384, 387, 12 Pac. 832, 833.

The question to be determined, then, is whether the railroad commission act is an amendatory statute within the meaning of the Constitution. This constitutional requirement was intended to prevent covert and improvident legislation. When amendments were made by mere reference to the place in the old law where words were to be substituted, stricken out or inserted, or alterations made, it was necessary, in order to understand the change, to compare the old law with the new. In case subsequent and successive amendments were made in the same manner, the confusion became such that it was extremely difficult to ascertain the precise terms of the law. Often the difficulty of making necessary examination and comparison was such that legislators and the public were mistaken, and even purposely misled, as to the effect and design of the amendatory enactments. Hence the
Constitution wisely ordained, in order that the full force and effect of the amendment might be apparent without reference to former statutes, that:

"No law shall be revised or amended by reference to its title only, but in such cases the act as revised or section as amended shall be re-enacted and published at length."

On the other hand, whenever a new statute is drafted, if it be necessary to refer to the title, and to publish and re-enact at length, as amended, every section in the whole body of existing statutory law affected thereby, legislation on many subjects would be practically impossible. Either in strict compliance with the rule, or out of abundant caution, a large portion of our state legislation would be republished and re-enacted at every session of the Legislature. Furthermore, an act complying with such a requirement would probably embrace more than one subject, and thus, in avoiding one prohibition of the statute, violate another. Hence, courts have not inclined to extend this prohibition beyond the mischief it was designed to prevent. Where a new act deals with the details of a former law and is designed to correct its defects and remedy its deficiencies without changing its general framework, then in order that the act as amended may be readily and fully understood, and the force and effect of changes appreciated, the original act or section as amended must be set out at length and its title referred to; but when a new act is complete in itself, when it does not purport to be amendatory of any previous act and requires no reference to another law to discover its scope and meaning, the mischief to be guarded against is not present and the reason for the rule fails. In such a case, though the new law has the effect of modifying a former law, it is not an amendatory statute within the meaning of the Constitution, and the previous law as modified or amended need not be re-enacted or published at length, nor is it requisite to the validity of the new law that it refer to the title of the old law.

"Hence, an act of the Legislature not amendatory in character, but original in form and complete in itself, exhibiting on its face what the law is to be, its purpose and scope, is valid, notwithstanding it may in effect change or modify some other law on the same subject." Warren v. Crosby, 24 Or. 558, 34 Pac. 661, 662; 1 Lewis' Sutherland, Stat. Constr. § 229; In re Dietrick, 32 Wash. 471, 476, 478, 73 Pac. 506; Northern Counties Investment Trust v. Sears, 30 Or. 383, 41 Pac. 931, 35 L. R. A. 188, 194; State v. Rogers, 107 Ala. 444, 19 South. 909, 32 L. R. A. 520, 522; Ex parte Pollard, 40 Ala. 98; In re Buellow (D. C.) 93 Fed. 86, 89; City of St. Petersburg v. English, 54 Fla. 535, 55 South. 483, 486; St. Louis, I. M. & S. Ry. Co. v. Paul, 64 Ark. 83, 40 S. W. 705, 37 L. R. A. 504, 508, 62 Am. St. Rep. 154; Erford v. City of Pocahontas, 229 Ill. 546, 82 N. E. 374, 375; People v. Mahaney, 13 Mich. 481, 497; Lake v. Palmer, 18 Fla. 501, 510; Hellman v. Shoulders, 114 Cal. 136, 44 Pac. 915, 919; Everhart v. Hultt, 45 N. J. Law, 53.

Sutherland, in the first volume of his work on Statutory Construction, at page 448, says that a statute which in general terms repeals all acts and parts of acts inconsistent with its provisions is not amendatory.

In State v. Trolson, 21 Nev. 419, 432, 32 Pac. 930, 933, where the court had under consideration the constitutionality of a statute of 1887 (St. 1887, p. 81, c. 126), entitled "An act to further define and punish embezzlement," which neither referred to nor re-enacted any previous
law, in response to the contention that the statute was invalid because it was virtually an amendment of sections 4634 and 4635, Gen. St. Nev. 1885, Judge Bigelow, concurring, said:

"In my judgment the weight of authority and the more practical reason is with those that hold the general rule that the clause of the Constitution under consideration does not apply unless the subsequent statute is, in terms as well as in effect, an amendment of the preceding statute. Speaking of the constitutional provision that an amended section of a statute must be re-enacted and published at length, Judge Cooley says: 'It should be observed that statutes which amend others by implication are not within this provision; and it is not essential that they even refer to the acts or sections which by implication they amend.' (Const. Lim. 182.) This statement is well supported by the adjudged cases of many states. A statute is frequently so interwoven with others, and directly or indirectly modifies or amends so many others, and the rule contended for is itself so uncertain and indefinite, and in its nature incapable of reasonably fixed limits of application, that, as it seems to me, its adoption would lead to more uncertainty and confusion in the law than it would eliminate."

In order to understand the statute in question, it is unnecessary to compare it with former laws on the same subject. Its terms are plain and complete in themselves; they can be understood and executed without referring to previous legislation. On its face it is apparently a complete scheme for the accomplishment of its evident purpose and object. Neither the Legislature nor the public could fail to ascertain its meaning and purpose, or could be misled by an inspection of it. There is nothing which indicates or even suggests any covert or obscure purpose in the railroad commission act. David v. Portland Water Committee, 14 Or. 98, 12 Pac. 174, 179; Warren v. Crosby, 24 Or. 558, 34 Pac. 661, 663.

It is not a mere attempt to correct, to rectify, to reform, to improve, or to recast the old laws on the same subject. Both in the title and the body of the act, the intention to create a new law and not to amend an old one is apparent. It is not modeled along the lines followed by any former statute. It is essentially new and independent, and complete in itself.

It is contended that the act of 1907 is incomplete because a portion of the old law, notably the provision in section 51 of the act of 1865 providing a minimum freight charge, is still in force. A similar problem was presented in State v. Lee, 28 Nev. 380, 82 Pac. 229. Section 4 of an act entitled "An act providing for the creation of a State Board of Medical Examiners, and to regulate the practice of medicine and surgery in the state of Nevada" (St. 1899, p. 89, c. 73), authorized the secretary of the board to issue temporary certificates entitling the holder to practice medicine until the next regular meeting of the board. Subsequently an act was passed by the Legislature entitled "An act regulating the practice of medicine, surgery and obstetrics in the state of Nevada; providing for the appointment of a State Board of Medical Examiners and defining their duties; providing for the issuing of licenses to practice medicine; defining the practice of medicine; defining certain misdemeanors and providing penalties, and repealing all other acts, or parts of acts, in conflict therewith." St. 1905, p. 87, c. 113.

The latter statute contained no provision for temporary certificates,
and as it did not expressly repeal the former act it was claimed that the secretary still had the power to issue temporary certificates. The Supreme Court held that the earlier act, including the clause relating to temporary certificates, was entirely repealed by the statute of 1905. The later act, said the court, "is a comprehensive measure, complete in itself, revising the whole subject-matter of the act of 1899, and evidently intended as a substitute for it, although it contains no express words to that effect."

The railroad commission act provides for all freight charges, great or small. There is no uncovered territory to which the minimum charge of 35 cents, specified in the act of 1865, may be applied. If, under the rules and the maxima set out in section 7 of the act, the highest possible charge for transporting some small parcel is but 20 cents, can the commission disregard the express words of the act, "the commission shall not fix a greater rate, nor shall it allow any broad or standard gauge railroad to charge a greater rate than that fixed for the following classification"? Can the commission disregard this plain mandate, and permit a charge of 35 cents instead of 20 cents, simply because the minimum charge of 35 cents is provided for in the act of 1865, and is not expressly repealed?

While I am not unmindful of the concession made by defendants in this behalf, it is clear that the provision in the earlier statute for a minimum charge of 35 cents is superseded by the act of 1907, not only because of its manifest repugnancy but also because the comprehensive terms of the act as to rate regulation and its provisions, so entirely new to Nevada legislation, leave no room for any other conclusion than that the Legislature intended an act independent and complete in itself. The corollary to this is, the Legislature included in the new law all of the old law in relation to intrastate freight regulation which it intended to preserve, and that which is omitted was discarded. Black on Interp. Laws, p. 116; Thorpe v. Schooling, 7 Nev. 15, 18; Phillips v. Eureka Co., 19 Nev. 348, 353, 11 Pac. 32; King v. Cornell, 106 U. S. 395, 1 Sup. Ct. 312, 27 L. Ed. 60; United States v. Tynen, 11 Wall. 88, 92, 20 L. Ed. 153; Murdock v. City of Memphis, 20 Wall. 590, 642, 22 L. Ed. 429; United States v. Cheese- man, 3 Sawy. 424, Fed. Cas. No. 14,790; Columbia Wire Co. v. Boyce, 104 Fed. 172, 44 C. C. A. 588; Mack v. Jastro, 126 Cal. 130, 58 Pac. 373; Sponogle v. Curnow, 136 Cal. 580, 69 Pac. 255, 256; City of Seattle v. Clark, 28 Wash. 717, 69 Pac. 407, 410; State v. Conkling, 19 Cal. 501.

It is not necessary that the new act should cover the whole subject-matter of the former acts. It will be sufficient if it is reasonably complete upon that distinct branch of the subject with which it professes to deal. People v. Knopf, 183 Ill. 410, 56 N. E. 155, 157.

"That there are points of difference between the two acts can constitute no reason why fragments of the former should be held to continue in operation when its substantial provisions are replaced. That which was regulated by the first statute is now regulated by the second." State v. Carbon Hill Coal Co., 4 Wash. 423, 30 Pac. 728.

The objection to the act on the ground that it contains no reference to the title of former acts on the same subject, and that it does not
re-enact or publish at length former statutes which may be amended by implication, is without merit.

3. Again, it is urged that this act is invalid because it violates section 21, art. 4, of the Constitution of Nevada, in which it is declared that "where a general law can be made applicable, all laws shall be general and of uniform operation throughout the state," and because it is repugnant to the fourteenth amendment to the Constitution of the United States, in that by an unjust classification it denies equal protection of the laws.

Section 7 of the act provides that:

"All narrow-gauge railroads may be permitted by the commission to charge a rate not to exceed one hundred and fifty per cent. higher than those mentioned for broad-gauge railroads."

And again:

"That the maximum rates herein fixed shall not apply to any railroad until the said road shall have been constructed and in operation for two years between the points where they shall commence to deliver freights."

In Ames v. Union Pac. Ry. Co. (C. C.) 64 Fed. 165, 171, it was held that a statute prescribing maximum rates, and exempting from its operation until December 31, 1899, all roads built prior to that date and subsequent to January 1, 1889, did not deny to other carriers the equal protection of the law.

"The principle of classification adopted by the Legislature, whether wise or unwise, is within its power. To divide railroads into two classes, placing in the one all that have been constructed and in operation for a length of time, and whose business must therefore be presumed to have been thoroughly established, and in the other all only recently constructed, is clearly not a mere arbitrary distinction; and this notwithstanding it may be that one of the recently constructed roads is so fortunate as to have immediately secured a large business."

In Covington, etc., Turnpike Co. v. Sandford, 164 U. S. 578, 598, 17 Sup. Ct. 198, 206, 41 L. Ed. 560, it was held that the constitutional provision forbidding a denial of the equal protection of the law—

"does not require that all corporations exacting tolls should be placed on the same footing as to rates, but that justice to the public and to the stockholders may require in reference to one road rates different from those prescribed for other roads; and that rates on one road may be reasonable and just to all concerned, while the same rates would be exorbitant on another road."

In Home Telegraph & Telephone Co. v. City of Los Angeles (C. C.) 155 Fed. 554, 580, Judge Wellborn says:

"A moment's reflection shows that the mere fact that different rates are prescribed for two companies does not, of itself, establish unlawful discrimination against either."

What is a reasonable charge depends upon the circumstances of each case; and among such circumstances are the fair present value of the plant, the operating expenses, the volume and character of the business, and the reasonable value to the public of the service performed. Obviously these circumstances cannot be the same for any two railroads. One railroad does an immense business, while another does but little. One is operated at less expense than another by reason of the nature
of the country through which it passes, or because of the relative cheapness of fuel, labor, and supplies. One has an expensive plant and is burdened with an enormous debt, while another was constructed cheaply and owes nothing. One runs through a populous territory, and another pushes out into the desert, hoping to develop business. All these circumstances must be considered by the rate-fixing agency. With such varying factors equal results are out of the question. It is doubtful whether it would be possible to adopt a uniform schedule of rates for any two railroads in the state which would not operate more or less unequally and unjustly. A rate fair for one railroad would be unfair for another. It is in recognition of this fact that the Legislature has authorized the commission to establish rates within the statutory maxima which shall apply to but one railroad. And this it is which also justified the Legislature in delegating that authority to the commission.

The power of the Legislature to classify railroads is clear, provided the classification is reasonable and not arbitrary. The classification should be based upon some real and substantial difference between the classes; a difference which bears some relation to and justifies higher rates for one class than for another. It has been held that the Legislature may classify railroads according to the amount of business done, and establish a maximum of rates for each class; because it is only reasonable to suppose that a large volume of freight can be transported at less expense per ton than a small quantity. Chicago, etc., R. R. Co. v. Iowa, 94 U. S. 155, 24 L. Ed. 94.

Again, it has been decided that for rate-fixing purposes a classification may be according to the length of the railroad lines, or according to the locality in which they are situated, or on the basis of their gross earnings. Dow v. Beidelman, 125 U. S. 680, 691, 8 Sup. Ct. 1028, 31 L. Ed. 841; Wellman v. Railway Co., 83 Mich. 606, 47 N. W. 493.

The length of the road, the amount of its gross earnings, or the locality in which it is situated, each bears a very apparent relation to the expense of operation, and hence serves as an appropriate test of classification for the purposes of regulating railroad traffic charges.

The federal Constitution does not withhold from the Legislature the power of classifying railroads for the purpose of establishing rates. If the classification is reasonable and not arbitrary, and if the same law is applied to all railroads of the same class, though it may be different for the separate classes, there is no violation of the rule securing to all the equal protection of the law. Dow v. Beidelman, 125 U. S. 680, 8 Sup. Ct. 1028, 31 L. Ed. 841; Gulf, etc., Ry. v. Ellis, 165 U. S. 150, 155, 17 Sup. Ct. 255, 41 L. Ed. 666; Commonwealth v. Clarke, 195 Pa. 634, 46 Atl. 286, 57 L. R. A. 348, 349, 86 Am. St. Rep. 694; Commonwealth v. Interstate, etc., Ry. Co., 187 Mass. 436, 73 N. E. 531, 11 L. R. A. (N. S.) 973.

In the last case a Massachusetts statute required street railway companies to carry school children to and from school at half rates, but excepted the Boston Elevated Railway from the operation of the law. It was claimed that other street railways were thus deprived of the equal protection of the law. The court sustained the classification in these words:
"The situation of the lines of the Boston Elevated Railway Company in the midst of a dense population is so different from that of other lines in the state, and their fitness for use by children in going to and from the public schools might be found by the Legislature to be so unlike that of street railways generally in the state, as properly to call for an exemption from the law established for others. We cannot say that the Legislature had no power to make this distinction, founded on differences in conditions."

Tested by these principles, the methods of classification adopted in the railroad commission act are not violative of either the federal or the state Constitution. The law operates uniformly on the members of each class. The statute differentiates between old railroads which presumably have an established business, and recently constructed roads, presumably with a business yet to be developed. It also segregates the broad-gauge railway, with its capacity for handling immense loads and enormous traffic, from the narrow-gauge railroad with its short haul, short trains, small engines, light traffic, and relatively large expense for train crews. These differences furnish a reasonable basis for a higher maximum freight charge in one case than in the other, and therefore justify the classification which is attacked.

4. In the first section of the railroad act it is declared that the Governor, Lieutenant Governor, and Attorney General shall constitute a railroad board for the purpose of appointing railroad commissioners. The constitutionality of this act is challenged on the ground that the power of appointment thus exercised and provided for in the act is intrinsically and exclusively an executive function, which cannot be exercised by the Legislature; that the Legislature under the Constitution is powerless to select the members of the railroad board, or to commit to that board the appointment of railroad commissioners.

If the act provides no method for selecting commissioners who are to enforce its provisions, it must fall. The Constitution nowhere in express terms withholds from the Legislature the power of appointment; neither does it expressly declare that power to be exclusively an executive function. It divides the powers of government into three separate departments—the legislative, which makes; the executive, which executes; and the judicial, which interprets the law; and it declares that:

"No person charged with powers properly belonging to one of these departments shall exercise any function appertaining to either of the others, except in the cases herein expressly directed or permitted."

Such distribution and separation of governmental power is found in the organic law of every state in the Union. In several state constitutions, notably in that of Ohio, in order to define more clearly the line of demarkation between legislative and executive activity, or in order to further limit legislative authority, it is expressly provided that no appointing power shall be exercised by the General Assembly. But no such provision is found in the Constitution of Nevada. In the light of this circumstance, our Supreme Court, in State v. Irwin, 5 Nev. 111, 127, and State v. Swift, 11 Nev. 128, 138, was led to the conclusion that:

"In the Constitution of the state of Nevada, the appointing power of the Legislature is neither cut up by the roots, nor in any manner hampered, save where the Constitution itself, or the federal Constitution, provides for filing
a vacancy. * * * In every other case the power is in the Legislature, to be by it regulated by law.”

The only definition of the Governor’s power of appointment in the Nevada Constitution appears in section 8, art. 5, and is as follows:

“When any office shall, from any cause, become vacant, and no mode is provided by the Constitution and laws for filling such vacancy, the Governor shall have the power to fill such vacancy by granting a commission which shall expire at the next election and qualification of the person elected to such office.”

Section 1 of the same article reads thus:

“The supreme executive power of this state shall be vested in a chief magistrate, who shall be Governor of the state of Nevada.”

As to the power of the Legislature in making appointments, the Constitution in section 10, art. 15, speaks thus:

“All officers whose election or appointment is not otherwise provided for shall be chosen or appointed as may be prescribed by law.”

If it were the intention to vest all appointing power in the chief executive, why was it not so declared? Why was it not ordained that “all officers whose election or appointment is not otherwise provided for shall be chosen” by election from the people “or appointed” by the Governor, “as may be prescribed by law”?

In the Irwin Case there was a statute organizing White Pine county, and appointing the individuals who should fill its offices until the next general election. In the Swift Case, an act incorporating the city of Carson named and appointed the persons who should serve as city trustees for the first year. These were clearly legislative appointments which the “Legislature had the power to make for the purpose of putting the new system into operation.” State v. Arrington, 18 Nev. 412, 4 Pac. 735; State v. Torreyson, 21 Nev. 517, 526, 34 Pac. 870; State v. Ruhe, 24 Nev. 251, 263, 58 Pac. 274.

But it does not appear that the exigencies which required and justified “provisional appointments” in those cases were of such an urgent character that the county officers in one instance and the city trustees in the other could not have been appointed by the Governor, if he was then the exclusive repository of appointing power.

While the Constitution vests the legislative authority of the state in a “Senate and Assembly designated the Legislature of the state of Nevada,” it vests not the executive power, but “the supreme executive power of this state” in the Governor. This, and the further fact that the chief executive is authorized to fill vacancies not otherwise provided for, does not necessarily lead to the conclusion that all executive power, or all right to exercise appointing power, is vested in the Governor, to the exclusion of other state officers, such as the Lieutenant Governor and Attorney General.

This subject is thus discussed in Cooley on Const. Lim. (6th Ed.) p. 183:

“The authority that makes the laws has large discretion in determining the means through which they shall be executed, and the performance of many duties which they may provide for by law they may refer either to the chief executive of the state, or, at their option, to any other executive or ministerial
officer, or even to a person specially designated for the duty. What can be
definitely said on this subject is this: That such powers as are specially con-
ferred by the Constitution upon the Governor, or upon any other specified
officer, the Legislature cannot require or authorize to be performed by any
other officer or authority; and from those duties which the Constitution re-
quires of him he cannot be excused by law. But other powers or duties the
executive cannot exercise or assume except by legislative authority; and the
power which in its discretion it confers, it may also, in its discretion, with-
hold, or confide to other hands."

All power to appoint officers as an implied executive function, where
the Constitution is silent on that subject, is not vested in the Governor.
State v. Boucher, 3 N. D. 389, 56 N. W. 142, 21 L. R. A. 539, 544; Overshiner v. State, 156 Ind. 187, 59 N. E. 468, 51 L. R. A. 748,
260, 47 S. W. 779, 84 Am. St. Rep. 454; Eddy v. Kincaid, 28 Or. 537,
41 Pac. 156; Mayor of Baltimore v. State, 15 Md. 376, 74 Am. Dec.
572; Travelers’ Ins. Co. v. Oswego, 59 Fed. 58, 65, 7 C. C. A. 669;
Fox v. McDonald, 101 Ala. 51, 13 South. 416, 21 L. R. A. 529, 536,
46 Am. St. Rep. 98; Biggs v. McBride, 17 Or. 640, 21 Pac. 878, 5
L. R. A. 115; People v. Freeman, 80 Cal. 283, 23 Pac. 173, 13 Am.
St. Rep. 122; In re Bulger, 45 Cal. 553, 558.

If in the statute in question certain non office holding individuals
were designated by name to be members of and to constitute the rail-
road board, undoubtedly it would be an appointment by the Legislature.
But this is not the case. The duty of serving as members of the
railroad board and of appointing commissioners is by the act attached
and added to the duties and powers of the offices of Governor, Lieutena-
unt Governor, and Attorney General.

In State v. Kennon, 7 Ohio St. 546, cited and relied on by com-
plainants, it is correctly held that the appointing power cannot lawfully
be exercised by the General Assembly of Ohio, except in the selection
of United States Senators, and officers of the Assembly itself, because
the Constitution of that state declares that "no appointing power shall
be exercised by the General Assembly." The Ohio Constitution leaves
no room for doubt on that point.

In the Kennon Case there was called in question the validity of an
act of the General Assembly, by which a board of statehouse commis-
sioners was created, composed of three members to be appointed by
three non office holding individuals, designated in the act as William
Kennon, Asahel Medbery, and William Caldwell. The court held that
the three individuals named, if duly appointed, were officers by virtue
of the appointment, but, having been appointed by the General As-
sembly, the appointment was void, because the Assembly had no au-
thority under the Constitution to exercise the power of appointment.
The Legislature may pass a law providing how an appointment shall
be made, but it cannot make the appointment; in other words, it
can make, but it cannot execute, the law. In a concurring opinion,
Judge Swan says:

"We do not decide whether a board of appointment, such as those laws
create, may or may not be constitutionally created; for it is unnecessary to
decide it. But we hold that the General Assembly cannot appoint the officers
of such a board. Whether the General Assembly can annex the power of ap-
pointment of commissioners to the office of Governor, or to any other
existing office or board, we do not decide, simply because the question is not before us."

Judge Swan demonstrates the existence of such a power thus:

"If the General Assembly annex to an office already existing and filled additional powers and duties, upon what ground can it be claimed that this is the exercise by the General Assembly of the appointing power? Certainly upon this only, that the General Assembly has enlarged or added to the powers and duties of an existing office. But this is really absurd; for, if adding to the duties or powers of existing offices is an exercise of the appointing power, then every new duty required, or power conferred upon any state, county, or township officer, must be deemed the exercise by the General Assembly of the appointing power and forbidden by the Constitution.

"But these fallacious positions arise out of a misapprehension of what is meant by the exercise of the appointing power. An office, until filled, is an Impersonal thing, an Incorporeal hereditament. It is filled by the exercise of the appointing power, and, when filled, the office and officer both exist. The office itself may by law be enlarged in its powers, or new duties enjoined, without touching the appointment or tenure of office of the incumbent or his successor. It would, therefore, seem highly probable, although the question is not before us, that the General Assembly could, without displacing or appointing a governor of Ohio, annex to the office of Governor the power of appointing directors of the penitentiary, or the duty of performing any other legitimate executive function.

"If the General Assembly conferred upon the incumbent of the gubernatorial chair official public powers as an individual, so that he would continue to exercise the powers thus conferred, whether he continued to hold the office of Governor or not, it would seem quite manifest, to my mind, that the General Assembly created an office in such case, and exercised the appointing power."

In State v. Washburn, 167 Mo. 680, 67 S. W. 592, 90 Am. St. Rep. 430, cited by complainants, there was under consideration a Missouri statute which empowered the Governor to appoint a board of three election commissioners in certain cities of that state, but required that one of the members should be selected from a list of three, to be presented by the city central committee of the leading party politically opposed to that to which the other appointees belonged. The Governor of Missouri appointed three commissioners for Kansas City, but ignored the central committee nominations. The court said that such power in a central committee is, or by cunning practice could be made, equivalent to the power of appointment. If the Legislature had attempted to make the third appointment itself, the act would have been void as an attempt to exercise executive power. If a valid power to make an appointment is conferred on a nonofficial person, the person on whom it is conferred becomes ipso facto a public officer.

"When, therefore," said the court (page 695 of 167 Mo., page 595 of 67 S. W. [90 Am. St. Rep. 430]), "the General Assembly undertook to confer the power to appoint the third election commissioner of Kansas City on a body of men not officially connected with the state government, it undertook, in effect, to create an office to exercise the governmental function of filling by appointment another public office, and not only to create such office, but to name by description the men who were to fill it; in effect, creating the office and appointing the incumbents, making the law and executing it. Section 9, art. 14, gives no such power, and article 3 forbids it."

In State v. Hyde, 123 Ind. 296, 28 N. E. 186, 13 L. R. A. 79, under constitutional provisions similar to our own, an Indiana statute au-
thorizing the state geologist, an officer elected by the people, to appoint a state supervisor of oil inspection, was sustained.

In Biggs v. McBride, 17 Or. 640, 21 Pac. 878, 5 L. R. A. 115, 119, under constitutional provisions like those of Nevada, the Supreme Court of Oregon refused to declare invalid an act of the Legislature vesting in the Legislature itself the appointment of railroad commissioners.

In Bridges v. Shallcross, 6 W. Va. 562, the Legislature of West Virginia had passed an act providing that the Governor, Auditor, Treasurer, Superintendent of Free Schools, and Attorney General of that state should constitute a board of public works. A few months later a second act was passed authorizing inter alia the board of public works to appoint a board of directors of the penitentiary, to consist of five persons. It was held that this legislation did not operate as an appointment of the Governor and other officers to another and a different office, but simply annexed to the several executive offices named certain additional powers and duties, and consequently the acts were not unconstitutional.

In Shoemaker v. United States, 147 U. S. 282, 300, 13 Sup. Ct. 361, 391, 37 L. Ed. 170, an act of Congress created a park commission to be composed of the Chief of Engineers of the United States army, the Engineer Commissioner of the District of Columbia, and three citizens to be appointed by the President, by and with the advice and consent of the Senate. It was urged that the act was invalid because Congress had no power to appoint the two engineers. In reply to this the court said:

"There are several features that are pointed to as invalidating the act. The first is found in the provision appointing two members of the park commission, and the argument is that, while Congress may create an office, it cannot appoint the officer; that the officer can only be appointed by the President with the approval of the Senate, and that the act itself defines these park commissioners to be public officers. * * * As, however, the two persons whose eligibility is questioned were at the time of the passage of the act and of their action under it officers of the United States who had been theretofore appointed by the President and confirmed by the Senate, we do not think that because additional duties, germane to the offices already held by them, were devolved upon them by the act, it was necessary that they should be again appointed by the President and confirmed by the Senate. It cannot be doubted, and it has frequently been the case, that Congress may increase the power and duties of an existing office without thereby rendering it necessary that the incumbent should be again nominated and appointed."

The power to appoint all officers whose election by the people is not provided for in the Constitution of Nevada cannot be held to be a part of the chief executive power of the state which is vested in the Governor. The Legislature may by law require the Governor, Lieutenant Governor, and Attorney General of the state to select and appoint railroad commissioners. This is not an appointment of those officers to a new office, but an increase in their official power and duty. Even if it be conceded that the Constitution forbids the exercise of the appointing power by the Legislature, still the act in question is not for this reason repugnant to that instrument, because no appointing power, as contemplated by the prohibition, has been exercised by the Legislature.
5. The business of the company is either interstate or intrastate traffic. All business which originates out of, comes into, and is laid down in the state, all business which originates in and passes out of the state, and all business which originates out of, passes through, and is delivered outside the state, is classed as interstate. All business which is picked up, carried, and delivered wholly within the state of Nevada is intrastate or domestic business.

It is only the intrastate business which can be considered in these proceedings. With the regulation of rates, tolls, and charges on intrastate traffic, the Legislature has nothing to do. It is well settled that a state, either through its Legislature or by a railroad commission, may make and regulate rates, charges, and tolls for intrastate traffic, and that this subject is primarily within the control of the state. This power finds its root in the old common law. When a man parts with his property it is no longer his; when he devotes it to the public use it ceases to be private property.

"He, in effect, grants to the public an interest in such use, and must, to the extent of that interest, submit to be controlled by the public for the common good as long as he maintains the use. When private property is devoted to public use, it is subject to public regulation; if the right to regulate exists, the right to establish the reasonable compensation for services as one of the means of regulation is implied." Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77.

If the state prescribes a schedule of maximum rates for transportation of intrastate freight, the rates must be reasonable; that is, they must be reasonable both to the carrier and to the public. It must always be remembered that the carrier is entitled to a just and reasonable compensation for his services and for the use of his property devoted to public service. This compensation up to the full measure of what is just and reasonable is his property, and is protected by that provision of the federal Constitution in which it is ordained that no state shall "deprive any person of life, liberty or property without due process of law, nor deny any person within its jurisdiction the equal protection of the laws."

"If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States; and, in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws." Chicago, etc., Ry. Co. v. Minnesota, 184 U. S. 418, 456, 458, 10 Sup. Ct. 462, 467, 33 L. Ed. 970.

Bearing these principles in mind, it is first in order to ascertain the reasonable value of that portion of the Southern Pacific Company's property which is devoted to the movement of intrastate freight; that is, to transportation which both begins and ends in the state. The rule for ascertaining such value is thus stated in Smyth v. Ames, 169 U. S. 466, 544, 546, 18 Sup. Ct. 418, 433, 434, 43 L. Ed. 819:

"It cannot, therefore, be admitted that a railroad corporation maintaining a highway under the authority of the state may fix its rates with a view solely to its own interests, and ignore the rights of the public. But the rights of the
public would be ignored if rates for the transportation of persons or property on a railroad are exacted without reference to the fair value of the property used for the public or the fair value of the services rendered, but in order simply that the corporation may meet operating expenses, pay the interest on its obligations, and declare a dividend to stockholders.

"If a railroad corporation has bonded its property for an amount that exceeds its fair value, or if its capitalization is largely fictitious, it may not impose upon the public the burden of such increased rates as may be required for the purpose of realizing profits upon such excessive valuation or fictitious capitalization; and the apparent value of the property and franchises used by the corporation, as represented by its stocks, bonds, and obligations, is not alone to be considered when determining the rates that may be reasonably charged."

"The basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth."

The evidence discloses but little testimony as to the present reasonable value of the property in question. The Southern Pacific Company operates under a lease the Central Pacific Railway Company's property in Nevada, and it is the value of this property which we are to ascertain.

Mr. Seger, auditor of the Southern Pacific Company, testifies that the total issued capital stock, both common and preferred, of the Central Pacific Railway Company, is $89,675,500, and its funded debt to July 1, 1907, $116,947,043.12—total, $197,632,543.12.

There is no evidence as to the market value of either stocks or bonds. For aught that appears in the record, the price may be either 50 per cent. above or 50 per cent. below par. The present value of these stocks and bonds, even though precisely determined, is not an absolutely reliable measure of the fair, reasonable worth of the property represented, because stock quotations often go up or down without much reference to intrinsic value of property; they may in part represent property which is neither used nor useful for transportation in Nevada; they may in greater or less degree represent moneys which were devoted to unwise or extravagant expenditures and investments, or to uses and projects foreign to the business of transporting freight in this state; and they may represent money expended for machinery, equipment, stock, and constructions which are worn out and antiquated, and therefore no longer in use.

It is also in evidence that the total cost of the entire line of road of the Central Pacific Railway Company to June 30, 1907, was $212,970,953.07. Of this amount $66,253,187.21 is the value of that portion of the property located in Nevada. It is probably safe to assume that
this amount includes not only the entire cost of originally constructing and equipping the road, but also the cost of all subsequent constructions, repairs, replacements, and equipment. If this conclusion is correct, it is probable that $66,253,187.21 exceeds the reasonable value of the property used in Nevada.

The cost of a plant devoted by its owner to public service is not always a reliable criterion of its reasonable value; it may have cost too much, or it may have been constructed on a scale too large for the needs of the public which it is intended to serve. However, the accuracy of these figures has not been challenged except in this: the defendants argue that the failure of complainant to produce evidence as to the cost of reproducing the road is fatal to its case. The cost of reproducing the physical structures of a railroad is not necessarily equivalent to the reasonable value of the road at the time it is being used. Such a standard may be either too narrow or too broad to serve as the measure of present reasonable value. For instance, it does not cover the fact that decay and use may have impaired the value of the property, or that the road has an established business, which imparts a value in addition to the value of its physical constructions.

Each case must depend largely on its own special facts, and every element or circumstance which increases or depreciates the value of the property should be given due consideration and allowed that weight to which it is entitled. Neither the fair value of stocks and bonds, the cost of construction, nor the cost of reproducing the plant, is absolutely controlling, but each should be regarded as a fact tending to show fair value. Milwaukee, etc., Co. v. Milwaukee (C. C.) 87 Fed. 577, 585; Metropolitan Trust Co. v. Houston, etc., R. R. Co. (C. C.) 90 Fed. 683, 687, 689; San Diego Water Co. v. San Diego, 118 Cal. 556, 50 Pac. 633, 38 L. R. A. 460, 463, 62 Am. St. Rep. 261.

The decision in Ames v. Railway Co. (C. C.) 64 Fed. 165, 177, gives countenance to the contention that "if there is no other testimony in respect to value of the railroad property than the amount of stocks and bonds outstanding, or the construction account, it may be fairly assumed that one or the other of these represents it."

I shall therefore assume, without deciding it to be a fact, that the construction account represents the fair value of the property; and that $66,253,187.21 is the fair and reasonable value of the Central Pacific Railway Company's property in Nevada which is used in part for the transportation of intrastate freight.

A reasonable return on this valuation should be required from the whole Nevada business done on the Central Pacific Railway, and only a fair proportion thereof from the intrastate freight traffic. The gross receipts of the company from all sources in Nevada during the year 1907 were $12,005,443.23. The total receipts from intrastate freight were $1,659,791.40, or 1.33096+ per cent. of the gross receipts. Intra state freight may therefore be charged with 1.3309+ per cent. of $66,253,187.21, or $881,763.67. The annual interest on the bonded debt of the Central Pacific Railway Company is $4,476,538.79. The proportionate amount chargeable to its mileage in Nevada is $1,369,-
149.88, and to its Nevada intrastate traffic is $18,222.01. The total amount of issued stock, both common and preferred, is $80,673,500, the proportionate amount chargeable to mileage in Nevada is $25,090,-
080.50, and to Nevada intrastate traffic is $333,923.88.

It also appears from the testimony of Mr. Seger that taxes in the state of Nevada on the company's property for the same fiscal year were $172,563.89. Of this amount the intrastate freight traffic should bear 1.3309 + per cent., or $2,296.64.

6. It has been asserted repeatedly in the course of these proceedings that under its present tariffs the Southern Pacific Company is conducting its Nevada intrastate business at a loss, and that such loss will be greatly increased if the maximum rates set out in section 7 of the act in question are enforced. This conclusion seems to be the result of a line of reasoning which is based principally on tables 1 and 7 attached to Mr. Seger's affidavit.

An element of the highest importance which enters into the construction of these tables is the undisputed testimony of complainant's experts, that as regards the conduct of transportation the cost of local freight business in Nevada is relatively greater than the cost of the business of the company as a whole, and the proportion is fairly stated as 3 to 1. The term "conducting transportation" is used to distinguish that class of operating expenses which is neither maintenance of way and structures, maintenance of equipment, nor general expense. Now it is only as to conducting transportation that the cost is claimed to be greater for local than for general traffic. Other items of expenditure are constant. They are practically the same for all kinds of traffic.

A through train moves from the beginning to the end of its journey with a full complement of fully loaded cars, stopping only for fuel, water, orders, and other trains. On the other hand, a local train moves with a constantly diminishing load; it stops for fuel, water, orders, and other trains, and also to deliver freight; consequently, while the expense of each train for power and crew is practically the same for each day's service, the through train occupies less time and performs a greater service; that is, it moves its whole initial tonnage for a greater number of miles. This has frequently been recognized as a matter of fact by the courts. Ames v. Union Pac. Co. (C. C.) 64 Fed. 165, 184; Northern Pac. Ry. Co. v. Keyes (C. C.) 91 Fed. 47, 54; Minneapolis, St. Louis R. R. Co. v. Minnesota, 186 U. S. 257, 262, 22 Sup. Ct. 900, 46 L. Ed. 1151; Chicago, etc., Ry. Co. v. Tompkins, 176 U. S. 167, 178, 20 Sup. Ct. 336, 340, 44 L. Ed. 417.

In the last case cited this language is used:

"Beyond the figures given from the books of the company of the actual cost of doing the total business of the company, there was the testimony of several experts as to the relative cost of doing local and through business. Such testimony is not to be disregarded simply because it cannot demonstrate by figures the exact amount or per cent. of the extra cost. It is obvious on a little reflection that the cost of moving local freight is greater than that of moving through freight, and equally obvious that it is almost if not quite impossible to determine the difference with mathematical accuracy. Take a single line of 100 miles, with 10 stations. One train starts from one terminus with through freight, and goes to the other without stop. A second train
starts with freight for each intermediate station. The mileage is the same. The amount of freight hauled per mile may be the same, but the time taken by the one is greater than that taken by the other. Additional fuel is consumed at each station where there is a stop. The wear and tear of the locomotive and cars from the increased stops and in shifting cars from main to side tracks is greater; there are the wages of the employees at the intermediate stations, the cost of insurance, and these elements are so varying and uncertain that it would seem quite out of reach to make any accurate comparison of the relative cost. And if this is true when there are two separate trains, it is more so when the same train carries both local and through freight. It is impossible to distribute between the two the relative cost of carriage. Yet that there is a difference is manifest, and upon such difference the opinion of experts familiar with railroad business is competent testimony, and cannot be disregarded."

No particular ratio can be established as a matter of law. The relative cost of domestic and interstate traffic must depend always upon the peculiar facts of each case. Of the freight which is shipped, carried, and delivered wholly within the state, much may be transported by what is practically a through movement; that is, by fully loaded trains, taken without interruption to their destination from the starting point. And, on the other hand, much interstate freight originating out of the state may be carried by what is essentially a local movement; that is, it may be distributed by way trains at various stations after it reaches the state.

In the affidavit of R. E. Wells, general manager of the San Pedro, Los Angeles & Salt Lake Railroad Company, filed here for the benefit of that company, after reciting the peculiar conditions under which that road conducts its local business in Nevada, and after excluding items of expense chargeable as maintenance of way, taxes, and returns upon the value of the road, the affiant says that the cost of conducting traffic—that is, the cost of handling, moving, receiving, and delivering freight upon that railroad in Nevada—is not less than ten times as great per unit of traffic in the case of local business as in the case of through business.

In view of the stipulations permitting any part of the affidavits, testimony, or depositions filed in any one of the cases against Bartine et al. now before this court to be considered as evidence in each of the other cases, it is earnestly contended that the ratio of 10 to 1 should be applied to the Southern Pacific business, as expressing more accurately the relative cost of local and general freights. This, however, cannot be conceded in the absence of a showing that conditions on the Southern Pacific and the San Pedro Railroads are and were alike as regards that matter.

In the absence of any contradictory testimony, it must be found as a fact that:

"The cost of local freight business (of the Southern Pacific Company) in the state of Nevada is relatively greater than the cost of the general business of the company—that is to say, of its business as a whole—and that a fair, just, and conservative estimate of the greater relative cost of such local business is that such cost as related to the cost of said general business is in the proportion of 3 to 1."

The following tables are referred to:

170 F.—48
Table 1.
Southern Pacific Company.
Statement Showing Cost of Local Business and Loss that would have been Sustained Thereon under Railroad Commission Bill for Fiscal Year 1907.

<table>
<thead>
<tr>
<th>Conducting Transportation</th>
<th>Percentage of Operating Expenses and Taxes to Gross Receipts of System</th>
<th>Additional Cost of Local Business</th>
<th>Total Cost of Local Business</th>
<th>Loss or Gain under Present Rates</th>
<th>Loss in Earnings under Railroad Commission Bill</th>
<th>Total Loss under Said Bill</th>
</tr>
</thead>
<tbody>
<tr>
<td>Basis</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2 to 1</td>
<td>62.22</td>
<td>30.85</td>
<td>93.07</td>
<td>+6.93</td>
<td>35.58</td>
<td>35.58</td>
</tr>
<tr>
<td>3 to 1</td>
<td>62.22</td>
<td>61.70</td>
<td>123.92</td>
<td>-23.32</td>
<td>35.58</td>
<td>59.59</td>
</tr>
</tbody>
</table>

Gross earnings of system.................. $83,309,535.96
Operating expenses and taxes................ 61,837,475.34—per cent. 62.22
Conducting transportation.................. 25,802,158.24—per cent. 30.85
### Table 6.
Central Pacific Railway.

Statement of Southern Pacific Company of Earnings and Expenses Accruing within State of Nevada for Fiscal Year 1907, as Apportioned Between Freight and Passenger Traffic, with Percentages of Expenses to Earnings.

<table>
<thead>
<tr>
<th></th>
<th>Earnings</th>
<th>Expenses</th>
<th>Per cent. of Freight Earnings</th>
<th>Per cent. of Passenger Earnings</th>
<th>Per cent. of Total Earnings</th>
</tr>
</thead>
<tbody>
<tr>
<td>Freight</td>
<td>$8,312,890.98</td>
<td>$413,486.36</td>
<td>4.97</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Maintenance of way</td>
<td>855,474.29</td>
<td>1,768,492.22</td>
<td>10.35</td>
<td>21.27</td>
<td>14.23</td>
</tr>
<tr>
<td>Maintenance of equipment</td>
<td>149,292.78</td>
<td></td>
<td>1.81</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total expenses</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>$3,191,745.65</td>
<td>$331,339.55</td>
<td>39.49</td>
<td>82.40</td>
<td>28.58</td>
</tr>
<tr>
<td>Passenger</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Maintenance of way</td>
<td>$327,467.63</td>
<td></td>
<td>8.37</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Maintenance of equipment</td>
<td>395,151.48</td>
<td>1,025,997.70</td>
<td>10.70</td>
<td>27.87</td>
<td>8.97</td>
</tr>
<tr>
<td>Conducting transportation</td>
<td>118,455.29</td>
<td></td>
<td>3.21</td>
<td></td>
<td>.99</td>
</tr>
<tr>
<td>General expenses</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>$1,770,822.10</td>
<td></td>
<td>50.65</td>
<td></td>
<td>15.53</td>
</tr>
<tr>
<td>Sum Total</td>
<td>$12,005,443.23</td>
<td>$5,061,827.75</td>
<td></td>
<td></td>
<td>42.16</td>
</tr>
</tbody>
</table>
Table 7.
Southern Pacific Company—(System).
Fiscal Year 1907.

<table>
<thead>
<tr>
<th>Gross Receipts on Local Tonnage</th>
<th>Percentage of Expenses to Earnings—Basis 2 to 1, Basis 3 to 1.</th>
<th>Cost of Hauling Local Freight</th>
<th>Net Earnings from Local Freight</th>
<th>Amount of Reduction Under Bill</th>
<th>Amount Gain or Loss Under Bill</th>
<th>Per cent. Gain or Loss</th>
</tr>
</thead>
<tbody>
<tr>
<td>$193,791.40</td>
<td>22.07</td>
<td>$148,717.86</td>
<td>+$11,073.54</td>
<td>$56,853.78</td>
<td>-$45,780.24</td>
<td>-28.65</td>
</tr>
<tr>
<td>193,791.40</td>
<td>123.92</td>
<td>198,013.49</td>
<td>-38,222.09</td>
<td>56,853.78</td>
<td>-95,075.87</td>
<td>-59.60</td>
</tr>
</tbody>
</table>
Complainant's position may be stated thus:

Table 1 shows for the fiscal year 1907 the gross earnings of the entire Southern Pacific System were $83,309,535.25, and the gross operating expenses and taxes $51,837,475.34, or 62.22 per cent. of the gross receipts. Of these expenses the cost of conducting transportation, as distinguished from the cost of maintenance of way and of equipment and general expenses, was $25,802,138.24, or 30.85 per cent. of the gross receipts, while the cost for maintenance of way, etc., was $26,025,337.10, or 31.37 per cent. of the same gross receipts.

From this the conclusion is drawn that each dollar earned by the company costs in operating expenses 30.85 cents for conducting transportation, and 31.37 cents for other expenses. If the cost of conducting local freight transportation in Nevada is twice the cost of conducting transportation of the company business as a whole, the total operating expense will be 31.37 + 30.85 = 62.22, or 93.07 per cent. of the entire receipts of intrastate or local traffic. If the cost is three times the cost of the whole business, the 30.85 must be added three times, and the operating expenses for Nevada intrastate business will be 31.37 + 30.85 + 30.85 = 93.07 per cent. of the gross receipts. Hence, in order to earn each dollar of revenue for intrastate freight, the company must pay an expense of 93.07 cents, or a total of $148,717.86, on a 2 to 1 basis. On a 3 to 1 basis it must pay in expense to earn each dollar of its freight revenue 123.92 cents, or a total of $198,013.49; and thus, on the 3 to 1 basis, expenses exceed receipts by 23.92 per cent.

These results are shown in Table 7. The tables are constructed on the assumption that the company hauled, in round numbers, 3½ million tons of freight for $159,791.40 that the expense was 123.92 per cent. of the receipts, or $198,013.49, and the loss $38,222.09.

"Obviously," says Justice Brewer in Ames v. Union Pac. Ry. Co. (C. C.) 64 Fed. 165, 182, "the cost of transportation would be the same whether the companies received the prices which they did receive, or the reduced rates prescribed by hour roll 33."

This statement seems too clear to require demonstration or the support of authority; and it is equally clear that the cost of transportation would be the same whether the rates and the resulting gross income be increased or decreased. The mere fact that a man receives $20 rather than $10 for performing a service cannot increase his expenses.

Mr. Seger says the amount collected for moving intrastate freight during 1907 was $159,791.40, but "on the same business for the same period and under the same circumstances the amount collectible * * * if * * * the act in controversy had been the law would have been $103,042.05."

Let us assume that the act was in force, and that the company received but $103,042.05, instead of $159,791.40, for hauling the 3,564,462 tons of local freight. On a 3 to 1 basis the expense was 123.92 per cent. of $103,042.05, or $127,689.70 instead of $198,013.49; and the loss $24,647.65, instead of $38,222.09.

Again, if we assume that the company receives but $10,000 instead of $159,791.40 for hauling 3,564,462 tons, the expense will be 123.92
per cent. of the receipts, or $12,392, and the loss but $2,392, instead of $38,222.09.

Again, if we assume that the company received a million dollars instead of $159,791.40 for hauling 3,564,462 tons, the expense will be 123.92 per cent. of the gross receipts, or $1,239,200; and the loss $239,200, instead of $38,222.09.

These results are shown in the following table:

<table>
<thead>
<tr>
<th>Tons Intrastate Freight Moved One Mile</th>
<th>Gross Receipts on Local Tonnage</th>
<th>Percentage of Expenses to Earnings—Basis 3 to 1</th>
<th>Cost of Hauling Local Freight</th>
<th>Net Loss for Local Freight</th>
</tr>
</thead>
<tbody>
<tr>
<td>3,564,462</td>
<td>$159,791.40</td>
<td>123.92</td>
<td>$128,013.49</td>
<td>$38,222.09</td>
</tr>
<tr>
<td>3,564,462</td>
<td>103,042.05</td>
<td>123.92</td>
<td>127,629.70</td>
<td>24,547.05</td>
</tr>
<tr>
<td>3,564,462</td>
<td>10,000.00</td>
<td>123.92</td>
<td>12,392.00</td>
<td>2,392.00</td>
</tr>
<tr>
<td>3,564,462</td>
<td>1,000,000.00</td>
<td>123.92</td>
<td>1,239,200.00</td>
<td>239,200.00</td>
</tr>
</tbody>
</table>

Instead of being the same in each case, the expense for transporting the given amount of freight varies from $12,392 to $1,239,200. Under this method of computation it would seem that a raise in the rates will be followed by a larger expense and greater loss. The company cannot, if its formula be correct, reduce its losses by raising its rates and increasing its income from local traffic. So long as it costs 123.92 cents in expense for every dollar of income, the expense will increase faster than the earnings. The condition is not nearly so good as that of a rear-end lantern racing with the headlight. A rule for computing profit and loss which leads under varying conditions to such startling results cannot be correct.

Without attempting here to give an equivalent expression in tons hauled one mile for the service performed in order to earn one dollar at an expense of 62.82 cents, let it be assumed for the purpose of illustration that the service is the same as in Nevada, where the company in 1907 hauled 746,414,832 tons one mile for $8,253,564.33, or approximately 90 tons for one dollar. The complete statement then would be that, as an average, the company hauled 90 tons one mile for one dollar, and at an expense of 62.82 cents. The expense, however, is in carrying the freight, not in manipulating the dollar. Now, if 90 tons of local freight are carried at an expense, on the 3 to 1 basis, of 123.92 cents, there will certainly be a loss of 23.92 cents for every dollar earned, provided the company continues to hold its rates at one dollar for transporting 90 tons one mile; but it appears from the testimony, in 1907 the company hauled 3,564,462 tons one mile for $159,791.40, or 22.3 tons for $1, or at the rate of 90 tons for about $4. If the company carries 90 tons one mile at a cost of 123.92 cents, and receives therefor a compensation of $4 instead of $1, there will certainly be a substantial profit above expense.

7. It will be observed that Mr. Seger and Mr. Calvin testify as to a ratio of 3 to 1, not between intrastate and general freight traffic, but between the cost of conducting local freight business in Nevada and the cost of conducting the business of the Southern Pacific Company as a whole. The additional cost is not affirmed of operating expenses
generally, but is limited to the conduct of transportation. There is no testimony to the effect that other operating expenses, such as maintenance of way and maintenance of structures and equipment, are greater for Nevada intrastate freight than for Nevada freight in general. True, Mr. Seger's tables Nos. 1 and 7 show that such other expenses for the whole system are 31.37 per cent. of the gross receipts, and this rate is applied to the entire earnings, $159,791.40, accruing from domestic freight traffic, in order to ascertain the expense for maintenance of way, etc. But Mr. Seger's table No. 6 shows that all operating expenses for Nevada freight traffic (excluding the cost of conducting transportation) are but 17.13 per cent. of the entire freight earnings for Nevada. The difference between 31.37 per cent. and 17.13 per cent. of $159,791.40 is more than $22,000. Conceding complainant's method of computation to be correct, this is an excessive charge against intrastate freight. The evidence shows that the expense for maintenance of way and structures in Nevada is fixed on a basis of actual expenditure, and the expense for maintenance of equipment is apportioned to Nevada on a basis of revenue engine mileage for engines, and car mileage for cars. Eliminating the cost of conducting transportation, there is no evidence which shows that operating expenses are higher for intrastate than for Nevada freight traffic in general.

For the purpose of computing the cost of conducting local freight transportation, the witnesses have given us as a standard the cost, not of conducting freight transportation, but the cost of conducting all kinds of transportation, not in Nevada, but on the whole system; that is, the cost of conducting mail transportation, express transportation, passenger transportation, and freight transportation. The total cost of conducting transportation on the whole system, in round numbers, is $25,000,000. If we could ascertain the average expense of conducting transportation for all sorts of freight, local freight, through freight, freight in train load lots and in small parcels, as being some definite sum for hauling one ton one mile, on a ratio of 3 to 1 between the cost of intrastate freight and freight in general, we could easily compute the approximate cost of moving the Nevada intrastate freight, because we know the precise number of tons moved one mile. But the fact that it costs $25,000,000 to conduct all sorts of transportation gives no unit of service for comparison. We know how many times to apply our measuring stick, but we do not know the length of the stick.

Our problem is something like this: If it costs $25,000,000 to transport freight, passengers, mail, and express, how much will it cost to transport 3,000,000 tons of freight one mile? Or, if it costs $100 to cut a quantity of cordwood and saw logs, how much will it cost to cut five cords of mahogany?

Complainant meets this difficulty by ascertaining the average cost of conducting transportation for each dollar of gross income (that is, the income from all sources, such as mail, express, rents, freight, and passenger service) to be 30.85 cents. Thus, according to complainant's estimate, each dollar of gross income costs 30.85 cents for conducting transportation in general. What, then, is the equivalent for this estimate, expressed as the cost of hauling one ton one mile?
It appears from table 4 that the gross freight earnings of the entire system were $52,313,267.39, and the total expense for conducting freight transportation $15,989,410.43, or 30.56 per cent. of the gross freight earnings. The cost per unit for conducting all transportation is to the cost per unit of conducting all freight transportation as 30.85 to 30.56. In other words, the average cost of conducting all transportation is 1.0095 times greater than the average cost of conducting freight transportation. If, then, we ascertain the average cost on the whole system of hauling one ton of freight one mile, and multiply the result by 1.0095, we shall have approximately the cost of hauling one ton of freight one mile, which is required as the basis or standard of complainant’s ratio. Multiplying this result by three to conform to complainant’s ratio of 3 to 1, we shall have approximately the cost of conducting intrastate freight transportation in Nevada for carrying one ton a distance of one mile.

It appears from the testimony of W. H. Hathaway, chief clerk of the auditor of freight accounts of the Southern Pacific Company, that during the fiscal year 1907 the Southern Pacific Company carried on the entire Southern Pacific System 4,290,621,056 tons of freight one mile at a cost for conducting transportation of $15,989,410.43. Dividing the cost by the number of tons moved, the result is $0.37265951, or a little more than one-third of one cent. This is the average cost of conducting freight transportation on the whole system per ton mile. Multiplying this cost by 1.0095 we obtain an expression which is equivalent to the cost for conducting all kinds of transportation on the whole system, namely, $0.376191 of one cent. Multiplying this by 3 to conform to the 3 to 1 ratio, we have $1.1286 cents, or the cost per ton mile for conducting intrastate freight.

The evidence is that in 1907 the Southern Pacific Company transported 3,564,462 tons of intrastate freight in Nevada one mile. Multiplying the tons thus moved by the cost of moving one ton one mile, the result is $40,288.50, or the total cost of conducting Nevada intrastate freight transportation.

We have next to ascertain the cost of maintenance of way, structures, and equipment, and of general expense. This, as we have seen, should be no greater for intrastate freight than for general freight traffic in Nevada. It appears that the total receipts from Nevada freight transportation in 1907 were $8,253,564.33, and the total number of tons moved one mile was 746,414,832. Of this tonnage 3,564,462 tons were intrastate or domestic freight, on which the total earnings were $159,791.40. If the maximum rates provided in the act of 1907 had been in force during that year, the reduction of income in consequence would have been $56,749.35.

The total expense for moving all Nevada freight in 1907, according to table 6 attached to Mr. Seger’s affidavit, is apportioned as follows:

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Conducting transportation</td>
<td>$1,768,492</td>
</tr>
<tr>
<td>Maintenance of way</td>
<td>$413,486</td>
</tr>
<tr>
<td>Maintenance of equipment</td>
<td>$80,474</td>
</tr>
<tr>
<td>General expenses</td>
<td>149,292</td>
</tr>
<tr>
<td><strong>Total expense for moving all freight, to wit, 746,414,832 tons</strong></td>
<td><strong>$3,191,745</strong></td>
</tr>
</tbody>
</table>

| **Total expense for moving all freight, to wit, 746,414,832 tons** | **$3,191,745** |
Dividing $1,423,253.43, total expense for maintenance of way, etc., by 746,414,832, the number of tons moved one mile, the result will be 0.19067\% of one cent per ton mile. Multiplying this by 3,564,462, the number of tons of intrastate freight hauled one mile, the product will be the total cost for maintenance of way, etc., or $6,796.64.

These results may be summarized as follows:

Total receipts for hauling intrastate freight in Nevada in 1907...$159,791.40
Reduction if maximum rates of the railroad commission law had been in force in 1907......................... 56,749.35

____

Total receipts under reduced rates.........$103,042.05
Conducting transportation.................... $40,228.50
Other expenses.................................. 6,796.64
Taxes ........................................... 2,296.64  $ 49,321.78

____

Net balance after paying operating expenses and taxes...... $ 53,720.27
Deducting interest................................ 18,222.01
Balance available for dividends on $333,923.88 capital stock
(10.6\% ) ........................................... $ 35,498.26

If the indebtedness is disregarded, $53,720.27, the residue after paying taxes and operating expenses, will yield an income of 6\% per cent. on $881,763.67, the proportionate value of the property used in intrastate freight traffic.

In allotting to intrastate freight traffic its portion of the taxes, interest, stock, and value of property, I have taken the ratio between the entire gross earnings of the company in Nevada and the gross domestic freight income; that is, between $12,005,443.25 and $159,791.40. But the above results have been computed on the theory that the total income available for the payment of operating expenses, taxes, income, and interest is $103,042.05, instead of $159,791.40.

It may well be urged that the correct ratio is to be obtained by dividing $103,042.05 by $11,948,693.88. In that case intrastate freight may be charged with .8657\% per cent. of $66,253,187.21, or $573,567.09, the value of the property; .8657\% per cent. of $173,568.89, or $1,493.91, for taxes; .8657\% per cent. of $1,369,149.88, or $11,853, for interest; and .8657\% per cent. of $25,090,080.50, or $217,209.84, for capital stock.

The results would then be summarized as follows:

Total receipts from domestic freight.......................$159,791.40
Reduction from maximum rates............................ 56,749.35

____

Total income under reduced rates........................$103,042.05
Conducting transportation.............................. $40,228.50
Other expenses..................................... 6,796.64
Taxes ............................................... 1,493.91  $ 48,519.05

____

Net balance after paying operating expenses and taxes......$ 54,523.00
Deducting interest.................................. $ 11,853.00

$ 42,670.00

This balance will yield an income of 19.6 per cent. on $217,209.84 capital stock. If the bonded indebtedness is disregarded, the net
balance, $54,523, above operating expenses and taxes, will yield an income of 9½ per cent. on $573,567.09 of the value of the Central Pacific Railway Company's property in Nevada.

The total operating expenses for conducting transportation, maintenance of way and structures, maintenance of equipment and general expense, was $40,238.50 plus $6,796.64, or $47,035.14.

Now the total amount of freight moved one mile by the Southern Pacific Company in Nevada during 1907 was 746,414,832 tons, and of this but 3,564,462 tons was intrastate freight. Therefore, the intrastate or domestic freight was but .47754+ of 1 per cent. of the total amount of freight; that is, the intrastate freight was less than one-half of 1 per cent. of all the freight transported by the company in Nevada. If the cost of conducting transportation were no greater for intrastate freight than for freight in general, the total expense of moving the intrastate freight would be .47754+ of 1 per cent. of $3,191,745.65, the expense of moving all freight, or $15,342, as against $47,035.14, which is allowed.

If $8,253,564.33, the total receipts from Nevada freight traffic, is divided by 746,414,832, the number of tons moved one mile, the result will be 1.10576+ cents, or the general average amount received by the company for hauling one ton of freight one mile.

If $159,791.40, total earnings from Nevada intrastate freight, be divided by 3,564,462, the total number of tons of intrastate freight moved one mile, we shall have 4.4829+ cents, or the average amount received by the company for hauling one ton of intrastate freight one mile, as against 1.10576+ cents, the average amount received by the company per ton mile for hauling Nevada freight in general.

It is obvious from these results that the charge for hauling intrastate freight is more than four times as large as the average charge for hauling freight generally.

I cannot hold that such a return on the property used in conducting Nevada intrastate freight traffic is confiscatory.

Nevada & California Railway Company.

8. The undisputed testimony shows that the total issued capital stock of the company amounts to $4,837,000. The proportionate amount thereof allotted to Nevada on a mileage basis is $3,265,543. This last amount will be distributed to the intrastate traffic of the company in the ratio which its total Nevada earnings, $1,820,766.79, bear to $250,079.71, its total earnings from Nevada intrastate freight, or 13.7348+ per cent. 13.7348+ per cent. of $3,265,543 is $448,515.80, the capital stock of the company allotted to intrastate freight.

The total funded debt of the company is $2,000,000, on which the annual interest charge is $80,000; the proportionate amount of debt allotted to intrastate freight is $184,887.09, on which the annual interest is $7,395.42.

The total cost of the entire line of the Nevada & California Railway to June 30, 1907, was $6,544,911.32, of which the proportionate amount allotted to Nevada on a mileage basis is $4,405,061.20, and to Nevada
intrastate freight traffic $605,026.34. The taxes paid by the company on its Nevada property in 1907 amounted to $47,649.56. Of this amount the intrastate traffic will be charged with 13.7348\% per cent., or $6,542.28.

In this case it is shown that the intrastate freight business of the Nevada & California Railway Company is more expensive than the business of the company as a whole, in the proportion of 3 to 1; the ratio, however, applies only to so much of the expense of operation as relates to the cost of conducting transportation.

The gross earnings of the entire line for 1907 were $1,977,734.16; and the entire cost of conducting transportation for the business as a whole was $997,980.49, or 20.123\% per cent. of the gross earnings. The gross freight earnings for the entire line were $1,412,292.04, and the entire cost of conducting transportation for the entire freight business of the company was $298,808.22, or 21.1576\% per cent. of the gross freight earnings.

In the management of the entire business of the company each dollar of income cost 20.123 cents for conducting transportation. In the management of the entire freight business of the company each dollar of income cost 21.1576 cents for conducting transportation. The cost per unit for conducting all transportation is to the cost per unit for conducting all freight transportation as 20.123 is to 21.1576. Otherwise expressed, the average cost of conducting all transportation is .95 times the average cost of conducting freight transportation.

During the year 1907 the company transported, all told, on its entire line 53,637,779 tons of freight one mile at a cost for conducting transportation of $298,808.22. Dividing the cost by the number of tons, the result is .55708\% of one cent, or the average cost per ton mile for conducting all freight transportation. Multiplying this by .95, the result will be approximately the equivalent of the cost per unit of conducting all kinds of transportation expressed in cost per ton mile for conducting freight transportation on the entire line of the Nevada & California Railway, namely .529226\% of one cent. Multiplying this by 3 in order to conform to the 3 to 1 ratio, we have 1.58768 cents, or the cost per ton mile for conducting intrastate freight transportation.

The company in 1907 moved 7,151,303 tons of intrastate freight one mile. Multiplying the number of tons by the cost of moving one ton one mile, the result is $113,539.80, or the cost for conducting transportation of intrastate freight.

Operating expenses for maintenance of way and structures, maintenance of equipment and general expense, are not shown to be greater for intrastate freight than for freight in general. In 1907 the total number of tons moved one mile in Nevada was 51,590,165, of which 7,151,303 were intrastate freight. The total earnings were $1,317,302.37, of which $250,079.71 were the earnings from intrastate freight. If the maximum rates of the statute had been in force during that year, the intrastate freight earnings would have been reduced by the sum of $98,586.04.
The total expense of moving all Nevada freight is apportioned as follows:

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Conducting transportation</td>
<td>$244,566 13</td>
</tr>
<tr>
<td>Maintenance of way</td>
<td>$123,316 55</td>
</tr>
<tr>
<td>Maintenance of equipment</td>
<td>86,480 07</td>
</tr>
<tr>
<td>General expense</td>
<td>18,183 02</td>
</tr>
<tr>
<td>Total operating expense for all Nevada freight, 51,590,165 tons</td>
<td>$474,545 77</td>
</tr>
</tbody>
</table>

Dividing the total expense for maintenance of way, etc., $229,979.64, by 51,590,165, the number of tons moved one mile, the result is \( \frac{.4457\text{+}}{\text{of one cent per ton}} \). Multiplying 7,151,303, the number of tons of intrastate freight moved, by \( \frac{.4457\text{+}}{\text{of one cent, the cost per ton}} \) mile, we have $31,873.35, expense of intrastate freight for maintenance of way, etc.

These results may be summarized as follows:

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total receipts for hauling Intrastate freight</td>
<td>$250,079 71</td>
</tr>
<tr>
<td>Reduction if maximum rates had been in force</td>
<td>98,586 04</td>
</tr>
<tr>
<td>Total receipts under reduced rates</td>
<td>$151,493 07</td>
</tr>
<tr>
<td>Conducting transportation</td>
<td>$113,539 80</td>
</tr>
<tr>
<td>Maintenance of way, etc.</td>
<td>31,873 35</td>
</tr>
<tr>
<td>Taxes</td>
<td>8,542 28</td>
</tr>
<tr>
<td>Excess of expense and taxes over income</td>
<td>$461 76</td>
</tr>
</tbody>
</table>

Operating expenses, including taxes, exceed the income which could have been received under the maximum rates by $461.76. Thus there is nothing left for interest or for dividends on the stock.

In Spring Valley Waterworks v. San Francisco (C. C.) 124 Fed. 574, Judge Morrow held that water rates fixed by a municipal ordinance which yielded but 4.40 per cent. return on the reasonable value of the property employed in supplying the San Francisco with water, were confiscatory. Judge Gilbert, in a subsequent case between the same parties ([C. C.] 165 Fed. 657, 666), held that rates fixed by a municipal ordinance which yielded less than 4.4 per cent. on the investment were confiscatory.

On the undisputed facts of this case, and evidence which was introduced without objection and without contradiction, the maximum rates, if enforced, would result in confiscating the use of complainant's property.

San Pedro, Los Angeles & Salt Lake Railroad Company.

9. In this suit defendants contend that the court is without jurisdiction because the amount in controversy is less than $2,000. It appears from the evidence that had the maximum rates in question been in force in 1906 and 1907 the company would have suffered a loss of $441 for the first year and $779.97 for the 11 months of the second year. This contention is without merit. Jurisdictional facts were sufficiently set out in the bill. These averments were not met by any plea to the jurisdiction, nor were they in any manner denied in the answer. The federal statute declares that in certain classes of actions the Circuit Courts of the United States shall have jurisdiction con-
current with state courts where the matter in dispute, exclusive of interest and costs, exceeds the sum of $2,000. The amount in dispute for jurisdictional purposes in a suit for injunction is the value of the right to be protected, not the amount of the alleged or anticipated loss. No loss has yet accrued, because the maximum rates in question have never been enforced. It certainly cannot be the rule that one whose rights are threatened with irreparable injury must wait until he has suffered actual damage to the extent of more than $2,000 before a Circuit Court can entertain his petition for injunctive relief.

It is not claimed that defendants have taken complainant's property, or that they will or have deprived it of the ownership or possession of the railroad. The complaint is that defendants threaten to enforce certain rates, and, if they do, complainant's income will be reduced below that fair, just, and reasonable return for the use of its property which is protected by the Constitution. The right to a just and reasonable return on the fair value of its property devoted to intrastate traffic in Nevada is property. Unlawful invasion of that right may be restrained by this court in a proper case where the value of the right, exclusive of interest and costs, exceeds $2,000. The bill alleges, and the testimony tends to show, the requisite value. Whether the right will be violated by the maximum rates, if enforced, is another question. Smith v. Bivens (C. C.) 56 Fed. 352; Butchers' & Drovers' Co. v. Louisville & N. R. Co., 67 Fed. 35, 40, 14 C. C. A. 290; Nashville, etc., Ry. Co. v. McConnell (C. C.) 82 Fed. 65, 72; Board of Trade v. Celia Com. Co., 145 Fed. 28, 76 C. C. A. 28; McNeill v. So. Ry. Co., 202 U. S. 543, 558, 26 Sup. Ct. 722, 50 L. Ed. 1142.

The San Pedro Railroad runs across the southern portion of the state for a distance of 210.87 miles, through a sparsely settled, unproductive country. July 1, 1907, the interest-bearing debt of the company was $42,650,000. The proportionate amount allotted to the Nevada mileage is $9,559,571, on which the annual interest charge is $394,262.26. The interest chargeable to Nevada intrastate freight apportioned according to gross receipts is $1,186.73.

The entire line of road cost $64,712,410.58, of which the amount allotted to Nevada on a mileage basis, including equipment, is $14,504,639.71. Of this, on a basis of earnings, $43,658.96 is chargeable to Nevada intrastate freight.

The road was opened in May, 1905. During the 11 months ending May 31, 1907, the company handled but 898 tons of intrastate freight; this was carried an average of 62.73 miles, making 56,233 ton miles all told, for a compensation of $3,733.49. There were 891 different shipments of less than car load lots, and 39 full car loads of freight.

Under these conditions carrying intrastate freight must be more expensive than carrying through freight, but to ascertain a ratio from the evidence which can be applied is not easy.

General Manager Wells says that:

"The actual cost of the station service and of the labor involved in the local traffic upon complainant's railroad in the state of Nevada is not less than ten times as great per unit of traffic as in the case of the through business. In this estimate I am considering only the actual cost of transportation, and am not considering any charges to be made in respect of such traffic for
the items properly chargeable as maintenance of way, or general expenses or taxes, nor yet anything in respect of return upon the value of the company's railroad, but have reference only to the various conditions concerning the cost of handling, moving, receiving, and delivering freight upon this company's line of railroad."

Again, he says:

"The actual cost of carriage of the business done by said railroad locally in the state of Nevada is not less than ten times the per unit of the interstate business of said company in the state of Nevada."

General Traffic Manager Wann says:

"The local business costs relatively not less than ten times the general average cost of the entire business of the entire line of road per unit of traffic."

The record does not disclose the unit of traffic for the entire business of the entire line of road for the 11 months ending May 31st, nor does it afford sufficient data from which we can ascertain in terms of such a unit the cost during those 11 months of moving freight.

Mr. Wells' statements are not sufficiently definite to designate precisely the two elements which stand in the ratio of 10 to 1, so that we may ascertain the value of either of them. He does not give the cost of interstate business nor of through business per unit of traffic, nor do such values appear in the record.

Let us assume that the cost of conducting transportation for intrastate freight is ten times as great as for Nevada freight in general. During the 11 months ending May 31, 1907, the company carried 52,525,370 tons of freight one mile at a cost for conducting transportation of $202,071.33, or $.3847+ of one cent per ton mile. The total cost for maintenance of way and structures, maintenance of equipment, and general expense for the same tonnage and during the same period was $279,563.98, or $.3822+ of one cent per ton mile. Therefore the average cost of moving one ton of Nevada freight one mile is: For conducting transportation, $.3847 cents; for maintenance of way, etc.,...$.3822 cents—total, $.91694 cents.

If we apply the 10 to 1 ratio to the cost of conducting transportation, we shall have: Conducting transportation ($.3847×10), 3.847 cents; maintenance of way, etc., .3822 cents—total, 4.37924 cents.

This result is the cost of moving one ton of intrastate freight one mile. If it costs 4.37924+ cents to move one ton of local freight one mile, moving 56,233 tons one mile will cost $2,462.57. For transporting this freight the company received 6.62 cents per ton mile, or a total of $3,733.49. Had the maximum rates been enforced, the reduction would have been $779.97, leaving a balance of $2,953.52, and a profit of $490.95 above expenses. This profit is 16.6 per cent. of the intrastate freight receipts under the maximum rates. During the same period the total receipts of the company from all sources for all Nevada business were $982,028.47; operating expenses were $901,903.17—leaving a profit above operating expenses of $80,125.30, or but 8.1 per cent. of the gross receipts, as against 16.6 per cent. for intrastate freight. At the ratio of 10 to 1 operating expenses for domestic freight per ton mile were 4.37924+ cents, as against the average.
expense per ton mile of .91694 of one cent for all freight on the same road in Nevada. The expense per ton mile for intrastate freight transportation on the Southern Pacific Company in 1907 was 1.31+ cents, and on the Nevada & California Railway 2.033+ cents. It is true the net income above operating expenses was not sufficient during the 11 months mentioned to pay that portion of the taxes and of the interest on the funded and floating debt which was properly chargeable to Nevada intrastate freight traffic. But this is also true of the company’s Nevada business in general, the deficit for that business being $405,475.97. And it also appears that the total income of the company from its business in Utah, Nevada, and California as a whole was insufficient to pay operating expenses, taxes, and interest on the debt, the deficit being $313,825.93. It thus appears that neither the earnings of the company as a whole, nor the earnings of the Nevada business as a whole, nor the earnings of the Nevada intrastate freight traffic were sufficient to yield any return whatever for stockholders during the 11 months ending May 31, 1907. This condition of things does not necessarily lead to the conclusion that intrastate, interstate, or general charges were too low, nor, on the other hand, that the expenses were too high. The more reasonable inference is that the business of the company was small in comparison with its investment.

If we substitute the 3 to 1 ratio instead of the 10 to 1, the results will be as follows:

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total earnings</td>
<td>$3,733 49</td>
</tr>
<tr>
<td>Reduction if maximum rates were enforced</td>
<td>779 97</td>
</tr>
<tr>
<td>Income under reduced rates (3847 cents × 3 × 56,233 tons)</td>
<td>$2,953 52</td>
</tr>
<tr>
<td>Cost of conducting transportation</td>
<td>$648 98</td>
</tr>
<tr>
<td>Maintenance of way, etc. (53224 cents × 56,233 tons)</td>
<td>290 29</td>
</tr>
<tr>
<td>Taxes apportioned on basis of earnings</td>
<td>132 35</td>
</tr>
<tr>
<td>Balance above expenses and taxes</td>
<td>$1,872 90</td>
</tr>
<tr>
<td>Interest apportioned on basis of earnings</td>
<td>$1,186 73</td>
</tr>
<tr>
<td>Net for stockholders</td>
<td>$ 686 17</td>
</tr>
</tbody>
</table>

The cost of the road and equipment apportioned to Nevada on a mileage basis is $14,504,639.71, or $68,784.74 per mile, as against $19,842.61 per mile for the Nevada & California Railway Company, and $146,900 per mile for the Central Pacific Railway Company. The proportion of the cost of the road properly allotted to Nevada intrastate freight traffic on a basis of relative earnings is $43,658.96. On this amount, the net income of $1,872.90, after paying operating expense and taxes, is sufficient to pay a return of 4.28 per cent.

It does not necessarily follow that a schedule of maximum rates fixed by law is confiscatory because it fails to yield a reasonable return on the investment, above taxes, operating expense, and interest on the indebtedness. The rates must be reasonable to the company, but they must, in any event, be reasonable to the public. If a railroad is built into a new, sparsely settled territory with a view of serving a large future population and developing business, the Constitution does not require the few people and the small business of the present time to
pay rates which will yield an income equal to the full return to be
gathered when the country is populated and business developed to the
full capacity of the road. Beale & Wyman, R. R. Rate Reg. §§ 343,
344, 462; Capital City Gaslight Co. v. Des Moines (C. C) 72 Fed.
829, 844; Boise City I. & L. Co. v. Clark, 131 Fed. 415, 65 C. C. A.
399; Water Dist. v. Water Co., 99 Me. 371, 376, 59 Atl. 537.
In San Diego Land & Town Co. v. Jasper, 189 U. S. 439, 446, 23
Sup. Ct. 571, 574, 47 L. Ed. 892, Mr. Justice Holmes says:
"If a plant is built, as probably this was, for a larger area than it finds
itself able to supply, or, apart from that, if it does not, as yet, have the
customers contemplated, neither justice nor the Constitution requires that,
say, two-thirds of the contemplated number should pay a full return."

Under the evidence it cannot be held that the maximum rates if
applied as a whole to the intrastate freight traffic of this company are
confiscatory.

Eureka & Palisade Railway Company.

10. The capital stock of this company is $300,000. The fair present
value of its property, according to the only witness who has testi-
\-fied on the subject, is $600,000. Its railroad is 88 miles in length, and
its total indebtedness is $30,343. The bulk of the business is interstate.

"The town of Eureka, which is the southern terminal of said road and
from which and from the terminus of the Ruby Hill branch all outward-bound
freight is shipped, and to which points all inward-bound freight is destined,
has a population of about a thousand. At one time it was prosperous owing
to the operation of the mines in that vicinity, but in later years mining has
materially decreased, leaving practically but one large producing company,
operating in the district, and from whom freightage to the amount of $46,629-
76 out of a total freight earning of $81,029.06 is obtained.

"The ores so far shipped by said company are of low grade, and there is no
assurance that mining operations will be permanently continued in that dis-
trict unless ores may be hereafter exposed and uncovered; in other words, the
present operations of said company are largely experimental in the hope that
something may be discovered which will make the camp a permanent one.
There is practically no local freight between stations."

The earnings of the company for the fiscal year ending June 30,
1907, were as follows:

Passenger, mail and express service.......................... $ 29,254 12
Through ore.................................................. 36,292 15
All other freight............................................. 45,336 91
Miscellaneous earnings........................................ 1,817 46

Total ......................................................... $112,700 64

During the same period the expenses were as follows:
Operation and maintenance................................. $103,415 41
Taxes ......................................................... 4,206 83 $107,622 24

Net income above taxes and operating expenses............. $ 5,780 40

This surplus must be applied to immediately maturing obligations.
No dividends have been paid since December 31, 1904. Under the
operation of the maximum rates, if applied, the net income of the
company would have been reduced $2,410.13. If we were considering
the effect of the maximum rates on the business of the company as an entirety, this showing would be exceedingly persuasive; but over the interstate business of the company, and consequently over the business of the company as a whole, the state has no control. The authority of the state to regulate freight rates is limited to that traffic which begins and ends within its borders.

"The reasonableness or unreasonableness of rates prescribed by a state for the transportation of persons and property wholly within its limits must be determined without reference to the interstate business done by the carrier, or to the profits derived from it. The state cannot justify unreasonably low rates for domestic transportation, considered alone, upon the ground that the carrier is earning large profits on its interstate business, over which, so far as rates are concerned, the state has no control. Nor can the carrier justify unreasonably high rates on domestic business upon the ground that it will be able only in that way to meet losses on its interstate business. So far as rates of transportation are concerned, domestic business should not be made to bear the losses on interstate business, nor the latter the losses on domestic business. It is only rates for the transportation of persons and property between points within the state that the state can prescribe; and when it undertakes to prescribe rates not to be exceeded by the carrier, it must do so with reference exclusively to what is just and reasonable, as between the carrier and the public, in respect of domestic business. The argument that a railroad line is an entirety; that its income goes into, and its expenses are provided for out of, a common fund; and that its capitalization is on its entire line, within and without the state can have no application where the state is without authority over rates on the entire line, and can only deal with local rates and make such regulations as are necessary to give just compensation on local business." Smyth v. Ames, 169 U. S. 466, 541, 18 Sup. Ct. 418, 432, 42 L. Ed. 819.

Whether the income of the company from that freight business which is wholly within the state will, by enforcement of the maximum rates, be unreasonably and unlawfully reduced, can only be determined by ascertaining whether the difference between domestic freight earnings and domestic freight expense is sufficient to pay a reasonable return on the fair proportion of the property devoted to and properly assignable to that class of traffic. Chicago, etc., Ry. Co. v. Tompkins, 176 U. S. 167, 177, 179, 20 Sup. Ct. 336, 44 L. Ed. 417.

"The method of procedure in such a case is to find what part of the gross receipts is derived from business within the state, and then find the actual cost of doing the business. This cannot be found by taking a proportionate part of the cost for the entire line, since the cost of moving local freight is greater than that of moving through freight." Beale & Wyman on R. R. Rate Reg. § 406.

Neither can it be found by applying the ratio between interstate and domestic earnings, because local charges are usually higher than other charges.

The facts in relation to the business of the company for the fiscal year ending June 30, 1907, are introduced to demonstrate the injustice of the maximum rates, not as applied to the whole business, nor as applied to the whole intrastate business, but only as applied to domestic freight traffic. No evidence so introduced shows the amount of domestic freight handled, the average distance it was hauled, the rates charged, the total compensation, or the operating expenses incurred in moving it. If we know neither the service performed, the compensation received, nor the expense incurred, how can we determine wheth-

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or lower rates and charges for transportation are reasonable or unreasonable? If the net income from domestic freight traffic is relatively large, that branch of the business may be profitable, though the business as a whole is very unprofitable. The facts are not given from which we may determine whether the charges are higher or lower, or whether the operating expenses are greater or less for intrastate freight than for other business of the company. State v. Atlantic Coast Line R. R. Co., 48 Fla. 146, 37 South. 657.

The testimony here is wholly insufficient to overcome the presumption in favor of the constitutionality of the act, and the reasonableness of the maximum rates therein set forth.

Tonopah & Goldfield Railroad Company.

11. This road is 97.1 miles in length. The cost of construction and equipment was $3,503,954.06. The bonded indebtedness in round numbers is, $1,073,000. The capital stock issued and fully paid up is $2,150,000.

During the year ending June 30, 1907, the total earnings of the company from all sources were.................$2,280,943 41
Total operating expenses..............................$1,287,133 27
Taxes .................................................44,012 97
Interest on bonds, etc. ...............................66,683 67 $1,397,829 91

Net income above operating expenses, taxes and interest..$ 983,113 50

This was sufficient to pay to the holders of the $2,150,000 capital stock a dividend of 45.72 per cent.

The evidence shows that during the same year the company handled 139,746 tons of intrastate freight, of which all but 5,160 tons was in car load lots. Nothing is shown as to the average length of haul, either of intrastate or interstate freight. Neither are we informed as to the relative weight and number of freight shipments. Evidence as to light loading, short trains, frequent stops, short hauls, and shipments in less than car load quantities would show the greater expense of hauling local freight, but such testimony is wanting. No facts are given which prove for this road that it costs either more or less to handle domestic than to handle interstate traffic.

The total freight earnings were $1,736,827.77, of which $1,378,728.39 is credited to interstate, and $358,099.38 to intrastate. If the maximum rates of the railroad commission act had been in force, the effect would have been a reduction of $199,124.74, leaving a gross income from domestic freight of but $158,974.64, instead of $358,099.38. This is a very serious reduction, but, standing alone, it is not sufficient to demonstrate its own unreasonableness. The evidence fails to tell how far complainant hauled its 139,746 tons of intrastate freight. If the company hauls 139,746 tons an average distance of 22.75 miles for a compensation of $159,974.64, the average charge per ton mile is 5 cents, which ordinarily would be a generous rate. If the average haul is 45.5 miles, the average charge is 2½ cents. (The average revenue per ton mile for the previous year in the whole United States was but .748 of one cent per ton mile.) It is impossible to affirm of such an income that it is unreasonable.
The total expense for all freight traffic during the year ending June 30, 1907, was $802,318.95, but how this should be apportioned as between intrastate and interstate business is a question upon which the evidence throws no clear light. As between interstate and domestic freight we have the relative earnings and tonnage shipped, but we know nothing of the relative number of tons carried one mile, the relative length of average haul, or the relative charge per ton mile.

In the calculations presented it has been assumed that operating expenses should be divided between the two classes of business in proportion to their respective earnings; but as the respective charges for service are not shown to be the same, such an apportionment might lead to very inequitable results. For illustration: Suppose the company carries on the same train from Tonopah to Mina 200 tons of ore consigned to Virginia City and 200 tons consigned to California, it is difficult to conceive any reason why the expense to the company should be greater in one case than in the other. If the company charges twice as much per ton mile for hauling the Virginia ore as for hauling the California ore, this fact cannot of itself increase or diminish the cost incurred by the company in carrying the ores, nor justify any inference that the expense for conducting transportation, and for maintenance of way, etc., was larger per ton mile for one than for the other. If the company collected $400 on the ore for Virginia City, and $200 on the ore for California, it would not be correct for the purposes of this suit to apportion the company's expense for transportation in the proportion of two to one. The burden is on complainant to show that the reductions contemplated by the act will deprive it of a reasonable income from its property, and until this is done clearly and definitely there is no sufficient cause to declare the maximum rates confiscatory or illegal.

Virginia & Truckee Railway Company.

12. This railroad is 52.8 miles in length, while its termini, Reno and Virginia City, are but 21 miles apart. The fair cost of reproducing the property is approximately $1,500,000, though the total cost of the road and equipment to June 30, 1907, was $4,920,119.07. During the year ending on that date the company carried 39,139 tons of interstate freight, upon which the revenue received was $27,314.22. During the same time it carried 67,085 tons of intrastate freight, upon which the revenue collected was $133,547.26. If the maximum rates of the railroad commission act are applied, the result is a reduction "in total freight earnings" of $60,868.82, and the net income on the main line of the railroad from all sources, passenger, freight, mail, and express, after deducting operating expense and taxes, is $22,867.14, or an income of 1\(1/2\) per cent. on the probable present value of the road. If the maximum rates are applied with "the most liberal application" of the statutory provision that "all hauls of less than 50 miles may be charged as if actually hauled 50 miles," the reduction will be $20,894.12, leaving, after deducting operating expense and taxes, a total net income on the main line of the road from all earnings, mail, passenger, express, and freight, of $62,841.75, or a net return of 4.18\(\frac{1}{2}\) per cent. on $1,500,000.
It is quite possible, if the maximum rates are enforced on the Virginia & Truckee Railway, its net income from intrastate freight will be reduced to an unjust and unreasonable figure, but the evidence is insufficient to establish that fact. No data is given from which it is possible to discover the cost of transporting intrastate freight, either as a whole or per unit of traffic, consequently it is impossible to say with that certainty which the law demands whether the maximum rates as applied to the domestic freight business of this company are reasonable or unreasonable.

13. In the first clause of the seventh section of the railroad commission act the commission is commanded to adopt that classification of freight commonly known as "Western Classification No. 41," and it is declared that this classification "shall be uniform upon all railroads in this state," but when the schedule of maximum freight rates is introduced into the same section of the same act, it is with the following words:

"The commission shall not fix a greater rate, nor shall it allow any broad or standard gauge road to charge a greater rate than that fixed for the following classifications."

The scheme of rates so fixed is followed in the same section by this provision:

"Nothing contained herein shall be construed as preventing the commission fixing a less rate than those mentioned."

The last clause of section 14 reads as follows:

"Nothing herein contained shall be construed as allowing the commission to increase the maximum rates fixed by this act."

Nowhere in the act are railroads required in direct terms to adopt the maximum rates. The injunctions and prohibitions which accompany the schedule are addressed directly to the commission, and but indirectly, if at all, to the railroads. The obvious purpose of the Legislature was to charge the commission with the duty of regulating rates, but along lines and within limits prescribed by the act. The commission must prevent railroads from exacting unreasonable charges, whether the charges so exacted exceed or fall short of the maximum rates. It was within the mind of the legislative body that rates might be less than the maxima, and still be unreasonable. Hence the rates set out in the statute were adopted, not as rates which must be put in force and must be adopted by the railroads themselves, but as establishing the limit beyond which the commission may not go in fixing rates. If it had been the intention of the Legislature that the maximum rates should at once go into effect, without action on the part of the commission, or that railroads must conform their charges to the statutory schedule, it would have said so in unmistakable terms. When it deals with rates and charges fixed by the commission, the Legislature speaks in language which cannot be misunderstood. The contrast is significant. Commission-made orders fixing rates become operative within a limited time. Railroads affected by such orders must conform their charges thereto, and every railroad company must file with the commission the schedule of its rates prevailing at the time of the passage of the act.
It must be noted that the commission is not vested with a general power to adopt and promulgate rates. The statute gives no such authority. When a complaint is laid before the commission showing that any rate or rates are "unreasonable or unjustly discriminatory," or when the commission believes that any rate or rates are "unreasonable or unjustly discriminatory," it may proceed to investigate the same; but before an investigation can be had, 10 days' notice of the time and place of hearing must be given to the railroad and to the complainants, if any there be. The parties shall be entitled to be heard, and shall have process to enforce attendance of witnesses.

"If upon such investigation the rate or rates * * * complained of shall be found to be unreasonable or unjustly discriminatory * * * the commission shall have power to fix and order substituted therefor such rate or rates, fares, charges * * * as it shall have determined to be just and reasonable, and which shall be charged, imposed and followed in the future."

Section 14 expressly makes it the duty of the commission to "determine and by order fix a reasonable rate, fare, charge * * * or a joint rate to be imposed, observed and followed in future in lieu of that found" upon such investigation to be "unreasonable or unjustly discriminatory." It is also made the duty of the commission to "cause a certified copy of each such order to be delivered to an officer or station agent of the railroad affected thereby." Such "order shall of its own force take effect and become operative thirty days after the service thereof," and "all railroads to which the order applies shall make such changes on their schedule on file as may be necessary to make the same conform to said order, and no change shall thereafter be made by any railroad in any such rates, fares or charges, or in any joint rate or rates, without the approval of the commission." If any railroad shall fail, neglect, or refuse to obey any lawful requirement or order made by the commission, it shall be subject to the penalties prescribed by law.

Provision is made whereby any railroad or other party interested, being dissatisfied with an order of the commission fixing a rate, may within 90 days begin suit in the district court of the proper district to vacate and set aside such order on the ground that the rate or rates therein fixed are unreasonable or unlawful. Provision is also made for an appeal from the judgment of the court.

It would seem from all this that the commission is vested with authority to fix rates only as the result of an investigation at which it shall have been found that the previous rates are unreasonable or unjustly discriminatory.

The procedure provided in the statute for investigating and thereafter regulating rates is adequate to reach and reduce every unreasonable charge or schedule of charges applied in Nevada to domestic freight transported by rail.

The Legislature, having provided a method for the regulation of rates, all other methods are excluded. 2 Lewis' Sutherland, Stat. Constr. § 572; Smith v. Stephens, 10 Wall. 321, 326, 19 L. Ed. 933; Thomason v. Ruggles, 69 Cal. 465, 11 Pac. 25.

The commission has no power to fix a schedule of rates by summary order without investigation. It is clothed with no authority to
fix rates except after due investigation, and after a finding that a previous rate or rates were unreasonable or unjustly discriminatory.

It is very earnestly contended that the powers thus delegated to the commission are judicial; that the investigation is a trial, and the result a judgment. Special emphasis is laid on the fact that the new rates promulgated by the order are thus established, not for railroads in general, but only for the particular railroad which has been investigated. It may occur under the operation of the act that the same rate will be lawful for one carrier and unlawful for another, without other justification than the mere circumstance that one railroad has been investigated and the other has not.

Section 1, art. 3, of the Constitution of Nevada, reads thus:

"The powers of the government of the state of Nevada shall be divided into three separate departments, the legislative, the executive and the judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any function appertaining to either of the others except in the cases herein expressly directed and permitted."

Section 1, art. 6, reads thus:

"The judicial power of this state shall be vested in a Supreme Court, district courts and justices of the peace. The Legislature may also establish courts for municipal purposes only, in incorporated cities and towns."

It is argued that the judicial power of the state is thus completely distributed, and is now vested in the several courts named in the Constitution; that these courts constitute the judicial department, and the whole of the judicial department, of the state. Consequently the Legislature is powerless to endow the Railroad Commission with judicial authority, and the exercise of judicial functions by the commission trenches on the power of the judicial department.

This question is very elaborately discussed in Louisville & N. R. Co. v. McChord (C. C.) 103 Fed. 216. The Kentucky statute there involved, excluding the fact that the Kentucky commission is not guided by a schedule of maximum rates, is practically the same as that portion of the Nevada act which prescribes the method for establishing rates. The Kentucky statute authorizes the Railroad Commission to investigate rates complained of, or believed by the commission itself to be extortionate; it requires the railroad company to be notified of the time and place of the hearing, and of the nature of the matter to be investigated; it requires the commission to hear such statements, evidence, and argument of the parties as are deemed relevant, and if the company complained of is found guilty of extortion the commission may by order fix a just and reasonable rate. It must serve a copy of such order upon the railroad company affected thereby, and it is provided that 10 days later the order shall go into effect. Violations of the order subject the offending railroad to penalties specified in the act.

Under constitutional provisions similar to our own it was held that the judicial department of that state had been established, and that no judicial tribunals except those named in the Constitution could be lawfully set up in Kentucky, and that the Railroad Commission was not such a tribunal. Therefore a statute attempting to confer judicial
powers on that commission was unconstitutional. The court took the view that the Legislature had the power to delegate authority to fix rates generally, and, if the statute had conferred only such general authority on the commission, it would be the duty of the court to wait until the commission had acted, and then pass upon the reasonableness or unreasonableness of the rates so established. The court declared that the statute neither fixed general rates nor gave the commission the right to establish such rates; it simply empowered the commission to fix rates in those individual instances where, after due investigation and hearing, rates had been found to be extortionate, and when so fixed the new rates were not of general obligation, but were binding only on the particular carrier found guilty of extortion. Finally, on page 226 of 103 Fed., the court uses this language:

"The act violates the Constitution of the state, in attempting to confer upon the commission what are judicial powers and functions, to wit, the power, after complaint and notice given, to 'hear and determine' that the railroad has been 'guilty of extortion,' and, as a consequence, after that finding, to further decide that the freight rate of that road for similar services shall be a lower figure. These steps, as they apply only to individual instances, and are not a method of fixing rates generally, constitute the very essence of a judicial proceeding and judgment."

No legal principle is better established than the rule that the power to fix rates, if delegated by the Legislature to a Railroad Commission, is, in kind, a legislative function, and that courts of equity will not interfere in advance by injunction to control the exercise of such a power. Prentis v. Atlantic Coast Line Co., 211 U. S. 210, 29 Sup. Ct. 68, 53 L. Ed. —; McChord v. Louisville & N. R. Co., 183 U. S. 483, 495, 22 Sup. Ct. 165, 46 L. Ed. 289; Southern Pacific Co. v. Bd. R. R. Com'rs (C. C.) 73 Fed. 236; Louisville & N. R. Co. v. Brown (C. C.) 123 Fed. 946, 948; Chicago, B. & Q. R. Co. v. Winnett (C. C. A.) 162 Fed. 242, 246; New Orleans Waterworks Co. v. New Orleans, 164 U. S. 471, 482, 17 Sup. Ct. 161, 41 L. Ed. 518.

The fixing of rates is a legislative rather than a judicial act. This is true even though the order fixing a rate was preceded by the most searching investigation, whether conducted under judicial forms or not. It is the essential nature of an act rather than the method of its accomplishment which determines its character. If legislative proceedings and investigations culminating in the enactment of a statute were conducted in strict obedience to the rules which obtain in a court of law, it could not be claimed for an instant that a statute so adopted has the force and effect of a judgment. The distinction between the two functions is thus stated by Mr. Justice Holmes in Prentis v. Atlantic Coast Line Co., supra:

"A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative, not judicial, in kind." Interstate Com. Com. v. Ry. Co., 167 U. S. 479, 505, 17 Sup. Ct. 896, 42 L. Ed. 243; Western Union Tel. Co. v. Myatt (C. C.) 98 Fed. 335, 341; Winchester, etc., R. R. Co. v. Commonwealth, 106 Va. 264, 281, 55 S. E. 692; Sawyer v. Dooley, 21 Nev. 390, 396, 32 Pac. 437; Steen-
Ordnances adopted by legislative bodies fixing particular rates for individual public service corporations have been repeatedly upheld. Houston & T. C. R. Co. v. Storey (C. C.) 149 Fed. 499, 504; Home Telephone & Telegraph Co. v. City of Los Angeles (C. C.) 155 Fed. 554, 580; Covington, etc., Turnpike Co. v. Sandford, 164 U. S. 578, 598, 17 Sup. Ct. 198, 41 L. Ed. 560.

In the last case the General Assembly of Kentucky by statute had prescribed maximum rates to be collected on a turnpike road. The court uses this language:

"Justice to the public and to stockholders may require, in respect to one road, rates different from those prescribed for other roads. Rates on one road may be reasonable and just to all concerned, while the same rates would be exorbitant on another road. The utmost that any corporation, operating a public highway, can rightfully demand at the hands of the Legislature when exerting its general powers is that it receive what, under all the circumstances, is such compensation for the use of its property as will be just both to it and to the public."

Whether a rate fixed by the commission be a general rate applicable to all carriers in the state, or a single rate to be enforced against some individual railroad, the nature of the act is the same; it is not a declaration of rights as they stand under present or past fact and law, but it is the making and the promulgation of a new rule for the future—an act legislative, not judicial.

If the adoption of a particular rate for an individual road in the manner provided by the Kentucky statute is a legislative and not a judicial act, the question naturally arises, is it not the duty of the court, just as in the case of a general rate, to wait until the commission has acted, before passing on the reasonableness or unreasonableness of the rate?

When the McChord Case was taken to the Supreme Court of the United States (183 U. S. 483, 22 Sup. Ct. 165, 46 L. Ed. 289), after stating that the "fixing of rates is essentially legislative in its character, and the general rule is that legislative action cannot be interfered with by injunction," the court declared that under the General Statutes of Kentucky indictments for extortion, discrimination, and preference could be found against a railroad only on recommendation or request of the Railroad Commission. Consequently the court held that the duty of enforcing such rates as might be established by the Kentucky Railroad Commission under the act devolved upon the commission itself, and therefore an injunction restraining the Railroad Commission from action could not be had in a suit by railroad companies, brought before any rates were fixed by the commission. Accordingly the decree of the lower court was reversed, and the bills of complaint ordered dismissed.

These questions were again considered by the Supreme Court in Prentis v. Atlantic Coast Line Co., supra. An order of the State Corporation Commission of the state of Virginia fixing various passenger rates for the several railroads of that state was an issue. The order fixing passenger rates was made after due notice and hearing,
and it was at this stage of the proceedings that the railroad companies brought suit and obtained from a federal court an injunction restraining the commission from enforcing the new rates. The Constitution of Virginia clothes the Corporation Commission of that state with both judicial and legislative power. The commission may, after due notice, establish rates, and it may enforce them by its own appropriate process. Any aggrieved party may appeal to the Circuit Court of Appeals, and that court, if it reverses what has been done, may substitute such order or rate as in its judgment the commission should have made. Thus the Court of Appeals also is invested with rate-making power.

The Supreme Court said that the rates fixed by the commission, or substitute rates made by the Court of Appeals, notwithstanding the judicial character of the two bodies, were legislative acts, and that:

"No rate is irrevocably fixed by the state until the matter has been laid before the body having the last word. It may be that that body will adhere to the old rate, or will establish one that will not be open to the charge of violating the contracts alleged. * * * On the question of contract, as on that of confiscation, it is reasonable and proper that the evidence should be laid, in the first instance, before the body having the last legislative word."

It was therefore held that a suit to restrain the enforcement of a passenger rate fixed by order of the Corporation Commission was prematurely brought, if commenced before the rate had been finally considered and acted on by the Circuit Court of Appeals.

"When the rate is fixed," said the court (page 230 of 211 U. S., page 71 of 29 Sup. Ct. [58 L. Ed. —]), "a bill against the commission to restrain the members from enforcing it will not be bad as an attempt to enjoin legislation or as a suit against a state, and will be the proper form of remedy."

In Chicago, B. & Q. Co. v. Winnett (C. C. A.) 162 Fed. 242, the Railway Commission of Nebraska had notified the complainant railroad company to show cause why a proposed schedule of rates should not be adopted. Before a hearing could be had the company brought suit to enjoin the commission from serving the company with any order reducing rates. As the commission had never fixed any rates, the bill had no other object than to perpetually restrain the commission from fixing a rate. It was held that the court had no authority to interfere before the rates were fixed.

It may be added that the Nebraska statute required the commission to fix rates, but provided that notice and opportunity to be heard, and due process to compel the attendance of witnesses, should first be given to the railroad.

In Southern Pac. Co. v. Bd. of R. R. Com rs (C. C.) 78 Fed. 236, two resolutions adopted by the Railroad Commission of California were attacked. In the first, known as the "Grain Resolution," rates on grain were reduced 8 per cent.; in the second, known as the "Twenty-Five Per Cent. Resolution," it was declared that the general freight rates of the Southern Pacific Company in California were 25 per cent. too high, and that "this board proceed at once to adopt a revised schedule of rates in accordance herewith, in order that the same may be in force before January 1, 1896." The court enjoined enforcement of the first resolution, but declined to interfere with the second,
because the final order declaring a 25 per cent. reduction had not been made.

In the present case it is neither shown by the evidence nor admitted in the pleadings that the Nevada Railroad Commission had instituted investigations and hearings, or determined, and by order fixed, any rate or rates to be observed and followed in future by either or any of the railroads interested in this litigation. This court has no control over the legislative department of the state. It cannot prohibit the Legislature from enacting a statute; it cannot forbid the adoption of rates by the Railroad Commission. After rates have been established, a bill to restrain the commission from enforcing them would be proper.

"Legislative discretion, whether rightfully or wrongfully exercised, is not subject to interference by the judiciary." Alpers v. San Francisco (C. C.) 32 Fed. 503; State R. R. Com. v. People (Colo.) 98 Pac. 7, 12; Glide v. Superior Court, 147 Cal. 21, 81 Pac. 225, 226.

The evidence introduced in behalf of the Nevada & California Railroad Company is sufficient to show that the maximum rates, if adopted and enforced during the fiscal year ending June 30, 1907, would have deprived that company of all compensation for the use of its property devoted to intrastate freight traffic. Whatever the actual fact may be, the evidence fails to show with that degree of certainty which is demanded by law that the maximum rates as a whole would operate unjustly if applied to the intrastate freight business of the Southern Pacific Company, the Eureka & Palisade Railway Company, the San Pedro, Los Angeles & Salt Lake Railroad Company, the Tonopah & Goldfield Railroad Company, or the Virginia & Truckee Railway. The testimony also fails to show that the commission by final order fixed any rate or schedule of rates to be observed and followed by the Nevada & California Railroad Company, or by any other railway company in Nevada, or has by lawful order adopted as rates to be observed and enforced the statutory maxima.

There are allegations in the pleadings, made on information and belief, to the effect that the commission had adopted the classification set out in section 7 of the act; had demanded of all broad-gauge railroads in the state immediate adoption of the maximum rates, and was and is threatening to institute investigations and hearings and to commence suits unless its demands are acceded to.

The defendants not only fail to deny this, but they admit that if such request had not been complied with, and these suits had not been brought, the commission "would have felt it their duty to advise the Attorney General of Nevada of the failure of complainant to comply as aforesaid." The Attorney General admits "he would, within a reasonable time after receiving such advice, have brought suit to compel complainant to adopt such schedule of rates."

There is nothing here as yet to justify the issuance of an injunction. The legislative or discretionary power of the board has not been fully and finally exercised. Notwithstanding the Attorney General's admission, it is safe to assume that suit will not be brought until some order of the commission establishing rates, made in full and strict compliance with the statute, has been violated. It is also prep-
er to assume that the commission will yield obedience to the Constitution, and that it will not, after due investigation, find and determine a present freight rate unreasonable, when in truth and in fact the rate is both just and reasonable. When an unjust or unreasonable rate or schedule of rates has been actually and finally adopted by order of the board, it may be properly challenged, and its enforcement enjoined.

It is therefore ordered that the bill in each of the suits brought against Bartine et al. be dismissed, and that the injunctions herefofore issued in said suits be dissolved.

The dismissal against the Nevada & California Railway Company is without prejudice.

BOYD v. NORTHERN PAC. RY. CO. et al.

(Circuit Court, E. D. Washington, E. D. March 30, 1900.)

No. 1,252.

1. RAILROADS ($134*)—CONSTRUCTION OF LEASE—ASSUMPTION BY LESSEE OF INDEBTEDNESS OF LESSOR.

A provision of a lease of railroad property for a term of 999 years, to be maintained in good condition by the lessee, that the lessee should save the lessor harmless from suits of "any and all kinds whatsoever arising out of, or in any manner appertaining to or connected with, the maintenance, operation or management of said demised railways, premises," etc., cannot be construed to render the lessee liable for an indebtedness of the lessor for original construction of its road, then in suit and upon which a judgment was subsequently rendered, which would ignore the limitations therein and hold the lessee liable for all of the lessor's indebtedness.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 134.*]

2. CORPORATIONS ($445*)—CONVEYANCE OF CORPORATE PROPERTY—RIGHTS OF CREDITORS.

A transferee of all of the property of a corporation takes and holds the same subject to the rights of creditors of the transferring corporation which as to the property are unaffected by the transfer, but the transferee does not become personally liable to such creditors except where it has disposed of, misapplied, or converted the property in fraud of the rights of such creditors, in which case a court of equity may require an accounting.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 445.*]

3. RAILROADS ($134*)—LEASER—LIABILITY OF LESSEE TO CREDITORS OF LESSOR—CONVERSION OF ASSETS.

A railroad company leased for a long term the road and all of the property of another company, except material and supplies on hand which it purchased, and also acquired the ownership of all of the stock of the lessor company. It covenanted to keep the property in good condition, and to pay as rental the interest on an issue of bonds to be made by the lessor, a part of which were reserved to pay off a prior issue, and the remainder, comprising the greater part, were used by the lessee or for its benefit. The operation of the leased road was in fact profitable, and produced net earnings more than sufficient to pay the interest on the bonds; but the lessee so apportioned such earnings between its own and the leased line as to show a deficit, and, making default in the payment of interest, the mortgages were foreclosed and all of the property of the lessor sold. Held, that the conversion by the lessee of the bonds of the lessor and the earnings from its property was in fraud of the rights of a general creditor.

*For other cases see same topics & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
of the lessor, who had an equitable lien upon all its property, and rendered the lessee liable for a judgment recovered by him on his claim, which was less in amount than the property so converted.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 134.*]


The Northern Pacific Railroad Company in 1888 leased all of the property of the Cœur d'Alene Railway & Navigation Company, consisting of a railroad line and equipment in Idaho, for 999 years, and also acquired the ownership of all its stock. It converted to its own use certain bonds of the lessor and net earnings of its property, which rendered it personally liable to complainant, who was a general creditor of the lessor, recovering final judgment against it in 1897. A creditors' suit and foreclosure suits were instituted against the Northern Pacific Railroad Company in 1893, which were consolidated and receivers appointed. Issues were joined, but no further action taken until 1896, when a reorganization scheme was perfected between a protective committee of the stockholders and the bondholders pursuant to which defendant the Northern Pacific Railway Company was organized, in which stock was issued to stockholders of the old company in exchange for their stock on payment of a small bonus in cash. A consent decree of foreclosure was then entered, and pursuant to the plan the mortgaged property was brought in by the new company, to which a large amount of the bonds had been transferred. Subsequently a supplemental bill was filed in the suit on behalf of certain general creditors, including the reorganized company, and on the same day a consent decree was entered under which unmortgaged lands of the mortgagor were sold and the proceeds distributed, the reorganized company receiving $1,200,000 as a dividend on account of unused bonds, etc. In the meantime the old company had made default in the payment of interest on the bonds of the Cœur d'Alene Railway & Navigation Company, and suits had been instituted to foreclose the mortgages in which the property of such company was sold and bought in by the Northern Pacific Railway Company, which had become the owner of practically all of the bonds. Complainant was then a general creditor only, and was not made a party to any of such suits, nor did he have actual notice of the supplemental bill, filed in Wisconsin, under which the unmortgaged property of the Northern Pacific Railroad Company was sold and the proceeds distributed. Held, that he was not bound by any of such proceedings, which, in so far as they deprived his debtors, the Cœur d'Alene Railway & Navigation Company and the Northern Pacific Railroad Company, of property on which he had an equitable lien, were in fraud of his rights; that since the stockholders of the latter company continued in interest as stockholders of the reorganized company, and also as such received the benefit of the unmortgaged property of the old company to the extent of over $1,000,000, the Northern Pacific Railway Company was liable in equity for the payment of his judgment.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 30.*

Liabilities enforceable against reorganized corporations, see note to Armour v. Bement's Sons, 62 C. C. A. 147.

Rights and liabilities of stockholders of railroads on consolidation, see note to Bonner v. Terre Haute & T. R. Co., 81 C. C. A. 450.]

5. Equity (§ 82*)—Laches—Delay Caused by Adverse Party.

The claim of complainant against the original debtor having been in continuous litigation in various suits and proceedings for many years, during most of which time it was being contested by the Northern Pacific Railroad Company or its successor, the Northern Pacific Railway Company, through both trial and appellate courts, complainant is not chargeable with laches because nearly 20 years elapsed after the first action was instituted

*For other cases see same topic & § number in Dec. & Am. Digs. 1897 to date, & Rep'r Indexes
before he commenced suit to charge the latter company directly with liability, which suit he was not previously in a position to maintain.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 236; Dec. Dig. § 82.*]

In Equity.

Turner & Geraghty and R. L. Edmiston, for complainant.

Francis Lynde Stetson, Charles W. Bunn, Charles Donnelly, and Edward J. Cannon, for defendants.

WHITSON, District Judge. This suit arises out of an extremely complicated state of facts running over a long period of time, an understanding of which can only be arrived at through the tedious process of relating them in detail. It is a creditors' bill brought in the superior court of the state of Washington for the county of Spokane, but removed to this court as a cause arising under the laws of the United States. The defendant, the Northern Pacific Railway Company, is a corporation organized under the laws of Wisconsin, and will hereinafter be designated as the "Railway Company." The defendant, the Northern Pacific Railroad Company, was created by the act of Congress approved July 2, 1864, c. 217, 13 Stat. 365, and it will be referred to as the "Railroad Company," while the Cœur d'Alene Railway & Navigation Company, on account of whose indebtedness the grievances complained of arose, is a corporation organized under the laws of Montana, but doing business in Idaho, and it will be noticed as the "Navigation Company."

In 1886 the Navigation Company, while engaged in the construction of a narrow-gauge railroad in the then territory of Idaho, incurred indebtedness for work and materials upon a contract with William L. Spaulding in the sum of $23,675.85, and, this being unpaid, an action was commenced by Spaulding on March 27, 1887, in a court of that territory against it, which resulted in a judgment on April 25, 1896, for the sum claimed with accumulated interest, amounting to $36,584.95. This judgment was affirmed by the Supreme Court of the state on November 26, 1897 (Spaulding v. Cœur d'Alene Ry. & Nav. Co., 5 Idaho, 528, 51 Pac. 408), Idaho having in the meantime been admitted into the Union.

On May 3, 1898, Spaulding instituted a suit upon this judgment in a state court of Idaho against the Navigation Company, the Railroad Company, and the Railway Company, alleging that the property of the Navigation Company had come into the possession of the Railway Company in fraud of creditors, and praying that the judgment be declared a charge upon the property of the Navigation Company, then in the hands of the Railway Company, and for the appointment of a receiver with authority to sell the same and apply the proceeds to the payment thereof. A receiver was appointed in this suit on July 27, 1899. The defendants presented a petition for the removal of the cause to the United States Circuit Court for the District of Idaho, but the right to remove was denied by the state court, and thereupon the defendants filed a suit in the United States Circuit Court.
to enjoin Spaulding from further prosecuting his suit in the state court. The injunction being denied, on May 20, 1898, an appeal was taken to the Circuit Court of Appeals, where the action of the circuit court was affirmed. 93 Fed. 286, 35 C. C. A. 295. It was sought to revise this judgment in the Supreme Court of the United States by writ of certiorari, but the petition was denied May 1, 1899. 174 U. S. 801, 19 Sup. Ct. 884, 43 L. Ed. 1187. The defendants then appealed from the action of the district court of the state of Idaho to the Supreme Court of the state, which, on November 21, 1899, reversed the judgment of the lower court holding that it was void. 6 Idaho, 638, 59 Pac. 426.

In the meantime Boyd, the complainant here, claiming to be the owner of the judgment against the Navigation Company, having discovered that Spaulding had assigned it (for purposes not now material) to Willis Sweet, who had as attorney conducted the litigation on behalf of Spaulding, demanded that the same be assigned to him, and, being met with refusal, he instituted a suit by complaint filed December 20, 1898, in the district court of Idaho, at Moscow, against Spaulding and Sweet, which was at the petition of the defendants removed to the United States Circuit Court for the Northern Division of the District of Idaho, the suit resulting in a decree in that court on the 21st day of May, 1901, in favor of the complainant, establishing his right to such judgment and vesting in him the title and ownership thereof, with full and sole power to enforce and collect the same. From this judgment an appeal was taken to the Circuit Court of Appeals for the Ninth Circuit after the time limit had nearly expired, which was dismissed by that court. The dismissal left the original decree adjudging the complainant the owner of the judgment against the Navigation Company in full force and effect. Pending the litigation between this complainant and Spaulding and Sweet in relation to the ownership of the judgment, Spaulding on March 9, 1900, filed his petition or supplemental bill in intervention in the consolidated foreclosure suit begun by the Central Trust Company against the Navigation Company (hereinafter to be particularly mentioned), by which it was sought to have it decreed that the judgment was a charge upon the property of the Navigation Company then in possession of the Railway Company superior to the lien of the mortgages which had already gone to decree on foreclosure. This complainant appeared in the suit by petition, and set up that, while in fact he was the real party in interest and the owner of the judgment, Spaulding had denied his rights therein, and was proceeding by intervention without his authority and contrary to his interest, and praying that he be permitted to become a party for the purpose of setting up his own claim to the judgment. While the complaint in intervention, or supplemental bill, was dismissed on the ground that the Spaulding judgment was not entitled to priority over the mortgage liens, this complainant was granted the right to intervene therein, but no further steps were taken, and his petition remains on file in the state court without having been prosecuted, for the reason, it may be assumed, that the dismissal of the principal controversy left nothing upon which jurisdiction could be based to proceed upon a matter purely incidental to it.
Certain details must be recited, in view of the contention made by
the defendants that complainant has not prosecuted his claim with
diligence. In the original action, the demand of Spaulding being in
dispute, the court ordered a resurvey and cross-section of the railroad
constructed by the Navigation Company, as a means of ascertaining
the amount due. This resulted in considerable delay through the dif-

culty experienced in procuring a competent engineer. During this
interval, also, witnesses had scattered, and it was necessary to secure
their attendance from Montana, Puget Sound, Oregon, and California,
whereby the trial was further delayed. The judge to whom the case
was first submitted was superseded by another before he had ren-
dered judgment, the latter of whom, having heard the evidence and
made a decision, died before he had given legal effect to his findings.
This necessitated a retrial of the cause. About this time Attorney
Sweet, who had been prosecuting the matter for Spaulding, was elect-
ed to Congress, and during his term the cause was permitted to slum-
ber, for in the opinion of plaintiff his familiarity with the controversy
made his services at least desirable, if not indispensable. Upon the
return of Sweet after two years' absence in Congress, he was elected
to the bench in Idaho to preside over the district where the action was
pending, but he was of course disqualified from hearing the cause,
and this resulted in further delay. At one time an execution was is-
sued and returned nulla bona, and at another a steamer of the Naviga-
tion Company (the George A. Oakes) was levied on, but the sale was
enjoined, while the cause was once delayed at the instance of the
defendant. After Spaulding disputed complainant's ownership of the
judgment, about three years were consumed in establishing his rights,
which brought the case up to 1901, while notice of appeal delayed it
until the fall of that year. During these delays the statute of limita-
tions was running, and upon advice of counsel, who considered it
unsafe to proceed before revivor, for that the expiration of the limita-
tion period pending the litigation would bar a recovery, the com-
plainant instituted a proceeding in the district court for Kootenai coun-
ty, Idaho, against the Navigation Company, to revive the judgment,
and this, upon petition of defendant, was removed to the Circuit
Court of the United States for the District of Idaho, Northern Divi-
sion, and there, on October 23, 1905, judgment was rendered in plain-
tiff's favor for $71,278.20, which is the original indebtedness con-
tracted by the Navigation Company in 1886, with accumulated in-
terest and costs. A writ of error from the Circuit Court of Appeals
to reverse this judgment was dismissed by stipulation, but the proce-
sion of this suit was not thereby delayed. It is this indebtedness
and the judgment last mentioned that the complainant seeks to recover
in this suit instituted on the 20th day of September, 1906.

In the litigation between the Navigation Company and Spaulding
the former was represented by counsel of the Railroad Company, after
its connection with the property in 1888, not specially retained, but
in pursuance of their general employment by that corporation. Every
step taken by Spaulding and every action or proceeding instituted by
him or subsequently by complainant, in the state courts of Idaho, in
the United States Circuit Court, in the Circuit Court of Appeals, and
in the Supreme Court of the United States, to obtain relief against the Navigation Company, was resisted by the attorneys of the Railway and Railroad Companies in pursuance of their general duties as counsel, and without special employment for the particular matter in hand. And this continued until September 13, 1906, when it was stipulated by counsel of the Railway Company that the writ of error sued out by them against the judgment of revivor should be dismissed.

Going back now to those occurrences which affected the status of the property of the Navigation Company, pending the several proceedings which resulted in a final judgment against it in favor of complainant, it will be necessary to inquire of the various transactions, liens, transfers, and mortgage foreclosures against its property, as well as the relation to and control of the property by the Railroad and Railway Companies.

At the time Spaulding instituted his action the Navigation Company had already constructed in the territory of Idaho a narrow-gauge railroad from Burke to Old Mission, with a branch from Wallace toward Mullan, a total distance of 33 miles; and it was possessed of a steamboat line operating between Old Mission and Cœur d'Alene city. A mortgage to secure $360,000 of the bonds of the Navigation Company was placed upon the company's property in 1886. In August, 1888, Daniel C. Corbin, one of the incorporators, and who at the time owned or controlled a majority of the capital stock of the Navigation Company, entered into a contract with the Railroad Company, the terms of which may be summarized as follows:

First. Corbin was to cause a lease to be executed to the Railroad Company of all the property and franchises of the Navigation Company for a term of 999 years.

Second. The Railroad Company was to pay as rental the interest on an issue of bonds of the Navigation Company to an amount not to exceed $25,000 per mile, of which bonds $825,000 were to be issued on account of the 33 miles of railroad already constructed, but $360,000 of which were to be retained by the trustee for redemption and payment of a like amount of the original issue under the prior mortgage of September 1, 1886, then outstanding. Until redemption of these outstanding bonds the Railroad Company was to pay the interest thereon and provide a sinking fund for the redemption of the whole of the new issue.

Third. The Railroad Company was to pay the Navigation Company, at the time of the execution of the lease and entering into possession of the demised properties, the sum of $20,500 for expenses incurred by the latter in making surveys between Wallace and the summit of the Bitter Root range of mountains, and in contesting the right of way with the Washington & Idaho Railroad Company, and for work done on said line; and the Railroad Company was to purchase from the Navigation Company all construction and operating material and supplies on hand at the time of taking possession, paying therefor the fair cost.

Fourth. In consideration of the execution of the lease and the guaranty by the Railroad Company, Corbin was to cause to be transferred to the Railroad Company at least 51 per cent. of the capital stock of
the Navigation Company, fully paid and nonassessable, and to cause the delivery of possession of the Navigation Company's property and franchises to the Railroad Company as soon as said issue of bonds could be prepared and executed, not later than October 1, 1888, and at and upon the execution of said lease and guaranty.

The lease, which included all the property of the corporation, was, as contemplated by the agreement with Corbin, duly executed on September 14, 1888, for the specified term of 999 years then next ensuing; but in addition to matters mentioned in the agreement there was reserved as rent the entire "net earnings" to be derived by the Railroad Company, that term being defined as surplus earnings of the property and appurtenances of the Navigation Company "which shall remain after all expenses of operating the said demised property and premises, and carrying on the business thereof, including all taxes and assessments, and payments of incumbrances, and the interest and sinking fund of the mortgage bonds," together with the expenses of repairing and replacing the demised railroads and premises and said steamboats, wharves, etc., which the Railroad Company agreed to keep and maintain in high condition. It was also provided in the lease, though not mentioned in the agreement, that, in addition to the rental already mentioned, a sum not exceeding $2,000 per annum should be paid by the Railroad Company to the Navigation Company to enable it to maintain its corporate organization and to defray the necessary expenses thereof.

The lease also contained the following:

"The party of the second part and its successors shall and will at all times during the existence of this lease, bear, and at its and their own proper cost and expense, pay and discharge any and all costs, expenses and charges, whatsoever, of operating, maintaining and transacting the business of said demised railroads and premises, or in any manner connected with, arising out of, or appertaining to, the maintenance, business, operation or management thereof; and shall at all times save, keep harmless and indemnify the party of the first part, its successors and assigns, from and against any and all charges, cost, expenses, suits, damages, demands and claims of any and all kinds whatsoever arising out of, or in any manner appertaining to, or connected with, the maintenance, operation or management of the said demised railroads, premises, and their appurtenances during the existence of this lease."

The mortgage contemplated by the lease was executed pursuant to its terms and dated the 1st day of September, 1888. Of the $825,000 of bonds thereby secured, $360,000 were reserved by the trustee for the retirement of the like amount issued under the mortgage of 1886, but those remaining, amounting to $465,000, were delivered to the Navigation Company. Who became the beneficiary will be reserved for future discussion. Fifty-one per cent. of the stock was transferred to the Railroad Company on September 18, 1888, and on October 1st of that year it went into possession under the lease, and so continued until its default in the terms thereof, hereinafter to receive more extended notice. In 1889 the Railroad Company concluded to build a standard-gauge railroad from Mullan eastwardly to the boundary line between Montana and Idaho to connect with the Northern Pacific system. This was a distance of 16½ miles, for the construction of which it advanced the money. By the terms of the mortgage, bonds to the extent of $25,000 per mile were to be issued for
each additional mile constructed, and pursuant to its terms $413,000 of the bonds provided for under the Navigation Company's mortgage of 1888 were issued to the Railroad Company, which amount, however, was less than the amount actually expended by something like a half million dollars. This brought the bonded indebtedness of the Navigation Company up to $878,000, exclusive of the $360,000 of outstanding bonds under the first mortgage, making a total of $1,238,000, for the payment of the interest upon which the Railroad Company stood as guarantor. On December 17, 1889, the Railroad Company bought 4,400 additional shares of the Navigation Company's stock of Corbin, and on December 24, 1889, 500 shares from Charles H. Head & Co., whereby it became the sole stockholder of that Company.

On August 15, 1893, P. B. Winston, the Farmers' Loan & Trust Company, and the copartnership of William C. Sheldon & Co., joining as complainants, filed in the Circuit Court of the United States for the Eastern District of Wisconsin a creditors' bill against the Railroad Company, praying the interposition of the court in administering the trust to the end that the obligations held by said complainants might be paid and the property preserved against sequestration by suits and attachments, which it was alleged would result in its dismemberment and destruction as a railroad system. To this bill the Railroad Company filed an answer upon the same day, admitting its allegations, and thereupon receivers were appointed to take possession of its property. Similar actions, ancillary in character, were instituted in the various districts through which the main line of railroad ran, including the district of Washington. There were six mortgages outstanding upon the property of the Railroad Company, and the interest due on the bonds secured by the general second mortgage of November, 1883, the general third mortgage of December, 1887, and the consolidated mortgage of December, 1889, having gone to default, the Farmers' Loan & Trust Company, as trustee, filed in the United States Circuit Court for the Eastern District of Wisconsin, on the 18th day of October, 1893, its original bill praying for their foreclosure. Thereupon the court consolidated the creditors' bill and the foreclosure suit, and the receivership created under the former was extended to the latter. Beyond filing similar bills in, and invoking the ancillary aid of, the several circuit courts within whose jurisdictions the property of the Railroad Company was situate, the record discloses no active proceedings in the consolidated suit from April 2, 1894, when the Railroad Company filed its demurrer therein, until the final decree, except that on December 28, 1893, the Railroad Company petitioned for the removal of the receivers, wherein complaint was made against the extravagant manner in which the property was being operated, and particularly as to the appointment of separate receivers for its 15 subsidiary companies. It was charged that their appointment was made by collusion and to prevent the control of the property passing out of the hands of Oakes, who was at the time president, and that the company should be in the hands of those "in whom the stockholders, whose coöperation is essential to the prompt and successful reorganization of the property, have full confidence"; and it was aver-
red "that it will be impossible to raise the large sums of money necessary to effect a reorganization of the company and restore it to a solvent condition while the management and control of the property is in the hands of those who have reduced it to bankruptcy." It was asserted that the receiver, Oakes, as president of the Railroad Company, had brought it into its then condition of insolvency by reason of mismanagement, was still the dominating factor in the control of the property and operation of the roads, and, in effect, that his connection with it would not inspire that confidence necessary to reorganization. The result of this petition is not material here.

While the Railroad Company, under the influences which dominated it at the time of the appointment of the receivers at the suit of Winston, and possibly even at the time of the institution of the foreclosure proceedings by the Farmers' Loan & Trust Company as trustee, and the consolidation of those suits, was in an attitude of friendliness toward those in power, it is apparent from the record, and particularly from the petition for the removal of the receivers who had theretofore been appointed, as well as the filing of the demurrer in the consolidated suit, that the stockholders were beginning to apprehend the probable wiping out of their stock by foreclosure, and to appreciate the result which might be expected if the suit should be vigorously prosecuted, for the fixed charges at this time amounted to something less than $11,000,000 per annum, while the net annual income was slightly in excess of $6,000,000. On account of the six mortgages of varying dates and rank upon the property of the Railroad Company, some of which were liens upon a part of the property, some upon other parts, and some general, as well as the complications arising by virtue of the 15 subsidiary companies with their several obligations and mortgage indebtedness, it became at once manifest that there was a necessity for preserving the property as a whole if the interest of all parties concerned was to be consulted. This could only be brought about by a reorganization which would conserve the property and preserve its integrity as a railroad system in the interest as well of the property as of the creditors and stockholders, and this became at once a problem in financiering worthy of the ingenuity afterwards displayed in solving it.

The interested parties, being thus confronted with a condition so complex, organized a committee of the holders of the general second mortgage, general third mortgage, and consolidated mortgage bonds on February 19, 1894. This committee having been put in control of a majority of the outstanding consolidated mortgage bonds and the general third mortgage bonds, but less than a majority of the general second mortgage bonds, secured the cooperation of J. P. Morgan & Co. of New York for devising a practical plan of reorganization, who, in connection with the Deutsche Bank of Berlin, E. D. Adams, chairman of the bondholders' committee, and the protective committee, of which Brayton Ives was chairman, formulated what was termed "the plan for independent reorganization of the property," of which the following is a summary:

The various properties, including all branch lines and subsidiary companies, were to be brought under direct ownership of one company;
the fixed charges were to be reduced to bring them within the net earnings under the receivership; ample provision was to be made for additional capital for the development of the property, and for greater facilities made necessary by the increasing business; the acquisition of the system was to be brought about by the organization of a new company, which was, at the discretion of the managers of the syndicate, to become the purchaser at foreclosure sales of the various properties of the Railroad Company, and this company was to be authorized to make a prior lien, 100-year, 4 per cent. $130,000,000 mortgage upon the main line, branches, terminals, etc., and a general lien, 150-year, 3 per cent. $60,000,000 mortgage to be subject to the prior lien mortgage. The capital stock of the new company was to be fixed at $155,000,000, to consist of $75,000,000 preferred and $80,000,000 common stock. The bonds and stocks of the new company were to be distributed as follows:

### The $130,000,000 Mortgage.

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>To the retirement of the general first mortgage bonds</td>
<td>$ 41,879,000</td>
</tr>
<tr>
<td>To provide for the conversion, and, so far as necessary, for the</td>
<td></td>
</tr>
<tr>
<td>sinking fund of the general first mortgage bonds</td>
<td>$ 14,657,650</td>
</tr>
<tr>
<td>For the payment of receivers' certificates and equipment trust, and</td>
<td></td>
</tr>
<tr>
<td>the conversion of the collateral trust notes and general second</td>
<td></td>
</tr>
<tr>
<td>mortgage bonds</td>
<td>$ 40,040,350</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>$ 96,577,000</td>
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</tbody>
</table>

Reserved to provide at their maturity for an equal amount of bonds of the St. Paul & Northern Pacific Railroad Company...

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Estimated amount to be reserved for new construction, betterments, equipment, etc., at $1,500,000 per annum</td>
<td>$ 25,000,000</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>$130,000,000</td>
</tr>
</tbody>
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### The $60,000,000 Mortgage.

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
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</thead>
<tbody>
<tr>
<td>For the conversion of the general third mortgage bonds, dividend certificates, and the consolidated mortgage and branch line bonds, under the plan.</td>
<td>$ 56,000,000</td>
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<tr>
<td>Estimated amount to be reserved under carefully guarded restrictions in the mortgage for new construction, betterments, equipment, etc.</td>
<td>$ 4,000,000</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>$ 60,000,000</td>
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### Preferred Stock, Amounting to $75,000,000.

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
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</thead>
<tbody>
<tr>
<td>For conversion and adjustment of various main line and branch line mortgage bonds, and the defaulted interest thereon, and other purposes in the plan.</td>
<td>$ 72,500,000</td>
</tr>
<tr>
<td>Estimated amount which might be used for reorganization purposes or might be available as a treasury asset of the new company</td>
<td>$ 2,500,000</td>
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<tr>
<td><strong>Total</strong></td>
<td>$ 75,000,000</td>
</tr>
</tbody>
</table>

### Common Stock, Amounting to $80,000,000.

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>For purposes of reorganization, as provided in the plan</td>
<td>$ 77,500,000</td>
</tr>
<tr>
<td>Estimated amount which might be used for reorganization purposes, or might be available as a treasury asset of the new company</td>
<td>$ 2,500,000</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>$ 80,000,000</td>
</tr>
</tbody>
</table>
Upon the completion of the reorganization, the managers in behalf of the syndicate were to deliver to each depositor of one share ($100) of preferred stock of the old company $50 in new preferred stock trust certificates and $50 in new common stock trust certificates in consideration of the payment of $10 per share, and to deliver to each depositor of $100 of old common stock one share of like par value of new common stock trust certificates in consideration of the payment of $15 per share.

While this plan was in process of incubation, the property of the Railroad Company was being operated under the receivership. Nearly 2½ years elapsed before the issues were made up in the consolidated cause. Outside of the controversy as to the personnel of the receivers and the interlocutory matters relating to the management of the property under the receivership, the proceedings appear to have been in a state of quiescence, for it was not until April 27, 1896, that the decree of foreclosure was entered. Adams, as chairman of the bondholders' committee, filed his answer on April 13th; the Railroad Company filed an answer on April 20th; Livingston and others on April 3rd; Winston on April 27th; Sheldon and others on April 27th; the Railroad Company, its additional or supplemental answer on April 27th—all in the year 1896. The several answers admitted the allegations of the bill, and the issues thus made resulted in a consent decree, "no one opposing" being the language by which the consent was expressed. The decree, pursuant to the plan of reorganization, contained, among other things, this language:

"The purchaser of any parcel may satisfy and make good any part of his bid not required to be paid in cash by turning in to be canceled or credited, as heretofore provided, any bond or coupon payable out of the proceeds of such parcel upon distribution of such proceeds; and such purchaser shall be credited therefor on account of his bid with such sums as would be payable on such bonds and coupons out of the purchase price if the same amount thereof had been paid in cash."

While the answers deny that a new company was formed for acquiring the properties of the Railroad Company in pursuance of the reorganization plan, the same purpose was accomplished by the purchase of the capital stock of the Superior & St. Croix Railroad Company, a Wisconsin corporation, the capital stock of which was increased to $155,000,000, and the name changed to the Northern Pacific Railway Company. In due course the property was sold under the decree of foreclosure, and the Railway Company became the purchaser. It bid the mortgaged property in for $12,500,000, but it took it subject to certain prior mortgages amounting to approximately $44,000,000, from which it appears that the actual purchase price was about $56,500,000, exclusive of receivers' certificates and costs. The syndicate turned over to the Railway Company $3,500,000 in cash, which is apparently less than the amount realized from subscriptions of the stockholders of the Railroad Company, they having availed themselves of the opportunity for converting the stock of the old into that of the new company. In the purchase of the property bonds which had been deposited in pursuance of the reorganization agreement, and as authorized by the decree, were used in payment for the property sold under foreclosure. It was by this means, which will presently
have more detailed reference, that the reorganization was effected and the Railway Company came into the property of the Railroad Company.

Pending the receivership, the Railroad Company, having become insolvent, was unable to make good its guaranty of interest upon the bonds of the Navigation Company, which as to the mortgage of 1886 defaulted on September 1, 1893, and as to the mortgage of 1888 on October 1, 1893. Thereupon the receivers petitioned for leave to pay these installments of interest. The petition for that purpose recited that the gross earnings to the Railroad Company to and from the Cœur d'Alene Branch for the fiscal year ending June 30, 1893, amounting to $316,167.11, of which there was apportioned to the Railroad Company proper $229,226.12, and to the Cœur d'Alene Branch $86,940.99; that the operating expenses and fixed charges of the Cœur d'Alene Branch for the same period amounted to $193,407.36, leaving a direct deficit from the operation of that road of $106,466.27 on its proportion of the earnings of $316,167.11, thereby showing a profit to the Railroad Company of $138,000. It was also set forth that for the fiscal year ending June 30, 1893, the earnings of this branch showed an increase of 25 per cent., which would show a net profit to the Railroad Company from the operation of it of $180,000 per annum over and above operating expenses, interest on the mortgage bonds, and other charges against it. On account of this manifest benefit to the Railroad Company, the receivers prayed for authority to pay the interest coupons maturing September 1, 1893, upon the $360,000 of bonds issued under the mortgage of September 1, 1886, and the semi-annual interest upon the $378,000 which matured on the 1st day of October, 1893, under the mortgage of September 1, 1888; and this was based upon the advantage to the Railroad Company which would accrue by virtue of the continuance of the operation of the property under the arrangement already referred to. The prayer of the petition was granted, and the payment was made accordingly. But while the property of the Navigation Company was operated by the Railroad Company from the date it was taken over until August 15, 1893, ostensibly under the lease of 1888, the Railroad Company was the actual owner of it, holding as it did all the capital stock and being in possession of the property; and so it was considered, as is shown by the petition filed by the receivers Oakes, Rouse, and Payne on August 31, 1893, in the consolidated foreclosure suit, from which the following extract is taken:

"* * *

And that (referring to the property of the Navigation Company), although it is operated in and by virtue of said indenture of lease above referred to, the demised property is, nevertheless, in reality part of the assets and property of the said defendant, the Northern Pacific Railroad Company, as all the stock, except a few shares necessary to qualify directors, are held and owned by said defendant."

The first nine months of the Railroad Company's control of this property, ending June 30, 1889—that is, from October 1, 1888, to June 30, 1889—the Navigation Company earned $130,269.01 in excess of operating expenses, taxes, and fixed charges, and, for the year next succeeding, $46,000.59. The year thereafter showed a deficit of
$36,381.19, and the year still following a deficit of $116,707.43, and the next year, namely, that ending June 30, 1893, a deficit of $84,049.65. But this was largely bookkeeping, based upon the apportionment made by the Railroad Company of the earnings and expenses.

The Central Trust Company of New York, as trustee, and Harry H. Trowbridge, as co-complainant, creditors of the Navigation Company, commenced a suit against it on October 10, 1893, in the United States Circuit Court for the District of Idaho, alleging the insolvency of the company, and its inability to earn operating expenses and fixed charges, reference being had to the first and second mortgages upon its property, whereupon receivers were appointed. Notwithstanding the above-mentioned interest payments upon the bonds of the Navigation Company by the receivers, the continuing deficiency of the earnings of the Railroad Company made it apparent that the course adopted was but a temporary expedient for the interest upon bonds thereafter defaulted, until, on August 24, 1895, the Central Trust Company as trustee commenced a suit in the same court for the foreclosure of the mortgage of September 1, 1888, and on May 25, 1896, it commenced a suit in the same court for the foreclosure of the mortgage of 1886. These suits were consolidated, and were pending at the time of the sale of the property of the Railroad Company under the decree of April 27, 1896. This consolidated suit went to final decree on October 16, 1896, and the property was sold thereunder on January 11, 1897. The Railway Company had, previous to that time, acquired $359,000 of the total of $360,000 of the first mortgage bonds, and had acquired the entire issue of $878,000 of the second mortgage bonds, the former having been paid for in cash at par, and the latter by its nonassessable preferred stock. The Railway Company bid in the property for the sum of $220,000, and the sale was confirmed January 28, 1897. The overplus—that is, the difference between the bid and the total of bonds held by it, amounting to $1,082,469.94—was presented by the Railway Company as a claim against the Railroad Company, and upon this claim it received as a dividend out of the unmortgaged assets remaining after the foreclosure against the Railroad Company the sum of $108,246.98. It will thus be seen that the Railway Company became the purchaser of the property of the Navigation Company in pursuance of the plan of reorganization; that it paid the purchase price for the property with bonds which it had acquired by purchase; but that it retired the second mortgage bonds by the issuance of its preferred stock.

While the manner in which the Railway Company came into possession of the railroads, terminals, and subsidiary companies, which were in fact a part of the general system of the Railroad Company, as well as the greater portion of the lands granted by Congress to aid in the construction of the latter’s railroad lines, has already been related, it is worthy of mention that the parties to the litigation all joined in a motion to confirm the sale upon the report of the master, each waiving the time to file exceptions and agreeing that the matter might be at once determined.

But a part of the lands granted by Congress, together with certain other property, were not mortgaged, and thereupon the Farmers’
Loan & Trust Company, on May 25, 1896, professedly claiming as trustee, filed its supplemental bill in the court of original jurisdiction, which recited the various proceedings already set out in detail, and, in addition thereto, that there were certain lands of the Railroad Company situate in the states of Minnesota and North Dakota east of the Missouri river not included in the mortgages upon which the decree had been rendered. It was alleged that these lands were wholly insufficient to pay the debts of the Railroad Company, and that the petitioner had become a judgment creditor in virtue of its trusteeship as follows:

On May 14, 1896, in the sum of $2,133,501.38 upon two certain judgments in the Circuit Court of the United States for the District of Minnesota, and upon these in an action brought on the 26th day of May, 1896, in the court of original jurisdiction in Wisconsin, the defendant Railroad Company appearing, a judgment was rendered upon the same day for the sum of $2,137,430.09. Two certain judgments rendered in the Circuit Court of the United States for the District of North Dakota against the defendant on the 18th day of May, 1906, aggregating $1,883,736.30, upon which, on the 25th day of May, 1896, in an action brought thereon in the court of original jurisdiction in Wisconsin the defendant appearing, judgment was rendered upon the same day for $1,385,367.95. Upon a judgment rendered in favor of E. J. Conity, as administrator of the estate of John Harris, deceased, in the United States Circuit Court for the District of North Dakota, on October 24, 1894, for $3,000. A like judgment in the same court in favor of Andrew Mortenson for $7,000, both assigned to the petitioner. The prayer was that these lands in Minnesota and North Dakota and other unencumbered property be sequestered and sold, and that the proceeds be applied to the satisfaction of the claims of general creditors. To this petition the Railroad Company and the various parties to the consolidated cause immediately filed their answers, and thereupon on the same day the court adjudged that the equity was with the complainant, and the receivers were directed to sell the lands and property, which sale was made in due course and was subsequently confirmed, all the parties agreeing.

The Railway Company claiming as a holder of the overplus of bonds of the Railroad Company which had come into its possession through the plan of reorganization by deposit with the syndicate managers, and through the above-mentioned judgments, was adjudged to be a creditor of the Railroad Company in a sum in excess of $100,000,000. Out of the proceeds of the sale of this unencumbered property it received a dividend of $1,200,000.

The complainant seeks a decree declaring the judgment sued upon to be a liability of the Railroad Company, and he prays judgment against that company accordingly; that said indebtedness be declared a lien upon the property of the Railroad Company from the time of the acquisition by said company of the property of the Navigation Company, or, at least, that it be declared to be a lien since the insolvency of the Railroad Company; that the decree of foreclosure through which the Railway Company came into the properties of the Railroad Company be declared to have been fraudulent and void as to
the complainant, and ineffectual to free the property from the lien of the complainant’s claim thereon; that it be decreed that the dividend of $108,246.98 paid to the Railway Company upon distribution of the proceeds of the unmortgaged assets of the Railroad Company was an unlawful and inequitable conversion by the Railway Company of the assets of the Railroad Company, and that the money so procured be treated as a trust fund in the hands of the Railway Company to be charged with the payment of the complainant’s judgment; or, in the alternative, that the court declare the said amount to have been received by the Railway Company for the use of the Navigation Company, and that it be treated as a trust fund for the payment of the debts of the Navigation Company, and that the complainant’s judgment be impressed upon said fund; that it be decreed that the Railway Company pay into the registry of the court the amount of the complainant’s indebtedness, or, in default, that an order be made for the sale of all or so much of the property of the Railway Company as may be necessary to make the amount due the complainant; or, in the alternative, that the court appoint a receiver with the usual powers to take possession of the property within its jurisdiction and operate it until the amount due complainant be paid. Complainant also prays for general relief. Under the general prayer it may be assumed that he also seeks to hold the Railway Company liable for the $1,200,000 distributed from the unmortgaged assets, for such has been the contention, and, in view of the submission of that phase of the case and the discussion of it without objection, it also will be considered as within the general scope of the bill. Complainant’s counsel have rested his right to relief upon three propositions:

First. Upon contract liability arising from the relation of the parties. This is based upon the language of the lease already noted. But the agreement of the Railroad Company to save the Navigation Company harmless from suits of “any and all kinds whatsoever arising out of, or in any manner appertaining to or connected with the maintenance, operation, or management of said demised railways, premises, etc.,” placed a limitation upon the obligations for which it pledged itself. The contract must be construed, in so far as it relates to the terms of the lease, strictly considered as such, in view of the subject-matter with which the parties were dealing. The interpretation contended for would hold the Railroad Company liable for all the debts of the Navigation Company. We are not at liberty to adopt a construction which would amount to treating the qualifying words as wholly superfluous, but must seek to ascertain what was intended. That for which the complainant secured a judgment could not be chargeable to the maintenance of the road, for the amount had already been expended upon it; more properly it would have been designated as construction. It was not for operation from any standpoint, nor did it relate to the management of the property, for these must have been under the lease. The intention to assume antecedent indebtedness can only be extracted from the language used, by ignoring those things which the contracting parties saw fit to express. The words were apt for expressing the obligation of the lessee to preserve the property while in its possession from those lienable
charges which might affect the title, and were inapt for expressing existing indebtedness.

The facts here differ from those in Chicago, Milwaukee & St. Paul Railway Company v. Third National Bank of Chicago, 134 U. S. 276, 10 Sup. Ct. 550, 33 L. Ed. 900, in that the parties there were dealing with certain judgment liens and unliquidated demands against the railway company, while here the Railroad Company did not undertake to deal with existing indebtedness at all.

The second ground relied upon is that the transaction by which the Railroad Company purchased the whole of the stock and took possession of all of the property of the Navigation Company under the lease created an obligation on the part of the former to pay and discharge the debts of the latter. The defendants' counsel do not deny that the Railroad Company in virtue of the circumstances stood in the same position as to creditors of the Navigation Company as though it had become the purchaser outright of the property. That it was regarded and treated by all parties in interest as a sale and transfer is abundantly justified by the record. Complainant's counsel invoke the doctrine of equity that the assets of a corporation constitute a trust fund for the payment of its creditors. This, of course, is not disputed, but a distinction is pointed out between the personal liability of a transferee in such a case and the right of a creditor to follow the property transferred. Thus the defendants' position is stated:

"When, on October 1, 1888, the Cœur d'Alene Company leased its property for 999 years to the Railroad Company, the rights of the creditors of the former company as against that property remained just what they were before. The Cœur d'Alene Company could not diminish or impair those rights by making the transfer, and the property remained subject to the claims of creditors upon it; and if at any time prior to 1893 the plaintiff had pressed his claim to judgment the property could have been sold (subject to mortgages upon it, but freed from the lease) to satisfy that judgment."

If counsel have appeared to dispute concerning the rule, it may be gathered from the briefs that there is no substantial controversy between them. Defendants' counsel admit that the transferee of the property of a corporation is liable to account to the creditors of the transferring company, but limits the remedy to the property transferred, while complainant's counsel apparently have not intended to be understood as claiming a liability for the payment of indebtedness beyond the assets taken over. But if they have been misunderstood in that regard, it must be held that there is no personal liability except where property has been disposed of, misapplied, or converted. The general trust doctrine would not permit of a more extended application, but the personal liability of one who fails to observe the duty imposed, when the assets of a corporation come into his hands, is abundantly sustained by authority. Angle v. Chicago, St. Paul, Minneapolis & Omaha Ry. Co., 151 U. S. 1, 27, 14 Sup. Ct. 240, 38 L. Ed. 55; Chicago, Milwaukee & St. Paul Ry. Co. v. Third National Bank of Chicago, 134 U. S. 276, 286, 10 Sup. Ct. 550, 33 L. Ed. 900; McVicker v. American Opera Co. (C. C.) 40 Fed. 861; Brum v. Merchants' Mutual Ins. Co. (C. C.) 16 Fed. 143; Hibernia Ins. Co. v. St. Louis & New Orleans Transp. Co. (C. C.) 10 Fed. 600; Thompson on Corporations, §§ 332, 6543.
A court of equity does not conclude its inquiry upon ascertaining that the property has passed beyond the control of the transferee, but will follow the fund in the enforcement of the trust fund theory. Chicago, Milwaukee & St. Paul Ry. Co. v. Third National Bank of Chicago, page 286 of 134 U. S., page 550 of 10 Sup. Ct. (33 L. Ed. 900); Pomeroy's Equity Jurisprudence (3d Ed.) vol. 3, § 1048; Thompson on Corporations, § 2957.

Applying the principle here, in order that there may be a liability on the part of the Railroad Company to pay the complainant's judgment against the Navigation Company, it must appear that the Railroad Company came into the possession of assets which the complainant could have made available to the satisfaction of his judgment, and, if not now possessed of them, that they have been wrongfully disposed of and in fraud of his rights.

With these propositions in view, the nature of the transaction between the Navigation Company and the Railroad Company will be inquired of.

We have seen that Mr. Corbin at the time that the lease was executed was in control of the property and stock of the Navigation Company, but it is necessary to scrutinize the transaction at this point. Remembering that the Railroad Company acquired all of the stock of the Navigation Company and that it went into control under a lease, it must account for the assets which it took over; for to those assets the complainant had a right to look for the satisfaction of his judgment. Speaking of the $465,000 of bonds, Mr. Corbin testified as follows:

"Q. If these bonds were issued during the time that you remained as president, did you or your associates derive any advantage from them in any way? A. I should say not. Q. You received none of this bond issue? A. We received no bonds. I am quite sure we did not. I do not remember that we did. My recollection is we received so much cash."

Referring to the second mortgage given to secure these bonds, he said:

"It could not be for our benefit, because we were wholly out of it, entirely, and turned over our stock, simply turning over the stock, practically turning over the property and receiving our money."

Again:

"Q. You say you and your associates received no benefit from this mortgage unless it was raised to pay you part of the purchase price? A. No, I should think not. I presume it was used, probably used to pay us, I presume. I know we got our money. Q. But you are certain that you did not receive the bonds, but that you received the money as your compensation? A. I do not think we received any bonds, unless possibly we might have received bonds with an agreement for somebody to take them off our hands and pay us the money, because I never had any bonds. Q. You do not remember having any of these bonds? A. If they ever came into my hands at all, they just passed through my hands. I never had any; I am quite sure of that."

Mr. Martin, in testifying on behalf of the defendants relating to the same matter, said in answer to an inquiry as to who got the $465,000 of bonds:

"A. I suppose the promoters of that enterprise did. Q. That is, Mr. Corbin and his associates? A. Yes, sir; his rights and so on were worth something."
Q. He did get that when he sold out, I suppose, as part of the consideration for the sale of the road? A. He and his associates certainly ought to get it. There were some other things; he had some surveys, I believe, that the Northern Pacific paid for, and also some stock of material that the Northern Pacific paid for."

It is true that the memory of Mr. Corbin was somewhat hazy concerning a transaction so long ago consummated, but his testimony is sufficiently convincing, corroborated as it is by that of Mr. Martin, to justify the conclusion that the proceeds went to pay Mr. Corbin for his stock, or that the Railroad Company otherwise received the benefit, particularly in the absence of any other explanation or theory presumably within the power of the defendants to make if the bonds were not in fact so applied. It appears that, if the bonds were actually delivered to the Navigation Company or to Mr. Corbin as president, it was purely a matter of form, for at the time his control was only nominal. Neither these bonds nor the proceeds were used to pay the obligations of the Navigation Company. They were either directly or indirectly applied to the benefit of the Railroad Company, and it is immaterial whether it used them to pay Mr. Corbin for his stock or appropriated them to its own use in extensions or otherwise. The transfer included certain stock on hand not accounted for, but the value is not disclosed. This throws some light upon the nature of the transaction. The Railroad Company, being in full control of the property, apportioned the revenues as best suited its purposes, and decreased the net income by gradual diminution from year to year until the Navigation Company became insolvent through these diversions. The petition of the receivers for payment of interest on the mortgage bonds frankly disclosed this situation, and the evidence otherwise abundantly justifies the conclusion. This was well enough as between the corporations themselves, but it was a manifest fraud upon creditors, who had a right to subject these surplus revenues to the payment of their just claims. The Railroad Company, having in this manner dealt with the property, is accountable to the complainant as an existing creditor, for at the time it became insolvent he had a right to look to it for payment on account of the conversion of property which had come into its hands, the amount being largely in excess of his judgment. Creditors had an equitable lien upon the property of the Railroad Company, but there could be no impairment of priorities on this account; therefore creditors holding liens were entitled to rank general creditors. This case is bottomed upon the theory that the manner in which the lienholders pursued their remedy was in fraud of general creditors. Stockholders of an insolvent corporation cannot retain an interest in its property to the exclusion of creditors, for this is a concomitant of the trust fund theory, and it applies to lien and general creditors alike. Thus the rule was laid down by the Supreme Court:

"Assuming that foreclosure proceedings may be carried on to some extent at least in the interests and for the benefit of both mortgagee and mortgagor (that is, bondholder and stockholder), we observe that no such proceedings can be rightfully carried to consummation which recognize and preserve any interest in the stockholders without also recognizing and preserving the interests, not merely of the mortgagee, but of every creditor of the corpora-
tion. In other words, if the bondholder wishes to foreclose and exclude in-
ferior lienholders or general unsecured creditors and stockholders, he may
do so, but a foreclosure which attempts to preserve any interest or right of
the mortgagor in the property after the sale must necessarily secure and pre-
serve the prior rights of general creditors thereof. This is based upon the
familiar rule that the stockholders' interest in the property is subordinate
to the rights of creditors; first of secured, and then of unsecured creditors.
And any arrangement of the parties by which the subordinate rights and in-
terests of the stockholders are attempted to be secured at the expense of prior
rights of either class of creditors comes within judicial denunciation." Louis-
ville Trust Co. v. Louisville, etc., Ry. Co., 174 U. S. 674, 683, 19 Sup. Ct. 827,
43 L. Ed. 1130.

An examination of the foreclosure proceedings by which the prop-
erty of the Railroad Company passed into the hands of the Railway
Company is necessarily involved. First it is to be observed that this
court cannot review the judgment of a court of co-ordinate jurisdiction.
Irregularities, erroneous conclusions, wrong views of the law, can-
ot stand as the sanction for disregarding what was adjudicated. Here
it becomes important to understand the powers of a court of equity to
relieve against a judgment fraudulently obtained.

"A court of 'chancery is always open to hear complaints against fraud,
whether committed in pais, or in or by means of judicial proceedings.'" Mar-
shall v. Holmes, 141 U. S. 599, 12 Sup. Ct. 62, 35 L. Ed. 870, quoting

"In such cases, the court does not act as a court of review, nor does it
inquire into any irregularities or errors of proceeding in another court;
but it will scrutinize the conduct of the parties, and, if it finds that they have
been guilty of fraud in obtaining a judgment or decree, it will deprive them
of the benefit of it, and of any inequitable advantage which they have derived
under it." Johnson v. Waters, supra.

But here the parties concealed nothing from the court, therefore
no imposition was practiced. On the contrary, after a full and frank
disclosure of the plan, it met with approbation. We must look else-
where for the ground upon which complainant may stand. This leads
to the inquiry whether the stockholders and bondholders of the Rail-
road Company so shaped the decree and conducted the proceedings
that the former by virtue of stock ownership retained a beneficial in-
terest in the property represented by stock in the new company,
which was brought into being pursuant to the plan of reorganization.
We thus pass to the final question, which must be considered in its
double aspect, namely, whether the proceedings as conducted were
in fraud of general nonparticipating creditors, and, if so, whether
the complainant is bound by virtue of the jurisdiction of the court
over the property and the notice to general creditors, coupled with
the actual notice that there was a foreclosure, that receivers were
appointed, that the property was operated under the receivership,
that it was sold, that the purchaser went into possession, and there-
after the Railroad Company in its corporate capacity ceased to be an
active and going concern. These will be examined in their order. On
this branch it is indispensable that certain facts be briefly recounted.

The foreclosure suit, commenced October 18, 1893, supplemented
as it was by bills subsequently filed which disclosed continuing and
accruing defaults in the payment of interest, was permitted to rest
upon the demurrer of the Railroad Company filed April 2, 1894, until
the final decree rendered April 27, 1896. The answers of the various parties defendant, all filed in the month of April, 1896, admitted the allegations of the original and supplemental bills. The answer of the Railroad Company, which generally admitted the allegations of the bill and supplemental bills, was filed April 20th, while the amended answer, consisting of specific admissions, was filed upon the day the decree was rendered. The issues thus made up must be considered as one cotemporaneous act, the dates of filing the respective answers having resulted, no doubt, from the exigencies of the situation and the necessity for conforming to methods of procedure. The reorganization committee was appointed on February 19, 1894, but the scheme proposed by it was not submitted until March 16, 1896, when it was finally promulgated. Up to the time that the reorganization plan was accepted, the Railroad Company was in an attitude of hostility. Upon its adoption all opposition was suddenly withdrawn, a consent decree was entered, and all became harmonious. Then it was that everybody consented to everything. These facts are significant as tending to disclose what was actually accomplished by the various transactions and proceedings which followed the adoption of the plan of reorganization. The mortgage indebtedness mentioned in the decree, including $18,510,653.13 accumulated interest, amounted to $152,335,155.13. The net income from the operation of the railroad properties under the receivership for the year 1895 amounted to $6,015,846.62, while the fixed charges were $10,905,690, but the average for the five years ending in June, 1896, was $7,801,645.78. Judge Jenkins in Paton et al. v. Northern Pacific Railroad Company et al. (C. C.) 86 Fed. 838, in an opinion filed July 22, 1896, denied the relief which the complainant sought in that case upon the basis of $7,800,000 as probably available by way of net revenues. Evidently there had been a considerable increase of net earnings for the year 1896 over prior years, and, in view of the circumstances, this amount, coming from one in a position to know, will be accepted as a close approximation to the earning capacity of the Railroad Company at that time. Taking these figures as a basis for calculation, we find that the net revenues under the receivership, at 4 per cent. per annum, the interest rate of the prior lien, 100-year, $130,000,000 mortgage, were paying interest upon a valuation of $195,000,000. Attention has been called to the statement, made in a brief in behalf of the Railway Company in a proceeding before the Interstate Commerce Commission, which fixed the cost of the property up to the time the Railway Company came into possession of it at $241,067,769.91. This, it is said, includes the cost of branch lines also, but even so, the disparity between cost and selling price is very large. While the cost is not necessarily the value of the property—for allowance must be made for depreciation—it is always pertinent as giving aid in making an estimate of value. The Railway Company bid the property in for $12,500,000, but it was subject to the liens of mortgages superior to those upon which the decree was based and the sale made, amounting in round numbers to $44,000,000, and to receivers' certificates, costs, etc., aggregating about $5,000,000, so that it may be fairly said that the property was acquired at an expenditure of about $61,500,000, while at the rate of
interest considered adequate at the time of reorganization the property was sufficient to pay the whole of the bonded indebtedness as well as the unsecured creditors, even in the then depressed state of the finances of the country, and upon revenues derived through the cumbersome, expensive, and inadequate methods necessarily adopted for conducting the property under the supervision of the court. And this is without regard to the value of the land grant, worth many millions of dollars, and $3,500,000 turned over to the Railway Company. An opportunity was afforded stockholders of the Railroad Company to surrender their stock and take in lieu thereof stock in the new company. True, this was coupled with a condition for the payment of certain specified sums, and it may have been designated as a subscription to stock, but the condition attached to the right of stockholders to subscribe was not open unless the old stock was surrendered for cancellation. It was manifestly the intention to dispose of or wipe out the stock of the old company, and, in carrying out the scheme, stockholders were to receive concessions. The proposal was addressed "To the Holders of the Bonds and Stocks Issued or Guaranteed by the Northern Pacific Railroad Company," and it concluded as follows:

"The plan has received the approval of the representatives of a majority of the bondholders of the three main line mortgages in process of foreclosure (the general second, general third and consolidated mortgages) and of other important interests affected by the terms of reorganization. It has also received the approval of the interests represented by the protective committee."

Brayton Ives, who signed as chairman of the "Protective Committee," was at this time president of the Railroad Company. It is pertinent to inquire what this committee was engaged in protecting. The president of the Railroad Company, in view of the fact that upon adversary proceedings its stockholders would have been entitled to no equity in the property, must have been protecting something in the way of stock. Clearly he was not protecting from the mortgage liens nor demanding an adjustment that would enable the company to resume control of its properties and continue their operation, for it had conferred the prayer of the bills in the suits pending against it, once generally and once specifically, and had thereby given its unqualified consent to a sale on foreclosure. Parties in interest solemnly agreed in writing that the property, which was taken over for something over $61,000,000, was "of the full value of $345,000,000, payable in fully paid, nonassessable stock and the prior lien and general lien bonds of the company, to be executed and delivered as hereinafter provided," etc. At this time the indebtedness of the Railroad Company, included expenses of the receivership and attendant costs, did not at the outside exceed $160,000,000. How much was advanced for rehabilitation of the property beyond the $3,500,000, which it is fair to assume came from the old stockholders, it is not necessary to discuss. It is sufficient to observe that the amount furnished was compensated for by stock and bonds of the new company. The testimony is replete with facts which indicate that the stockholders of the old company became the beneficiaries of the reorganization plan. The very term itself is indicative of this view. Aside from the concord which the acceptance of the reorganization plan seemed to magically produce, we
find it proposed and discussed in many phases. Note the following from the reorganization agreement:

"Holders of the bonds, collateral trust notes, dividend certificates, and of the preferred and common stock of the Railroad Company," etc., "may become parties to this plan and agreement by depositing their securities with the depositaries upon the terms and conditions specified in the plan and this agreement, or hereinafter defined, and within the periods which shall be fixed or limited by the managers."

In a letter written by Brayton Ives on December 13, 1893, to Hon. W. F. Sanders, at Helena, Mont., among other things, it was said:

"We have delayed aggressive action in the hope that some arrangement might be made by which we could have a voice in the management of the property."

In a circular issued by the board of directors, through Mr. Ives as president, in January, 1894, the statement was made that the Railroad Company owned every share of stock and every dollar of bonds of the 15 branch roads. In this circular it was also stated that there had been an increase in the expenses of operation. He further said:

"If properly protected, stockholders can secure equitable terms in any reorganization. Let the law and the terms of the bond be what they may, the fact is that an actual foreclosure of the consolidated mortgage and the sale of the road would involve so much time and trouble as to make it practically impossible. The question as to the land grant, the claims of holders of preferred stock and others of equal importance, make it essential that the rights of stockholders be not ignored."

Again:

"While recognizing the superior claims of the bonds, the directors propose to secure justice for the stock."

The requirement of the decree that the defendant pay the amount found due against it within 10 days was of course not fixed by the court in the exercise of its discretion in that regard, but in virtue of the consent of the parties, for the time was scarcely sufficient for assembling that amount if the defendant had been possessed of it.

It has been urged that the stock which the stockholders of the Railroad Company were permitted to subscribe for was not worth as much upon the market as they were required to pay, and the conclusion is drawn that they retained no beneficial interest in the property. This theory is wholly inconsistent with the elaborate plan adopted for reorganization, and it cannot be overlooked that the reorganization managers were themselves acquiring a large interest. It is a significant fact that the reduction of the interest to the highest rate upon which the reorganization was effected would, by slight concessions on the part of the stock and bond holders, have avoided the complex arrangement devised for acquiring the property. If the stockholders of the old company could have purchased stock in the new for less than the amounts paid in upon surrender of their stock, it is proper to infer that men so experienced in dealing with that class of securities would have done so rather than pursue the more extensive plan worked out by the reorganization committee. It is not to be supposed that they were treating the transaction upon a charitable basis, but rather that they regarded it as of substantial advantage to them-
selves to surrender their stock and pay the ten and fifteen dollars per share assessed as a condition to becoming stockholders in the new company. But whether the stock secured was valuable or not (although it proved to be immensely so, and the then existing revenues made it apparent that it would be), they did retain an interest. Its value does not enter into the consideration of the question; it is the retention of that interest which invalidates the transaction. The purpose throughout the proceedings, so often displayed, coupled with the manner in which it was finally consummated, lead irresistibly to the conclusion that that which was designated as a reorganization was meant to be a reorganization in fact, and not a foreclosure sale in the strict sense of the term. The protective committee, acting in the interest of stockholders of the Railroad Company, recommended the adoption of the plan, and we have seen that the protection of stockholders' interests was the object this committee had in view and which it was appointed to subserve. And thus it was that finally, when it agreed to the plan and recommended it to stockholders and consented to the subscription to stock upon the basis outlined, all opposition to the decree of foreclosure was withdrawn, the decree itself being nothing beyond a pursuit of the methods adopted for carrying out the agreement reached by theretofore contending litigants. The foreclosure sale was made as a means of reorganizing, and the complainant's contention as to its purpose and effect in this regard is well sustained.

This is the theory of counsel for defendants: The bondholders and other lien creditors were necessarily compelled to protect themselves by bidding in the property. Sufficient sums of money for the purchase of like properties are rarely, if ever, available. The fact that shareholders were allowed to subscribe for stock was an independent transaction, and they should be treated, if I have apprehended counsel aright, as individuals who incidentally happened to hold stock of the Railroad Company. In view of the conditions, it is said that the Railway Company stands now upon the insolvency of the Railroad Company, the liens which it acquired, the foreclosure of those liens, and the necessity for placing the property upon some working basis.

But this is the shadow: However the transaction be obscured by legal phraseology, or the form be changed, the substance is that the conflicting interests desired to maintain the integrity of the property as a general railroad system. The difficulties in the way of this consumption arose out of the different rank of the liens, combined with the demands of stockholders. Upon a part of the system certain persons held first mortgage bonds, upon other parts certain other persons held mortgage bonds of like rank, and upon the whole there were outstanding general mortgage bonds, while 15 subsidiary companies, conducted by as many corporations, necessitated some kind of an accommodation to the complicated situation; and it was for this reason that the stockholders of the Railroad Company as such received a substantial benefit directly attributable to their ownership of stock. The argument based upon the theory that the syndicate subscribers had agreed to take the stock regardless of subscriptions by stockholders of the Railroad Company fails, in that it substitutes the form for the reality.

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It is not denied that if the mortgage liens had been foreclosed by an adversary proceeding in the usual way for the enforcement of such demands, and the property had been bidden in by the holders thereof and without connivance or collusion with stockholders, complainant would have no standing. His counsel plant themselves upon the proposition that, while lienholders may rest secure upon their rights and prosecute their prior liens to judgment, conduct a sale thereunder, and thereby cut off all general creditors and subsequent lienholders, permitting the stockholders to participate rendered the proceeding void as to those who were not parties or privies, and it is this principle which they would avail themselves of.

Counsel for defendants have met the contention in this way:

"When property of a corporation has been seized at the instance of creditors and administered by a court of equity having undoubted jurisdiction both of parties and subject-matter, may a general creditor of that corporation, by a subsequent independent proceeding, attack the judgments disposing of that property without submitting a particle of evidence to show that the court in rendering those judgments was not fully aware of every fact relied on as a ground for vacating them?"

The question as propounded must be answered in the negative. But did the court have jurisdiction of the parties? Undoubtedly those who, having knowledge of the facts, participated, or with such knowledge failed to participate, are bound; but since the law forbids that which was actually brought about, a creditor who was not a party and who was without notice may attack it unless the sequestration proceeding, being in rem, became a binding adjudication against him. And in deciding that question the conclusion is to be constantly borne in mind that a prohibited thing was done, a thing invalid as to creditors was accomplished, for we have seen that as to the assets of an insolvent corporation a general creditor cannot be precluded from sharing so long as they are sufficient to pay his demand, while the stockholders continue to hold a beneficial interest in the property through reorganization or otherwise. It must be accepted as a fact, for it is undisputed, that the complainant had no actual notice of the sequestration proceedings, of the existence of unmortgaged assets, or that the court was proceeding otherwise than in regular course for the foreclosure of existing mortgages. It is worthy of remark that the property sequestered was situate in the states of Minnesota and North Dakota, while the complainant lived in the state of Washington. Notices to creditors were not published in any newspaper in the city of Spokane, where the complainant resided, and those which were published were not called to his attention.

In Williams v. Gibbes et al., 17 How. 239, 255, 15 L. Ed. 135, the distribution of the property of an estate was under discussion. It was there held that an administrator may reasonably proceed to distribute among those who have established an apparent title, and, such proceedings having been taken upon notice by publication, a court will protect the administrator against any future claim. But as to the right of one entitled to share in the fund, the following was laid down as the rule:

"Now the principle is well settled, in respect to these proceedings in chancery for the distribution of a common fund among the several parties inter-
ested, either on the application of the trustee of the fund, the executor or administrator, legatee or next of kin, or on the application of any party in interest, that an absent party, who had no notice of the proceedings, and not guilty of willful laches or unreasonable neglect, will not be concluded by the decree of distribution from the assertion of his right by bill or petition against the trustee, executor, or administrator, or, in case they have distributed the fund in pursuance of an order of the court, against the distributees."

In the same case the following language from Davis v. Frowd, 1 Miln. & K. 200, was quoted with approval:

"But it is obvious that the notice given by advertisements may, and must in many cases, not reach the parties really entitled. They may be broad, and in a different part of the kingdom from that where the advertisements are published, or, from a multitude of circumstances, they may not see or hear of the advertisements, and it would be the height of injustice that the proceedings of the court, wisely adopted with a view to general convenience, should have the absolute effect of conclusively transferring the property of the true owners to one who has no right to it.

" If a creditor does not happen to discover the proceedings in the court until after the distribution has been actually made, by the order of the court, amongst the parties having, by the master's report, an apparent title, although the court will protect the administrator, who has acted under the orders of the court, yet, upon a bill filed by this creditor against the parties to whom the property has been distributed, the court will, upon proof of no willful default on the part of such creditor, and no want of reasonable diligence on his part, compel the parties, defendants, to restore to the creditor that which of right belongs to him."

Conceding that a purchaser would take the property free from any claim which a creditor might make as against him, it does not follow that those who receive a fund may take refuge behind a principle so manifestly necessary for the peace of society and for upholding judicial decrees.

This distinction is pointed out in Daniell's Chancery Pleading & Practice (5th Ed.) vol. 2, star page 1206, in the following language:

"The distribution of property, under the decree of the court, amongst persons found by the master's report to be entitled, does not, however, conclude the rights of persons who have an equal or paramount title to those amongst whom the distribution has taken place; such persons are only precluded from taking the benefit of the decree under which the distribution has been made; and they may, notwithstanding that decree, file another bill against the persons who have taken the property under it, to compel them to refund. Such a suit, however, can only, after a distribution under a decree, be instituted against the parties who have partaken of the distribution. It cannot be instituted against the executor, or administrator, or other person who, having fairly represented everything to the court, has acted under its direction in distributing the fund, for the court will not permit a party who has acted in pursuance of its decree in distributing a fund to be afterwards charged for what he has done under its directions. * * *

Continuing, it is said:

"A creditor, * * * who is entitled to the assets of a deceased debtor or testator, after payment of the debts, etc., may, after a decree in such a suit, to which he was not a party, institute another suit against the personal representative for an account of the assets."

We find the rule stated by the Supreme Court in the Matters of Howard, 9 Wall. 175, 184, 19 L. Ed. 634, in the following language:

"The general doctrine that, where there is a fund in court to be distributed among different claimants, a decree of distribution will not preclude a claim-
ant not embraced in its provisions, but having rights similar to those of other claimants who are thus embraced, from asserting by bill or petition his right to share in the fund, is established by numerous authorities, both in England and the United States."

Speaking of the effect of a decree upon one not a party, and referring to the authorities, it was further said in this case:

"None of them suggest even the proposition that the judgment or decree affirmed concludes the rights of third parties not before the court, or in any respect affects their rights. It would have been against all principle and all reason had they asserted anything of the kind. There is, indeed, a class of cases affecting the personal status of parties, in which a judgment necessarily binds the whole world; but it is not of these we are speaking. We refer to judgments at law, or decrees in chancery, affecting rights of parties to property. They bind only the parties before the court and those who stand in privity with them."

In Burke v. Short, 79 Fed. 6, 8, 24 C. C. A. 422, 424, it was said:

"Where there is a fund in court to be distributed among a class of creditors, a decree of distribution which seems to make no provision for some of the class will not ordinarily preclude any of the class having rights similar to those of other claimants from asserting by bill or petition their right to share in the fund."

In Public Works v. Columbia College, 17 Wall. 521, 21 L. Ed. 687, we find the following:

"The jurisdiction of a court of equity to reach the property of a debtor justly applicable to the payment of his debts, even when there is no specific lien on the property, is undoubted. * * * Unless the suit relate to the estate of a deceased person, the debt must be established by some judicial proceeding, and it must generally be shown that legal means for its collection have been exhausted."


Those having the management of the reorganization, holding as they did the securities chargeable against the mortgaged property, did not content themselves with asserting their liens in reliance upon priority and their strictly legal rights, but seized upon the unmortgaged assets as well. When the Farmers' Loan & Trust Company filed its supplemental bill praying for the sequestration of those assets, the several parties to the foreclosure suit, who had already consented to the decree, immediately filed their respective answers, and the decree granting the prayer of the bill was entered upon the day of its filing. The record discloses no notice of the application; want of it was supplied by the immediate appearance of parties already before the court in the consolidated cause. The effect of this procedure as to the complainant has already been discussed, but the result calls for a detailed recapitulation.

The Railway Company had a surplus of $86,911,604.20 of the bonds of the Railroad Company not used in the purchase of the property at the foreclosure sale. It acquired other outstanding, unsecured claims by assignment amounting to $13,907,402.55, and at its suits thereon the Railroad Company appeared and confessed judgment. We thus have a total of $100,819,006.75. These claims were presented for allowance out of the fund realized from the sale of the unmortgaged assets, and it was upon this demand that it received a dividend of $1,200,000.
The dividend of $108,000, by virtue of a claim growing out of the ownership of $1,082,469.82 of the bonds of the Navigation Company, was from the same fund, $220,000 only of the outstanding bonds having been used to buy in the property of that company on foreclosure. This, of course, was an admission on the part of the Railroad Company that the Navigation Company was a creditor of the Railroad Company, for the latter only bound itself for the payment of interest upon the bonds.

Defendants rely upon lis pendens. Stout v. Lye, 103 U. S. 66, 26 L. Ed. 428, and Hollins v. Briarfield Coal & Iron Co., 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1113, are cited. Those cases hold that a general creditor is not only an unnecessary but an improper party. This is the language of the Supreme Court in the case last mentioned:

"If they had been made parties when suit was begun, they could have done nothing by way of defense to the action until they had acquired some specific interest in the mortgaged property. As creditors at large they were powerless in respect to the foreclosure proceedings; but when they obtained their judgment, not before, they were in a position to contest in all legitimate ways the validity and extent of the superior lien which the bank asserted on the property in which by the judgment they had acquired a specific Interest."

But the following, it is assumed, better expresses the views of counsel:

"• • • And on the further ground that the creditor represented in the foreclosure suit, not merely himself, but all parties who, like the Stouts, acquired any interest in the property since the commencement of the suit."

The fact that the complainant had not secured a final judgment against the Navigation Company until after the sale under foreclosure does not make him any less a creditor having a lien. Fogg v. St. L., H. & K. C. Co. (C. C.) 17 Fed. 871.

It has been held that the holders of bonds are not concluded by the action of the trustee in foreclosing the mortgage given to secure them, where the trustee exceeds the powers given by the trust deed. Moran v. Hagerman, 64 Fed. 495, 504, 12 C. C. A. 239.

If in such a case as this an insolvent corporation can conclude its creditors by consenting to the misapplication of a part of its property, stockholders the while retaining an interest therein themselves, or creditors who do appear can defeat the claims of those without notice, there remains nothing of the doctrine that the property constitutes a trust fund for their benefit, and it may be dealt with regardless of their rights.

The conclusion reached as to the real transaction seems to leave no equitable ground for the defendants to stand upon which will preclude the complainant, with his hostile demand, from asserting his rights as against the conversion of assets and the continuance in interest of stockholders. The books term such conduct a fraud in law, apparently distinguishing it from covinious acts and false representations of fact, but for practical purposes classifying it as subject to the same remedies. It is for this reason that the Railroad Company in its corporate capacity did not bind its creditors in the litigation. That part of the fund realized from the sale of unmortgaged assets which the Railway Company received by virtue of its ownership of the surplus of bonds
of the Navigation Company, the complainant was entitled to share in as a creditor of the Navigation Company. The $1,200,000 received as a general creditor of the Railroad Company complainant was entitled to share in, because he was a creditor of the Railroad Company through the conversion by it of the assets of the Navigation Company. But complainant is entitled to more. He has a lien upon the property of the Railroad Company which went into the hands of the Railway Company, for the reason that stock in the new company was exchanged for stock in the old, and this applies to the property of the Navigation Company also, which reached the Railway Company through the more circuitous route. When the Railroad Company converted assets of the Navigation Company to which the complainant had a right to look for payment of his debt, it became his debtor. The Railway Company, knowing this, availed itself of the debtorship of the Railroad Company to secure a dividend out of its assets, while the assets of the Navigation Company, which were liable for the complainant's judgment, came into its possession charged with the complainant's equities, based upon the ground that a general creditor as to an insolvent corporation is entitled to assert his demand against the property, the prevention of which, by whatever method, was regarded by Mr. Justice Brewer as subject to "judicial denunciation." Something over $1,000,000 was presented by general creditors at the time the fund was distributed, although the Railway Company held about 99 per cent. of the total. But these parties, of course, had notice. They had appeared and contested, and some of them at least had fought out the contention which the complainant now makes. The fact that the court having jurisdiction of the foreclosure decided the same question presented there is urged as binding here upon several grounds: First. That the decree was entered and approved by this court. If the record discloses that the decree concerning the unmortgaged property was ever so entered, it has not been discovered; naturally it would not have been. But if it was, the rule would equally apply. The right is not limited to the court from which the judgment emanates, and there would at least be as much reluctance to disturb the effect of the judgment of another court as for a court to interfere with its own judgment. Second. The holding of Judge Jenkins that the reorganization plan was not in fraud of creditors. This court takes a different view with diffidence, but it is reassured by the decision of the Supreme Court subsequently rendered in 174 U. S. 674, 19 Sup. Ct. 827, 43 L. Ed. 1130, supra, although it must be confessed that Railroad Company v. Howard, 7 Wall. 392, 19 L. Ed. 117, seems to have laid down the same doctrine. Third. That the complainant is bound by the jurisdiction of the circuit court of Wisconsin. The ground upon which complainant's bill is entertained here is that he was not a party, and therefore he is at liberty to wage the same contest which other creditors waged, and the argument relating to the conclusiveness of the judgment fails if the complainant is not bound by virtue of the jurisdiction of that court over the property.

The extraordinary circumstances which have attended the complainant's contest naturally suggest laches, and the defendants stoutly contend that, even though all other questions be resolved against them, the
attempt of the complainant to disturb existing conditions, in view of the changed and constantly changing situation through long lapse of time, ought not to meet with favor.

It has been said by the Supreme Court:

"Laches does not, like limitation, grow out of the mere passage of time, but it is founded upon the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of the property or the parties. "* * * 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." Gallibler v. Cadwell, 145 U. S. 368, 12 Sup. Ct. 873, 36 L. Ed. 738.


So in Johnson v. West India Transit Company, 156 U. S. 647, 15 Sup. Ct. 520, 39 L. Ed. 556, relief was denied when seven years had elapsed from the date of sale and no satisfactory explanation of delay was given. There the trustee of the mortgage bonds defended by intervention.

The defense of laches is upheld because the disturbance of rights long acquiesced in will work injustice. There must be delay, a knowledge of the facts, or such indication as will import knowledge, and a condition which, if changed, will injuriously affect those who have relied upon silence as giving consent. Pomeroy's Equity Jurisprudence, vol. 5, §§ 19, 36.

Ordinarily a complainant after so many years would be remediless. Does this complainant fall within the rule that he has silently stood by and permitted others to be misled to their prejudice? Let us see what it is that imputes neglectful repose. The Railway Company, ever vigilant, watchful, and ready to contend, the while denying complainant's rights, resisted the revival of his judgment. As far back as 1898 its president and counsel had notice that it was the purpose of the complainant to claim a liability against it; with that notice, having contested, objected and fought to the last ditch, even appealing from the revivor of 1905, it now says that he has slept upon his rights; that he should have made known his contention long ago. Yet complainant could not successfully wage his contest without reviving his judgment. The expiration of the limitation period pending such a suit would have barred a recovery. And this defendant did know that the complainant looked to it for payment. The only thing that can be said is that it was not advised as to how he intended to sustain his contention. It is true that stockholders may not have known of this demand. But a corporation always represents its stockholders. Their want of notice cannot defeat a litigant, for notice to the corporation is notice to them. The rise or fall with the success or failure of the corporate entity is an incident of stock ownership.

This controversy was begun when Spaulding sought a judgment against the Navigation Company. The Railroad Company shortly after stepped into the Navigation Company's shoes and continued it; when the Railway Company stepped into the Railroad Company's shoes
it continued and still continues it. On one hand, we have the claim of Spaulding, of which Boyd was the beneficial owner. On the other, we have the Navigation Company conveying its property to the Railroad Company, the Railroad Company becoming liable for the debt, and, with this liability pending, becoming insolvent. The Railway Company comes into the property by committing a fraud in law, and then when complainant undertakes to revive the judgment, and having finally succeeded, notwithstanding obstructive tactics, he is met with the proposition that he has slumbered while defendants have been wide-awake. There was a time when Spaulding allowed the matter to drag during Sweet's term in Congress. But this was before the Railway Company had any connection with the property. The Railroad Company was at that time contesting the right to any judgment at all against the Navigation Company, and but for its interposition he would have had an adjudication long before. These conflicting interests have been in litigation all the time. Complainant has spent between twenty-five and thirty thousand dollars in prosecuting his claim. Perhaps it is meant that he did not seek this particular remedy. But he was prevented from pursuing any remedy looking to the merits of the matter by the pugnacious attitude of his adversaries. No doubt it was the intention—the record seems to disclose it, the employment of such eminent counsel would indicate it—to bring in all the creditors. It is fairly to be inferred that the proceedings were concluded upon the supposition that they were all before the court. Complainant was either omitted inadvertently or upon denial of liability. His judgment now doubly serves him, in that he is not chargeable with notice which will preclude him from the assertion of his rights; for that the defendants caused the delay; and it was also notice of his equities, which through all these years he has prosecuted over objection. The fact that the defendants so strenuously opposed the rendering of any judgment whatever tends strongly to the conviction that they had reasonable ground to apprehend a liability; not that the apprehension would create it, but it could not exist without notice. The contest which the defendants have ever waged, resting when the complainant rested, offering battle when he proceeded, coupled with the peculiar conditions, transfers, and succession of ownership, exclude the case from the familiar doctrine that unreasonable delay avoids the assertion of even a just claim. This is also a ground upon which the complainant can stand as against the contention that he might have filed his lien against the property of the Navigation Company under the statutes of Idaho, although the insufficiency of the remedy to reach the franchise of the Navigation Company is sufficient excuse in that regard.

I cannot bring myself to believe that one who prevents another from securing a right can be heard to say that such person has been guilty of neglect. If the stockholders were induced to make their investments without knowledge of this debt, now that they do know of it, manifestly, it must appear to them that they are enjoying the benefit of complainant's efforts, whose money went into the construction of the railroad which has since passed into the control of the company of which they are stockholders. It will therefore not be any breach of
the rules of equity to let them, out of the abundance of their profits, pay him for that which they are now enjoying.

Complainant must prevail, and these views will enable counsel to frame a decree in accordance therewith.

In re HUGHES.

(District Court, D. New Jersey. February 15, 1909.)

Bankruptcy (§ 347*)—Property Sold in Admiralty Proceedings—Liability for Costs and Expenses.

An adjudication in bankruptcy operates in rem, and from the time it is entered the bankrupt's property is in the custody of the court, and where a part of such property consists of vessels they cannot be thereafter taken from its custody by the marshal in admiralty proceedings without its consent; and if by such consent they are so taken and sold in suits to enforce maritime liens, the proceeds are subject to the payment of the necessary cost incurred by the bankruptcy court in preserving the property before it was turned over and the costs of administration, which by Bankr. Act July 1, 1898, c. 541, § 64b (1), (3), 30 Stat. 563 (U. S. Comp. St. 1901, p. 3447), were entitled to priority over the admiralty liens.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 347.*]

In Bankruptcy. On exceptions to master's report.

George S. Silzer, for receiver in bankruptcy.
Currier & Barnard, for exceptant Frank McWilliams.
Horace L. Cheyney, for exceptant Charles L. Walker.
De Lagnel Berier, for exceptant Hudson Oil & Supply Co.
Cushman & Dewell, for exceptants Perth Amboy Dry Dock Co. and John H. Starin.

LANNING, District Judge. On January 30, 1908, at 2 o'clock in the afternoon, Frank McWilliams filed in this court a libel in admiralty for $1,992.23 against the barge Falcon. A monition was issued on the same day, and on January 31st the marshal attached the vessel. On January 30th, at 4 o'clock in the afternoon, James Hughes, the owner of the Falcon, filed in this court his petition in voluntary bankruptcy. Adjudication was immediately entered, and Theodore B. Booraem was immediately appointed receiver of the bankrupt's estate. The receiver did not file his bond, however, until February 3d. The bankrupt's estate consisted of 35 barges used for carrying freight, besides other property. At the date of the receiver's appointment, the barges were at a number of different ports in the vicinity of New York, and some of them were discharging cargoes. It was necessary to retain, for a little time, the crews of the vessels discharging cargoes. It was desirable, also, to bring all the vessels into the district of New Jersey. As the receiver had no funds, he was authorized, by order of February 7th, to borrow $500 on the credit of the estate and to issue receiver's certificates therefor. On March 2d a considerable number of parties who claimed to hold maritime liens against the bankrupt's several vessels appeared by counsel and applied for

*For other cases see same topic & § Number in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
leave to file libels in admiralty. The court, actuated by a desire to keep
the judicial and administration expenses down to the lowest possible
point, ordered the trustee in bankruptcy—the receiver having in the
meantime been appointed as trustee—to sell the vessels at public auct-
on and to keep a separate account of the proceeds of the sale of
each vessel. On March 23d a number of counsel appeared before
the court and vigorously protested against the order authorizing the
trustee in bankruptcy to sell the vessels, denied his right to sell free
from maritime liens, and insisted upon their right to file libels and
have the sales made by the marshal in admiralty proceedings. In view
of the statement that there were not less than 60 maritime claims
against the vessels—the number now shown is 274—and of the fact
that sales by the trustee would almost certainly be followed by suits
in admiralty against the vessels in the hands of the trustee's vendees,
and, consequently, by protracted and expensive litigation, the court
vacated the order directing the trustee to sell and granted permission
for the filing of libels. Libels have been filed against 25 of the ves-
sels, and they have been sold by the marshal, in due course, in ad-
miralty proceedings.

On June 8, 1908, the court made an order in the bankruptcy case,
on the petition of the trustee as former receiver, directing George T.
Cranmer, as special master, to examine into the truth of the allega-
tions of the petition, and to report to the court what expenses had
been actually incurred by the receiver, whether they had been properly
incurred and were necessary for the preservation of the assets of the
estate, and what sums, if any, should be allowed to the receiver and
his counsel for their services. The master has now filed his report.
It shows the receiver's total approved disbursements to have been $1,-
098.77, and his approved unpaid bills to be $930.14. Other indebted-
ness reported by the master is $350 due to the Central Railroad Com-
pany of New Jersey for wharfage charges against the vessels after
the marshal took possession of them in the admiralty proceedings. He
also advises allowances of $412.94 to the receiver and $250 to his
counsel for their services. He suggests that the allowance for his
own services be fixed at $175. The master declares that every item
in the disbursements of $1,098.77 was for the benefit of the maritime
assets of the bankrupt. His report shows, also, that the unpaid bills,
amounting to $930.14 and $350, were exclusively for the benefit of
the same assets. The allowances of $412.94 to the receiver, of $250
to his counsel, and of $175 to the master, are very reasonable. The
total of these sums, being $3,146.85, the master regards as expenses
properly chargeable against the maritime assets, and advises that
they be paid out of the funds deposited in the registry of this court
to the credit of the vessels sold in the admiralty proceedings. The
proceeds of the sales of the 25 vessels, deposited in the registry, are
$7,492.51. The expenses ($3,146.85) amount to 42 per centum of
the $7,492.51. The master has charged against each of the 25 vessels
42 per centum of the amount on deposit to the credit of each vessel.

One of the grounds of complaint set forth in the exceptions to the
report is that no part of the expenses incurred in bankruptcy can be
charged against the sums deposited in the registry of this court. It
should be borne in mind that all the vessels, except the Falcon, were in the possession of the receiver in bankruptcy at the time the libels were filed. The charges of $1,028.77 and $930.14 are for debts incurred in caring for the vessels before the marshal took possession of them. The item of $350 is for wharfage incurred after the marshal took possession. These sums are properly chargeable against the proceeds in the registry, because they represent debts incurred after this court took possession of the vessels, for the purpose of properly caring for them until the time of judicial sale. The maritime claimants have had the benefit of every dollar of these expenses. In the case of In re People's Mail Steamship Co., Fed. Cas. No. 10,970, Judge Blatchford enjoined a proceeding in admiralty instituted after the owner of the libeled vessel had been adjudged bankrupt. He said:

"The possession of the vessel by the assignee is the possession of her by the court. That possession cannot be lawfully disturbed or ousted by any person. If the libelants in the collision suit have a lien on the vessel, created by the fact of the collision, which is entitled to be satisfied out of the vessel in preference to the claims of creditors under the bankrupt proceedings, that lien inasmuch as proceedings to enforce it were not commenced before this court took possession of the vessel for administration in those proceedings, can be enforced, so long as this court holds possession of the vessel, only by being submitted, by those claiming it, to the arbitration of this court sitting in bankruptcy."

That these vessels, while they were in the custody of this court sitting in bankruptcy, could not be taken from its receiver in bankruptcy and given over to the marshal in any admiralty proceeding, without the court's consent, is too clear to require argument. Taylor et al. v. Carryl, 20 How. 584, 15 L. Ed. 1028. As already stated, the court consented to the sale of these vessels in admiralty for the purpose of avoiding protracted and expensive litigation; but it did not release the vessels from the charges justly and necessarily incurred in caring for them before the surrender to the marshal.

Nor are the objections to the items allowed to the receiver or his counsel valid. These expenses, too, were incurred in caring for the vessels. All the expenses, except the $175 allowed to the master, were the "actual and necessary cost of preserving the estate subsequent to the filing of the petition," and the allowance to the master is a part of "the cost of administration." Such costs are entitled, by virtue of section 64b of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447]), to priority of payment. That section states the order of the payment of preferred debts. Costs of the kind above referred to are placed before "debts owing to any person who by the laws of the states or the United States is entitled to priority." A debt secured by a maritime lien is therefore inferior, under the bankruptcy law, to such costs. In re West Side Paper Co. (D. C.) 159 Fed. 241, 244.

What has been said applies to all the vessels except the Falcon. She was attached on January 31, 1908, by the marshal under the admiralty proceedings instituted in this court by Frank McWilliams. While the receiver in bankruptcy did not qualify until February 3d, adjudication in bankruptcy was entered on January 30th. A receiver in bankruptcy is but an agent of the court to see that a bankrupt's
property is not dissipated before the appointment of a trustee. His
custody is the court's custody. From the moment of adjudication
the decree operates in rem, and from that moment all the bankrupt's
assets are in the custody of the court making the adjudication. Car-
ter v. Hobbs (D. C.) 92 Fed. 594. The appointment of a receiver does
not in any wise perfect the court's custody. It is simply an act by
which the court designates a person in whom it has confidence to
represent it in guarding and enforcing that custody. In an admiralty
suit in rem, on the other hand, a vessel is not in the custody of the
court until it is actually arrested. Miller v. United States, 11 Wall.
294, 20 L. Ed. 135; Brennan v. Steam Tug Anna P. Dorr (D. C.)
4 Fed. 459. The case of the Falcon, therefore, is not distinguishable
from the other cases. That vessel was in the custody of the bank-
ruptcy court when it was attached by the marshal, as were all the
other vessels.

The exceptions will all be overruled, and the report of the master
confirmed. The clerk will draw from the proceeds of the sale of
each individual boat now standing to the credit of such boat in the
registry of this court the amount of expenses properly chargeable to
such boat, as set forth on pages 24 and 25 of the special master's re-
port, and place the amounts so drawn from said proceeds to the
credit of the expense fund, and from said fund he shall then pay the
various items of expenses summarized on page 21 of said report.

WILLS et al. v. BATES COUNTY et al.
(Circuit Court, W. D. Missouri, W. D. June 1, 1909.)

1. Drains (§ 20*)—CONSTRUCTIVE OF MISSOURI STATUTE—NATURE AND LIABILI-
TY OF DRAINAGE DISTRICT.

The Missouri drainage act (Rev. St. 1899, § 8288, as amended by Laws
1905, p. 182 [Ann. St. 1906, p. 3918]), which authorizes the county court of
a county to let contracts for drainage work, to issue and sell bonds to raise
the necessary money, payable from assessments to be made by such court
on the lands of the drainage district, and to direct the issuance of warrants
on the county treasurer in payment for the work, and further provides
that "If the court shall find in favor of the improvement the lands which,
as hereinafter provided, it may be found will be thereby benefited shall
for the purposes of this article constitute a drainage district which shall
be designated by number," does not make such drainage district a quasi
 corporation of the county which can be sued by a contractor to recover
for work done, but such an action lies only against the county which is
the contracting party.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 20.*]

2. Drains (§ 49*)—CONTRACT FOR CONSTRUCTION—LIABILITY OF COUNTY.

A contract for drainage work under such statute, executed by the chief
engineer of a district with the approval of the county court, which issued
and sold bonds of the district to pay for the work and paid for a large
part thereof from the proceeds, is the contract of the county, made by the
engineer as its agent.

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

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

A petition in an action against a county to recover for the construction by plaintiff of a section of a drainage ditch, which alleges that plaintiffs entered into a written contract with the county to construct the ditch by sections, that when it was found that the earth through which said section was to be constructed was of materially different character from that called for by the specifications and profile on which the contract was based, on petition to the county court it was agreed that plaintiffs should complete the work without prejudice to the right of either party to have the question determined whether or not it was within the contract, and that plaintiffs did complete the work at a greater cost, states a cause of action to recover for such work.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 49.]

On Demurrers to Petition.

Lowe & Shannon and William Mumford, for plaintiffs.
Thos. J. Smith, for defendants.

PHILIPS, District Judge. This case has been submitted on the demurrers filed by the respective defendants, and also on motion to make the petition more specific. The petition is based upon a contract made between plaintiffs’ assignor and one A. H. Bell, as chief engineer, for construction of a drain in drainage district No. 1, Bates county, Mo. The ditch was divided into certain sections of different numbers for construction. The work was done by the plaintiffs, accepted and paid for by the county, except as to one division, about which this controversy arises.

The claim of the petition is that the character of the formation of the earth through which this portion of the ditch was to be constructed was materially different from that called for by the contract, and was not of such formation as the profiles furnished by the engineer called for; that, as disclosed by the profiles the work required by the contract was to be done by steam dredge, could not be done therewith by reason of the undisclosed formation, rock, etc.; that this fact was brought by petition of the contractor to the attention of the county court, and that the county court thereupon, in effect, directed the plaintiffs to proceed with the completion of said work, without prejudice to either party as to whether the additional and more expensive work to excavate and of construction came within the terms of the original contract; that the plaintiffs thereupon proceeded to perform and complete the said work at an additional expense of construction, for which the county refused to pay, and to recover which this suit is brought.

The suit is brought against both the county and drainage district No. 1 of Bates county. The separate demurrers of the defendants raises the question, first, of a misjoinder of parties defendant. Without entering into any detailed discussion, I am of opinion that the demurrer is well taken as to the defendant drainage district. The whole scope and tenor of the statute under which the contract was made indicate that it was made, in effect, under orders of the county court of Bates county, in pursuance of a power conferred upon it by the Legislature.

*For other cases see same topic & § number in Dec. & Am. Digs. 1897 to date, & Rep’t Indexes
The only provision respecting the drainage district as a legal entity is found in section 8283, Rev. St. 1899, as amended by Laws 1905, p. 182 (Ann. St. 1906, p. 3918), which recites that:

"If the court shall find in favor of making the Improvement, the lands which, as hereinafter provided, it may be found will be thereby benefited, shall, for the purpose of this article, constitute a drainage district which shall be designated by number."

This does not by any means, it seems to me, constitute such drainage district a quasi corporation of the county. It was nothing more than the designation of the district to be especially benefited by the construction of the draining ditch, for the purpose of ascertaining the property situate therein to be assessed to raise the necessary revenue to pay for the construction. The act, taken in its entirety, clearly enough indicates that the county court had entire control and supervision of the matter of authorizing the construction work, and was, in contemplation of the statute, the responsible party to contract therefor, and to and from whom the contractor must look for his pay. The county court on petition, provided for by the act, could issue bonds to be sold by the treasurer of the county, payable out of the assessments on the property of the district, and the fund arising therefrom was to meet the undertakings of the county to pay for the work. I am therefore unable to see that any judgment could be rendered against the drainage district for the work done by the plaintiffs. The demurrer, therefore, on behalf of the drainage district is well taken.

For the reasons above indicated, I think the county is the responsible contracting party for the work so done, as it required its approval and order to authorize it. It alone could direct the assessment upon the property of the district for the payment of the construction. It alone could order the bonds to be issued and sold for raising the necessary revenue for the payment; and, as the petition alleges that bonds were so issued and sold, the proceeds of which are in the hands of the county treasurer, the county court is the only authority to direct the issue of the warrant on the treasurer for payment of the work when completed. If it fail to issue such warrant, as the petition alleges, the remedy for the relief of the contractor must be against it. Whether or not the judgment, if obtained, should go against the county in personam, or whether the prayer of the petition should be, on the finding of the issues for the plaintiff, that the county court be required to issue and deliver the warrant on the treasurer for the satisfaction of the judgment, may be an interesting question in the determination of the case, if it appear that the proceeds of the bonds in the hands of the county treasurer are sufficient to satisfy the demand. It is sufficient here for the court to say that, if it should turn out to be the proper remedy, the prayer of the petition could be amended accordingly.

It is urged that the contract in question does not purport to have been made with the county of Bates, eo nomine, but with one A. H. Bell, as chief engineer of said drainage district. But it appears from further allegations of the petition that after the engineer had made survey of the district, and submitted the same to the county court, with maps and profiles, and a complete plan for draining and reclaiming the
lands in said district, etc., the said county court, in pursuance of the statute, issued the bonds of the drainage district, equal to the tax levy, which bonds were sold in accordance with the provision of the statute, and the proceeds of the sale are in the hands of the treasurer of the drainage district, he being the county treasurer of Bates county; and that there yet remains in the possession and custody of said treasurer the sum of $74,000, the proceeds of said sale, for the work done by the plaintiffs.

Looking at the provisions of the statute, under which this whole transaction was had, this engineer was nothing more than the agent or instrument of the county for making this contract; and as it sufficiently appears from the allegations of the petition, taken as a whole, that the county court recognized and acted upon this contract, paid for the work done thereunder, except for that portion herein in controversy, it does seem to me that, giving effect to substance rather than mere form, it sufficiently appears that the contract was made with the county for the work, to be paid for in the manner aforesaid.

The only other objection raised by the demurrer of any importance is that the action is based upon a specific contract for the completion of the entire work, and that the petition discloses on its face that the contract was not performed in full by the contractor, and therefore there can be no recovery. It may be conceded to this contention that, where the action is predicated of a specific contract, the plaintiff, in order to recover, must aver and prove a performance thereof by him. No recovery can be had upon such petition for a quantum meruit. But that is not all of the petition in this case. It charges and discloses that, as to that part of the construction work in question, the plaintiffs were not required, by a correct construction of the contract, to perform by reason of the matters hereinbefore stated; and that thereupon, when the matter was brought by the plaintiffs to the attention of the county court, the parties entered into a new convention, whereby it was agreed that the plaintiffs should proceed to finish the remaining work, without prejudice to the county to pay the additional expense of the remaining construction, if the same should be held to come within the terms of the original contract; the clear implication being, from the allegations of the petition and the order of the county court, that, if such additional cost of construction was not within the provisions of the original contract, the county court would see to it that the plaintiffs should be paid therefor. This, in my opinion, is the essence of the controversy as disclosed on the face of the petition. My conclusion, therefore, is, that the demurrer as to Bates county should be overruled, and the parties be put to trial; and when all of the contracts are before the court, and the facts are all developed, the court will be in better position to determine the rights of the parties.

While the petition may be somewhat inartificially drawn, the detailed statement of facts is reasonably sufficient to advise the defendant of what it is called into court to try. This is sufficient under the practice act of the state.
RIEDEL v. WEST JERSEY & S. R. CO.

(Circuit Court, E. D. Pennsylvania. June 2, 1909.)

No. 364.

ELECTRICITY (§ 15*)—ELECTRIC RAILROAD USING THIRD RAIL—CARE REQUIRED AS TO TRESPASSING CHILDREN.

Defendant operated an electric railroad by the third-rail system, such rail being covered at stations and crossings, and the remainder of its line being inclosed by a fence as required by statute. At a point in a village where the right of way was inclosed by a picket fence, in which there was a gate fastened by a bolt, plaintiff, a boy eight years old, was playing with another boy of about the same age when they were attracted by some flowers on the right of way beyond the track. They succeeded in opening the gate, and were crossing the track when plaintiff fell upon the third rail and was severely injured. Held that, in the absence of any statutory requirement, defendant was under no duty to keep the third rail at such point covered for the protection of trespassers, whether adults or children, nor was it chargeable with negligence by reason of the gate which rendered it liable for the injury, there being nothing about its track which it could reasonably anticipate would attract children.

[Ed. Note.—For other cases, see Electricity, Dec. Dig. § 15.*]

On Motion by Plaintiff for a New Trial.
Evans & Forster, for plaintiff.
John Hampton Barnes, for defendant.

J. B. McPherson, District Judge. The defendant operates a line of electric railway eastward from Camden to Atlantic City in the state of New Jersey, using the third-rail system. Except at stations and crossings, the rail is unprotected, but, so far as appears, the right of way is fenced in accordance with the requirements of the New Jersey statutes. At all events, it was so fenced at the point where the injury happened for which this suit is brought. The other facts relating to the accident are few and undisputed: On July 4, 1908, the plaintiff, who was then a lad nearly eight years old, went with his parents to visit friends of the family residing in the village of Westville. The house, which was about two blocks east of the station, fronted on the street, and the lot extended back to the defendant’s right of way. Between the lot and the tracks was a pointed picket fence five feet high in which there was a gate. The fence and the gate had been in place nearly six years at least, and during that time, so far as the testimony discloses, no one had used the gate. It was fastened with a slip bolt, and was further secured with “a piece of wood, sometimes a nail, whatever I found handy”—to use the language of the owner of the property. During the morning the plaintiff was engaged in play with another boy nearly nine years old, and after various excursions they found themselves in the back part of the lot. Looking through the fence, they saw and were attracted by some flowers growing on the other side of the rails, and went to the gate to open it. Finding it fastened, the plaintiff’s companion, as he testified, “put a nail or a piece of wood, then pulled it out again.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep’r Indexes
and it came open." Having thus unbolted the gate, the two started to pluck the flowers. The first boy crossed the tracks in safety, but the plaintiff fell, apparently having tripped over something, and came in contact with the third rail, sustaining severe and permanent injuries. Upon these facts the court directed a verdict for the defendant, and the question now is whether this instruction was correct.

I have had the advantage of an elaborate and very capable argument in support of the plaintiff's contention that the case should have been submitted to the jury, but I have not been convinced that the action of the court was wrong. It would extend this opinion unduly to follow the argument in detail, but I may indicate briefly the reasons that have controlled my judgment. In the first place, the class of decisions to which the "spring-gun" cases belong may, I think, be laid aside as inapplicable. The plaintiff was making a lawful use of its right of way. It was employing an instrumentality which it was permitted to use, in a manner which it was at liberty to adopt, and upon a roadbed which was fenced and set apart as required by law. No statute compelled it to cover the third rail, although such protection was properly—and, it is not too much to say, was necessarily—given to the public at crossings and stations, where passengers and other persons had a concurrent right. It is so clear, however, that the "spring-gun" cases are not in point, that I content myself with referring to a note appended to State v. Barr, 29 L. R. A. 154, in which the whole subject was discussed a few years ago. Neither, as it seems to me, are the so-called "turntable" cases applicable. The essential feature of this class is the attractiveness of the turntable, or other device, whatever it may be, especially its attractiveness to children; and, where these decisions are accepted as authoritative—they are denied in a good many jurisdictions—it has been held that the owner of the device must recognize such attractiveness and take reasonable precautions accordingly. As is said in 29 Amer. & Eng. Ency. of Law (2d Ed.) 33:

"This liability is based on the theory that there is an implied invitation to such children to visit the turntable, it being a dangerous place, which the railroad knows or reasonably ought to know is attractive as a plaything to children, whose judgment is too immature to enable them to realize its dangerous character, and that therefore it is the duty of the railroad so to safeguard it that such children cannot be injured thereby."

See, also, two recent cases Conrad v. Baltimore & O. R. Co., reported in (W. Va.) 61 S. E. 44, 16 L. R. A. (N. S.) 1129, and Wheeling & L. E. R. Co. v. Harvey, 77 Ohio, 235, 83 N. E. 66, 122 Am. St. Rep. 503, especially the case of Wheeling & Lake Erie Railroad Co. v. Harvey, a decision by the Supreme Court of Ohio, in which the whole subject of a property owner's liability to a trespasser, whether he be an adult or a minor, is learnedly and satisfactorily treated. Reference may also be made to Ft. Worth Railroad Co. v. Robertson, 14 L. R. A. 781. Here, however, the device that did the injury was not inherently attractive, and, besides, there is affirmative proof that what allured the lads upon the track was not the rail itself, but the flowers that grew beyond it. Neither, I think, do the cases apply in which a gate has

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sometimes been called an invitation to use a particular route or path. No path led from it, and, even if a path had been there, the fact would be immaterial unless there had been some connection between the path and the flowers. The gate had not been used for five years; it was fastened with reasonable caution; and under such circumstances the only ground on which the railroad company could be held to be negligent in reference to the gate would be on the ground that it was obliged either to take out the gate altogether or to nail it shut, anticipating that a child might succeed in opening the bolt and might then stray upon the tracks.

This brings me to what is, after all, the central position of the plaintiff's counsel, namely, that the company was bound to cover its third rail so as to protect it against possible trespassers, the reason assigned being that the instrumentality is so extremely dangerous that extraordinary precautions must be adopted to preserve even trespassers from harm. I am unable to agree to this proposition as a sound legal rule. The conceded dangers of the third rail may undoubtedly induce a Legislature to require extraordinary precautions to be taken against injury therefrom, and it is no doubt true that, where the public are or are likely to be exposed to its perils, the companies that use it are obliged, even in the absence of legislation, to exercise care commensurate with the danger; but in this case we are dealing with the duty toward a trespasser, and, before the defendant can be held liable, some breach of a legal obligation toward him must be shown. There can be no actionable wrong unless the defendant has been negligent, and negligence must be found in a breach of duty, or it does not exist.

Now, what duty did the defendant owe to this child? Primarily it owed the duty to exclude him from the right of way; or—what is perhaps a more accurate statement—it was bound to maintain the statutory fence, which the Legislature had declared to be sufficient. This was done, but it may be assumed that, if the circumstances had been unusual, presenting a peculiar hazard, the defendant would be under a corresponding duty, which might not be discharged by the mere maintaining of the lawful fence. In what respect, therefore, if at all, was the situation peculiar? The plaintiff's answer is that the situation was peculiar because of the presence of the uncovered third rail; but to this the sufficient reply is, as it seems to me, that the rail was harmless to all persons who remained outside of the right of way. It was only dangerous to a trespasser, and certainly it cannot be contended that, if an adult had trespassed where the plaintiff was injured, the defendant would have been liable. But the plaintiff urges that the situation was also peculiar, because a child was involved, and because care must be exercised toward children in proportion to their childish capacity. What duty, then, was violated which the defendant owed to the injured child? There was no violation of duty in maintaining an attractive danger on the defendant's premises; for no implied invitation from such a source is even alleged, and none has been proved. Moreover, there was no invitation from an open road, for a lawful fence was there, as well as a closed and bolted gate, so that a certain degree at least of obstruc-
tion was undoubtedly present. It seems, therefore, to be clear, that the duty of the defendant must be found, if anywhere, in an obligation to anticipate that a child might, in the pursuit of some object, not at all connected with the unguarded rail, be attracted to the right of way and might be successful in unbolting the gate, and that in view of such a possibility the defendant would be bound to take still further precaution, either by padlocking the gate or by nailing it shut. It is obvious, however, I think, that children might circumvent even these precautions. If in no other way, they might climb the fence, and they would then be as much exposed to danger as if the gate had been neither locked nor nailed. Evidently, this possibility must also be foreseen, and the result is that the rail itself must be protected. But no covering can be fully adequate; there will always be some danger, although it may be slight, and the danger will be greater where children are concerned than in the case of adults. Is the standard of safety to be measured by the peril of the child or of the adult? It seems to me that it would be unreasonable to hold the defendant to account for failing to anticipate the remote happenings that must be supposed as possible by the plaintiff’s theory, and that the only safe rule to follow is the general rule that a trespasser, whether an adult or a child, cannot recover for injuries suffered upon the premises of another person, unless in such a situation or under such circumstances as the law has explicitly declared to be exceptional. In my opinion, no such exception was present in the case now under consideration, and, as I should not have felt justified in supporting a verdict in favor of the plaintiff, it was my duty, as I conceive it, to direct a verdict in favor of the defendant.

The motion for a new trial is overruled.

CHARAVAY & BODVIN v. YORK SILK MFG. CO.

(Circuit Court, S. D. New York. March, 1909.)

CARRIERS (§ 51*)—SALES (§ 455*)—CONDITIONAL SALES—DISTINGUISHED FROM OTHER TRANSACTIONS—BILLS OF LADING—CONSTRUCTION.

A bank which advances money or credit for the purchase of goods for import, taking the bills of lading in its own name, becomes the legal owner of the goods, but its title is not an absolute but only a security title. If it permits the importer to take the goods on signing a trust receipt binding him to hold the same or their proceeds in trust, and subject to the order of the bank until its advances are paid, the transaction is not a conditional sale, but one for security only, and, where the bank reclaims the property and sells it as authorized by the trust receipts, the debt is not thereby canceled, but the bank may recover any deficiency remaining.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 51;* Sales, Cent. Dig. § 1326; Dec. Dig. § 455.*

What constitutes a contract of conditional sale, see note to Dunlop v. Mercer, 86 C. C. A. 448.]

The following is the opinion of A. L. Everett, Special Master:

This proceeding is brought to determine the right to a certain fund deposited in bank pursuant to order by the receivers of the York Silk Manu-

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep’s Indexes.
facturing Company. The German Bank of London claims the fund, and the claim is disputed by the receivers.

The receivers were appointed in an action brought in this circuit, entitled "Choray & Bodvin, Complainant, v. York Silk Manufacturing Company, Defendant." This action was ancillary to one in the court of common pleas for York county, Pa., in which the Western National Bank and others were the complainants and the York Silk Manufacturing Company the defendant.

The facts which give rise to the dispute are these: The York Silk Manufacturing Company imported raw silk from China, its agents in Hongkong being Arnhold, Karberg & Co. For this purpose the silk company had applied to the German Bank of London (through the latter's agent, the Bank of New York, N. B. A.) in New York, and obtained from it a letter of credit in favor of Arnhold, Karberg & Co. for account of the silk company, amounting to £5,000, "for the cost of raw silk to be shipped from Hongkong to New York." This letter of credit provided that the bills of lading should be made out to the order of the German Bank of London, and that the bill of lading used for forwarding to the bank's agent in New York should be accompanied by an invoice properly certified. At the same time the silk company signed an agreement, of which the following provisions are material:

"We will place your bank, previously to the maturity of the bills that may be drawn under the credit, in possession of sufficient funds in cash or in bankers' bills of exchange at not exceeding sixty (60) days' sight, indorsed by us and approved of by you to meet the payment of the said bills," etc.

"Upon receipt from you of the possession of the said merchandise shipped under such credit or the bills of lading or other documents of title thereto, we will sign and deliver a receipt therefor in such form as you may require and will give such security as you may demand, and the said merchandise, after delivery of the custody thereof to us, and the proceeds thereof, if sold by us, shall be held subject to your order on demand as your property, with authority to take possession of and dispose of the same at any time by public sale or otherwise, for your reimbursement or protection and to charge all expenses, including commissions for sale and guaranty, the bank being free from all responsibility whatever in respect of such sale. Said merchandise shall be covered by insurance at our expense, loss, if any, payable to the German Bank of London, Limited.

"All questions arising under this agreement or the credit issued in connection herewith shall be determined according to the law of the State of New York."

The agreement also provides that, in the event of a decline in the market of such merchandise, additional security shall be deposited.

The letter of credit and agreement in question are dated July 5, 1907. Thereafter, from time to time, silk was bought and drafts were drawn under this credit. The drafts were accepted and paid by the bank. The bills of lading for the silk were duly made out to the bank's order. The invoices stated the value of the silk as $4 per pound. As it arrived, the bank permitted the silk company to take and hold it upon signing what are known as "trust receipts." By these trust receipts the York Silk Manufacturing Company agreed to hold the merchandise on storage as the property of the German Bank of London, Limited, with liberty, however, to manufacture it and to sell it, accounting for the proceeds to the Bank of New York, as the attorney of the German Bank of London, Limited, until all of the said bills of exchange should have been paid or provided for, "the intention of this agreement being to protect and preserve unimpaired the ownership and rights of the said bank in and to said property in whatever form or condition it may be, and the proceeds thereof, and to give said bank all rights in respect to said property and proceeds as provided in the agreement signed by us in connection with the credit under which said property was imported." The silk company failed to place the bank in funds to meet the drafts, and thereupon, under the credit agreement, all the obligations of the silk company immediately became due. The silk company having gone into the hands of receivers, the bank tried to recover from them the silk which had been obtained by the company in the way described, and it made petition to the court of common pleas of York county, Pa., where the receivers had been appointed and where the silk, or some of it, was,
to be permitted to retake such silk as had been taken under the trust receipts and could be identified. A certain amount was so identified. The court then made an order, upon consent of the receivers, directing them to deliver to the petitioner such merchandise, and ordering also that the receivers have authority to purchase the silk at $3 per pound. The order also contained this provision: "This order is made without prejudice to any existing right of the petitioners to present any additional claim or claims which they may have against the York Silk Manufacturing Company, defendant, or its receivers." From a receipt annexed to the order it appears that the silk was sold to the receivers for the sum of $5,207.05, which amount, less a charge of $500 of the attorneys for the petitioner in that proceeding, was received by the bank. At that time the bank had accepted or paid drafts amounting to a sum which, together with interest to July 1, 1908, aggregated $4,507 18s. 6d. Against this is to be credited the proceeds of the silk mentioned (less the attorney's fees), amounting to £966 10s. 10d., leaving a balance due and unpaid on July 1, 1908, of £3,541 7s. 10d., with interest from July 1st to September 1st; this amounts to £3,577 9s. 7d., or $17,458.10. In the proceedings in this circuit $15,222.40 was admitted by the receivers to be due to the bank, and, in accordance with the re-sumption agreement executed by the silk company and its creditors, the bank received satisfaction for that amount. It now claims the difference, amounting to $2,235.70, as of September 1, 1908.

Counsel for the receivers show that this is the difference between the invoice value (at $4 per pound) of the silk which was retaken in Pennsylvania and the amount (at $3 per pound, plus attorney's fees) which it actually realized, and they assert that the bank is not entitled to this difference, it having, by the retaking of the property, elected to satisfy itself from this source, and thereby abandoned the right to recover the full amount advanced by it for the purchase of the silk in China. This is on the theory that the transaction between the bank and the silk company constituted a conditional sale, and they invoke the familiar doctrine of election of remedies which obtains in connection with such transactions. Unless this applies, the bank must prevail, because it has admittedly advanced (with interest) the full amount of $17,458.10, and has only received satisfaction to the extent of $15,222.40. It is not necessary to consider the claim made against the receivers otherwise than as a claim against the silk company itself, nor do I understand it to be asserted by either side that the receivership introduces any distinguishing element.

In considering the nature of the relation between the parties, it must first be determined under what law the case is to be decided. The credit agreement provides that all questions under it shall be decided according to the laws of New York. The retaking of the property under the order of the York county court took place in the state of Pennsylvania. In the proceeding in Pennsylvania the credit agreement was before the court, and the silk must be presumed to have been surrendered in consequence of this credit agreement. The court made a special proviso that the order was made without prejudice to any existing right of the petitioners to present any additional claims which they might have against the York Silk Manufacturing Company or its receivers, and this, I think, must be construed as including the right to sue in this case upon the agreement as construed by the New York law. If this case were not to be decided by New York law, the result would, however, be the same, according to the view which I take of the Pennsylvania law and which I shall later briefly consider.

The first important decision in New York as to the relation of an importer of merchandise to the bank which makes advances to pay for the goods in his behalf is First National Bank of Cincinnati v. Kelly, 37 N. Y. 34. There the question was whether a bank holding the possession of goods under a bill of lading was required to file the papers as a chattel mortgage. The court, while holding the filing of papers unnecessary, refused to define the relation of the parties more accurately than to say that the bank, if not the absolute owner, stood in the position of mortgagee in possession; and added, "It is not of particular consequence what name is given to the transaction."

The next case was that of Farmers' & Mechanics' Bank v. Logan, 74 N. Y. 568. In that case the bank permitted the purchaser of wheat to obtain possession, the bill of lading being indorsed by the bank, with a direction that the
goods were not to be diverted until payment of the draft. It was held that the bank, notwithstanding the surrender of the goods, retained its stipulated rights in them. The court did not explicitly define the relation of the parties in these cases. For the purpose of maintaining its rights the bank, however, was held to be clothed with the legal title. "The result is, though, the transaction is not intended to give the permanent ownership, but to furnish a security for advance of money or discount of commercial paper made upon the faith of it." Again: "Hence, there was no relation between the plaintiff and Brown of pledgee and pledgor, and hence no giving up by it as pledgee of the possession of the property held by it in pledge to him while the general owner of it. It is not, therefore, needed that we consider whether, if such were the case, the special property or lien of the plaintiff was lost thereby." In this case, however, we have the first hint of the doctrine which the receivers' counsel now advances in order to defeat the bank's claim, namely, the doctrine of conditional sale, as follows: "Although such correspondents act as agents and are set in motion by the principal who orders the purchase, yet their rights as against him in the property are more like those of a vendor against a vendee in a sale not wholly performed, where delivery and payment have not been made, and where delivery is dependent upon payment." This suggestion was made by Judge Folger in order to make it plain that the transaction was not that of pledge, for, if it had been one of pledge, the bank, by surrendering the goods, would have lost its title, so, also, it would have lost its title if the transaction had been a mortgage. Judge Folger, however, it will be observed, while pointing out the analogy so far as the case before him was concerned, did not declare that the transaction was a conditional sale for all purposes, and with all its possible consequences.

Following this came Moors v. Kidder, 106 N. Y. 32, 12 N. E. 818. There the defendant bankers issued a letter of credit under a credit agreement substantially similar to that in this case. The bankers permitted the importer to take the goods, which were to be warehoused for their account. The importer, however, wrongfully entered them in the name of his broker and pledged the warehouse receipt with the plaintiff. It was held that the title of the defendant bankers was good against the plaintiff. The court upheld the validity of the trust receipt. Counsel for the plaintiff there tried to show that the relation created originally was that of pledgor and pledgee, and that the subsequent delivery of the goods under the trust receipt effected a relinquishment of the pledgee's rights. The court, denying that the relation was that of pledgor and pledgee, said that the bankers had all the rights of an owner requisite to enable them to retake their property. The doctrine of the Logans' Case was reaffirmed, Finch, J., saying of it: "The doctrine stated was in substance that where a commercial correspondent, however set in motion by a principal for whom he acts, advances his own money or credit for the purchase of property and takes the bill of lading in his own name, looking to such property as the reliable and safe means of reimbursement up to the moment when the original principal shall pay the purchase price, he becomes the owner of the property instead of its pledgee, and his relation to the original mover in the transaction is that of an owner under a contract to sell and deliver when the purchase price is paid." Here, again, the court declares not that the transaction was a conditional sale, but that it had the quality of a conditional sale in the right of the banker to retake the goods.

This case was followed by the New Haven Wire Cases, 57 Conn. 352, 18 Atl. 266, 5 L. R. A. 300. They arose under conditions substantially similar to those in the case of Moors v. Kidder, except that the claim was made against the receivers of and not purchasers from the importer. The court appeared to think, and it was practically admitted in the argument of counsel, that all transactions for security must lie within three categories—mortgage, pledge, and conditional sale—and that in order to escape from holding that it was a mortgage or pledge they had to hold the transaction to be a conditional sale. It does not appear that the court's attention was called to the consequences which might follow such a holding. For the first time the cautious attitude adopted by the courts in this class of cases was abandoned.

Following this there came a Massachusetts case in which the nature of the banker's relation to the importer and the effect of trust receipts had to be considered. In Moors v. Wyman, 146 Mass. 60, 15 N. E. 104, the banker, plain-
tiff, had released certain hides to the Importer to be tanned. He was allowed to recover the proceeds in the hands of the Importer's assignee for the benefit of creditors. The court (per Holmes, J.) held that the title remained in the bank for the purpose of enforcing his security, rather inclining to think that the Importer in obtaining the goods became the bank's agent, as the trust receipt literally provided. "Neither did Moors lose his rights by giving the custody of the hides to the Shaws. They expressly agreed to hold as Moors' agents, and the general rule is perfectly well settled that the custody of a servant or mere agent to hold is the possession of the master or principal." But the court did not adopt any one of the categories enumerated in the Connecticut case. It remarked, "The bank had a title, whether absolute or qualified does not matter."

In Moors v. Drury, 186 Mass. 424, 71 N. E. 810, the Massachusetts court had again occasion to consider the nature of this relation. The plaintiff bank had enforced his rights under the trust receipt against the goods, and sold them to satisfy the amount of his advances, without application to the court of insolvency, the importer having become an insolvent. If the bank had been a mortgagee or pledgee, this sale without authority of the court would have been unlawful. It was held: "We consider it well settled that under circumstances similar to those in this case a banker making advances and retaining the title is the owner and not a mortgagee or pledgee." See note, p 20. Although the New Haven Wire Cases and Mershon v. Moors, infra, are cited, the court does not follow those authorities in so far as they define such a trust receipt as a conditional sale.

In Mershon v. Moors, 76 Wis. 502, 45 N. W. 95, the court followed the New Haven Wire Cases in defining a similar transaction as a conditional sale, but here, too, counsel seemed to have argued the case on the assumption that this was the only way in which such trust receipts could be enforced.

In Drexel v. Pease, 133 N. Y. 129, 30 N. E. 732, the plaintiff bankers had advanced money to the extent of 40 per cent. of their value on goods imported from France. They allowed the importer to get possession under trust receipts, and thence they came into the hands of his receiver. It was held that the bankers could recover the amount of their advances on the goods. The court follows Moors v. Kidder and the cases cited in it, Peckham, J., saying: "As stated in those cases, the doctrine is that where a commercial correspondent advances his own money or credit for a principal for the purchase of property for such principal, and takes the bills of lading in his own name, looking to reimbursement, such correspondent becomes the owner of the property, instead of the pledgee, up to the moment when the original principal shall pay the purchase price, and the correspondent occupies the position of an owner under a contract to sell and deliver when the purchase price is paid. The correspondent's position is one of ownership so far only as is necessary to secure him for the advances he made upon the merchandise described in the bill of lading, and in such a case as this he is bound to sell upon receipt of the purchase price from the principal, or, in other words, upon receipt of the amount he advanced upon its credit. In no other sense is the correspondent the owner of the property." The court did not mean that it was in all respects a conditional sale. If it had been, one of the consequences would have been that the bank could have reclaimed the goods and kept them, and not been limited to 40 per cent. of their value.

In Pennsylvania the courts have held that deliveries under these trust receipts were bailments. They have explicitly repudiated the doctrine of conditional sales. They were compelled to do this, as there is a rule of law in Pennsylvania that the vendor, in the case of conditional sale, cannot prevail against the assignee in insolvency of the vendee, and there would have been great injustice in applying such a rule in the case of trust receipts. Brown v. Billington, 163 Pa. 76, 29 Atl. 904.

The Supreme Court of the United States has passed upon the question raised in the Logan Case. In Dows v. National Exchange Bank, 91 U. S. 618, 23 L. Ed. 214, the purchasers of grain happening also to be the owners of a storage warehouse, the bank allowed them to keep the property for its account, stipulating that it was to be delivered from the warehouse only on payment of the drafts drawn by the shipper. It was held that the bank was the own-
er and could recover against third parties, to whom the purchasers had wrong-
fully sold the grain; that the purchasers were in the position of a baillee.
"The possession they had, therefore, was not their possession. It belonged to
their bailors, and they were merely warehousemen and not vendees."

The English courts do not appear to have had occasion to consider these
trust receipts, but they have frequently been required to discuss the relations
of bank and buyer where bills of lading are issued in the name of it or of
the shipper to secure the purchase price. They were for a long time indis-
pensed to allow the jus disponendi to the extent demanded in the interests of
the shipper or bank, but the demands of commerce were allowed to prevail,
and in Mirabita v. Imperial Ottoman Bank (1875) 3 Ex. Div. 194, the law as
it practically now is was summed up by Cotton, L. J., some of whose conclu-
sions are embodied in the sales of goods act. He throughout treats the rela-
tion as depending upon the conduct and intention of the parties, and he sets
forth a number of situations which can arise and the different consequences
which respectively result from them.

was said, per Lord Blackburn: "From the terms of the application it is plain
that the bankers were to have the property with a power of sale in the goods
represented by the bills of lading, so far as was necessary to secure their
advances, and that subject thereto Cottam & Co. (importers) were to remain
owners of all the rest of the interest in the goods, and might do as owners
everything consistent with the property thus given to the bankers. I do not
think it is necessary to express any opinion on a question much discussed by
Brett, L. J.—I mean whether the property which the bankers were to have was
the whole legal property in the goods, Cottam & Co.'s interest being equitable
only, or whether the bankers were only to have a special property as paw-
nees, Cottam & Co. having the legal general property. Either way the bankers
had a legal property, and at law the right of possession, subject to the ship-
owner's lien, and were entitled to maintain an action against any one who,
without justification or legal excuse, deprived them of that right."

The result of the cases is that, when a banker advances money for the pur-
chase of goods and takes the goods as security, the contract of the parties in
respect to the title and disposition of the goods will be recognized and en-
forced. If the banker stipulates for the legal title, that stipulation will be
enforced to the extent necessary for his protection. The title is, in its nature,
at all times a security title, and no more; and it is incident and subordinate
to the general obligation of the purchaser to repay the banker his advance.

In this connection the difference between these transactions and true condi-
tional sales is apparent. In cases of true conditional sale, where it has been
held that the vendor having reclaimed and sold the goods cannot afterwards
sue for his deficiency, it is pointed out by the courts that by retaking the
goods the whole consideration has failed or been terminated, and that there
is no further consideration upon which to sue. Earle v. Robinson, 91 Hun,
363, 36 N. Y. Supp. 178. When a banker advances money for the purchase of
goods the result is different, because the consideration is different. The con-
sideration is not the supplying of goods, but the supplying of funds. The
goods themselves are no essential element in the contract, being merely securi-
ty for its execution. The claim of the German Bank of London is not upon a
cause of action for goods sold and delivered, but for money lent to or furnished
for the silk company.

Certainly a banker never intends that the amount of his recovery shall de-
pend upon the value of the goods. He is concerned only with getting back his
advance, with interest and commissions. That is his business. Just as he has
to return any surplus after a sale of the security, so he has a right of action
for any deficiency which may result. It is clear enough that in the ordinary
case, where the banker has not parted with possession of the goods under trust
receipt or otherwise and is forced to realize upon them at a loss, he is entitled
to claim for a deficiency, and there is no reason why, because he has given
them up and retaken them, his rights should be any less.

If further illustration were needed of the difference between the transaction
in question and a conditional sale, it can be found in this view of it: At
whose risk is the property from the inception of the transaction? No one will
pretend that if the goods were destroyed at sea without insurance (there be-
ING no agreement for insurance) the loss would fall upon the bank. Yet, if the transaction were a conditional sale, the risk of loss would be upon the bank until it delivered the goods to the importer.

The application of the analogy of conditional sale to its remote consequences would produce here a great injustice. There is no authority, which necessitates such a holding, and, indeed, the cautious expressions of the courts leave it to be inferred that they do not intend this analogy to be pushed farther than the case requires. The transaction is not actually a sale, and that word is used only by fiction or analogy. It is not necessary to find in the nomenclature of security relations a category in which to place this one. It is governed by the contract of the parties, and the contract will only be disturbed by courts for illegality. It is not pretended that this contract is illegal. My conclusion is that the bank is not precluded by the retaking of the silk from recovering the loss which it has suffered by reason of the sale of the silk below the invoice valuation.

It is then to be determined whether the bank had the right to sell as it did. The credit agreement gives it ample powers in this respect, and the sale, in the absence of proof of fraud or willful neglect, must be supposed to be a fair one.

The question was raised whether the bank is entitled to recover the fee of $500 paid to its attorneys in Pennsylvania. This, I am of opinion, it can charge under the credit agreement as an expense of the sale. The propriety of the amount of the fee was not questioned before me, and I find it to be permissible in amount.

I accordingly find that the German Bank of London is entitled to recover the amount of its claim as above stated, with interest.

Since writing this opinion, I learn that in the proceedings in the assignment of Richardson and Denny in Boston, about 15 years ago, the holder of trust receipts was allowed to prove for his deficiency after realizing upon the security. The proceedings were uncontested.

Davies, Stone & Auerbach and Shattuck & Glenn (Charles E. Hotchkiss and Garrard Glenn, of counsel), for receivers.

Wilmer, Canfield & Stone (Harlan F. Stone. of counsel), for German Bank of London, Limited.

WARD, Circuit Judge. The exceptions to the report of the special master are overruled, and the report confirmed on his opinion.

In re BEACHTY & CO.

(District Court, E. D. Wisconsin. June 7, 1908.)


Hurd's Rev. St. Ill. 1908. c. 32, § 16, providing that "if the indebtedness of any stock corporation shall exceed the amount of its capital stock the directors and officers of such corporation asstenting thereto shall be personally and individually liable for such excess to the creditors of such corporation," as construed by the Supreme Court of the state, gives a right of action against officers which belongs exclusively to creditors, and which is not an asset of the estate of the corporation in bankruptcy and does not pass to its trustee, but may be enforced by creditors as a secondary security independently of the bankruptcy proceedings.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 205; Dec. Dig. § 145.*]

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

Hurd’s Rev. St. Ill. 1908, c. 32, § 18, which makes the officers and directors of any corporation who assume to exercise corporate powers or to use the name of the corporation before all the stock shall be subscribed in good faith jointly and severally liable for all debts and liabilities made by them in the name of the corporation, as construed by the Supreme Court of the state, is highly penal, and can be enforced only by a creditor in an action at law, the right of action being one which does not belong to the pretended corporation nor pass to its trustee in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 203; Dec. Dig. § 145.]*

3. Corporations (§ 88*)—Stockholders—Payment for Stock in Merchandise.

Under the Illinois statute it is competent for the directors of a corporation to accept merchandise in which the corporation is authorized to deal in lieu of cash in payment for capital stock, and such a transaction can only be impeached for actual fraud.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 338; Dec. Dig. § 88.]*

In Bankruptcy. On review of decision of referee.

This is a statutory review of an adjudication made by Hon. E. Q. Nye, referee in bankruptcy, whereby the claim of Jacob Laskin against the bankrupt corporation was allowed. The objections filed by the trustee to such claim are as follows:

First. That no amount is due or owing from said bankrupt to said Jacob Laskin.

Second. That said Jacob Laskin was guilty of fraud in securing the charter for said corporation, and was guilty of violating the corporation laws of Illinois under which said corporation was formed, and that such fraud and such violations resulted in detriment to the creditors of said estate.

Third. That under section 16, c. 32, of the Laws of the state of Illinois (Hurd’s Rev. St. 1908), said Jacob Laskin is liable, personally and individually, to the trustee of said estate in a sum far in excess of his alleged claim, for the reason that he consented to the creation of debts far in excess of the amount of the capital stock.

Fourth. That said Jacob Laskin is indebted to your trustee for the capital stock of said corporation that said Laskin subscribed for, and upon which he had paid but the sum of about $400.

An objection was interposed by sundry creditors, alleging preferential payments to claimant within four months of the filing of the petition. This objection was practically abandoned at the hearing.

The bankrupt is a corporation organized under the laws of the state of Illinois in October, 1906, with a capital stock of $5,000, doing business in selling furs, ladies’ suits, cloaks, etc., at Green Bay, Wis. The incorporators were Jacob Laskin, of Chicago, J. W. Beachy, and A. L. Wolfson, who subscribed for the total amount of the capital stock. The corporation was adjudicated bankrupt August 31, 1908. Jacob Laskin filed a claim against the estate for $2,091.50 for money loaned, and goods, wares, and merchandise sold and delivered to the bankrupt from time to time. It is conceded that the bankrupt corporation did receive from the claimant the amount of money, goods, wares, and merchandise set forth in the claim, and that the prices charged for such goods were reasonable. So that the first objection was properly overruled by the referee. The real contest arises over the alleged fraudulent conduct of Laskin in connection with the organization of the corporation. This objection is predicated upon three sections of the Illinois statute. Section 16, c. 32, Hurd’s Rev. St. Ill. 1908, reads as follows:

“If the indebtedness of any stock corporation shall exceed the amount of its capital stock, the directors and officers of such corporation assenting there-

*For other cases see same topic & § Numbers in Dec. & Am. Digs. 1897 to date, & Rep’t Indexes
to, shall be personally and individually liable for such excess to the creditors of such corporation."

Section 18 reads as follows:
"If any person or persons, being or pretending to be, an officer or agent, or board of directors, of any stock corporation or pretended stock corporation, shall assume to exercise corporate powers, or use the name of any such corporation, or pretended corporation, without complying with the provisions of this act, before all stock named in the articles of incorporation shall be subscribed in good faith, then they shall be jointly and severally liable for all debts and liabilities made by them, and contracted in the name of such corporation, or pretended corporation."

Section 21 reads as follows:
"If any certificate, report or statement made, or public notice given, by the officers of any corporation, shall be false in any material representation, all the officers who shall have signed the same, knowing it to be false, shall be jointly and severally liable for all damages arising therefrom."

After its incorporation the bankrupt corporation engaged in the business, which it was apparently authorized to carry on, until proceedings in bankruptcy supervened.

Burke, Alexander & Burke, for trustee.
Marshut & Burnham, for claimant.
Bloodgood, Kemper & Bloodgood, for certain creditors.

QUARLES, District Judge (after stating the facts as above). The bankrupt corporation, having had the money and goods covered by the claim, would, upon the plainest principles be estopped to raise any of the objections based upon malfeasance of the officers of the corporation, and it is difficult to see why the trustee is not affected by the same estoppel. Speaking broadly, the theory of the bankruptcy act of July 1, 1898, c. 541, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3418), is that the trustee steps into the shoes of the bankrupt, subject to the same liens, conditions, and restrictions under which the bankrupt rested. Congress enlarged the jurisdiction of the bankruptcy court to recover property, when the transfer was fraudulent or preferential, by sections 60b, 67e, and 70e. When the trustee accepts a lease, or a contract for a lease made by the bankrupt, he must assume every obligation and be bound by all the conditions that the contract imposes upon the bankrupt. Loveland (3d Ed.) p. 488.

The same rule applies to property purchased by the bankrupt on condition. It passes to the trustee subject to all such conditions and liens. Loveland, p. 491. This rule is familiar, that the title of the trustee to assets is no better than that of the bankrupt. Hewit v. Berlin, 194 U. S. 299, 24 Sup. Ct. 690, 48 L. Ed. 986; York Co. v. Cassell, 201 U. S. 350, 26 Sup. Ct. 481, 50 L. Ed. 782. It would have been impossible for the bankrupt to bring any suit to enforce the several statutory liabilities, under the Illinois law, against officers of the corporation. How, then, does the trustee succeed to any such right in the absence of any statutory authority?

The trustee by his objection sets up two statutory causes of action, based upon sections 16 and 18 of the Illinois statute, which appear in full in the statement of the case. The issue thus tendered by the trustee is to be regarded in the nature of a set-off, although not pleaded with technical accuracy. We cannot indulge a wholesale collateral attack upon the corporate existence of the bankrupt corpora-
tion to establish personal liability of Laskin as an officer thereof. It is elementary that such collateral attack cannot be sanctioned. The trustee must establish a legal or equitable cause of action based upon these statutes, with which he is invested. The question thus broadly presented is whether the trustee has any cause of action which he can advance as a set-off or defense to the claim. This requires an investigation of the statutes in question, and the construction that has been placed upon them by the highest court of Illinois.

By a long line of decisions in Illinois it has been held that section 16 is not penal, but remedial, in its nature; that it is intended to furnish creditors protection against the malversation of officers of a de jure corporation; that it is contractual in nature, and imposes upon corporate officers transgressing the law an obligation in the nature of suretyship, and that therefore it is to be strictly construed; that the effort of the statute is to provide a fund in the nature of a secondary security to which the creditors must resort; that it is peculiarly a remedy to be enforced in a court of equity in a proceeding where all the creditors may be joined, and the fund distributed according to the maxims of equity. In this respect the doctrine of Horn v. Henning, 93 U. S. 228, 232, 23 L. Ed. 879, appears to have been followed. Low v. Buchanan, 94 Ill. 76; Woolverton v. Taylor, 132 Ill. 197, 23 N. E. 1007, 22 Am. St. Rep. 521; Lewis v. Montgomery, 145 Ill. 47, 33 N. E. 880.

Under this section it has been held that only those corporate officers are liable who have by some affirmative act sanctioned the creation of the excessive indebtedness. It seems clear, therefore, that this statutory cause of action belongs exclusively to the creditors. It is a secondary security which is not an asset of the estate and does not pass to the trustee. Such a claim may be enforced by the creditor in any court having jurisdiction, quite independently of the bankruptcy proceedings. Loveland (3d Ed.) p. 494; Re Crystal Spring Bottling Co. (D. C.) 96 Fed. 945.

It is familiar that by what is known as the "bankruptcy rule" the creditor must enforce his own security and share in dividends only on the balance of his claim after making due allowance for the proceeds of such security. This doctrine is enforced, and the difference between this system and the ordinary chancery rule in marshaling assets is enforced, in Merrill v. Bank, 173 U. S. 131, 19 Sup. Ct. 360, 43 L. Ed. 640. The advantages and necessity of this rule are emphasized when we remember that the right of each creditor to avail himself of this secondary security must depend upon the peculiar facts and circumstances of each case, and cannot be considered and passed upon in a wholesale issue such as is here presented.

The construction placed by the courts of Illinois upon section 18 is radically different. It is to punish the supposed officers of a pretended corporation from masquerading as such. It is looked upon as an affront to the sovereignty of a state and a matter of public concern. It is therefore treated as highly penal in its character, and therefore a cause of action with which a court of equity cannot deal, because equity does not enforce penalties. Loverin v. McLaughlin, 161 Ill. 417, 435, 44 N. E. 99.
The distinction between the two sections is pointed out in Gay v. Kohlsaat, 223 Ill. 260, 270, 79 N. E. 77, 80, where the court say:

"The object and purpose of section 18 was to protect creditors of corporations, and we find in it no intimation of any application to a person, or an association of persons, wrongfully assuming to exercise corporate authority and thereby incurring indebtedness. By this section creditors are protected against de jure corporations where they incur indebtedness beyond their capital stock. By section 18 creditors are protected against persons contracting an indebtedness by unlawfully pretending to exercise the functions of a corporation."

The court further holds in substance that under section 18 the action must be at law, while under section 16 the action is by bill in equity. There is no correct conception of pleading that would tolerate the joinder of these two statutory causes of action. What we have said above regarding the title of the trustee applies with equal force to the cause of action under section 18. It is a legal cause of action which can only be enforced by the creditor, and does not devolve upon the trustee.

There is also another impediment which might be suggested. If the forfeiture under section 18 is to be considered as strictly penal, it is doubtful whether the federal court can be employed to enforce penal forfeitures imposed by another sovereignty. Wisconsin v. Pelican Ins. Co., 127 U. S. 265, 8 Sup. Ct. 1370, 32 L. Ed. 239. This subject was considered and elaborately discussed by the Supreme Court in Huntington v. Attrill, 146 U. S. 676, 13 Sup. Ct. 224, 36 L. Ed. 1123, which arose under a statute substantially like section 16. It is there held that a judgment rendered upon a remedial statute in one state is entitled to the protection of the Constitution of the United States requiring full faith and credit to be given to such a judgment in other states. It is unnecessary to pursue this discussion, because the instant case must be ruled by the principles above laid down.

As to the fourth objection interposed by the trustee, that the plaintiff is indebted on his subscription to capital stock, it is familiar that such a liability is an asset of the estate and belongs to the trustee. The learned referee, after a careful examination of the evidence submitted, decides that the corporation exchanged its stock with the claimant for an amount of merchandise which the corporation was qualified to deal in, and which was a necessity in order to carry on its business; the goods and merchandise thus furnished by Laskin, together with some $400 in money, before the bankrupt corporation commenced business, exceeded the amount of his subscription; that while no formal resolution seems to have been passed accepting such merchandise in lieu of cash, still by common consent such stock in trade was so accepted by the directors, and that no fraud or collusion is proven in the premises. Under the Illinois statute it is entirely competent for the directors to accept merchandise in lieu of cash for the payment of capital stock. Where paid-up stock is issued for property received, there must be actual fraud in the transaction to render the stockholder liable. Streator Car Seat Co. v. Rankin, 45 Ill. App. 226; Davenport v. Plano Implement Co., 70 Ill. App. 162; Farwell v. Great Western Telegraph Co., 161 Ill. 522, 44 N. E. 891. Under the
authorities considerable latitude is given the board of directors of a corporation in this regard in absence of fraud or collusion. It has not been claimed that in this exchange there was any discrepancy in values, and I find nothing in the record to justify a reversal of the referee on this issue of fact.

For these reasons, the ruling of the referee must be affirmed.

I feel, however, that an opportunity should be extended to the creditors to enforce the statutory liabilities awarded to them by the law of Illinois, if they be so disposed. I therefore direct that the claim of Laskin remain in abeyance, without final allowance, for the period of 20 days, and, if during that period the creditors shall institute such proceedings under the Illinois statutes, that the final allowance of Laskin's claim be deferred until such litigation can be concluded. If, however, no such proceedings are taken by the creditors within the period of 20 days, then the Laskin claim is to be allowed by the referee in accordance with this opinion.

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BROOKFIELD et al. v. NOVELTY GLASS MFG. CO.

(Circuit Court, D. New Jersey. January 27, 1908.)

1. PATENTS (§ 286*)—INFRINGEMENT—DAMAGES RECOVERABLE.

Where the owner of a patent was not individually engaged in the manufacture or sale of the patented article, he cannot recover from an infringer as damages the profits of which a corporation licensee in which he was a stockholder was deprived by the infringement where such corporation is not a party to the suit, nor any part thereof, in the absence of proof of the terms of the license.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 453–456; Dec. Dig. § 286.*]

2. PATENTS (§ 318*)—INFRINGEMENT—PROFITS RECOVERABLE.

Where the claims of a patent infringed are for a combination of old elements, the invention consisting in the combination, the infringer is liable for all of the profits made by the use of such combination.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 566–576; Dec. Dig. § 318.*]

3. PATENTS (§ 318*)—INFRINGEMENT—PROFITS RECOVERABLE.

The profits recoverable from the user of an infringing machine include all of the profits made upon the product of such machine, where the infringer could have made no profits by the use of any other machine then known and open to his use.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 566–576; Dec. Dig. § 318.*]

4. PATENTS (§ 318*)—INFRINGEMENT—PROFITS RECOVERABLE.

That the profits made by an infringer were, in part the result of an alleged unlawful agreement between competing manufacturers to maintain prices, to which agreement a corporation in which the owner of the patent is a stockholder was a party, does not lessen the liability of such infringer for the profits made by his infringement.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 566–576; Dec. Dig. § 318.*]

In Equity. On exceptions to master’s report.

For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep't Indexes.
For opinion sustaining the patent and finding infringement, see 124 Fed. 551.


LANNING, District Judge. The bill of complaint in this case was filed in 1901 by William Brookfield as sole complainant. By it he alleged that he was the sole owner of two patents, Nos. 542,565 and 532,973, for improvements in presses for making glass insulators for telegraph poles, etc., capable of conjoint use and actually conjointly used by him in one and the same machine, and that they were also so used by the defendant company in infringement of his rights. There was the usual prayer for an injunction and an accounting. On the hearing upon pleadings and proofs, Brookfield having died and his executors having been substituted as complainants, an interlocutory decree was entered adjudging the defendant an infringer of claims 1, 2, 3, 6, 7, and 8 of patent No. 542,565, but not of any of the claims of patent No. 532,973, and referring the cause to a master to take and report an account of the defendant’s profits and the complainant’s damages. The master now reports the profits at the sum of $29,910.48, and the damages at the sum of $54,701.08.

The exceptions present several important questions. In the first place, it appears that Brookfield permitted the Brookfield Glass Company—a corporation having outstanding 1,500 shares of its capital stock, of which Brookfield owned 1,370, and his three sons the remaining 130 shares—to use his patented presses, and that he never individually used them in any business whatsoever. In ascertaining the amount of damages sustained by Brookfield, the master has proceeded on the theory that they are fixed by the profits which the Brookfield Glass Company would have made except for the defendant’s infringement. But it is impossible to ascertain what part of those profits Brookfield would have been entitled to, for the reason that the proofs are silent concerning the nature of the agreement between Brookfield and the Brookfield Glass Company. The presumption is that the Brookfield Glass Company had no corporate power to enter into a copartnership with Brookfield, and therefore the case of Yale Lock Manufacturing Co. v. Sargent, 117 U. S. 536, 6 Sup. Ct. 934, 29 L. Ed. 954, which held that Sargent was entitled to recover all damages which his copartnership had sustained by the infringement of his patent, while he might be liable on an accounting in a suit by his copartner against him, is not applicable. That the complainants are entitled to recover what damages it is legally shown Brookfield sustained, is clear; but the profits which the Brookfield Glass Company might have made if there had been no infringement by the defendant, in the absence of any proof of the contractual relation between Brookfield and the Brookfield Glass Company, is too uncertain a basis on which to make an award of damages to Brookfield’s executors. In determining the amount of Brookfield’s damages, the question is, what did he lose? not, what did the Brookfield Glass Company lose? Brookfield was not at any time during the
period of the infringement in a position to supply the market with any insulators whatever. Individually, he was not in the business of manufacturing or selling insulators. If he sustained any loss, it was not the direct and proximate result of the infringement, but his failure to receive from the Brookfield Glass Company, as one of its stockholders, or under some contract with that company, as large a sum by way of dividends, royalties, or otherwise as he would have received except for the defendant's competition with the Brookfield Glass Company. If the Brookfield Glass Company was Brookfield's exclusive licensee, either under a written or an oral license, and that company had been joined in the bill of complaint as a co-complainant with Brookfield, the profits lost by the company by reason of the unlawful competition of the defendant might probably have been recovered for the benefit of the company, and thereby Brookfield might have been indirectly benefited. If, on the other hand, the company was not Brookfield's exclusive licensee, it sustained no damage whatever. In any aspect of the case, therefore, the present attempt to fix the damages sustained by Brookfield as the whole, or even any part, of the profits which the Brookfield Glass Company would have made if there had been no infringement, must fail. Furthermore, as Brookfield was not engaged, individually, either in the manufacture or sale of insulators, as he had no manufacturing plant, and was not in a position to supply the market with any insulators whatever, he had no business which was interfered with by the defendant's infringement. At most, therefore, his damages were only nominal.

Exceptions 14, 15, 16, 17, 18, 19, and 24, all relating to the question of damages, are sustained, and no part of the sum of $54,701.08, reported by the master as the damages sustained by Brookfield, is allowable.

This brings us to the consideration of the question concerning the profits made by the defendant, which the master reports at the sum of $29,910.48. The defendants' counsel argue, in their brief, that, if the complainants are entitled to recover any profits whatever, it is not the whole amount realized as profits from the defendant's glass manufacturing business, but only the benefit or advantage contributed to that business by the use of that fraction of the machinery which was covered by claims 1, 2, 3, 6, 7, and 8 of the patent. Each of these claims, however, is for a combination. In considering the claims, Judge Bradford, in the opinion on which the interlocutory decree was entered ([(C. C.) 124 Fed. 552]), declared that all the elements of the combinations mentioned therein are old, but he sustained the claims as valid combinations. When claims 2 and 3 of the same patent were before me, in Brookfield v. Elmer Glass Works (C. C.) 144 Fed. 418, I also held the elements of the combinations in those two claims to be old, as did the Circuit Court of Appeals in 154 Fed. 197, 83 C. C. A. 180. The elements thus combined constitute the whole machine. The patent does not cover a combination which constitutes a mere part of the machine. Consequently, if there be no other valid objection, the complainants are entitled to recover all the profits realized by the defendant by the use of its machines, because these ma-
chines were composed of nothing but the elements entering into the patented combination.

It is said, however, that, as the defendant might have lawfully adopted one of the old methods of manufacturing insulators, the complainants are entitled to recover only that part of the defendant's profits which was over and above what they could have made by adopting one of those old methods. But there is evidence to the effect that the patented combination (known as the "Kribs Press") is so far superior to any press which preceded it, both in the quantity and quality of its production, that successful competition by the use of any of the old presses was utterly impossible. Judge Bradford, in his opinion above referred to, says:

"The Insulator press of the patent largely increased the production and improved the character and quality of glass insulators, at once met with great success, and practically superseded the older methods of manufacturing those articles."

The master, too, reaches the conclusion, on the proofs before him, that the defendant could have made no profits by the use of any of the old methods of manufacture. At the present time, and during the period of the accounting in this case, insulators were and are successfully made by the use of the Duffield press, but that press was not in use, and apparently not devised or invented, until about March 1, 1903. The master has allowed to the complainants no profits made by the defendant after February 28, 1903, and he has correctly based the accounting on a period ending on that date. The complainants are entitled to recover all the profits actually made by the defendant up to and including February 28, 1903. This conclusion disposes of exceptions 1, 2, 3, 4, 5, 6, and 7, all which must be overruled.

The master reports the defendant's profits at the sum of $29,910.48. He has refused to allow the following items of expense, which refusal is the subject-matter of exceptions 8, 9, 10, 11, and 12:

- For traveling expenses ............................................. $ 496.46
- For discount and interest ........................................ 1,060.73
- For interest on bonds ............................................ 2,505.00
- For salaries ..................................................... 15,680.00
- For legal expenses .............................................. 2,685.67

The defendant has offered no explanatory evidence concerning these items. The books of the defendant fail to show, in any satisfactory manner, that they were expenses incurred in the production or sale of insulators. It is fair to infer that the "legal expenses" were in connection with the litigation in this cause. The "traveling expenses" may have been incurred in connection with the same litigation. The "interest on bonds" may relate, at least in part, to interest paid on bonds issued by the defendant in payment for a patent. The "salaries" were enormously increased about June 1, 1902, were paid only to the four officers and stockholders of the defendant company, and were doubtless intended as the defendant company's method of distributing profits. The "discount and interest" may have been paid on loans to the defendant, but, if so, it is not probable that any loans would have been necessary if the salaries had been kept down to reasonable
figures. In the absence of explanatory evidence by the defendant, exceptions 8, 9, 10, 11, and 12 must therefore be overruled.

It is further contended by the defendant's counsel that a certain agreement entered into by the Brookfield Glass Company, the Hemingray Company, and C. S. Knowles, dated April 21, 1901, to maintain prices of insulators, was in violation of the Sherman anti-trust act; that the profits made by the defendant company were, at least in part, the fruit of the alleged unlawful agreement; and that the complainants, as representatives of Brookfield, cannot recover in equity any part of such fruit. The defendant has embodied, in exceptions 20, 21, and 22, a statement that Brookfield himself was also a party to this agreement. The proofs, however, do not support the statement. Although Brookfield was very probably the dominating spirit in the Brookfield Glass Company, the parties to the agreement were the Brookfield Glass Company, the Hemingray Company, and C. S. Knowles. None of the parties to that agreement is before this court. No such defense is set up in the answer to Brookfield's bill. Exceptions 20, 21, and 22 should therefore be overruled.

What has been said disposes, also, of exceptions 13 and 23, in each of which objection is made to the recovery of any of the defendant's profits. These exceptions are overruled.

A final decree will be entered in accordance with these views.

EARN LINE S. S. CO. v. UNITED STATES.

(Circuit Court, E. D. Pennsylvania. June 12, 1909.)

No. 19.

Salvage (§ 28*)—Rescue of Derelict—Naval Coal Barge—Amount of Compensation.

An award of $4,000 made against the United States for the salvage of a derelict iron coal barge belonging to the navy and worth $18,000, which was picked up off the southern coast of Florida and towed to Jacksonville by the steamship Nordkyn, worth about $100,000, then on a voyage under a time charter at a monthly hire of $4,000, which was delayed 48 hours. The barge was in the track of vessels, and would probably have been picked up by some other vessel, but, being without lights, was a menace to navigation. The sea was somewhat rough, and the service attended with some danger, and the award included $350 for the towage of the barge by a tug up the St. Johns river.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 69, 71; Dec. Dig. § 28.*]

In Admiralty. Suit against the United States for salvage.

Charles Welsh Edmunds and Francis S. Laws, for petitioner.

J. B. McPHERSON, District Judge. This is a suit under the so-called “Tucker Act” of March 3, 1887, c. 359, 24 Stat. 505 (U. S. Comp. St. 1901, p. 752), and is brought by the Earn Line Steamship
Company, charterer of the Norwegian steamship Nordkyn, to recover salvage from the United States for the rescue of a derelict coal barge belonging to the navy. In obedience to the act, I find the facts to be as follows:

The Nordkyn is a steel vessel of 2,104 tons net register, and was worth about $100,000 when the service in question was rendered. On April 6, 1907, she was under a time charter to the Earn Line Steamship Company, the monthly hire being nearly $4,000. Her crew comprised 25 officers and men, and the monthly wage account was 2,720 kroner, or about $725. Her daily coal consumption under full speed was from 20 to 22 tons. She left Baltimore on April 2d, bound south for Tampico, Mexico, with a cargo of coal. On Saturday, April 6th, between 4 and 5 o'clock in the afternoon, when she was off the southern coast of Florida about 15 miles northeast of Cape Canaveral, the barge was seen some distance away. She had broken loose from a collier that was towing her from Key West to Norfolk, and, while it does not clearly appear that she had been finally abandoned, she was at large upon the sea and was prima facie a derelict. Under a strong wind from the southwest and a high sea, she was drifting away from the land and was rolling heavily. The steamship came as near as was prudent, perhaps within half a mile, slowed down, and whistled to learn if any person was upon the barge. No response being received, the chief mate and four men were ordered to go on board. On account of the wind and high sea, there was some danger in reaching her and in climbing her ladder, but the risk was not excessive, although some water was shipped during the passage, and no injury was done except slight damage to the small boat. No one was on board, and (as has been stated) the vessel was apparently a derelict. The pumps showed about a foot of water, but the steering gear seems to have been in order, and in other respects she had seemingly suffered little injury. A new seven-inch manila hawser was found, and this was made fast to the steamship after about an hour's work, the mate and two men remaining on the barge. A new line belonging to the Nordkyn was used as a bridle, and this was afterwards broken in several places. After the hawsers were adjusted, the vessel turned about and proceeded up the coast in a northerly direction, in order to take the barge to Jacksonville. At 11 o'clock the ship and her tow arrived off Mosquito Island, and, fearing that the barge and men might be lost in the darkness, the Nordkyn came to anchor, the barge hanging on behind. The mate and men were taken off for the night. Early on Sunday morning the second mate and two men were put upon the barge, and the steamship resumed the voyage toward Jacksonville. About 8 o'clock the strain upon the hawser caused it to part, and the tow was interrupted. The work of eight men for an hour or more was necessary before the hawser was again made fast, but there was no further incident during the day that calls for notice. At 6 o'clock in the evening, the tow arrived off St. Johns river, and signaled for a pilot and a tug. While awaiting their arrival the ship came to anchor about five miles out from the mouth of the river, and at 11 o'clock that night turned over the barge to the Jacksonville Towing & Wrecking Company, under an agreement that she should be
delivered to the United States court at Jacksonville, subject to the
salvage claims of the Nordkyn and the towing company. The steam-
ship immediately resumed her voyage to Tampico, and on Monday at
2 o'clock in the afternoon was again at the point off Cape Canaveral
where she first discovered the barge.

During all the time occupied by the tow the wind was heavy and
the sea was high, and the steamship was obliged to run under slow
or half speed for fear of parting the hawser. On both occasions
when the hawser was run, and on the three occasions when men were
put aboard the barge, the steamship was in some, but I think not
serious, danger of collision. While the weather may probably be de-
scribed as stormy, there was no alarming or very threatening danger
from this source to either vessel. A close watch was maintained on
the barge both by day and by night for fear she might break loose.
The distance from the point where she was picked up to the point
where she was delivered to the towing company's tug was 125 miles,
making the distance traveled by the Nordkyn out of her course 250
miles, and the time thus consumed was 1 day and 22 hours. The tow-
ing company delivered the barge at Jacksonville, a distance of 26 miles
up the St. Johns river, the service rendered after the river was reached
involving nothing more than is ordinarily required of a tug on inland
waters. The barge was an iron vessel, built in 1884, and had been
bought by the United States during the Spanish War and converted
into a coal barge for use by the navy. She was 200 feet long, 34 feet
beam, 19 feet 9 inches depth of hold, and had a carrying capacity of
1,600 tons of coal. She was equipped with four modern steam
winches, two modern boilers, a steam capstan and windlass, and was
fitted as an ocean-going barge, although she was not well adapted
for coaling purposes. After the rescue, she was brought to the Nor-
fork Navy Yard, where $1,350 was spent in overhauling her.

The towing company put in a claim to the government for a share
in the salvage, but (so far as appears) there has been no litigation
either by that company or by the Earn Line until the present suit was
begun. Originally the towing company was not a party to the action,
but recently it has entered an appearance, adopted the averments of
the petition so far as its own services are concerned, and submitted its
claim to the court.

It is conceded that both claimants rendered salvage services, and it
is also conceded that the barge is to be treated as a derelict, although
she may have been only temporarily abandoned. The character and
extent of the services sufficiently appear from the finding of facts, and
need not be dwelt upon. The work was meritorious, was performed
with skill and prudence and assiduity, and involved some, although
not a high degree of, hazard. It has been urged by the government
that the barge was in such a position that she would surely have been
picked up soon by some other vessel, if the Nordkyn had not undertak-
en the task; and this I think may be assumed, if no disaster had hap-
pened to the barge meanwhile. But, aside from the risk to which
the barge herself was exposed in her helpless condition, it may fairly
be taken into account (as an offset to the probability of rescue by
some other vessel) that she was a dangerous menace to navigation,
and all the more dangerous because many other ships were likely to be in the neighborhood. She was large and heavy in bulk, without lights and without guidance, drifting with the wind and tide toward the track of coastwise vessels, and it need not be said that the sooner she was taken in charge the safer that part of the sea would be. The principal contention has been waged about the value of the barge at the time of the rescue, and a large part of the testimony has been devoted to this subject. I shall not discuss it in detail; it ranges between widely separated estimates, and I have given it careful consideration. The result is that I find the value to have been about what the government's witnesses have indicated, say, in round numbers, $18,000. I may add that the court's award would not be changed, even if her value were $25,000, for the decree is not based upon a percentage, but upon my estimate of what the services were worth. Into that estimate the value of the property saved has necessarily entered in some degree, but not so essentially that the difference between $18,000 and $25,000 would seriously affect the result.

In my opinion the Jacksonville Towing & Wrecking Company is entitled to $350. The Earn Line Steamship Company should recover the following sums:

- Charter hire at rate of $15 pounds per month ........................................  $263 60
- Wages at 2,729 kroner .................................. “ ” (say) .................. 50 00
- Coal .............................................. (say) ................................ 22 00
- Food ............................................... “ ” ................................ 25 00
- Damage to boat .................................. “ ” ................................ 15 00
- “ ” line ............................................. “ ” ................................ 57 50

Total .................................................. .........................................  $433 10

But these items are to be paid either to the owners or to the charterer, as the charter party may determine. In addition, an award is made of $3,216.90 (making a total of $4,000) as compensation and reward, and this amount is to be divided among the owners, charterer, and crew of the Nordkyn in suitable proportions.

A decree may be drawn in conformity with this opinion.

THE LIZZIE CRAWFORD.

THE ACTIVE.

(District Court, E. D. Pennsylvania. June 10, 1909.)

No. 50.


After dark a tug started to tow a car float about a mile and a half down the Delaware river at Philadelphia from one pier to another. The float was alongside the tug on the starboard side, and the cars thereon obstructed the side lights and perhaps the towing lights of the tug from that side, and the float carried but a single white lantern placed on the rail at the starboard corner of the bow. Owing to the wind and ebb tide they missed the pier and swung to the eastward to make a turn, and when heading east the tug stopped, allowing the vessels to drift downstream broadside on, and while in such position the float was struck by a steam-
ship coming upstream, which immediately proceeded without stopping or giving her name. *Held,* that the steamship was in fault because of her failure to stand by as required by Act Sept. 4, 1890, c. 875, § 1, 26 Stat. 425 (U. S. Comp. St. 1901, p. 2902), and prima facie responsible for the collision, and was also in fault for being on the wrong side of the river without giving any good reason therefor; that the tug was also in fault for placing herself and tow in a position where her lights were probably obscured from an approaching vessel by the cars on the float without sounding any warning of her presence to the approaching steamer, and for not mounting a green light on the starboard bow of the tow as required by the Pilot Rules for Inland Waters (Ed. 1905) rule 12, par. 3.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 200–202; Dec. Dig. § 93.*]

2. Collision (§ 75)—Lights—Barge in Tow Alongside—Pilot Rules.

Pilot Rules for Inland Waters (Ed. 1905) rule 12, par. 3, applies to the Delaware river, and requires a car float in tow alongside of a tug on the starboard side, where the cars obscure the side lights of the tug, to carry a green light at night on her starboard bow.

[Ed. Note.—For other cases, see Collision, Dec. Dig. § 75.*]

In Admiralty. Suit for collision.

John F. Lewis, for libelant.

Henry R. Edmunds, for respondent.

J. B. McPHERSON, District Judge. On December 3, 1906, about half past 5 o'clock in the evening, the steam tug Lizzie Crawford, 75 feet long, of about 100 horse power, started from Pier 22, South Wharves, in the city of Philadelphia, to tow car float No. 72, belonging to the Baltimore & Ohio Railroad Company, down the Delaware river to Pier 62, a distance south perhaps of a mile and a half. The tug was fastened to the float by three lines in the customary manner, her starboard side being in contact with the port side of the float, and her position being so far aft that about 100 feet of the float projected in front of her bow. The float carried 10 loaded cars arranged in 2 parallel rows of 5 cars each, their tops reaching at least as high as 20 feet—perhaps 2 or 3 feet higher—above the level of the water. The evening was dark when the trip began, and soon grew darker, although the atmosphere was not thick and there was nothing to prevent the seeing of lights for more than a mile. The tug carried side lights and towing lights, and they were set and burning. No evidence was offered concerning the height of her foremast nor concerning the exact position of the towing lights, so that I cannot find with confidence whether these lights would be visible to a vessel approaching from the starboard side of the float; but it is clear that the side lights of the tug could not be seen by a vessel in that position. The only light on the float was a white light, an ordinary ship's lantern, which was placed on the rail at the starboard corner of the bow. The tide was ebb, and there was a moderate breeze from the northwest when the tug got under way. About the time Pier 62 was reached, however, the wind increased suddenly and blew hard from the northwest; and the force of the wind and tide made the float temporarily unmanageable (although under ordinary circumstances the tug was fully able to control it), and carried the tow beyond the pier for which

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
she was bound. Up to this time the course had been close to the western or Pennsylvania shore; but it now became necessary to turn the float toward the eastern or New Jersey shore, and move out somewhat further into the channel across the tide, in order to turn the head of the float northerly and then westerly so as to reach the pier upon the second attempt. To execute this maneuver the tug backed, swung the float around so that her broadside faced south (the tug lying, therefore, on her northerly side), and then stopped her engine for several minutes. The reason for stopping the engine at that time does not appear, but the result was that the headway of the float was stopped or nearly stopped, and that she drifted downstream, broadside to, under the influence of the wind and the ebb tide. She was then about 200 feet from the western edge of the channel.

While she was in this position, the starboard bow of the Active, a Norwegian steamship 290 feet long, of about 600 tons register, drawing not more than 13 feet of water, carrying a cargo of coconuts from St. Andrew's Island to Philadelphia, struck the float a glancing blow well aft on the starboard quarter, doing the damage complained of. The steamship immediately proceeded on her way as soon as she found that her stern was clear, without stopping to make inquiry concerning the extent of the injury done by the collision, and without giving her name or any other information to the tug or float. This failure to comply with Act Sept. 4, 1890, c. 875, 26 Stat. 425 (U. S. Comp. St. 1901, p. 2902), raises a presumption of the Active's negligence; she made no effort to show any reasonable cause for her failure to stop, and is therefore prima facie to blame. The act is as follows:

"That in every case of collision between two vessels, it shall be the duty of the master or person in charge of each vessel, if and so far as he can do so without serious danger to his own vessel, crew and passengers (if any), to stay by the other vessel until he has ascertained that she has no need of further assistance, and to render to the other vessel, her master, crew and passengers (if any) such assistance as may be practicable and as may be necessary in order to save them from any danger caused by the collision, and also to give to the master or persons in charge of the other vessel the name of his own vessel, and her port of registry, or the port or place to which she belongs, and also the name of the ports and places from which and to which she is bound. If he fails to do so, and no reasonable cause for such failure is shown, the collision shall, in the absence of proof to the contrary, be deemed to have been caused by his wrongful act, neglect or default."

I had occasion to consider this statute recently in The Williamsport (D. C.) 167 Fed. 190, and some of the authorities are referred to in the opinion delivered in that case.

But the Active was at fault in at least one other respect; she was on the wrong side of the river, and has not justified her conduct in taking that course. There was plenty of room on the eastern or right-hand side of the channel—its width at the point of collision is more than a quarter of a mile; there were no other obstructing vessels in the neighborhood; and the only reason given by the pilot for coming up on the westward side was a reason of his own convenience. Upon that course he could steer by the electric lights along the shore, and it was apparently on this account alone that he deliberately violated the
well-known rule that requires vessels to keep to the right in a narrow channel. Other faults are charged against the Active, but I see no need to consider any other, since the two already referred to are sufficient to establish her negligence.

Was the Lizzie Crawford also to blame? It has been argued that she had no towing lights up at all, and the negative testimony to this effect on the part of the Active tends to support the argument. I have found the fact to be otherwise, however, but the testimony certainly leaves it doubtful whether these lights could be seen from a vessel coming toward the tug from beyond the starboard side of the float. If these lights were placed higher than the tops of the cars, it would have been easy to prove that fact, and I think it fair to assume, therefore, that, in the broadside position occupied by the tow shortly before the collision, the cars would probably shut out the view of the towing lights upon the tug. If this is correct, the tug was negligent in not adopting some other means of making her presence known. She could have used her whistle, and it seems to me that it would have been no more than ordinary precaution to have whistled while the float was broadside to the stream, with the engine stopped and the tow drifting with the wind and tide. But, aside from this, the tug was at fault in failing to see the steamship in time, and in failing to signal when she learned that the ship was approaching. There were two men on the lookout upon the float, but their testimony is not very definite about what they saw and what notice they gave to the tug. One of them did not see the steamship until she was only "about a square" away, although he testifies that both her lights were burning. It is the fact that all her lights were set and plainly visible for more than a mile. The other testified that he saw her about 900 feet away, but he adds that she was "pretty close when I discovered her." Thereupon he testified:

"I halled to the captain, but it was blowing so heavy I don't think he heard me right the first time, and I started—I got about, I suppose, 15 or 20 feet from where I was standing—"There is a steamer coming," I said. 'She is going to the westward of us,' that is what I said. I seen her sheer to the westward."

How long this was before the collision does not satisfactorily appear. The captain merely testified that he got the lookout's report "before the collision," but he does not say how much time intervened. If he was notified of the steamship's approach, even if the notice came only a few minutes before the collision, he certainly ought to have used the whistle at once in order to give such warning of his presence as was possible, and failure to do so was a fault.

But there is another fault that is chargeable to the tug, namely, the failure to have the proper light on the float, as required by the third paragraph of rule XI of the Pilot Rules for Inland Waters, entitled "Lights for Barges and Canal Boats in Tow of Steam Vessels" (see page 6 of Pilot Rules, Official Edition of 1905). This rule was in force at the time of the collision, and, as there is some difference of opinion between counsel concerning the scope of certain paragraphs, it may be well to quote the paragraphs over which the dispute arises:
"Rule XI. (1) On the Inland rivers, bays, sounds, and harbors of the United States—except on the waters of the Hudson River and its tributaries from Troy to Sandy Hook, the waters of the East River and Long Island Sound, and the waters entering thereon, and to the Atlantic Ocean, to and including Narragansett Bay, R. I., and tributaries and Lake Champlain—barges and canal boats towing astern of steam vessels, when towing singly, or what is known as tandem towing, shall each carry a green light on the starboard side and a red light on the port side.

"(2) When two or more boats are abreast, the colored lights shall be carried at the outer side of the bows of the outside boats.

"(3) Barges or canal boats towing alongside a steam vessel shall, if the deck houses, or cargo of the barge or canal boat be so high above water as to obscure the side lights of the towing steamer, when being towed on the starboard side of the steamer, carry a green light upon the starboard side; and when towed on the port side of the steamer, a red light on the port side of the barge or canal boat; and if there is more than one barge or canal boat abreast, the colored lights shall be displayed from the outer side of the barges or canal boats.

"(4) Barges and canal boats, when being towed by steam vessels on the waters of the Hudson river and its tributaries from Troy to Sandy Hook, the East river, and the Long Island Sound (and the waters entering thereon and to the Atlantic Ocean), to and including Narragansett Bay, R. I., and tributaries, and Lake Champlain, shall carry lights as follows:

"(5) Barges and canal boats being towed astern of steam vessels, when towing singly or what is known as tandem towing, shall each carry a white light on the bow and a white light on the stern.

"(6) Barges and canal boats when towed at a hawser two or more abreast, when in one tier, shall carry a white light on the bow and a white light on the stern of each of the outside boats; when in more than one tier, each of the outside boats shall carry a white light on its bow; and the outside boats in the last tier shall carry, in addition, a white light on the outer after part of stern.

"(7) Barges or canal boats towed alongside a steam vessel, if on the starboard side of said steam vessel, shall display a white light on her own starboard bow; and if on the port side of said steam vessel, shall display a white light on her port bow; and if there is more than one barge or canal boat alongside, the white lights shall be displayed from the outboard side of the outside barge or canal boat: Provided, that car floats of 200 feet or over in length shall have a white light at each outboard corner of said floats."

It will be seen that paragraphs 1, 2, and 3 (the numbering is my own for purposes of convenient reference) apply, inter alios, to the Delaware river, and each paragraph has to do with a single subject—paragraph 1 dealing with barges towed astern; paragraph 2, with barges towed abreast; and paragraph 3, with barges towed alongside, but only under certain conditions. It is the latter paragraph that is applicable in the present case, because the conditions existed. The rule then turns to the waters that were excepted in paragraph 1—the Hudson river with certain of its tributaries, etc.—and, having specified them again in paragraph 4, goes on to make different regulations for lights upon these waters. Paragraph 5 deals with barges towed astern, and corresponds with paragraph 1; barges towed abreast are dealt with in paragraph 6, corresponding with paragraph 2; and, finally, barges towed alongside under all conditions are dealt with in paragraph 7, corresponding with paragraph 3. That paragraphs 5 and 6 apply only to the waters specified in paragraph 4 is, I think, so plain that there is little room for argument. The scope of paragraph 7 is more doubtful. It certainly applies to all barges towed alongside on the waters specified in paragraph 4, but the question now is, Does it
apply also to such barges upon other inland waters? If it applies in all cases to barges towed alongside upon such waters, it conflicts irreconcilably with paragraph 3, so far as barges are concerned whose deck, deckhouses, or cargo obscure the lights of the tug, and therefore I think that, if it applies at all (as it may) to barges upon the Delaware river, it can only apply when the lights of the tug are not obscured by the deck, deckhouses, or cargo of the barge. When these lights are thus obscured (as they were in the present case), paragraph 3 applies on the Delaware river, and not paragraph 7. The proviso to paragraph 7 could not possibly be controlling in the dispute under consideration, for two reasons: First, the float was less than 200 feet in length; and, second, it only carried a white light at one outboard corner.

My conclusion on this branch of the case is that, as the cargo of the float obscured the side lights of the tug when being towed on its starboard side, there should have been a green light in place of the white light on the starboard side of the float. Failure to display such a light violated paragraph 3 of rule XI, and was a fault on the part of the tug. A decree may be entered, finding both vessels at fault and dividing the damages.

LYLE et al. v. NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS.

(Circuit Court, E. D. Tennessee. March 15, 1909.)

No. 1464.

ARMY AND NAVY (§ 52*)—NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS—LIABILITY TO ACTION FOR TORTS—"POWER TO SUE AND BE SUED AT LAW AND IN EQUITY."

The National Home for Disabled Volunteer Soldiers, being a charitable institution engaged as an agency of the federal government in the discharge of a governmental function, is not subject to suit in an action sounding in tort to recover damages for the alleged unlawful and wrongful or negligent acts of its officers in diverting and polluting the waters of a spring situated on lands of the plaintiff, the power "to sue and be sued at law and in equity" conferred on the corporation by Rev. St. § 4825 (U. S. Comp. St. 1901, p. 3337), being limited to matters within the scope of the other corporate powers with which it is vested.

[Ed. Note.—For other cases, see Army and Navy, Dec. Dig. § 52.*

Liabilities of charitable institutions for negligence, see note to Powers v. Massachusetts Homoeopathic Hospital, 47 C. C. A. 184.]

Action at Law.

The declaration in this case is as follows:

"The plaintiffs, * * * residents of the Ninth civil district of Washington county, Tenn., sue the defendant, the National Home for Disabled Volunteer Soldiers, a corporation created under the laws of the United States of America, before the court by issuance of proper service of process, for that:

"The plaintiffs are the owners of a certain tract of land consisting of about 17 acres, adjoining the lands of defendant near Johnson City, Tenn., and located east of said defendant's land down the creek, known as 'Bush Creek,' from the same, on which is located a beautiful home, which home and tract of land have been for more than 50 years, and as far back as the memory of man runs, supplied with water from a beautiful spring, located upon said tract of land within a few hundred feet of the residence, and defendant the

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep'y Indexes
National Home for Disabled Soldiers has within the last year diverted and destroyed the flow of the same by the erection of what is termed a 'disposal plant' for the consumption of the sewerage and waste for what is known as the 'Hospital Group' and other buildings on its reservation, and the construction of other works, stopping thereby the flow of said spring almost entirely, even during the wet seasons of the year, and polluting the same so as to be unfit for use to the extent that the same does flow, in seasons when the same is not entirely cut off.

"Plaintiff avers that the act of defendant, the National Home for Disabled Volunteer Soldiers, in diverting said stream from its natural channel and polluting the same, as aforesaid, is unlawful, and without excuse or justifications, and to the great injury and damage of plaintiff's tract of land and home, wherefore they sue for $2,000.00 damage, and demand a jury to try the issue."

The defendant filed a plea of not guilty.

Upon the trial of the case the plaintiffs introduced evidence tending to show that the defendant, in excavating for a foundation for the disposal plant upon the tract of land on which the National Home for Disabled Volunteer Soldiers was located, had diverted the waters of an underground stream supplying a spring upon the plaintiffs' land, causing it to dry up at certain seasons of the year, and diminishing its flow at all times, thereby injuring the spring and depreciating the value of plaintiffs' tract of land.

At the conclusion of the testimony offered in behalf of plaintiffs the defendant moved the court for peremptory instructions in favor of the defendant. This motion was sustained by the court, and the jury was instructed to return a verdict for the defendant upon the ground that the defendant, as an agency of the government, was not subject to suit for the cause of action alleged. A verdict was returned accordingly, and plaintiffs thereupon moved for a new trial.

S. E. Miller and Harr & Burrow, for plaintiffs.
S. C. Williams, for defendant.

SANFORD, District Judge. After careful consideration, I am of opinion that the jury was properly directed to return a verdict for the defendant upon the ground that, as an agency of the government, it was not subject to suit in this court for the cause of action alleged.

1. It is expressly conceded in plaintiffs' brief that the power given the defendant by Congress "to sue and be sued in courts of law and equity" (Rev. St. § 4825 [U. S. Comp. St. 1901, p. 3387]) "does not include the power to be sued for tort, for the negligence of its officers"; but it is earnestly insisted that the court was in error in assuming that this is an action of tort; that the defendant has committed no tort, but has merely taken from plaintiffs a stream of water which it had the right to take in the legal conduct of its affairs, while acting within the scope of its delegated powers, in excavating for a foundation for its disposal plant, under the power expressly delegated to it to "procure sites * * * and have the necessary buildings erected" (Rev. St. 4830 [U. S. Comp. St. 1901, p. 3342]); that having thus taken plaintiffs' property without compensation, in the exercise of its express powers, it is "liable to be sued for the value of the property so taken"; and that having, it is claimed, the power of eminent domain under Act Aug. 1, 1888, c. 728, 25 Stat. 357 (U. S. Comp. St. 1901, p. 2516), conferring the right upon any officer of the government authorized to procure real estate for the erection of a public building or other public use, to condemn the same under judicial process, the right now exists in accordance with the Tennessee prac-
tice, as declared in Duck River Railroad Co. v. Cochrane, 3 Lea (Tenn.) 478, to bring suit in this court to recover the value of the property taken in the exercise of this power, with damages.

However, without now determining whether by analogy to the case of backing up water so as to overflow the land of another (Pumpelly v. Green Bay Co., 13 Wall. 166, 20 L. Ed. 557), the diversion of water from plaintiffs’ property, where there is no direct encroachment upon plaintiffs’ property but merely consequential damages arising from the defendant’s use of its own property, could be considered as a taking of plaintiffs’ property (Langford v. United States, 101 U. S. 341, 25 L. Ed. 1010; Hill v. United States, 149 U. S. 593, 13 Sup. Ct. 1011, 37 L. Ed. 862), or whether, if so, under proper pleadings, an action to recover the value of the property so taken in the exercise of any power delegated to the defendant would have lain in this court, the present suit, not being a suit of this character, is clearly not maintainable upon such theory.

The declaration does not allege that the defendant has taken the plaintiffs’ property in the exercise of any of its corporate powers, or that it has taken their property at all, either in the exercise of the right of eminent domain or of any right whatever, either governmental or proprietary, or that it has appropriated any of plaintiffs’ property to its own use or benefit, for any purpose. On the contrary, the declaration specifically avers, as the sole cause of action alleged, that the defendant, by the erection of a disposal plant and the construction of other works, has diverted and destroyed the flow of a spring upon the plaintiffs’ property, stopping its flow almost entirely, and polluting the same so as to render it unfit for use in seasons when the same is not entirely cut off; and that the act of the defendant “in diverting said stream from its natural channel and polluting the same, as aforesaid, is unlawful, and without excuse or justification, and to the great injury and damage of plaintiffs’ tract of land and home, wherefore they sue for $2,000 damage.” Clearly, under this declaration, this is not a suit to recover for the value of property taken by the defendant—in which the measure of the recovery would be very different from that in an action of damages (Alloway v. Nashville, 88 Tenn. 512, 18 S. W. 123, 8 L. R. A. 123)—nor is it in any respect based upon any alleged action of the defendant in the exercise of the right of eminent domain or of any of its delegated powers; but it is plainly and unmistakably an action sounding solely in tort, to recover damages both for the diversion and pollution of plaintiffs’ spring, alleged to have been caused by the defendant unlawfully and without excuse or justification. It must therefore stand or fall as an action for damages to plaintiffs’ property, caused by the defendant’s tort; and, if it cannot so stand, it cannot now be maintained upon any other theory.

2. I think it clear, however, under the authorities, and independently of the concession of plaintiffs’ counsel, that the defendant is not liable in such action of tort. The clear weight of authority is to the effect that a charitable institution, such as a hospital, whose foundation is laid in donations to be held in trust as a public charity, and which is operated as an eleemosynary institution, without private gain, and
LYLE V. NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS. 845

dependent upon charitable gifts for its support, is not liable for the
tortious and negligent acts of its officers, managers, and agents, since
its trust funds cannot be diverted to such purposes, although its offi-
cers, managers, or agents may be individually liable to the injured
party. Abston v. Waldon Academy, 118 Tenn. 24, 102 S. W. 381,
11 L. R. A. (N. S.) 1179; Parks v. Northwestern University, 218 Ill.
381, 75 N. E. 991; 2 L. R. A. (N. S.) 556; Downes v. Harper Hospital,
McDonald v. Massachusetts General Hospital, 120 Mass. 432, 21 Am.
Rep. 529; Benton v. Boston Hospital, 140 Mass. 18, 1 N. E. 836, 54
Am. Rep. 430; and note, Williamson v. Louisville Industrial School,

While, however, there is some diversity of opinion as to this rule
when applied to a private charitable institution, if not to a municipal
charitable institution, it is well settled that a charitable corporation
created by the state itself for governmental purposes solely, owned
and maintained by the state, and engaged in the discharge of its public
duties, from the performance of which it derives no benefit, is, as an
agency of the state, unless otherwise expressly provided by statute,
exempt from liability to a private action for negligence in the discharge
of its duties. This general rule, which was stated, obiter, in Lane v.
Minnesota Agricultural Society, 62 Minn. 175, 64 N. W. 288, 29 L.
R. A. 708, has been applied in the case of a state reform school, in
Williamson v. Louisville Industrial School, 95 Ky. 251, 24 S. W. 1065,
hospital, in Maia v. Eastern State Hospital, 97 Va. 507, 34 S. E. 617,
47 L. R. A. 577; a state agricultural society in A'Hern v. Iowa Agri-
cultural Society, 91 Iowa, 97, 58 N. W. 1092, 24 L. R. A. 655; and a
state's prison, in Moody v. State's Prison, 128 N. C. 12, 38 S. E. 131,
53 L. R. A. 855.

And in the case of Overholser v. National Home, 68 Ohio St. 236,
67 N. E. 487, 62 L. R. A. 936, 96 Am. St. Rep. 658, this rule was
specifically applied to the case of a National Home for Disabled Volun-
teer Soldiers, it being held that such a National Home, being a cor-
poration created by Congress for the purpose of performing an appro-
priate and constitutional function of the federal government, for na-
tional purposes only, and supported entirely by funds supplied by the
general government, is, as such, a governmental agency, and a part
of the government of the United States, and, as such, cannot be sued
in an action sounding in tort for the unlawful collection and discharge
upon adjoining property of water, sewage, and other noxious sub-
stances, such suit being in effect a suit against the government and its
property, there being no corporate fund or property applicable to the
payment of a judgment in such action except by the seizure of the
property and funds supplied by the government for the purposes for
which the Home was created, and without which it must cease to ex-
ist. It was furthermore expressly held that the grant of power to the
National Home "to sue and be sued at law and in equity"—upon
which plaintiffs rely in their brief—must be regarded as "imposing the
power and liability to sue and be sued in respect to such matters only
as are within the scope of the other corporate powers of the defend-
ant," and that the Home not having been given the right to commit wrongs upon individuals, and it not having been contemplated that it would do so, the right to sue the Home "for a tort was never contemplated or conferred."

I regard the opinion in this case, which is clearly reasoned and contains a full discussion of the authorities and principles upon which it is based, as conclusive of the case at bar, there being no difference in principle, so far as the present question is concerned, between an action sounding in tort for the discharge of water and noxious substances upon the plaintiffs' land and an action sounding in tort for the wrongful diversion and pollution of water running to the plaintiffs' land.

While it is true that plaintiffs insist that the recognition in this opinion of the right to sue a National Home in respect to matters within the scope of its corporate powers involves the right to sue the present defendant for the value of plaintiffs' property taken by it in the exercise of its power to erect necessary buildings and in the exercise of the power of eminent domain which it is also claimed to possess, it is clear that, even if this be so—as to which no opinion is now expressed—it has no application to the present case, where the declaration does not seek to recover the value of any property alleged to have been taken by defendant in the exercise of any of its corporate powers, but, as before stated, seeks damages only for injuries resulting from the diversion and pollution of water, and alleged to have been caused by the defendant, unlawfully and without excuse or justification, and is purely and simply an action for damages, sounding in tort. And, as was held in the Overholser Case, the right to sue a National Home "for a tort was never contemplated nor conferred."

The underlying principle of the Overholser Case, that the National Home is a governmental agency, is furthermore conclusively determined by the case of Ohio v. Thomas, 173 U. S. 276, 19 Sup. Ct. 453, 43 L. Ed. 699, in which it was held that a National Soldiers' Home is a federal creation, under the direct and sole jurisdiction of Congress; that its governor, in making provision for feeding the inmates under the direction of a board of managers, and with the assent and approval of Congress, is engaged in the internal administration of a federal institution; and that in feeding the inmates of the Home in accordance with the provision made by Congress he is acting as a federal officer under and by virtue of valid federal authority, and in the performance of such duty is not subject to the laws of the state or liable for violating a state statute in reference to the use of oleomargarine.

I therefore conclude, following the direct authority of the Overholser Case, that the defendant Home, being a charitable institution, engaged as an agency of the federal government, in the discharge of a governmental function, is not subject to suit in the present action for tort, and that its funds cannot be diverted to the payment of any judgment that might be recovered herein.

As to whether the defendant would have been or may yet be liable in this court in another form of action, or whether the plaintiffs may
have any other mode of redress, if their property rights have been in fact impaired, it is unnecessary to determine here; but if injury has been done, and no other remedy has been provided, "it is always to be presumed," as stated in the passage from Cooley on Torts quoted in the Overholser Case, "that the legislative authority will make the proper provision for redress when its attention is directed to the injury."

3. Upon the trial of this case the evidence furthermore left me in great doubt whether the plaintiffs had shown a known and defined channel of the subterranean water course in question, whose course could have been determined by reasonable inference from the pre-existing condition of the surface of the ground, so as to have made the defendant liable in any case for the diversion of such water course, under the rule laid down in 3 Farnham's Water and Water Rights, § 974, p. 2799, and Gould on Waters, § 281. Being in doubt upon this question, however, it was not stated as a ground of the peremptory instructions to the jury, and, not having been furnished with a transcript of the testimony or had further opportunity to consider the evidence, no opinion is expressed upon this point at this time.

An order will be entered overruling the motion for a new trial, at the plaintiffs' cost.

LYNE v. DELAWARE, L. & W. R. CO.

(Circuit Court, D. New Jersey. July 9, 1908.)

1. CARRIERS (§ 36)—DISCRIMINATION—ACTION FOR DAMAGES UNDER INTERSTATE COMMERCE LAW.

A shipper may maintain an action at law under the interstate commerce act of February 4, 1887, c. 104, § 3, 24 Stat. 382 (U. S. Comp. St. 1901, p. 3159), to recover damages from an interstate railroad company because of the giving of a preference or advantage to another shipper by permitting him to keep cars on its terminal tracks without payment of the charges fixed by its schedules while denying the same right to plaintiff.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 95; Dec. Dig. § 36.*]

2. CARRIERS (§ 36)—PROCEEDINGS TO ENFORCE INTERSTATE COMMERCE LAW—ACTION FOR DAMAGES.

Two methods of procedure are prescribed for the recovery of damages for violation of the interstate commerce law: One by section 9, Act Feb. 4, 1887, c. 104, 24 Stat. 382 (U. S. Comp. St. 1901, p. 3159), by an action at law; and the other by complaint to the Interstate Commerce Commission under sections 14, 15, 16, as amended by Act June 29, 1906, c. 3381, §§ 3, 4, 5, 34 Stat. 559, 590 (U. S. Comp. St. Supp. 1907, p. 899 et seq.), and the provision of section 16 as so amended, that "all complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues," is merely a limitation as to time upon the second method, and does not deprive a party injured of the right to sue at law.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 36.*]

At Law. On demurrer to declaration.

Everett Colby, for plaintiff.

M. M. Stallman, for defendant.

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
LANNING, District Judge. The plaintiff seeks to recover from the
defendant damages for alleged violations of the interstate commerce
law (Act Feb. 4, 1887, c. 104, 24 Stat. 384 [U. S. Comp. St. 1901,
p. 3154]). The declaration is demurred to. One of the causes of de-
murder is that the declaration fails to state a cause of action. The
substantial averments of the declaration are that between November
15, 1901, and November 1, 1906, the defendant's published rate of
storage charges was $1 per car per day after the expiration of 48
hours allowed as "free time"; that during the period between Novem-
ber 15, 1901, and November 1, 1906, it granted to Bahrenburg & Bro.,
business competitors of the plaintiff, the privilege of peddling to their
customers from its cars in the Newark freightyard, after the expira-
tion of the "free time," in small lots, potatoes and cabbages, while it
denied the same privilege to the plaintiff; that when the plaintiff ap-
plied to the defendant for the same privilege granted to Bahrenburg
& Bro. he was informed that that firm had a lease for some portion of
the freightyard, but that it refused, on his application, to grant to
him a similar lease; that, if such lease was in fact granted to Bahren-
burg & Bro., it was a device fraudulently to evade the policy of the
interstate commerce law; and that, with such discrimination against
him, the plaintiff could not successfully compete with Bahrenburg &
Bro.

Two methods of procedure for the recovery of damages resulting
from the violation of the interstate commerce act are provided. One
of them is prescribed in section 9 of the act of February 4, 1887,
which authorizes any person claiming to be damaged by a common
carrier's violation of the act to bring an original suit at law against
the carrier in any District or Circuit Court of the United States of
competent jurisdiction. The other method of procedure is prescribed
by section 13 of the act of February 4, 1887, and sections 14, 15, and
589, 590 (U. S. Comp. St. Supp. 1907, pp. 899–902). By this latter
procedure an application is made to the Interstate Commerce Commissi-
on, who are authorized to investigate the complaint, and, where the
facts warrant it, to make an order awarding damages to the com-
plaining party, which order may be enforced by a subsequent suit in
a proceeding at law.

The present action is founded on section 9. The question is, do the
averments of the declaration make a case cognizable under that sec-
tion? The best exposition we have of the difference between the two
methods of procedure is to be found in Texas & Pacific Railway v.
553. It was there held that there is an indissoluble unity between the
provision of the interstate commerce act for the establishment and
maintenance of rates until corrected in accordance with the statute and
its prohibitions against preferences and discriminations, and that no
action can be maintained under the authority of section 9, the judg-
ment in which will disturb the stability and uniformity of schedule
rates fixed by the Interstate Commerce Commission. While it was
admitted that section 9, when taken alone, might receive a broader con-
struction than that given to it by the court, it was declared that, when
read in connection with the other sections of the act, and in the light of its plain policy, the section must be more narrowly construed than it otherwise would be. "We think," said the court, "that it inevitably follows from the context of the act that the independent right of an individual originally to maintain actions in courts to obtain pecuniary redress for violations of the act conferred by the ninth section must be confined to redress of such wrongs as can, consistently with the context of the act, be redressed by courts without previous action by the commission."

If the present action were one for the recovery of charges made by the defendant company on the ground that they were unreasonable, it could not, as I understand the Cotton Oil Company's Case, be maintained under the authority of section 9. But it seems to me that a judgment for the plaintiff against the defendant in the present case cannot disturb or affect the Interstate Commerce Commission in the exercise of any of its powers. Section 6 of the interstate commerce act, as amended June 29, 1906, provides that every common carrier shall file with the United States Commerce Commission, and print and keep open to public inspection, schedules which, amongst other things, shall "state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission shall require, all privileges and facilities granted or allowed, and any rules or regulations which could in any wise change, affect or determine any part or the aggregate of such aforesaid rates, fares and charges, or the value of the service rendered to the passenger, shipper, or consignee." The declaration avers that the defendant's published rate of storage charges up to November 1, 1906, was $1 per car per day after the expiration of 48 hours allowed as "free time." The complaint is that Bahrenburg & Bro. were allowed to keep cars of produce consigned to them at the Newark freightyard after the expiration of the "free time," while the same privilege was denied to the plaintiff. This, it is alleged, was an undue and unreasonable preference and advantage afforded to Bahrenburg & Bro. in violation of the act and injurious to the plaintiff. I think the declaration is not defective in the respect above referred to.

It is further objected that the action cannot be maintained for the reason that section 16 of the act, as it now stands, provides that "all complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, and the petition for the enforcement of an order for the payment of money shall be filed in the Circuit Court within one year from the date of the order, and not after." This provision applies only to the second method of procedure described in the act, and not to a suit instituted under section 9. There is no limitation prescribed by the act for the commencement of a suit under section 9. Whether the time within which an action under section 9 may be commenced is limited by the statute of limitations of New Jersey in accordance with the rule stated in Ratican v. Terminal R. Association (C. C.) 114 Fed. 668, or by section 1047 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 727), in accordance with the rule stated in Carter v. New Orleans & N. E. R. Co., 143 Fed. 99, 74 C. C. A. 293,
need not be considered. In either case, the present action was commenced in time.

Other objections to the plaintiff's declaration are made which I think cannot be taken advantage of on demurrer. Possibly some of the averments might be stricken out on a motion to that effect. Others of them will have to be dealt with on the trial as the facts are presented. Certainly, the plaintiff cannot be allowed to offer evidence of "inconveniences, hardships, and injuries" which he has not specified. As special demurrers are abolished in New Jersey, the defendant cannot, under a general demurrer, secure the advantage of a special demurrer by assigning special causes. The declaration seems to set forth, though in a manner which the common-law lawyer does not deem very artistic, a case sufficient to call for a defense, if any defense there be. I think there will be no difficulty in pleading to it.

The demurrer will be overruled, and the defendant will be allowed 20 days after service of a copy of the order overruling the demurrer in which to plead.

ROBINSON v. PARKER—WASHINGTON CO.

(Circuit Court, W. D. Missouri, W. D. June 1, 1909.)


Where the original pleadings and record in a cause in a state court do not disclose a fact which entitled the defendant to remove the same, he may file a petition for removal after an amended pleading filed by plaintiff for the first time discloses such fact.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 135, 136, 139-160; Dec. Dig. § 79.*]

On Motion to Remand to State Court.

Walter Burch, for plaintiff.
Harry B. Walker and Ball & Ryland, for defendant.

PHILIPS, District Judge. The plaintiff has filed a motion to remand this case to the state court, from which it was removed to this jurisdiction by the defendant. The ground of the motion is that the petition for removal was not made on or before the day on which the defendant was required to plead under the statute of the state.

The facts, as disclosed by the record, are as follows: The original petition alleged that the defendant was a corporation of the state of Missouri. At the return term in October, 1908, after service on the alleged corporation, it appeared and by its answer put in contestation every allegation of the petition, except that Kansas City (which is not a defendant) is a municipal corporation. It is conceded that the denial put in issue the allegation of the petition that the defendant was a Missouri corporation. At the next January term of the state circuit court, the plaintiff, by leave of court, amended his petition by alleging that the defendant is a corporation of the state of West Virginia. Thereupon, before the expiration of the time for pleading to the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
amended petition, the defendant presented petition for removal of
the cause, based upon the ground of diversity of citizenship; the plain-
tiff being a citizen of the state of Missouri and the defendant a citizen
of the state of West Virginia. The petition for removal recited the
facts aforesaid respecting the allegations of the citizenship of the de-
fendant.

As I read and understand the decisions of the courts of controlling
authority on this question, so long as the pleadings in the case do not
disclose on their face, and so long as the record does not disclose, the
fact which would entitle the defendant to move for a removal of the
case, he is not precluded from making such application after the fact
is disclosed, by the amended petition of the plaintiff, that the right of
removal does exist in favor of the defendant. The leading case touch-
ing this question is Powers v. Chesapeake & Ohio Railway Co., 169
U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673, in which the court laid down
the following proposition:

"The reasonable construction of the act of Congress, and the only one which
will prevent the right of removal, to which the statute declares the party to
be entitled, from being defeated by circumstances wholly beyond his control,
is to hold that the incidental provision as to the time must, when necessary
to carry out the purpose of the statute, yield to the principal enactment as to
the right, and to consider the statute as, in intention and effect, permitting
and requiring the defendant to file a petition for removal as soon as the ac-
tion assumes the shape of a removable case in the court in which it is
brought."

Judge Shiras, in Bailey v. Mosher et al. (C. C.) 95 Fed. 223, gave a
very considerate and accurate interpretation of the statute, which has
been repeatedly cited as authority by the Court of Appeals of this cir-
cuit, in which he asserted that it is—

"open to the defendants to have filed a petition for removal for the first time
when the plaintiff, by amending his petition, made it appear that the case was
one arising under the laws of the United States, and certainly the right of the
defendants was not lost because the petition for removal had been filed at
an earlier day."

In this case the learned judge animadverted upon the conduct or
act of the plaintiff in so framing his original petition as not to dis-
close upon its face the fact or facts which would have entitled the de-
fendant to a removal. So here the original petition alleged that the de-
fendant was a corporation of the state of Missouri. The plaintiff did
not disclose the fact that the defendant was not a corporation of the
state of Missouri, but was of the state of West Virginia, until the next
term of court when the petition for removal was filed.

A corporation is a legal entity created by the laws of the state from
which it derives its being. I take it that had the defendant defaulted,
and the plaintiff had taken a judgment against the defendant as a cor-
poration of the state of Missouri, his judgment would not have been
binding on the defendant corporation of the state of West Virginia.

Counsel for the plaintiff was evidently put upon his guard by the
answer to the original petition in the nature of a general denial, and
thereafter he amended the petition by bringing into the litigation for
the first time the West Virginia corporation, disclosing on the face of the petition the right of the defendant as a nonresident citizen to remove the case into this jurisdiction.

The motion to remand is denied.

ERRICO v. WASHBURN WILLIAMS CO.
(Circuit Court, M. D. Pennsylvania. May 29, 1909.)
No. 141, June Term, 1908.

MASTER AND SERVANT (§ 217*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—ASSUMPTION OF RISK.

A defect in a machine and the danger from it are not necessarily to be identified, and an employer may know of the one without appreciating the other; but where both were plainly visible and apparent, and the employee injured was of mature age and average intelligence, and familiar with the use of the machine, which was not complicated, and continued to use it without complaint, he must be conclusively presumed to have assumed the risk, and cannot recover from the master for the injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574-600; Dec. Dig. § 217.*]

At Law. On motion by defendant for judgment non obstante veredicto.

E. N. Willard and F. R. Stocker, for the rule.
M. J. Martin, contra, opposed.

ARCHBALD, District Judge. The jury gave a verdict for $500, a mere pittance, to the plaintiff for the loss of his fingers, if the defendants were really liable. It was evidently a compromise between judgment and sympathy. They recognized that the plaintiff had only himself to blame for the accident, but they did not like to have him go without something. The court, however, cannot deal with the case so complacently, but must dispose of it without regard to the consequences.

The plaintiff's fingers were cut off by the revolving knives of a machine, called a "joiner," at which he was working. That it was not reasonably safe without a guard bar, which it did not have, is established by the verdict; and, considering that one of the jurors was an agent for such machines, we may unhesitatingly take their word for it. We may also assume that, although the plaintiff ordinarily worked in an entirely different department of the shop, he was not out of place, having been ordered by his foreman, as he says, to make use of the machine when he had to plane or straighten the different parts of the windows and doors which he was putting together. There is some pretty positive evidence to the contrary—that he was told to keep away from the machine, where he had no business, and warned against the very thing that happened; but that was for the jury. But whether there by right or by wrong, if the danger from the want of a guard bar was obvious, having used the machine, as

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
he had, on an average of twice a week for over two years without complaint of the defect or having assurance that it would be remedied, he assumed the risk, and must take the consequences.

A defect and the danger from it are not necessarily to be identified, and a person may know of the one without appreciating the other. Blumenthal v. Craig, 81 Fed. 320, 26 C. C. A. 427; Haines v. Spencer (C. C. A.) 167 Fed. 266. He may know, for example, that a machine is not provided with safety appliances such as others that he has seen of a similar character; or he may realize, as a matter of independent judgment, that with certain things supplied the machine would be safer and is not reasonably safe without them; and yet he may not fully understand all that is involved in the lack of these. But where the defect and the danger from it are plainly visible, and the person injured, being of mature age and ordinary intelligence, is perfectly familiar with the operation of the machine, which is not complicated, if he keeps on without complaint, he is conclusively presumed to be content with it as it stands, and to have assumed the risk, whatever it may be; and if he is injured under such circumstances the law affords him no remedy.

In the present instance, the machine consisted of a divided or double table, the one section nearest the operator being slightly lower than the other, and along this the material to be cut or planed was shoved against the knives, which extended transversely to it, between it and the other or upper section. These knives revolved at a high rate of speed, and were arranged to shave off the material which was moved forward by hand into them. On the left side was a gauge, which was designed to be shoved over, according to the width of the material, and serve as a guide for it, incidentally covering, and protecting at the same time, so much of the knives from contact with anything. There was, in addition, in some establishments, a guard bar, consisting of a flat pin of wood or iron, which was bolted to the table and could be swung over on its pivot, to cover the remaining portion of the knives; the double arrangement leaving only enough of them exposed to cut the particular piece of material being operated on. It was the lack of a guard bar of this character that the plaintiff complains of. It is not clear that it would have prevented the accident, it being his left hand that was injured; but it is not necessary to dwell upon that feature.

Complaint is also made that the plaintiff was not instructed in the use of the machine. But by his own statement, as already pointed out, he had used the machine for the very same purpose twice a week for upwards of two years, and it is idle to suggest, after that, that he was not familiar with its ordinary working. That there was nothing to protect the knives, which were exposed, in plain view, without guard or cover, was, of course, obvious. The gauge or guide on the left side could be shoved over as a protection for a part of them, although the plaintiff did not see fit to avail himself of that expedient. The exact condition of the machine was thus perfectly well known to him, and so, of necessity, was the danger. Every time he used the machine it was made plain to him that the knives would cut into bits whatever came in contact with them. That, indeed, was
what they were there for, and it is impossible to resist the conclusion that his fingers were cut off because he did not pay heed to this.

But, aside from that, the danger from naked knives such as these was too open and obvious for the plaintiff to say that he did not appreciate it. There was nothing latent or hidden about it. It lay on the surface. It was as plain to the plaintiff that his fingers would be cut off if he did not keep them away from the knives as that they would be burned if he put them into the fire. Having made no complaint, therefore, of the unguarded condition of the knives, in continuing to use the machine in that shape he assumed the risk, and is now bound by it. "Where the conditions are constant and of long standing," says Mr. Justice Moody, in Butler v. Frazee, 211 U. S. 459, 467, 29 Sup. Ct. 136, 138, 53 L. Ed. —, "and the danger is one that is suggested by the common knowledge which all possess, if 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."

Applying this to the case in hand, the jury on the uncontradicted evidence should have told to find a verdict for the defendants; and, a point to that effect having been presented and reserved, the case must now be disposed of in the same way as if this course had been taken.

Judgment is directed to be entered non obstante veredicto in favor of the defendants.

UNITED STATES v. NORTHERN PAC. R. CO.
(District Court, W. D. Washington N. D. May 15, 1906.)

No. 441.

PUBLIC LANDS (§ 79*)—RAILROAD GRANT—EXCEPTIONS FROM GRANT—ABANDONED HOMESTEAD ENTRY.
Land within the place limits of the grant to the Northern Pacific Railroad Company of May 31, 1870, which at such date, as shown by the books of the land office, was subject to a homestead entry, but which entry had in fact been abandoned and was canceled prior to the definite location of the road, was vacant public land which passed under the grant.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 248; Dec. Dig. § 79.*]

In Equity. On bill and answer.
J. B. Kerr, for Northern Pac. R. Co.

HANFORD, District Judge. This suit originally had for its object the cancellation of patents issued to the Northern Pacific Railroad Company for several tracts of land, but the government has aban-
doned the prosecution of the case with respect to all of the lands except one tract, and by a stipulation of the parties the case has been submitted for determination upon the amended bill and answer.

The tract referred to was settled upon and claimed under the homestead law by a man named Chambers, June 1, 1866. Chambers complied with the requirements of the homestead law so far as to initiate his claim by the filing of the homestead application in the proper district land office, and by the records of the land office his claim appeared to be an existing homestead claim until the year 1873, when it was canceled by order of the Commissioner of the General Land Office. The land is within the "place" limits of the grant to the Northern Pacific Railroad Company, for its connecting line from Portland to its Puget Sound terminus, made by the joint resolution of Congress of May 31, 1870, and, after the construction of said line of railroad, this tract, with others, was conveyed by a patent to the railroad company as "earned land." The ground upon which the government sues for cancellation of the patent is that the land was not granted, and that the patent was erroneously issued.

The question to be decided is, whether the land was at the date of the grant, viz., May 31, 1870, vacant public land free from any claim or right of a settler, or whether, by reason of the homestead filing of Chambers, it had been segregated from the body of the public domain so that it was not comprehended within the terms of the grant to the Northern Pacific Railroad Company. The defendant admits that the land was covered by Chambers' homestead application, which was, according to the record in the land office, apparently an existing claim attached to the land until 1873; but pleads in avoidance that Chambers had in fact abandoned the land more than six months prior to May 31, 1870, and that on said date he had ceased to have or assert any claim to the land, and that it was then vacant public land, subject to the grant. In a hearing upon bill and answer, the relevant facts averred in the answer are to be considered as true, to the same extent as if proved by a preponderance of the evidence. See Amendment to Equity Rule 41; Encycl. Pl. & Pr. vol. 1, p. 924. I must therefore assume, for the purpose of this decision, that it is true that Chambers had abandoned his homestead claim previous to the date of the grant, and that there was then no existing adverse claim which could interfere with the grant to the railroad company.

The decision of the Supreme Court, in the case of Bardon v. Northern Pac. R. Co., 145 U. S. 535, 12 Sup. Ct. 856, 36 L. Ed. 806, establishes the proposition that land which at the date of the granting act was segregated from the public lands within the limits of the grant, by reason of a settler's claim to it having attached, does not by the subsequent action of the Land Department canceling the settler's claim, before the location of the grant, pass to the Northern Pacific Railroad Company. Other decisions hold that, if the settler's claim had attached to the land previous to the definite location of the line of railroad, such claim has the effect to except the land claimed from the grant. It is necessary, in order to reconcile these decisions with the De Lacey Case, 174 U. S. 622, 19 Sup. Ct. 791, 43 L. Ed. 1111, and Oregon & C. R. Co. v. United States, 190 U. S. 186, 23 Sup.
Ct. 673, 47 L. Ed. 1012, to understand that there is a substantial difference between an asserted adverse claim, and a dead claim which is apparent only, upon the records of the land office. An actual existing claim, although invalid and erroneously asserted, and although it be finally extinguished subsequently to the time when the grant becomes located, does except the land claimed from the grant, and, if the land covered by such a claim has been inadvertently patented to the railroad company, the government has the right to a decree annulling the patent. The converse proposition, that a mere record in the land office is not sufficient to defeat the grant to the railroad company, if in fact there be no real claimant, is disputed by the attorney for the United States, upon the authority of Hastings & D. R. Co. v. Whitney, 132 U. S. 357, 10 Sup. Ct. 112, 33 L. Ed. 363, and Whitney v. Taylor, 158 U. S. 85, 15 Sup. Ct. 796, 39 L. Ed. 906. And it is his contention that those cases, and the case at bar, are distinguishable from the De Lacey Case, and the Oregon & California Railroad Case, by the fact that the land office records afforded all the information necessary to support a finding that the pre-emption claim involved in the De Lacey Case, and the donation claim involved in the Oregon & California Railroad Case, had been extinguished, and that the principles applied by the Supreme Court in those cases cannot be applied when it is necessary to depend upon evidence other than the land office records to clear the land from adverse claims. I might be convinced by the force of this argument, if the defendant were asking the court to adjudicate a forfeiture of rights for nonobservance on the part of the homestead claimant of the requirements of the homestead law, but the plea in the defendant's answer is different. The averment of the answer is that more than six months prior to May 31, 1870, Chambers "had fully and entirely abandoned said land, and had ceased to have or assert any claim or right thereto whatsoever, and said land then was, and thereafter remained, vacant public land of the United States, free from all claims or rights whatsoever except for the rights of the Northern Pacific Railroad Company." And it is admitted by the pleadings that the homestead entry was canceled of record, for abandonment of the claim, November 11, 1873, which date was prior to the date of definite location of the line of railroad, so that the land was, in fact, free from adverse claims and rights at the date of the grant, and by the records of the land office it appeared to be, and was in fact, free from adverse claims and rights and vacant public land of the United States, at the time when the grant became located.

In its opinion, in the Oregon & California Railroad Case, the Supreme Court said:

"It may be said that presumptively the land had been reserved, as shown by the donation notification, and for nought that appeared the donee might still be in possession; but we know of no reason why the railroad company may not show the actual facts as well as an individual who might desire to enter the land upon his own account."

I consider this to be a decision by the Supreme Court of the very question raised by the argument of the United States attorney, and to be decisive of the whole controversy in this case.
CROSBY v. HAMMERLING.

I, also, hold that the decisions in Hastings & D. R. Co. v. Whitney, and Whitney v. Taylor, are not authorities in point, for the reason that in those cases there was no admission that the claims had been actually abandoned previous to the dates of the respective granting acts, and the Supreme Court did not pass upon the question as to the effect of an actual extinguishment of a claim by intentional abandonment thereof in either of those cases.

The answer contains other averments of matters constituting equitable grounds of defense which I deem unimportant, for the reason that I have reached the conclusion that the patent conveying the land in controversy to the railroad company was issued lawfully, and that ground I direct that a decree be entered dismissing this suit.¹

CROSBY v. HAMMERLING.
SAME v. GENERAL LUBRICATING CO.
(Circuit Court, E. D. Pennsylvania. June 6, 1909.)

1. Partnership (§ 199*)—Contracts—Action for Breach—Name in Which Action Must Be Brought.
   A partner cannot maintain an action in his own name on a contract made by the partnership.
   [Ed. Note.—For other cases, see Partnership, Cent. Dlg. § 362; Dec. Dlg. § 199.*]

2. Trial (§ 34*)—Pleadings—Necessity of Offering in Evidence.
   An affidavit of defense filed under the Pennsylvania practice cannot be used in evidence to prove admissions by defendant, unless offered in evidence the same as other written instruments.
   [Ed. Note.—For other cases, see Trial, Cent. Dlg. § 87; Dec. Dlg. § 34.*]

On Motions to Take Off Nonsuits.
Humbert B. Powell, for plaintiff.
J. L. Wetherill and Joseph Hill Brinton, for defendants.

J. B. McPHERSON, District Judge. With reference to the suit against the General Lubricating Company, it is enough, I think, to say in support of the compulsory nonsuit that the plaintiff brings the action as an individual, whereas the contract which lies at the base of his claim was made with the Crosby Lubricating Company, a partnership of which he was a member. On such a contract he cannot sue in his own name, as if he were the legal plaintiff. There are other objections, also, to his right to recover; but I shall not take time to discuss them.

The contract just referred to is equally fundamental to his success in the suit against Hammerling; but he failed altogether to prove that the sales alleged to have been made by Hammerling were such as the contract agreed should be made solely by the Crosby Company. The action is founded upon the theory that, although Hammerling was

¹Reversed by stipulation in the Circuit Court of Appeals January 2, 1908.
a partner of the plaintiff in the Crosby Company, he violated his duty to the partnership by selling on behalf of the General Company certain grease which the General Company had agreed should be sold by the Crosby Company, and by that partnership alone, thereby depriving the Crosby Company of profits. It seems to be overlooked, however, that the authority that was given to its officers by the General Company at its corporate meeting of March 19, 1907, to enter into a contract with the Crosby Company for the sale of the General Company's grease, confined the exclusive sale thereof to transactions by the Crosby Company with "street railways and steam railroads." The contract executed by the officers of the General Company does not contain this limitation, and they exceeded their powers, therefore, so far as they attempted to make the Crosby Company "sole selling agents for the entire world," unless this phrase is so construed in the light of their instructions as to apply only to sales to "street railways and steam railroads." Now the sales by Hammerling in behalf of the General Company, which are somewhat vaguely referred to in the testimony, are not shown to have been made either to street railways or to steam railroads, and therefore the proof fails to establish that he violated his duty as a partner by entering a field to which the partnership had an exclusive right. In this suit, also, there are other objections to the plaintiff's claim; but I do not think it necessary to consider any other.

I may add that, so far as the affidavit of defense made by Hammerling is concerned, its contents are not properly before the court, because the affidavit was not offered in evidence at the trial. In Pennsylvania the office of such an affidavit is simply to prevent a summary judgment. Its contents may be competent evidence as admissions made by the affiant; but the paper must be offered in evidence in the same manner as any other written instrument, before the admissions are legally established. In Mullen v. Insurance Co., 182 Pa. 150, 37 Atl. 988, the Supreme Court of Pennsylvania held that:

"It is reversible error for a trial court to permit counsel for plaintiff to read in his argument to the jury the affidavit of defense filed in the case, when such affidavit has not been offered in evidence by either side."

It is said in the opinion:

"If it [the affidavit] contained an omission or statement inconsistent with the defense made on the trial, and the plaintiff desired the benefit of the inconsistency, he should have offered the paper in evidence. It was not an item of evidence in the case, and therefore the plaintiff had no right to read it or comment upon it to the jury."


The limited function of such an affidavit is well known in the state practice.

In each case the motion to take off the nonsuit is refused, and to this refusal an exception is sealed.
In re McCarthy.

(Bankruptcy (§ 413*)—Discharge—Sufficiency of Specifications in Opposition.

Where specifications of objection to the discharge of a bankrupt wholly fail to state any statutory ground for the refusal of a discharge, their insufficiency is not waived by the bankrupt by failing to except thereto, and they may be disregarded.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 413.*]

In Bankruptcy. On application for discharge.

This is a motion for discharge of the bankrupt upon the certificate of the referee acting as special master. The petition was originally filed before the referee, and, upon coming up before the court, Joseph F. Duffy appeared as objecting creditor and subsequently filed specifications. No objection was taken to these specifications before the court, and the matter was referred to the referee as special master. Upon the hearing, the special master reported that the specifications failed to state any grounds for refusal of the discharge of the bankrupt, that they should be dismissed and the discharge granted. No testimony was taken upon the hearing. The specifications were as follows:

"(1) The testimony taken before the referee, Hon. Peter B. Olney, is contradicting in a material sense, in that said bankrupt willfully conceals the amount of his assets in his business.

"(2) The alleged transaction between the bankrupt and one Elizabeth Fitzmorris, the mother-in-law of the bankrupt. He states that he borrowed $1,000 from her in 1906; the record of the bank shows that the money was taken out of the bank on May 6, 1904.

"(3) There are other discrepancies in bankrupt's testimony as to dates, and as to the fact of ownership in the business in which he states that he was the owner, yet he admits that he was doing business under the name of McCarthy Bros., and had an account in bank under that name.

"(4) That being the owner of said business and the license in the name of Michael McCarthy is in itself sufficient to show that the bankrupt's statements are untrue, under the laws of this state, as no license is granted to any one unless they are the owners of the business.

"(5) That said bankrupt further testified that Michael McCarthy had no interest in the business, did not participate in the profits or losses, and that the bank account in the name of McCarthy Bros. was simply an accommodation.

"(6) That on the whole the bankrupt's testimony is a series of contradictions and glaring improbabilities, and the application for a discharge should be dismissed."

George W. Gibbons, for John J. Duffy, a creditor.
Edward J. Dowling, for the bankrupt.

HAND, District Judge (after stating the facts as above). There is no express rule in this district by which defects in the form of specifications are waived by the bankrupt's failure to except or demur to them. Still, it is proper in most instances that the special master should disregard all defects in form to which the bankrupt has not excepted. If the specifications in the case at bar had stated anything which, by any construction whatever, would have come within the statute, I should have held that a failure to except waived any failure of form; but after reading them with a great deal of care, and construing them in the most benign sense possible, I cannot really under-
stand which of the statutory grounds, if any, the creditor means to assert. The nearest approach to an allegation of fact within any of the grounds set forth in section 14 is in subdivision 1 of the specifications. This may perhaps have meant that the bankrupt had committed an offense punishable by imprisonment, the offense in question being perjury upon his examination. The trouble is that this ground of objection is not set forth. The only statement is that the bankrupt's testimony is inconsistent and contradictory, and that is not only consonant with the innocence of the bankrupt, but is a characteristic of most testimony of any length whatever. I do not think, therefore, that even by the most liberal interpretation the first specification can be held to charge any offense under the act.

Therefore there was nothing before the learned referee, and the specifications were, in fact, a mere nullity. I suppose there must be a degree of meaningless verbiage which the bankrupt can afford to disregard altogether, and I do not think that by failing to except he must be ready before the referee to rebut any proof which the creditor may be then ready to adduce under the statute. The specifications in this case seem to me to be meaningless verbiage, and I think they have no weight in any stage of the proceeding.

The discharge is granted, with costs against the objecting creditor as found.

In re DE LANCEY STABLES CO.
(District Court, E. D. Pennsylvania. May 27, 1909)
No. 2,834.

Where the face of a petition in involuntary bankruptcy it appears that the defendant is a mercantile or trading corporation and subject to bankruptcy proceedings, the court obtains complete prima facie jurisdiction, not only to inquire into and determine the issues raised on the petition, but also to preserve the property of the alleged bankrupt, and as a means to that end, when necessary, to appoint a receiver and cause the property to be converted into money; and the expense of so doing is properly chargeable against the fund, even though the court afterward dismisses the petition. It is also the duty of the court to distribute the remainder of the fund, which thus came rightfully into its possession, so as to protect, as far as possible, the rights of those who had liens on the property which they might have enforced but for the court’s action.
[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. §§ 114, 117.*]

Under the law of Pennsylvania goods and chattels on demised premises, whether the property of the lessee or a subtenant, are under a quasi pledge to the landlord for rent, and when he has exercised his right of distraint his lien is superior to that of an execution creditor of the owner.
[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1010, 1011; Dec. Dig. § 248.*]

In Bankruptcy. On petition to distribute fund.

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep’r Indexes
John J. McDevitt, Jr., Chapman & Chapman, and Charles F. Warwick, for De Lancy Stables Co.
Frederick J. Shoyer, for Gibney & Bro.
Walter Biddle Saul and Edwin O. Michener, for Eighth Nat. Bank.
Howard M. Long, for receiver.
Henry A. Hoefer, for landlords.

J. B. McPHerson, District Judge. The questions for consideration arise upon the following facts:
On May 16, 1907, Gibney & Bro. obtained a judgment against the De Lancy Stables Company in the common pleas of Philadelphia county, and on May 29th issued execution thereon. A levy was made by the sheriff on June 8th, and a sale of the corporation's personal property was advertised for June 18th. In July, 1906, the real estate afterwards occupied by the stables company had been leased to John J. McDevitt, Jr., for five years from September 10, 1906, at the annual rent of $4,000, payable in monthly installments of $333.33 in advance on the 10th day of each month. On May 10, 1907, one month's rent was unpaid, and on May 29, 1907, the landlords issued a distrain to a constable against McDevitt and against the goods and chattels on the leased premises. These goods and chattels were then in the possession of the stables company, which (it is said) was occupying the leased premises without the knowledge or consent of the landlords. The costs incurred by the distrain amounted to $26.34. On June 10th another month's rent became due and payable, and this also was not paid. On June 15th a petition in bankruptcy was filed against the stables company, averring that the corporation "was principally engaged in the livery stable business, buying and selling horses and feed," and on June 17th a receiver was appointed, who took possession of the premises and of the personal property thereon. On the same day a restraining order was issued against both the execution and the distrain. On June 19th the District Court ordered the personal property to be sold as perishable, and on July 8th a sale was had, which was afterwards confirmed. On July 6th the stables company filed an answer to the petition in bankruptcy, denying that the company had been "principally or at all engaged in buying and selling horses and feed," and asking for a trial. This was afterwards had, and on January 9, 1908, the court found as a fact that the stables company was not principally engaged in any trading or mercantile business, and entered a decree dismissing the petition. The receiver continued to hold in his hands the fund derived from the sale of the personal property, and on June 23d the Eighth National Bank issued an attachment execution out of the common pleas of Philadelphia county upon a judgment recovered against the stables company on March 30, 1908, and summoned the receiver as garnishee. In September the bank asked for judgment against the receiver, but the court of common pleas refused the application. On July 20th the receiver filed an account in the District Court, claiming credit for various payments and showing a balance in his hands of $1,211.64. It is this sum
that the court is asked to distribute, and the petition calls for the
decision of several questions.

First of all, the objection is made that the court has no jurisdiction
over the fund and can do nothing with it except turn it over to the
stables company. This position seems to be based upon a misappre-
hension. The court obtained complete prima facie jurisdiction of the
proceeding as soon as the petition was filed. Upon the face of that
paper the stables company appeared to be a trading or mercantile
corporation. Its principal business was averred to be “the livery stable
business, buying and selling horses and feed”; and, if this averment
had been sustained by the proof, an adjudication would have followed.
Without regard to the proof, however, the averment quoted was suf-
cient to give the court jurisdiction to inquire into the matter, and to
determine whether or not the corporation belonged to a class against
which a petition in bankruptcy may be filed. It was not the case
where upon the face of a petition it is clear that the bankrupt belongs
to an excepted class; for example, a transportation company or a rail-
road company. In such a proceeding any action attempted by the
court would be wholly void, for no jurisdiction ever attaches—the
petition is cram non judicis. But where there is an apparent right
to file the petition, jurisdiction undoubtedly exists—that is, the right
to hear, inquire, and determine—although the inquiry may result in
a finding that the averments of the petition are not true, and that
for this reason the proceeding can go no further. Therefore, as ju-
risdiction against the stables company existed—prima facie a trading
or mercantile company—it follows that the court had a right to pre-
serve the property, and, as means to that end, to appoint a receiver, and
also to turn the goods and chattels into cash. This last step was neces-
sary, for the cost of keeping and feeding the horses would soon have
exhausted their value. Having, therefore, exercised the undoubted
power of caring for the property and of transforming it into money,
the expenses of so doing are properly chargeable against the fund, and,
as there is no attack upon the reasonableness of the credits asked for
in the receiver’s account, these credits will be allowed.

But it is urged that, even if so much be conceded, the court can do
no more. It may perhaps have had prima facie jurisdiction of the
 corporation and of the subject-matter, and may therefore be justified
in allowing the receiver’s expenses, but this is the limit of its power;
the balance must be returned to the stables company, and the claimants
must be left to such remedies as they may possess. This argument,
I think, overlooks two or three important features of the situation. I
agree that, if the property of the stables company had remained un-
changed in kind, the duty of the District Court would be discharged by
returning it to the sheriff and the constable, and leaving all parties in
interest precisely where the bankruptcy proceedings found them. But
this cannot now be done. The personal property has become money,
and, as this sum came rightfully into the possession of the bankruptcy
court, its character as a court of equity requires it to protect the rights
of all claimants to the money as carefully as possible. The fund is to be
regarded precisely in the same light as if the property that produced it
were still in the custody of the receiver, and, in my opinion, the court
is bound to see that the execution creditor and the landlords suffer no
preventable harm from the restraining orders and from the sale of the
property.

From this point of view it is clear, I think, that the landlords are en-
titled to be paid in full. This is the effect of the decision in Re West
110, whether the personal property on the premises belonged to the
stables company or to McDevitt (whose claim will be considered in a
moment). In either event it would be liable to distress. It is there-
fore ordered that the two months' rent, with interest and the con-
stable's costs, be paid in full by the receiver to the landlord.

The execution of Gibney & Bro. is next to be considered. When the
restraining order was issued, these creditors had an undoubted prima
facie lien upon what appeared to be the personal property of the
stables company, and, if there were no dispute about the true owner-
ship of the property, this execution should also be paid in full. But
there is such a dispute, as appears from Judge Holland's order of
July 10, 1907, which confirmed the receiver's sale, "subject to any
right of lien on the fund derived from the said sale which J. J. Mc-
Devitt may have and establish, and without prejudice to any rights or
claims of the said J. J. McDevitt in and to said property sold." This
claim has never been heard, and, of course, the claimant is entitled to
an opportunity to present his contention to the court. It is manifest,
therefore, that there are four parties interested in the controversy,
namely, the stables company, J. J. McDevitt, Jr., Gibney & Bro., and
the Eighth National Bank. If the balance of the fund remaining after
the landlords are paid is the property of the stables company, it should
first be awarded to Gibney & Bro., and afterward to the Eighth
National Bank. If the balance belongs to McDevitt, it should be
awarded to him. I shall therefore treat McDevitt's answer that was
filed on July 6, 1907, as a sufficient, although informal, statement of
his claim, and will hear the controversy arising thereon on Friday
morning, June 4th, at 10 o'clock, when the parties may produce their
witnesses and may proceed with the argument of the case.

MUNROE v. ATLANTA MACH. WORKS.
SAME v. R. D. COLE MFG. CO.
(Circuit Court, N. D. Georgia. May 12, 1909.)

EQUITY (§ 350)—TIME FOR TAKING PROOFS—DISREGARD OF RULES.

Where a complainant took no action toward the taking of testimony un-
til nearly six years after issue was joined by replication, and no applica-
tion was made for enlargement of the time, as required by equity rule 69,
leave to take testimony will not then be granted.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 733; Dec. Dig. §
350.*]

In Equity. Suit for infringement of letters patent Nos. 339,998
and 446,151. On application for leave to take testimony.

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.
Geo. L. Bell and John H. Roney, for complainant.
John L. Hopkins, for defendant.

NEWMAN, District Judge. The bill in this case was filed on the 2d day of March, 1903. The answer was filed on the 29th day of July, 1903. The replication of complainant was filed on the 31st day of July, 1903. Nothing whatever was done in the case after this, so far as the record shows, until the 10th day of April, 1909, when an application was filed for leave to take testimony in support of the bill. Attached to the application for leave to take testimony is the affidavit of Robert Munroe, Jr., a son of the complainant, in support of the application. In this affidavit he says, after stating the pleadings up to the filing of the replication of July 31, 1903:

"Thereafter, and I am informed and believe that it was during the early part of November, 1903, certain stipulations were entered into between counsel in regard to the taking of proofs in this case, but I am not informed and do not know whether such stipulations were."

The affidavit then states that about the time this suit was commenced a large number of suits (more than twenty) for the infringement of these same letters patent were filed in other districts of the United States, and a large amount of testimony has been taken in these cases, and a great deal of time occupied. This I understand to be given as a reason why the motion to take testimony in this case has not been made earlier. The affiant states, further, that the complainant has never been requested by defendant herein to proceed with his testimony, but, on the other hand, complainant was informed that defendant would not insist on a strict compliance with the rule in regard to the taking of testimony.

No such stipulation as is mentioned in the affidavit appears in the record, and counsel for the defendant company, who has been in the case all the time, has stated in open court that no stipulation of any kind or agreement on the subject has ever been made. The case has simply been standing here, as the record shows, since the replication was filed on July 31, 1903, without further action of any kind. Equity rule 69 is as follows:

"Three months, and no more, shall be allowed for the taking of testimony after the cause is at issue, unless the court, or a judge thereof, shall, upon special cause shown by either party, enlarge the time; and no testimony taken after such period shall be allowed to be read in evidence at the hearing," etc.

While a judge may enlarge the time for taking testimony, certainly during the three months, and perhaps after the three months, upon good cause shown, the application, after the three months has expired, should certainly be made within a reasonable time. Here nearly six years have elapsed, and no movement has been made on the part of the complainant to take testimony. I think the motion comes entirely too late, and should be denied; and it is so ordered.

The case of Robert Munroe v. R. D. Cole Manufacturing Company is like the above case, and a similar motion is made in it. In the response to the motion in the Cole Case, it is stated that the defendant would be put at great disadvantage now, because one of its witnesses is dead, and another is either dead or cannot be found. The motion in this case is also denied.
DIETZ V. HORTON MFG. CO.

DIETZ et al. v. HORTON MFG. CO.

(Circuit Court of Appeals, Sixth Circuit. May 22, 1909.)

No. 1,840.

1. TRADE-MARKS AND TRADE-NAMES (§ 21*)—SUBJECTS OF OWNERSHIP—PRIORI-
TY OF USE.

Neither complainant nor defendant held entitled to the exclusive use of
the word "Globe" as a trade-mark for washing machines; it appearing
that it had been in use by another manufacturer and his successors in
business, whose machines were sold throughout the country, for some
years before its adoption by either, and that such use continued for some
years afterward.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Dec.
Dig. § 21.*]

2. TRADE-MARKS AND TRADE-NAMES (§ 33*)—TITLE—ASSIGNABILITY.

The right to a trade-mark cannot be assigned, except as an incident to
the sale of the business and good will in connection with which it has
been used, or as an incident to the sale of the premises where the article
has been made and has acquired a special reputation in connection with
such place.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent.
Dig. § 37; Dec. Dig. § 33.*
Contracts relating to use of trade-names, see note to Chattanooga Medi-
cine Co. v. Thedford, 14 C. C. A. 104.] ...

3. TRADE-MARKS AND TRADE-NAMES (§ 32*)—ABANDONMENT—UNFAIR COMPETI-
TION.

Where the owner of a trade-mark has permitted other manufacturers
to use it for a number of years without objection, it becomes so far com-
mon property that the only restriction which can be imposed on its use
is that each user shall so identify his goods as to indicate their origin,
and prevent confusion and deception and unfair competition.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Dec.
Dig. § 32.*]

4. APPEAL AND ERROR (§ 1178*)—DISPOSITION OF CAUSE—AMENDMENT OF
PLEADINGS.

The Circuit Court of Appeals may on its own motion authorize a party
to file an amended pleading in the court below to cover relief to which
the evidence in the record shows him entitled.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4606;
Dec. Dig. § 1178.*]

Appeal from the District Court of the United States for the South-
er District of Ohio.

James N. Ramsey, for appellants.
W. P. Denny, for appellee.

Before LURTON, SEVERENS, and WARRINGTON, Circuit
Judges.

WARRINGTON, Circuit Judge. This was a suit in equity of the
Horton Manufacturing Company, appellee, brought in the Circuit
Court of the United States, Southern District of Ohio, against Con-
rad Dietz, who died later, and revivor was had in the name of his
administrators, appellants. Jurisdiction was obtained through diver-
sity of citizenship. The bill was based on alleged infringement of a

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
170 F.—55
trade-mark claimed by appellee and also on alleged unfair competition. Upon hearing in the court below on the bill, answer, and proofs, a decree was rendered finding in favor of appellee, and that Conrad Dietz had been guilty of unfair competition. An injunction was granted against appellants, enjoining further use of the trade-mark, ordering that all labels, etc., be delivered to appellee to be destroyed, and referring the cause to a master to take an account, specifying the objects. Appeal was allowed and perfected.

The first question arising upon the record, as we view it is whether either of the original parties to the suit was entitled to the exclusive use of the word "Globe" as a trade-mark. The pleadings show that each party claimed as against the other the exclusive right to the mark. Appellee based its claim on adoption and use by one Heberger, a washing machine manufacturer of Cincinnati, Ohio, who, as averred in the bill, adopted the mark on the 1st day of June, 1897, and duly transferred it to appellee in 1901. Dietz based his claim on two grounds. One was that he had continuously used the mark since 1893. The other ground was an alleged purchase of the mark by him in May, 1903, of one James H. Taylor, by written transfer, a copy of which is attached to the answer as an exhibit. Thus an issue of priority of adoption and use was made between the parties. The court below found that the weight of the evidence established priority in complainant below.

As regards the uses made by the parties themselves, we should not interfere with this finding. But upon the claim made by Dietz that he had acquired a right to the mark through Taylor it was developed that Taylor had adopted and used the word "Globe" as a trade-mark in the manufacture and sale of washing machines as early as 1885, and that the mark was continuously used thereafter either by himself or with his sanction until the early part of 1902. Taylor, who seems to have been engaged in and otherwise connected with the manufacture of washing machines, was called by Dietz as a witness, and testified thus:

"Q. 13. Please state, if you know, who originated and first adopted the word 'Globe,' and the representation of a globe as a trade-mark for washing machines. A. I did. Q. 14. About when? A. About 1885. Q. 15. Please state how long you continued to be the owner of the trade-mark 'Globe,' which you originated and adopted for washing machines. A. Continuously thereafter until I sold or made an assignment to Conrad Dietz. Q. 16. Please state how you used said trade-mark upon washing machines. A. I first used it as a stencil on the washing machine, with a globe and the word 'Globe' through the center of the globe; afterwards had labels printed to represent a globe, with the word 'Globe' through the center of said globe. * * *

Q. 60. Please state, if you remember, where you were located in 1885, and under what name you were operating in the washing machine business at the time you designed and adopted the trade-mark 'Globe' for washing machines, as you have testified. A. Was located on Erle street, west side, between Hamilton and Tecumseh streets [Toledo]. First as J. H. Taylor; afterwards American Churn Company."

Another witness, a salesman of the Bostwick-Brown Company, one Joseph L. Tillman, of Toledo, was called by Dietz and testified in December, 1904, as follows:

"Q. 18. Please state, if you know, whether your company ever sold any of the machines called the 'Globe Washer' as illustrated on said page (refer-
ring to exhibit), and, if so, about when they commenced to sell washing machines so marked, and how long they have continued to do so. A. I can remember of them selling the Globe washing machines 14 years ago. I bought one myself at that time from Bostwick-Braun Company. I remember of them selling machines up to the time they sold out."

As late as April, 1903, Dietz sought erroneously to have public use proceedings instituted in the Patent Office for the purpose of showing that the mark belonged to the public. In re Dietz, 104 O. G. 852. In an affidavit filed in that proceeding, Dietz stated that he "received in the regular course of business" in each of the years 1893 to 1899, inclusive, a publication issued by the Farm Implement News Company of Chicago, called the "Buyers' Guide," and that in each of these publications, on pages stated, it appeared that under the title "Washing Machines" was the following: "Union Manufacturing Company, Toledo, Ohio, American, Western Globe."

Appellee sought to meet such prior use of the mark in several ways. One was that stenciling or otherwise placing upon the side of the machine the figure of a globe, with the word "Globe" printed across it, was not sufficient to establish a trade-mark. For instance, there appears plainly on the side of the machine, in at least two exhibits showing cuts of the "Western Washer," the figure of a globe with the word "Globe" printed across it; the globe being placed under the word "Western" and above the word "Washer." The claim is that the distinguishing mark is comprised in the words "Western Washer," rather than in the figure containing the word "Globe." We do not, however, discover any denial that the mark in dispute was used in the way mentioned.

If the affidavit of Dietz before alluded to can be relied on, the objection just noticed is met by the advertisements in the "Buyers' Guide," for there the words used to describe the washing machines were "American, Western Globe." A sample of the "Buyers' Guide," in the form of a printed pamphlet for the year 1893, is found in the record and corroborates Dietz as to that year.

Tillman testified as to the use of the word "Globe" thus:

"Q. 26. Please state, if you know, how said washing machines were known to the trade. A. They were known as the 'Globe Washer' in my time, when selling the trade; manufactured by the Union Manufacturing Company."

Another way in which appellee endeavored to meet the claim in respect to Taylor's adoption and use of the mark was that Taylor had transferred his business, including the mark, to a certain company, and that the mark had passed then by due transfers, through certain transferees, to the Union Manufacturing Company mentioned in the "Buyers' Guide," and that the assets of that company were sold in March, 1902, to persons other than Taylor, and the mark abandoned. Taylor, however, claimed in his testimony that he had never parted with his right to the trade-mark. But the important inquiry is whether all this does not show that neither Dietz nor Heberger had a right to adopt the word "Globe" as a characteristic exclusively to distinguish his goods.

In Columbia Mill Co. v. Alcorn, 150 U. S. 460, 14 Sup. Ct. 151, 37 L. Ed. 1144, the company was engaged in the manufacture of
flour and it brought the suit to restrain defendants from using the word "Columbia" in a brand placed on packages of flour sold by them. After citing a number of decisions to show the general principles of law applicable to trade-marks and the conditions under which a person may establish an exclusive right to the use of a name or symbol, Mr. Justice Jackson said, among other things (page 463 of 150 U. S., page 152 of 14 Sup. Ct. [37 L. Ed. 1144]):

"(3) That the exclusive right to the use of the mark or device claimed as a trade-mark is founded on priority of appropriation; that is to say, the claimant of the trade-mark must have been the first to use or employ the same on like articles of production."

The learned justice thereupon referred to the proof showing that the word "Columbia," before its adoption by the complainant, had been used by a number of other companies—two in Dakota, two in Rhode Island, and one in Indiana. He then said (page 464 of 150 U. S., page 152 of 14 Sup. Ct. [37 L. Ed. 1144]):

"The word 'Columbia,' having been thus previously appropriated and used upon barrels and sacks of flour, was not subject to exclusive appropriation thereafter by the complainant, so as to make it a valid trade-mark such as the law will recognize and protect."

It was also held in the case that the word "Columbia" was not the subject of exclusive appropriation under the rule that words in common use designating locality or section of the country cannot be appropriated by any one as his exclusive trade-mark; but this, we think, does not affect the holding touching prior appropriation.

In O'Rourke v. Central City Soap Co. (C. C.) 26 Fed. 576, a bill in equity was filed to prevent infringement of a trade-mark claimed by plaintiff in the use of the words "anti-washboard," as applied to the manufacture of soap. The facts are involved, but are sufficiently stated in the following portions of the opinion. The case was tried in the Circuit Court, Eastern District of Michigan, before Judge Brown (afterwards Mr. Justice Brown), who said (page 578):

"In the case under consideration, however, the question is presented whether a person may appropriate a trade-mark belonging to another, and subsequently acquire a good title thereto by the abandonment thereof by the first proprietor. The testimony shows, and it is not disputed, that when Winger began manufacturing soap at Sturgis, under the name of 'Winger's Anti-Washboard Soap,' the firm of Clark & Benefiel was manufacturing soap at Mattoon, Ill., under the same name, and continued so to do for nearly a year after Winger commenced business. During this time he was an admitted trespasser upon their rights. The fact that he supposed the Ohio firm had gone out of business is no defense, if in fact they had an exclusive right to the trade-mark. Millington v. Fox, 3 Myln. &. C. 338; Welch v. Knott, 4 Kay & J. 747; Leather Cloth Co. Case, Cox, Trade-Mark Cas., 223. There is no evidence in this case that his competition interfered with the business of Clark & Benefiel, or Stephens, their successor, or that he was the cause of the subsequent abandonment of the business by them; but if it be once conceded that a person may acquire a good title to a trade-mark by appropriation, without the consent of the lawful owner, it would enable a manufacturer, by the use of large capital or superior energy, to drive competitors out of business, by seizing their trade-marks and using them for that very purpose, provided the lawful owner is unable or unwilling to assert his rights by resort to the courts. We think that no court would hesitate to pronounce against a title so obtained. We find it difficult to distinguish such a case, in principle, from the one under consideration, as it might be impossible to prove
that the lawful owner was compelled to discontinue by reason of such com-
petition."

In Bulte v. Igleheart Bros., 137 Fed. 492, 70 C. C. A. 76, the bill
was to restrain alleged infringement of a trade-mark for flour, and
also to restrain unfair competition in trade. The mark consisted of
the words "White Swan" and two circles, within the smaller of which
was a pictorial representation of a lake bearing a white swan. It
appeared from the findings of the master that the name "White
Swan," but without the picture of a swan, was used as a trade-mark
for flour in Western New York and in the country around St. Cath-
erines, in Canada, as early as the year 1867, and continuously up to
1872 or 1873, and, further, that a certain firm in 1874 sold flour with
the brand "White Swan" and a picture of a swan floating on water.
This firm (of Chicago) appeared to have used the swan brand on
its packages of flour, though not as its leading brand, from 1874 to
1901, excepting that the picture of the swan was discontinued in 1878.
Jenkins, Circuit Judge, said (page 501 of 137 Fed., page 85 of 70
C. C. A.):

"It clearly and certainly appears that prior to the appropriation of the
trade-mark containing the words 'White Swan' and the picture of a swan
floating upon water by the complainants in 1880, and for at least 15 years
prior thereto, the words 'White Swan' had been quite generally used, and
the picture of a swan floating upon water had been adopted and used by at
least two firms, Eckhart & Swan and Land and his successors. So that there
can be no justification for the pretension that the complainants originated
this brand. They undoubtedly changed the arrangements of the marks and
the picture, but that gave them no right to the exclusive use of the picture or
the marks or the name as a trade-mark."

It is sought by counsel for appellee to avoid the rule thus shown,
by certain evidence tending to prove that the use of the mark, as made
by the Union Manufacturing Company, at Toledo, was not known
to Heberger, at Cincinnati, and that Heberger's use was not known
to that company. Such uses, it is urged, could not cause confusion
or interference with the good will or trade of either. Then, in sup-
port of the use by Heberger, reliance is placed on Tetlow v. Tappan
(C. C.) 85 Fed. 774.

But the difference between the facts of that case and those of the
present case touching prior appropriation is so marked as necessarily
to distinguish the two cases, without regard to any views of the law
as expressed in the Tetlow Case. Every case of alleged prior appro-
priation must involve an inquiry into the purpose and duration of use.
If the adoption has been but tentative or experimental, or the use but
slight and intermittent, it can scarcely be said that the symbol chosen
has ever become so far identified with any article of trade as really
to point out its origin or ownership, in the sense that a trade-mark is
established. Illustrations of this may be found in Levy v. Waitt, 61
Fed. 1008, 10 C. C. A. 227, 25 L. R. A. 190; Macmahan Pharmacal
Heublein et al. v. Adams (C. C.) 125 Fed. 782; Brower v. Boulton et
al. (C. C.) 53 Fed. 389.

The prior adoption and use of the word "Globe" is shown in the
present case to have been made and commenced as early as 1885.
This was 8 years before Dietz claimed to have adopted the word and 12 years before Heberberger claims to have adopted it. The word was applied to washing machines by stenciling and otherwise, and was employed also in the names given them. The business of manufacturing and selling the machines, and applying the mark to them, appears to have been continued under one ownership or another until 1902, a period of 17 years. The machines bearing this mark were extensively advertised by the wholesale house of Bostwick-Braun Company, of Toledo; some 9,000 catalogues being distributed by that company alone in the three years from 1894 to 1896. The salesmen used the catalogues in effecting sales of the machines.

Compton, Ault & Co., of Cincinnati, appear to have handled the machines from 1890 until the business in them ceased. They prepared and circulated several thousand catalogues to assist in the sale of various articles, including these washing machines, supplying their traveling men with the catalogues for that purpose. The machines seem also to have been sold by three jobbing houses of Detroit. Taylor testified that the machines were sold "all over the United States and to some extent in Canada," naming such cities as San Francisco, Seattle, Tacoma, Toronto, Spokane, Chicago, Monroe, Mich., Wheeling, Pittsburg, Columbus, New York, Allegheny, and Ft. Wayne. Dietz, who was operating in the vicinity of Cincinnati, made affidavit, as before pointed out, that he had received the "Buyers' Guide" in every year from 1893 to 1899, inclusive, in which the machine was advertised as "American, Western Globe."

In view of a traffic as widespread as this, emanating from the same state as that in which Heberberger and Dietz were operating, and extending to the vicinity, if not the city, where both maintained their factories, it was manifestly impossible that any single mark could of itself point out the origin and ownership of the washing machines produced respectively by the three different manufacturers. Furthermore, it is hardly conceivable that either Heberberger or Dietz was ignorant of the prior adoption and use of the mark in question, when they adopted and began to use it. But it is enough to say that they were clearly chargeable with notice of the use.

Our conclusion is that when these men attempted to adopt the word "Globe" as a trade-mark, assuming for the purposes of this conclusion that they both did so, the word had been appropriated by Taylor and either his associates or successors in title.

The claim that Dietz acquired this trade-mark through his transaction with Taylor in 1903, must fail. The theory of the claim, as we understand it, is that Taylor never parted with his title until he made the sale to Dietz. Taylor was not making or selling washing machines at the time of the alleged sale. He had not been doing so on his own account for years. It, therefore, was not possible for Taylor to sell the mark as an incident to any business and good will involving washing machines bearing the mark, or as an incident to any place where such machines were made, at the time of the transfer to Dietz. The most that Taylor could do, as stated in the instrument of assignment, was to transfer his "right, title, and interest in and to said trade-mark, consisting of the representation of a 'Globe,' including all sten-
cils, stationery, electrotypes, labels, and castings intended for use on
the washing machines bearing this trade-mark." True, he in terms
included also a "list of Globe washing machine customers, and the
good will of said business, together with all claims and damages, both
at law and in equity, for profits and damages already accrued or to
accrue on account of infringement to said trade-mark, and also all
rights of recovery for said infringement."

Analysis of this cannot fail to show that the transfer in effect
included only the naked trade-mark. The stencils, etc., afforded only
means of applying the trade-mark to machines, when machines should
be constructed. The list of customers could have been no more than
names, because, in the absence of a business, he could not have cus-
tomers. So of the "good will of said business."

Decisions cited in support of the claim that Taylor's title to the
mark remained in him do not seem to sanction a transaction of this
kind. We need notice but one. Kidd v. Johnson, 100 U. S. 617, 25
L. Ed. 769, involved a sale of a trade-mark as an incident to the sale
of the premises where the goods were produced with which the trade-
mark was associated. Mr. Justice Field said (page 620 of 100 U.
S. [25 L. Ed. 769]):

"As to the right of Pike to dispose of his trade-mark in connection with
the establishment where the liquor was manufactured, we do not think there
can be any reasonable doubt. It is true, the primary object of a trade-mark
is to indicate by its meaning or association the origin of the article to which
it is affixed. As distinct property, separate from the article created by the
original producer or manufacturer, It may not be the subject of sale. But
when the trade-mark is affixed to articles manufactured at a particular
establishment, and acquires a special reputation in connection with the place
of manufacture, and that establishment is transferred either by contract
or operation of law to others, the right to the use of the trade-mark may be
lawfully transferred with it."

In Bulte v. Igleheart Bros., cited above, Jenkins, Circuit Judge,
speaking for the Court of Appeals, and in entire accord with Kidd v.
Johnson, said (page 498 of 137 Fed., page 82 of 70 C. C. A.):

"A trade-mark is analogous to the good will of a business. Whoever heard
of a good will being sold to one while the original owner continues the busi-
ness as before? The good will is inseparable from the business itself. So,
likewise, is a trade-mark or trade-name that gives assurance to a purchaser
that the article upon which is stamped the trade-mark or trade-name is the
genuine production of the manufacturer to whom the trade-name or trade-
mark points by association as the maker of the article. Therefore it is that
It is a necessary qualification to the assignability of a trade-mark that there
goes with it the transfer of the business and good will of the owner of the
symbol."

625, 35 L. Ed. 247; Atlantic Milling Co. v. Robinson (C. C.) 20 Fed.
217; Morgan v. Rogers (C. C.) 19 Fed. 596.

The facts suggest still another view, which we regard as also fatal
to the claims of exclusive right in any of the parties to the cause.
It is the general and contemporaneous use made of the mark by dif-
f erent manufacturers of washing machines. We have seen that Tay-
lor and his associates or successors were engaged in the use of the
mark for nearly, if not quite, 17 years; and so far as shown this use
appears to have taken place without objection on the part of Heberger or Dietz or appellee. Heberger used the mark from 1897 until his sale to appellee, and the latter has used it since then. While we think Dietz began his use of the mark as a trade-mark some years later than Heberger, still Dietz continued the use thereafter until his death, and presumably appellants have since continued such use. There does not appear to have been any objection made to these uses on behalf of what we may call the Taylor interests. Furthermore, the property and business with which Taylor was connected in making and selling washing machines was sold in March, 1902, to a syndicate. The syndicate abandoned the business, and more than a year elapsed between its purchase and abandonment of the business and Taylor's attempted sale of the mark to Dietz. Whether all this, as claimed, amounted to an abandonment of the mark or not, it certainly does not aid the claims of either side in the present suit. It is rather a token of assent to the use of the mark by the public.

The facts thus pointed out signify such a degree of laches and apparent acquiescence as to bring the case within the rules laid down by this court in Saxlehner v. Wagner, 157 Fed. 745, 85 C. C. A. 321, and by the Supreme Court in French Republic v. Saratoga Vichy Co., 191 U. S. 427, 24 Sup. Ct. 145, 48 L. Ed. 247. The only restriction, then, that can be imposed upon the use of the mark is that each user shall so identify his washing machines as clearly and conspicuously to show the name or names of the manufacturer and vendor. This restriction would prevent confusion and deception as regards other users and the public.

The question now is whether the court should do more than to make an order reversing the decision and remanding the case, with direction to dismiss. The bill charges unfair competition, and this charge was sustained in the decree below. Objection is made that the bill in this regard is defective in form, in that it does not charge Dietz with endeavoring to palm off his machines on the public as the machines of complainant. The bill does not make an averment in that form. The pleadings appear to have been framed on the theory that each party was exclusively entitled to the use of the mark, and that each was infringing upon the rights of the other.

We cannot, under the evidence, repress a feeling that relief should be granted complainant below, at least to the extent of preventing the representatives of the estate and business of Conrad Dietz, deceased, from directly or indirectly placing on the market or selling washing machines bearing either the figure of a globe or the word "Globe," without permanently affixing to each of the machines and conspicuously displaying thereon the name or names of the manufacturer and vendor. We see no reason why appellee shall not be permitted, if it desire, to amend its bill so as to admit of the granting of relief under the present record to the extent indicated, conditioned, however, that appellee shall submit to like restraint. This will be allowed upon our own motion, in analogy to the principle involved in the action of this court in making an order upon its own motion in Barber v. Coit, 118 Fed. 273, 55 C. C. A. 145.

We should not adopt this course, but for the unusual methods of
competition to which Dietz and those acting in his interest appear to have resorted, and the manifestly injurious effects that a continuance of such methods would have upon the business of appellee, and also in misleading the public. It is not necessary to say that we should not pursue this course, if the record revealed such methods in the conduct of appellee. It is equally unnecessary to repeat, since the proposed relief shows, that we do not mean to sanction any right in appellee to do anything denied to appellants.

An order will be entered reversing the decree below, with costs of this court, and remanding the cause, with direction to permit amendment if desired by appellee, and thereupon to enter a decree in accordance with this decision, and, if such amendment be not desired, to dismiss the bill, with costs.

PIONEER S. S. CO. v. McCANN.

McCANN v. PIONEER S. S. CO.

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

Nos. 1,880 and 1,934.

1. SHIPPING (§ 84*)—LIABILITY OF VESSEL FOR TORTS—INJURY TO STEVEDORE'S EMPLOYEE.

An employé of a stevedore, engaged to discharge a vessel, when employed in or about the work, is on the vessel by invitation of the owner, who owes him the duty of exercising ordinary care to render the vessel reasonably safe for the workmen while engaged in the work or going to or from the same.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 342, 349–351; Dec. Dig. § 84.*]

2. SHIPPING (§ 84*)—LIABILITY OF VESSEL—INJURY TO STEVEDORE'S EMPLOYEE—DANGEROUS CONDITION OF VESSEL.

Libelant was an employé of a stevedore engaged in discharging a vessel of a cargo of ore which was taken from the holds by means of a grabber and hoisting apparatus. Libelant with others was engaged to shovel ore into position for the grabber in the forward hold. While libelant was descending into the hold, in order to avoid the grabber, which was swinging as it was being lowered, he stepped through a door in a false bulkhead forward of the hold, which was open, and fell to the bottom of the ship and was injured. The location of the door was similar to those in other freight ships opening into the dunnage room, but this vessel was of peculiar construction, and the door opened upon an unguarded shelf in an open space between the false bulkhead and the dunnage room, which was dark. Held, that the ship was negligent in permitting such door, which was not known to libelant, to remain open.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 342, 349–351; Dec. Dig. § 84.*]

3. SHIPPING (§ 84*)—LIABILITY OF VESSEL—INJURY TO STEVEDORE'S EMPLOYEE—CONTRIBUTORY NEGLIGENCE.

A finding approved that a stevedore's employé, injured while descending into a hold to help to discharge a ship, was chargeable with some negligence contributing to his injury.

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

4. ADMIRALTY (§ 71*)—PLEADING—WAIVER OF DEFECTS.

Defects in a libel not objected to either before or during trial, and which if so objected to might have been cured by amendment under the

*For other cases see same topic & § Number in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
liberal rules of pleading in admiralty, are not ground for reversal of a decree entered thereon.

[Ed. Note.—For other cases, see Admiralty, Dec. Dig. § 71.*]}

Appeals from the District Court of the United States for the Northern District of Ohio.

Libelant, McCann, claims to have received personal injuries through negligence of the owners and master of the steamship William Payne, for which he seeks to recover $20,000. The Pioneer Steamship Company appeared and executed the usual bond as owner of the ship and filed answer.

The libel avers, and the answer admits, that on August 21, 1905, the ship was lying alongside the Cleveland & Pittsburg Dock, in the harbor of Cleveland, for the purpose of unloading ore from her holds, and that libelant was one of a number of longshoremen employed to assist in taking the ore out of the vessel; that the ore was removed from the hold of the vessel by means of an immense clam-shell bucket, known as a grabber, which had wide and distended jaws, and when lowered could be made to swing around in the hold; that the jaws of the clam are forced into the ore and closed, and the grabber is then lifted by a hoisting appliance and the ore so removed from the hold; that libelant, with others, was to shovel the ore so as to bring it within the reach of the grabber.

Issue was joined upon averment and denial as to whether the ship afforded a place of safety for libelant to stand when the grabber was lowered into the hold, and whether the place in which libelant sought safety and met with his injury was where his employment called him. In this way two issues of fact were presented; one of negligence of the ship, and the other of contributory negligence of libelant.

The case was tried to the court upon deposition and some oral testimony, and resulted in findings that there was negligence on the part of those in charge of the vessel, and that libelant was guilty of some contributory negligence; and, under the rule in admiralty, a recovery of $3,000 was allowed libelant.

Two appeals are prosecuted; one by the appellant, the Pioneer Steamship Company, from the whole decree except the finding against libelant, and the other by the libelant so far as he was found guilty of some contributory negligence and limited in recovery to $3,000.

According to averments of the libel, and the evidence, the ship Payne was in some respects of unusual design. At a distance of from 8 to 10 feet aft of the usual dunnage room was a partition athwart the ship called a “false bulkhead,” which was designed to prevent the cargo of the forward compartment from extending under the dunnage room and into the forward part of the ship. The space thus left extended from port side to starboard side, and from the deck to the bottom of the ship. On each side was a place called a “shelf.” Libelant fell from the shelf on the starboard side. In the false bulkhead, about 13 inches above and over this shelf, was an opening with oval top and bottom some 42 inches in height, and for a portion of its height about 22 inches in width. This opening was furnished with door and latch. There was also an opening and a door over the shelf at the dunnage room, the shelf being the top of the tank and extending along the side and the length of the ship.

There was no railing or other device at the inner edge of the shelf between the false bulkhead and the dunnage room, and no light, artificial or otherwise, was furnished for the guidance of persons passing through these doors and along this shelf between them. The space was dark. The inner edge of the shelf was nearly if not quite on a line with the inner side of the opening leading to the shelf. The main difference between this ship and the ordinary ship, so far as important here, was the existence of this unprotected shelf and dark space.

The object of the doors, as claimed on behalf of the shipowner, was to enable members of the crew to enter the forward cargo hold for purposes of repair or other attention to appliances carried along the shelf. It appears

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
that there are openings called “Manholes” through the portions of the ship’s arches, which come into contact with or are very close to the top of the shelf. Description of the port side is omitted.

Cargoes are loaded and unloaded through hatches opening into the cargo compartments. There were three of these compartments and libelant’s work at the time of the accident was in No. 1, forward; that is, the one next to the false bulkhead. The means provided for entering this compartment, aside from the way along the shelf, before described, were a scuttle at its top and a ladder leading thence perpendicularly along the center of the false bulkhead to the bottom. From a point in the ladder opposite to the top of the shelf, a plank with railing was extended as a footway from the ladder to the shelf near the opening above described in the false bulkhead above the shelf. This bulkhead was about seven feet forward of the hatch of compartment No. 1. One of the arches before described was between this hatch and the false bulkhead. It was claimed by libelant that this false bulkhead with the opening through it at the end of the plankway had an appearance, then usual in ships, of an entrance directly into the dunnage room, a place of safety.

Arrangement had been made between the ship and an independent contractor for unloading the cargo at the dock. Libelant, with other stevedores, was an employe of this independent contractor. At the time of the accident, libelant had passed down the ladder and reached the plankway when the grabber was being lowered through the forward hatch. Libelant’s claim is that the grabber was swaying so that he became frightened, and, believing the aforesaid opening over the shelf through the false bulkhead led to the dunnage room, he entered the opening and fell to the bottom of the ship.

T. S. Dunlap, for Hugh McCann.
H. D. Goulder and F. L. Leckie, for Steamship Co.

Before LURTON and WARRINGTON, Circuit Judges.

WARRINGTON, Circuit Judge (after stating the facts as above). So far as concerns the assignments of error made on behalf of the shipowner, they must depend upon the nature and extent of its duty to libelant.

In Gerrity v. The Kate Cann (D. C.) 2 Fed. 241, libelant had been employed by an independent contractor to trim grain in the hold of the ship. At the time of his injury he was sitting in the between-decks, his work having been suspended. While sitting there, a quantity of dunnage and planks which had been stowed by the crew fell upon him. Benedict, District Judge, said (page 246):

“In regard to the presence of the libelant in the between-decks, the evidence shows that he was not there by the mere sufferance or license of the shipowner, but for the purpose of performing a service that could not be performed elsewhere, and in which the shipowner had an interest. To be sure, the libelant was not directly employed by the shipowner, and it may be truly said that no relation by contract existed between the shipowner and the libelant. But the libelant was trimming the shipowner’s ship. He was doing what was necessary to be done to enable the ship to carry the cargo in safety, and the reason why he was so employed was because the shipowner had, by a contract with the charterer, indirectly provided for the performance of this service. * * * The libelant had, therefore, a right to be where he was; and it follows that there was a duty on the part of the owner to see to it that the dunnage and plank stowed above him was so secured as to prevent its falling upon him of its own weight. Nicholson v. Erie R. R., 41 N. Y. 533.”

The decision was affirmed by Blatchford, Circuit Judge, 8 Fed. 719, the learned judge saying:

"I am entirely satisfied with the conclusions arrived at by the District Judge in this case, and with the reason assigned by him therefore in his decision."

In The Rheola (C. C.) 19 Fed. 926, libelant was employed by a master stevedore to discharge cargo. While at his work in the lower hold, a chain carrying a tub furnished by the ship broke, from which the injuries were received. Wallace, Judge, said (page 927):

"Libelant was performing a service in which the shipowners had an interest, and which they contemplated would be performed by the use of appliances which they had agreed to provide. They were under the same obligations to him not to expose him to unnecessary danger that they were under to the master stevedore, his employer. * * * What would be negligence toward one would be towards the other. Coughtry v. Globe Co., 56 N. Y. 124, 15 Am. Rep. 387; Mulchey v. Methodist Society, 125 Mass. 487."

In The Jos. B. Thomas, 86 Fed. 658, 30 C. C. A. 333, 46 L. R. A. 58 (9), libelant was an employé of a stevedore who was loading the vessel under a contract with the owners, and while in the lower hold libelant suffered injuries from the falling of a keg placed in a dangerous position by an employé of the ship and knocked over by a co-employé of libelant. It was held that the placing of the keg in the dangerous position was the proximate cause, and was a breach of the shipowner's duty to provide a safe place for libelant. Hawley, District Judge, speaking for the court (86 Fed. 660 [30 C. C. A. 333, 46 L. R. A. 58]) said:

"What duty did appellants owe to appellee? Their duty was to provide him a safe place in which to work, and to exercise ordinary and due diligence and care in keeping the premises reasonably secure against injury or danger. This is the pith and substance of all the decisions upon this subject, as expressed in a great variety of cases, each having reference to the special facts and surroundings of the evidence relating thereto."

Among the decisions thus alluded to by the Court of Appeals was Leathers v. Blessing, 105 U. S. 626, 629, 26 L. Ed. 1192, where libelant had gone upon a steamer expecting a consignment of cotton, to ascertain whether it had arrived, and was injured by the falling of a cotton bale. Mr. Justice Blatchford said (page 629 of 105 U. S. [26 L. Ed. 1192]):

"This makes the case one of invitation to the libelant to go on board in the transaction of business with the master and officers of the vessel, recognized by them as proper business to be transacted by him with them on board of the vessel at the time and place in question. Under such circumstances, the relation of the master, and of his co-owner, through him, to the libelant, was such as to create a duty on them to see that the libelant was not injured by the negligence of the master."

The principle of that decision, as well as that of Bennett v. R. R. Co., 102 U. S. 577, 26 L. Ed. 235 (except as to the difference between admiralty and common-law rules touching contributory negligence), seems to us to be applicable here; for if one invite others, either expressly or impliedly, to go upon his property, whether for business or for any other purpose, "it is his duty," as said by Mr. Cooley and adopted by Mr. Justice Harlan in the last-cited case (page 580 of 102 U. S. [26 L. Ed. 235]), "to be reasonably sure that he
is not inviting them into danger, and to that end he must exercise ordinary care and prudence to render the premises reasonably safe for the visit."

Morgan Const. Co. v. Frank, 158 Fed. 964, 86 C. C. A. 168, decided by this court and cited by counsel, is distinguishable. The decision, recognizing the duty of the master to provide a safe place, found that the master did so, but held that he was not bound to continue it in that condition, where the work itself, as done by the fellow servants of the injured person, made it dangerous later. To the same effect is the decision of this court in Deye v. Lodge & Shipley Machine Tool Co., 137 Fed. 480, 70 C. C. A. 64, also relied upon by counsel. Plainly, the facts of those decisions did not involve a danger which was known to the master and unknown to the workmen at the time they were invited to enter the premises.

The case of Clan Graham (D. C.) 163 Fed. 961, also relied upon by counsel, is not in point. It involved the question whether a stevedore was bound to take notice of the fact that the space between certain girders was left open and without decking in the ship's primary construction. This was not an unusual method of construction. It was customary to place dunnage upon these girders, and libelant was fully aware of its presence. When stepping upon some of the loose planking, which in itself was dunnage, he lost his balance and fell. The danger was known alike to the master and libelant.

That case is also cited by proctors to show that employment of an independent contractor to unload a cargo relieves the shipowner of any duty toward stevedores. It is there said that when a shipowner has employed an independent contractor, and has turned the ship over in a safe condition, the owner is "relieved of any fault that may arise through the work of the servants of the contractor." (Page 966 of 163 Fed). But if libelant's claim be true, the Payne was not turned over in safe condition. We do not think it was meant by that decision to sanction a rule which would enable a shipowner, through an independent contractor, to absolve the owner from the duty reasonably to provide a place of safety for the employés of the contractor to carry on their work, much less to absolve the owner from any duty concerning unusual dangers which are known to the owners and are not known to the employés. No such question was involved, and no decision there cited approves of any such rule.

Any rule of safety affecting owners in their relations to subservants must, of necessity, be determined in each instance with reference to the object of the invitation or permission to enter the vessel or other property. In the present instance, the object, as regards libelant and his class, was to descend into the cargo holds, including the forward hold, and shovel ore to places within the range of the grabber. The presence, then, in the forward cargo hold, of both the grabber and stevedores, was plainly within the purpose and contemplation of the shipowner when making the contract for removal of the cargo. We therefore hold that the shipowner was bound to furnish to the subservants, like libelant, while entering or working in the hold, a place of reasonable safety against ordinary dangers of the grabber.

We do not think that the shipowner discharged this duty. The
court below found that, at the time of the accident, the door leading through the false bulkhead to the unguarded shelf was open. We cannot, under the evidence, disturb this finding. The fact that the District Court saw and heard libelant testify strengthens the finding. We think the door was open when the ship reached the dock, and was not closed thereafter prior to the accident.

One of the peculiarities of the ship Payne was that the location of this door, with its surroundings, resembled entrances on nearly all other freight ships to the dunnage room. Prior to this time, the Payne had never been in the harbor of Cleveland. The ship's master was fully aware of the danger of the passage into which the door opened. Shortly before the accident in question, one of the ship's mates had entered this passage and suffered injury by falling from the shelf. No notice of the existence of the passage or of its danger was given to those who were engaged to remove the cargo.

It is claimed by proctors for the shipowner that libelant also knew of the danger of this passage. They base this claim on the sixth paragraph of the libel; but we think that this paragraph can have reference only to the accident to the mate. It is not alleged, and the evidence does not show, that libelant prior to the accident either notified the master or had any knowledge of the passageway.

The court below found:

"Immediately prior to the accident, he (libelant) claims, and there is no testimony contradicting him, that he was standing on the gangway plank which ran athwart the vessel against the cargo bulkhead at the forward end of the vessel, extending between the shelf piece on either side."

As pointed out in the statement, it was at this time and place that the appearance of the grabber caused libelant's fright. He passed along the gangway to the shelf piece and through the open door into the passage, where he met with his injury. It was found by the court below, in respect to this opening, that it was "negligence on the part of those in charge of the vessel to permit the manhole to remain open." We concur in this finding.

It is claimed on behalf of the shipowner that libelant was guilty of contributory negligence. It is urged that libelant was where he had no business to be, and that, if he had simply passed over the gangplank to the shelf and there stopped, he would have been safe. As to the first of these claims, it was shown that the sides of the ore piles were so far below the shelf as to render work of the stevedores unnecessary except at or near the bottom of the hold. But it must be said that libelant had not gone far from the line of the ladder leading to the ore when the grabber was being lowered. It is hardly to be expected that men entering or working within a ship's hold will always keep within the exact parts of the hold where their employment, strictly construed, would call them. As said in The Illinois (D. C.) 63 Fed. 161, respecting the claim that a stevedore had gone out of his way for the purpose of removing his clothing before going to his work in the hold below (page 162):

"Nor could he be expected to go directly, in a straight line, to the spot where he proposed to strip, and straight back; it would not correspond with what men generally do under such circumstances, and would therefore be un-
reasonable. Every part of the deck to which it might be anticipated the men would go should have been made safe."

It is to be further observed that if, instead of being on the gang plank, libelant had been passing along the ladder near the gang plank on his way to the ore, he would have been quite as much exposed to the grabber as he was where he stood.

As regards the claim that libelant should have stopped at the shelf without attempting to pass through the open door, it is to be borne in mind that he was in a state of fright. The court below appears to have been convinced of the fact of his fright; and when we consider the swaying of the grabber, the way in which its clamps or jaws could be opened, the proximity of the hatch to the ladder and gang plank, together with what some of the witnesses said of the situation, it is not surprising that libelant was seized with fright.

By what rule, then, shall libelant's conduct be tested? Is it by what a careful person would do in the absence of peril and under ordinary circumstances, or rather by what such a man would probably do in the presence of existing peril? If he was at fault in placing himself in the situation of danger, his conduct would be tested by the former rule; if not so at fault, then by the latter. Pennsylvania Co. v. Snyder, 55 Ohio St. 343 (Syl. par. 3), 45 N. E. 559, 60 Am. St. Rep. 700; New York Trans. Co. v. O'Donnell, 159 Fed. 659, 86 C. C. A. 527. In view of all the circumstances, it is hard to see why libelant's conduct should not be tested by the rule laid down in the cases just mentioned, by which he would be excused for failing to stop on the shelf. The open door led to what he thought was the dunnage room. It appeared to him at that moment to be a place of safety. It was in effect, though not within the intent of the master, an invitation to enter. Libelant does not appear to have been in a condition to deliberate.

Attention, however, in counsel's brief, is called to the fact that libelant testified that at the time he first boarded the ship he observed that this bulkhead was "so near the forward hatch it was dangerous." The court below was inclined to think that, "taking all the circumstances together, he (libelant) was guilty of some contributory negligence." We are not disposed to alter this finding, either in form or substance.

The question made in respect to the proximate cause of the injury needs but little attention. This case is to be tested by the admiralty rule, not the common-law rule, regarding contributory negligence. The negligence of the shipowner respecting the open door leading to the unguarded passage, as well as the negligence of libelant, was a concurring cause of the injury. The duty of the shipowner at least to close the door before receiving the persons upon the ship engaged to work in the hold, and itself to refrain from opening the door and leaving it open during the progress of the work, was continuing in its nature. Such a duty differs from the one concerning matters which become dangerous only through the work executed by the head servant and subservants.
We discover no finding or evidence that the grabber or its appliances were defective or that the operation was negligent. The shipowner, then, as before pointed out, was, in legal contemplation, so far cognizant of the ordinary operation and effect of the grabber as to require him to anticipate and, as regards the place, reasonably to provide against ordinary dangers of the grabber. This is well within the rule illustrated in Pennsylvania R. R. Co. v. Snyder, supra (Syl. pars. 1 and 2).

So of the assumption of risk which is urged against libelant. It is true that he was chargeable with the usual risks of his employment, but the relation between the shipowner and him, as before shown, was such as to entitle him as against the shipowner to a place of reasonable safety. He was not required to assume the additional risk—exposure to the unusual and dangerous passageway—to which the owner negligently subjected him.

The question made as to sufficiency of the libel cannot avail. If the contention were technically correct, still the case was allowed to go to trial without raising the question, and, under the liberal rules of pleading in admiralty, the libel could have been made to conform with the evidence. The decisions cited in the very able brief of proctors for the shipowner and not commented on are, we think, sufficiently distinguished by the views herein expressed.

This case, in our opinion, falls clearly within the decision in The Max Morris. As it seems to us, the facts found by Judge Brown ([D. C.] 24 Fed. 860) are in several important respects similar to the present facts. We think, under the evidence, that the fault of the shipowner here was greater in degree than that of the libelant. This is fairly to be inferred, too, from the findings of the District Court. It is not necessary that we should determine whether the damages should be divided accordingly or not. That question is left open in the final decision of The Max Morris, 137 U. S. 1, 15, 11 Sup. Ct. 29, 34 L. Ed. 586. We refer also to The Victory, 15 C. C. A. 490, 68 Fed. 395, 400; The Lackawanna (D. C.) 151 Fed. 499, 501; Workman v. Mayor of New York, etc., 179 U. S. 552, 562, 21 Sup. Ct. 212, 45 L. Ed. 314.

Applying the moiety rule, and considering the language of the decision below, together with the evidence, we are satisfied that the sum of $3,000 allowed by the court was not more than one-half the damages libelant suffered, and that the decree should be affirmed (Wm. Johnson v. Johansen, 30 C. C. A. 675 [5], 86 Fed. 886, 889); and as to each appeal it is so ordered.
LEBER v. UNITED STATES ex rel. FLEMING.

PRATT v. SAME (three cases).

(Circuit Court of Appeals, Ninth Circuit. May 3, 1909.)

Nos. 1,555, 1,553, 1,556, 1,554.

1. WITNESSES (§ 10*)—SUBPOENA—AUTHORITY TO ISSUE UNDER ALASKA CODE.
   Alaska Code Civ. Proc. § 625, provides that subpoenas shall be issued "First: To require attendance before a court of record or at the trial of an issue therein, or out of such court in any action, suit or proceeding pending therein, by the clerk of such court. * * * Third: To require the attendance before the judge, justice of the peace or other person authorized by law to take the testimony or affidavit of another, by such judge, justice of the peace or other person in the places within their respective jurisdiction." Held, that a subpoena requiring a witness to appear before a notary public to give testimony in an action then pending in the District Court was properly issued by the clerk of such court, regardless of whether such a subpoena might also have been lawfully issued by the notary under paragraph 3 of the section.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 10.*]

2. WITNESSES (§ 21*)—PUNISHMENT OF DISOBEDIENCE TO SUBPOENA AS CONTEMPT—DEFENSES.
   A variance of an hour in the time when a witness is required to appear and testify between the original subpoena read to the witness and the copy delivered to him affords no defense to proceedings in contempt against him for failing to appear, where he did not appear at either time, basing his refusal on the claim that the subpoena was void on other grounds.

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

Excuses for disobedience of subpoenas, see note to Fairfield v. United States, 76 C. C. A. 501.]

3. WITNESSES (§ 14*)—SERVICE OF SUBPOENA—PAYMENT OF MILEAGE.
   Where a witness was served with a subpoena to appear and give evidence before a notary public in the town where the service was made, and was paid mileage for one mile, which he received without objection, he was not excused from obeying such subpoena because of the fact that he resided at a greater distance than a mile from the notary's office.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 15; Dec. Dig. § 14.*]

4. WITNESSES (§ 16*)—SUBPOENA DUCES TECUM—DUTY OF WITNESS TO APPEAR.
   The fact that a subpoena requires a witness to produce books and papers which he cannot lawfully be required to produce does not affect the legality of the issuance of the subpoena nor the obligation of the witness to appear in obedience to it.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 25; Dec. Dig. § 16.*]

5. CONTEMPT (§ 10*)—ATTORNEY—ADVISING CLIENT TO DISOBEY ORDER OR WRIT.
   An attorney has the right to advise a client as to the validity of an order of court or a writ issued under its authority, and if after investigation it is his honest belief that the order or writ is void his advice to that effect will not render him liable for an error of judgment, but he has no right to go beyond that and advise the client to disobey the same, and if he does so he is guilty of a contempt of the court which made the order or issued the writ; and the offense is especially flagrant where the court is open, and there is full opportunity for testing its legality in a lawful way, before obedience to it is required.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. § 21; Dec. Dig. § 10.*]

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.
6. **Contempt (§ 61*)—Review—Refusal of Jury Trial—Discretion of Court.**

Under Alaska Code Civ. Proc. § 611, which provides that in proceedings for contempt not committed in the presence of the court the trial shall be by the court, or, in its discretion, by a jury on application of the accused, the refusal of a jury trial was not an abuse of discretion for which the judgment can be reversed by an appellate court, where there was no substantial issue of fact but the judgment was justified by the admitted facts.

[Ed. Note—For other cases, see Contempt, Cent. Dig. §§ 180-191; Dec. Dig. § 61.*]

7. **Contempt (§ 10*)—Action of Attorney—Unprofessional Conduct.**

The action of an attorney in going to a judge in his room and stating that he wished to speak to him as a citizen, and then attempting to influence the judge's action with respect to the trial of a pending cause, was a gross violation of professional propriety, and warranted the punishment of the attorney for a contempt of the court.

[Ed. Note—For other cases, see Contempt, Dec. Dig. § 10.*
Liability of attorneys, see note to Anderson v. Comptoirs, 48 C. C. A. 7.]

8. **Appeal and Error (§ 19*)—Decisions Reviewable—Temporary Order Which Has Ceased to Affect Substantial Rights.**

An order of a court suspending an attorney from the right to practice therein for a stated time will not be reviewed by an appellate court in proceedings not instituted until after the term of suspension has expired.

[Ed. Note—For other cases, see Appeal and Error, Cent. Dig. §§ 63-80; Dec. Dig. § 19.*]

In Error to the District Court of the United States for the Territory of Alaska, Third Division.

Proceedings in the above-entitled cases as against the plaintiffs in error for acts in contempt of court originating in the alleged unlawful and contemptuous disobedience of the mandate of a subpoena issued by the clerk of the District Court for the Territory of Alaska, Third Division, in case No. 622, pending in said court, wherein Robert H. Fleming was plaintiff and R. E. Leber et al. were defendants. To review the judgments in these cases, they have been brought here upon writs of error.

Campbell, Metson, Drew, Oatman & Mackenzie and S. D. Woods, for plaintiffs in error.


Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. In a suit commenced in the court below on November 8, 1906, by Robert H. Fleming against R. E. Leber, administrator of the estate of Victor Baubet, deceased, and R. E. Leber, defendants, it was alleged in the complaint duly filed that, pursuant to certain agreements, conveyances, and leases, the plaintiff on April 14, 1906, became entitled to receive from the defendant R. E. Leber 10 per cent. of the gross output of gold from certain mining premises in Alaska until the sum of $8,500 due to the plaintiff should be fully paid; that the said Leber had collected from the laymen and lessees of the said mining company as royalty for the

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*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes*
privelege of working and mining such property large quantities of
gold dust of great value, the exact amount of which was unknown
to plaintiff; that he had been informed and believed, and accordingly
alleged, that the defendant Leber had collected and received gold dust
in sufficient quantities and of sufficient value to entitle the plaintiff
to the full sum of $3,500 from the defendant; that said sum had not
been paid, nor any part thereof, save and except the sum of $953.75,
paid him from time to time by the said Leber; that upon informa-
tion and belief the said Leber, for himself and as administrator of
the estate of Victor Baubet, deceased, claimed some interest in and
to said gold dust, or the money value thereof alleged to be due to the
plaintiff.

The prayer of the complaint was that the defendants and each of
them be required to render to the plaintiff an accounting of all their
acts and deeds in the premises; to set forth the nature and character
of any claim the defendants or either of them had to the 10 per cent.
of the gross output of the gold or gold dust taken from said mining
claim, and claimed by the plaintiff since the 14th day of April, 1906;
that a decree be entered in favor of the plaintiff against the defend-
ant in the sum of $1,540.25, with interest thereon from the time the
same was collected by defendants, and costs of suit.

The name of Morton E. Stevens appeared upon the complaint as
plaintiff’s attorney. Summons was issued on this complaint on No-
vember 8, 1906, and on the same day service was made upon the de-
fendant by the deputy United States marshal, together with copies
of the complaint; on the same day a subpoena was issued by the
clerk of the court requiring the defendant to appear before C. E.
Wright, a notary public in and for the district of Alaska, at the office
of Morton E. Stevens, in the Fairbanks Building in the town of
Fairbanks, on November 12th, at the hour of 11 a. m. of that day,
to testify as a witness upon behalf of plaintiff in the cause, and be
examined under oath, and make then and there depositions as an ad-
verse party in said case and at the instance of plaintiff. The subpena
also required the witness to bring with him, and have then and there
for examination and inspection, all of the books, papers, accounts,
and other documentary evidence of every nature whatsoever in his
possession or under his control relating to the subject-matter in the
action, and as required to do so by virtue of the provisions of chap-
ters 61 and 63 of Carter’s Alaska Code. This subpoena was served
upon the defendant by the deputy United States marshal on November
8, 1906, at Fairbanks, by showing and reading to him the original
and handing a copy thereof to the defendant, together with a copy of
the original notice of taking depositions attached thereto, and also
handing the defendant the sum of $4 for one day’s attendance and
the sum of 50 cents for mileage. With the subpoena was also served
a notice to take the defendant’s deposition at the same time and place
mentioned in the subpoena. Thereafter and on the same day Leber
took the said copies of summons, complaint, notice of taking deposi-
tions, and subpoena served upon him in said action to Louis K. Pratt,
a practicing attorney, and asked him whether he, the said Leber, was
required to appear before the notary public at the time and place
designated in the notice and subpoena and be examined by deposition in said action, and thereupon the said Pratt advised the said Leber not to respect the subpoena, and that "if Mrs. Wright (the notary public) had signed it it would be all right, but don't go near her." Thereupon Leber disobeyed the subpoena and did not attend before the notary public, and on the evening of November 12th he left Fairbanks for Valdez, a distance of about 350 miles. On November 24, 1906, Morton E. Stevens, attorney for plaintiff, filed a petition in the District Court of Alaska for a warrant to arrest the defendant R. E. Leber and bring him before the court to answer the charge of a contempt of court. The petition alleged that the defendant Leber on the 12th day of November, 1906, had willingly, maliciously, and contumaciously disobeyed the requirements of the subpoena issued by the clerk of the court commanding the defendant to be and appear before C. E. Wright, a notary public, as required by the terms of the subpoena. To this petition was attached the affidavit of the deputy United States marshal setting forth the service upon the defendant of the original summons, together with a copy of the complaint, and the service of a subpoena issued by the clerk of the court, and the notice to take depositions in said cause. There was also filed the affidavit of C. E. Wright, the notary public, setting forth that neither the defendant nor his attorney or any one for him appeared at the time and place mentioned in the subpoena and the notice to take depositions, or at any other time or at all. There was also filed the affidavit of Robert H. Fleming, the plaintiff in the case, setting forth the proceedings to take the testimony of the defendant Leber, and the failure of the latter to appear before the notary public and give his testimony as required in the subpoena and notice to take his deposition. A warrant was thereupon issued by the court for the arrest of the defendant, with directions to bring him before the court to show cause why he should not be punished for contempt of court for his unlawful and contemptuous disobedience of the mandates of the subpoena issued and served upon him by the warrant of arrest. This warrant was executed by the arrest of the defendant by the deputy United States marshal on November 26, 1907, at Valdez, Alaska, the defendant having left Fairbanks on the evening of November 12, 1906, and being at the time of his arrest on his way to Seattle in the state of Washington.

On November 26, 1906, Louis K. Pratt, appearing as attorney for R. E. Leber, moved the court to quash the petition for a warrant. This motion was denied on November 30, 1906. The attorney for Leber thereupon, on December 3, 1906, moved the court to fix Leber's bail, reciting in the moving paper that in the citation no bail had been fixed, and the defendant was then in custody some 400 miles distant from the court. The court fixed the bail at $2,000, which was given, and order entered that the defendant be discharged from custody. The defendant did not return to Fairbanks until March, 1907. In March, 1907, Judge Gunnison held court in Fairbanks in place of Judge Wickersham, who had been directed by the Attorney General to hold court at Juneau. Judge Gunnison continued to hold court
at that place until August, 1907. In April, 1907, and while Judge Gunnison was holding court at Fairbanks, on motion of the attorney for the relator Robert H. Fleming in the contempt proceedings against R. E. Leber, the court set the cause for hearing on April 17, 1907, at which time Louis K. Pratt appeared for Leber and announced that he was not ready for trial, and moved the court that the case be indefinitely postponed. The order was entered by the court upon terms. In October, 1907, after Judge Wickersham had returned and was holding court at Fairbanks, the attorney for the relator moved the court that the contempt proceedings and the original suit of Fleming v. Leber et al. (No. 622) be placed upon the next motion calendar, the attorney for the defendant being present and not objecting thereto. On October 15, 1907, the cause came on for hearing, and the attorney for the defendant moved the court for a jury trial, alleging that the judge of the court was biased and prejudiced against the defendant, and that a fair and impartial trial of the contempt proceedings could not be had before the judge. The demand was denied, and the cause set for trial on October 18, 1907. Before the court convened on October 15, 1907, Louis K. Pratt, the attorney for the defendant, entered the private chambers of Judge Wickersham, closed the door and said to the judge that he did not want him to try the case, and if he did so it would be disagreeable for the court. On October 19, 1907, the attorney for the defendant moved the court for a change of venue or change of judge, alleging in an affidavit filed by him that the Hon. James Wickersham, the judge of the court before whom the action was pending, was so biased and prejudiced against the defendant that he could not have a fair and impartial trial; that the said judge was for that reason disqualified from hearing and determining the same. This motion was also denied. The court thereupon heard the evidence in the contempt proceedings herein and adjudged the defendant guilty of contempt of court, finding that the right and remedy of the plaintiff in civil cause No. 622, wherein Robert H. Fleming was plaintiff and R. E. Leber et al. were defendants, had been prejudiced by the disobedience of the defendant of the subpoena issued therein. The court fined the defendant $250 and costs.

In the course of the hearing of this case, Louis K. Pratt, the attorney for the defendant, offered himself as a witness on behalf of the defendant, and testified that he had advised Leber with respect to the subpoena herein; that it was absolutely void, and that he, Leber, was under no obligations, legal or moral, to respect it; that if he, the witness, was in Leber's place, he would not do it; and he would not be imposed on in that way.

On October 23, 1907, Jeremiah Cousby, the attorney for the United States, brought this testimony to the attention of the court by affidavit. A warrant was thereupon issued for the arrest of Pratt upon the charge of contempt of court in advising and counseling the defendant Leber to disobey the subpoena. The defendant answered, substantially admitting the facts alleged in the affidavit of the United States attorney, but claiming that as a lawyer he was familiar with the question as to the validity of the subpoena; that it was void, and he had a right to so advise his client. The case was heard by the
court on November 11, 1907; the defendant was adjudged guilty of contempt of court, and sentenced to pay a fine of $250 to be paid forthwith in court, and in default of payment to be confined in jail until the same should be paid at the rate of $2 per day.

On October 22, 1907, the court entered an order reciting the facts hereinbefore stated, that on October 15, 1907, while case No. 637, entitled "United States ex rel. Robert H. Fleming, Plaintiff, v. R. E. Leber, Defendant," was pending, Louis K. Pratt, the attorney for the defendant in that case, entered the chambers of the judge and threateningly spoke and used the language:

"I don't want you to try that case (referring to the above-entitled case). I want a jury trial for Leber. If you do try it, it will be very disagreeable for you."

The order entered by the court directed that Louis K. Pratt show cause why he should not be punished for contempt of court committed in the face of the court. The respondent made return to the order to show cause, in which he made explanation and set up matters by way of purging himself of the charge of contempt of court. Among other things, he claimed to have said to the judge in his chambers:

"I want to talk to the judge as a citizen for a minute. In this case versus Leber there has been so much kicked up that is of a disagreeable nature that I don't want to try the case at this term; but if you think it must be tried, then I should like to have it tried by a jury."

The court thereupon determined that the defendant had been guilty of misconduct and misbehavior in office and had been guilty of contempt of court. The court thereupon ordered that the defendant be punished by a fine of $300, to be paid to the United States forthwith, otherwise to be recovered in the manner provided by the law for the recovery and collection of fines.

On November 11, 1907, Jeremiah Cousby, the attorney for the United States, filed in court an affidavit setting forth the proceedings in the court and the action by Louis K. Pratt in presenting motion for a change of venue or judge or for a jury trial in case No. 275, in which the said Louis K. Pratt alleged that he believed that in many instances James Wickersham, the judge of the court, in making rulings, decisions, and judgments in cases of which the affiant was interested as an attorney at law, had been blinded by passion and prejudice, and had been led into the doing of arbitrary, illegal, and unjust things by reason thereof; that in a number of instances affiant had been unable to account for the rulings and decisions of the said judge upon any other theory, and had been led to believe, and did believe, that the rulings and decisions in these instances were not the result of calm judgment, but were arbitrary, vindictive, and apparently actuated by malicious motives against the affiant. Thereupon the court ordered that a warrant issue for the arrest of the defendant, and that he be brought before the court to answer the charge. The defendant appeared and filed an affidavit alleging that the judge of the court was interested in the proceedings to such an extent and in such a manner that he was disqualified from sitting as a judge in the fur-
ther hearing and trial of the case. The purpose of this affidavit was to secure a continuance of a hearing in the case until the arrival of another judge to hold the court at Fairbanks. The court denied the motion for a continuance; overruled a demurrer to the charge contained in the affidavit, and the defendant's motion for a jury trial. The defendant entered a plea of not guilty, and upon the evidence the court adjudged the defendant guilty of contempt of court as charged, and sentenced him to pay a fine of $1, together with costs, and be imprisoned in jail for a period of one hour, and suspended him from practicing as an attorney at law in the courts of Alaska from the date of the judgment entered on the 18th day of November, 1907, until the 1st day of February, 1908.

These proceedings against the plaintiffs in error for contempt of court originated in case No. 622, wherein Robert H. Fleming was plaintiff and R. E. Leber et al. were defendants. The action was for an accounting in a mining enterprise in which plaintiff claimed to be entitled under an agreement to receive from the defendants 10 per cent. of the gross output of the claim, and for a decree for the amount found due. The summons issued under the complaint having been served upon the defendant, the plaintiff was authorized to take defendant's deposition under section 644, Alaska Code Civ. Proc. The plaintiff gave the notice of time and place for taking the deposition as required by section 652 of that Code. The plaintiff further proceeded under sections 624 and 625 of the Code and had a subpoena issued by the clerk of the court requiring the attendance of the defendant at the time and place designated in the subpoena to testify as a witness in the action. The defendant did not attend at the time and place mentioned, and he justifies his conduct by assailing the validity of the subpoena.

Section 624 of the Alaska Code of Civil Procedure defines a subpoena as follows:

"The process by which the attendance of a witness is required is a subpoena. It is a writ directed to a person and requiring his attendance, at a particular time and place, to testify as a witness in a particular action, suit, or proceeding therein specified, on behalf of a particular party therein mentioned. It may also require him to bring with him any books, documents, or other things under his control which he is bound by law to produce in evidence."

Section 625 of that Code, providing how and by whom such subpoena shall be issued, reads as follows:

"First. To require attendance before a court of record or at the trial of an issue therein, or out of such court in any action, suit or proceeding pending therein, by the clerk of such court;

"Second. To require attendance before a commissioner appointed to take testimony by a court of the United States, or any state or territory, or any foreign country, by any clerk of a court of record, in places within the jurisdiction of such court;

"Third. To require the attendance before the judge, justice of the peace, or other person, authorized by law to take the testimony or affidavit of another, by such judge, justice of the peace, or other person, in the places within their respective jurisdiction."

It is contended on the part of the defendant that the clerk of the court was without jurisdiction to issue the subpoena to take the testi-
mony of the defendant before the notary public, and, being without jurisdiction, the subpœna was void and the defendant might disregard its mandate with impunity. In our opinion, this is not the correct construction of this statute. The language of the statute is plain, and points out specifically how and by whom subpœnas shall be issued. The clerk of a court of record shall issue all subpœnas described in the first and second paragraphs of the section, and the judge, justice of the peace, or other person all subpœnas described in the third paragraph. Under which do we find the subpœna described in this case? It was a subpœna to take the deposition of a witness out of court in an action pending therein. This subpœna is clearly described in the first paragraph of the section, and was required to be issued by the clerk of the court. It may be that the notary public was also authorized to issue the subpœna under the provisions of the third paragraph of the section, but that fact does not deprive the clerk of the court of his jurisdiction to issue the subpœna provided in the first paragraph.

It is objected further that the original subpœna required the defendant to appear before the notary public at 11 o'clock a. m. on November 12, 1906, while the copy left with the defendant by the deputy marshal required him to appear at 10 o'clock a. m. of that day. The return of the deputy marshal shows that he read the original subpœna to the defendant; he was therefore fully informed that he was to appear before the notary public at 11 o'clock a. m., and not 10 o'clock a. m. But it appears from the evidence that he did not appear before the notary public at any time during that day, and he does not claim that he did; his refusal to appear was not because of the difference in time stated in the original and the copy, but because of the alleged invalidity of the subpœna.

It is further objected that the defendant lived at least 27 miles from the office of the notary public at Fairbanks, and that the mileage of 50 cents paid to him was not the mileage to which he was entitled under the law. The defendant was served with the subpœna in Fairbanks. He received the amount paid to him without objection, and his refusal to appear was not based upon that objection. It is further objected that the subpœna contained directions (duces tecum) requiring him to produce books, papers, and accounts that were too broad and general and in violation of the defendant's rights. The defendant was not adjudged guilty of contempt of court in failing to produce books and papers, but solely because he refused to appear before the notary and give his deposition. This objection has therefore no bearing upon the question before the court. Fairfield et al. v. United States, 146 Fed. 508, 76 C. C. A. 590. It did not affect the jurisdiction of the clerk of the court to issue the subpœna. Hale v. Henkel, 201 U. S. 77 (concurring opinion of Mr. Justice Harlan, page 78), 26 Sup. Ct. 370, 50 L. Ed. 652.

The subpœna having been issued by an officer authorized by law and properly served, it was the duty of the defendant Leber to appear before the notary public at the time and place named and be examined as therein required, and, as the validity of the subpœna is the only subject of controversy in this case, the judgment of the court below is affirmed.
The next case in order of time was the proceedings against Louis K. Pratt upon the charge of contempt of court in advising and counseling the defendant Leber to disobey the subpoena. The defendant raises the same objections as to the subpoena that were raised in the case of Leber. These objections, having been disposed of in that case, need not be further considered. The defendant further justifies his conduct on the ground that he acted in good faith as an attorney in advising Leber that he was under no legal obligations to attend before the notary public notwithstanding the fact that he had been served with a subpoena so to do.

In the case of In re Dubose, 109 Fed. 971, 974, 48 C. C. A. 1, 4, this court said:

"There can be no question as to the right of an attorney to advise his client as to the validity of an order of court or of a writ issued under its authority, where such an order or writ affects the client's interests; and if, after investigation, it is the attorney's honest belief that such order or writ is illegal and void, his advice to that effect will not render him liable for an error of judgment. But an attorney cannot go beyond the right to advise, and, actuated by a spirit of resistance, conspire with his client or with others to disobey an order of court, obstruct the due administration of the laws, and bring the authority of a court of justice into contempt."

The case of In re Noyes, 121 Fed. 209, 57 C. C. A. 445, included a writ of error in the case of In re Geary, 121 Fed. 225, 57 C. C. A. 445. In the latter case Thomas J. Geary was charged with contempt of court upon a statement as shown by the reporter's notes made by himself in the course of his examination in the case of Alexander McKenzie charged with contempt of court. The statement of Mr. Geary was to the effect that he had advised McKenzie to disobey a writ of this court. There was no further evidence against him, and upon the hearing in the contempt proceedings in his own case he testified that he gave McKenzie no advice whatever as to the course of action he ought to pursue in the matter. His attention was directed to the specific testimony which he was reported as having given in the McKenzie Case. He testified that he either did not catch the scope of the interrogatory, or the testimony had been incorrectly taken down by the reporter, and that he did not intend to testify as reported. He referred to other testimony in the case which corroborated his testimony that he gave no such advice. The court found the explanation satisfactory, and the charge was therefore dismissed for the reason that he did not advise or encourage disobedience of the order of the court.

That the present case does not come under the rule of the latter, but under the rule of the former, is clearly established by the testimony. R. E. Leber testified as follows:

"Mr. Pratt stated, as I said before, after he looked over the papers, he said: 'Steve can't do that. It ain't made out right. Don't you go near them.' He said, 'If the notary had signed that in place of the Judge or 'the clerk, you should obey it, but this way you don't need to go near her (the notary public). They are trying to hold you up.' * * * Q. What did you do when he told you not to go near her? A. I didn't go near her. Q. Was that the reason why you didn't go near her? A. Yes, sir."
Mr. Pratt testified in his own behalf as follows:

"Q. It was upon a thorough examination of the authorities, such as you could find, that you came to the conclusion that the process that was shown to you was void? A. Certainly. I knew it was void, and I know it now. Q. And you are still of the same opinion? A. Why, certainly. When a man comes to me and asks me if such a paper is void or valid, I will tell him it is void, certainly. Q. If he further asked you what to do under the circumstances, what would you tell him? A. I would tell him if he was gillie enough to be jerked around that way and bulldozed and mistreated that way, he can go to the notary public if he wants to, but if he has any manhood about him he will just stay away. That is what I would tell him. * * * Q. Had he asked you at that time whether he should go over there? A. I don't know whether he did or not. Q. You just told him that without him asking you anything about it? A. A lawyer who tells a client a process is void, and he need pay no attention to it—it is folly to draw a distinction between that and his telling him that the process is void and you need pay no attention to it. It is folly to draw a distinction between that and where he goes further and says, 'Just stay away from there.' There is nothing to that. Whenever a lawyer gives that advice and a client follows it, he has got to take his chances, of course. I took my chances, and am taking them now."

He knew that in advising his client to disobey the subpoena he did so at his peril, and he accepted the peril. The subpoena had been issued by the clerk of the court; the court was in session at Fairbanks. The regular procedure to determine the validity of the subpoena was a motion to quash. This motion could have been heard by the court at any time and determined before the day designated for the taking of Leber's testimony, and this procedure was peculiarly appropriate to the situation in this case; or the defendant might have advised his client to attend before the notary public and there make the objection to the validity of the subpoena. An appearance for that purpose only would not have been a waiver of jurisdiction. But instead of testing the validity of the subpoena in court in some regular way, the defendant advised his client to disobey its mandates, thereby exhibiting a spirit of contemptuous resistance to the order and process of the court, in which his client participated by leaving Fairbanks on the evening of November 12, 1906, and proceeding to Valdez, a distance of 350 miles on his way to Seattle.

It is assigned as error that the court excluded the testimony of certain attorneys who, it is said, would have testified that in their opinion the subpoena was void. It is said that the testimony was offered to show good faith, but, as already stated, good faith required that this question should have been submitted to the court for its determination. The opinion of attorneys as to the validity of the subpoena could not excuse defendant's conduct in this respect.

It is also assigned as error that the court improperly refused the defendant a jury trial. Section 611, Alaska Code Civ. Proc. (31 Stat. 430), provides as follows:

"When a contempt is committed in the immediate view and presence of the court and officer, it may be punished summarily, for which an order must be made reciting the facts as occurring in such immediate view and presence, determining that the person proceeded against is thereby guilty of a contempt, and that he be punished as therein prescribed. In other cases of contempt the trial shall proceed upon testimony produced as in criminal cases, and the accused shall be entitled to be confronted with the witnesses against him, but
such trial shall be by the court or, in the discretion of the court, upon application of the accused, a trial by jury may be had as in any criminal case."

It is admitted that the only question under this statute is whether the court abused its discretion in refusing the defendant a jury trial. The general rule is that decisions which rest in the discretion of the court below cannot be examined in the appellate court except in cases of gross abuse of discretion, and generally, where the action of the inferior court is discretionary, its decision is final. 1 Encyclopedia of U. S. Supreme Court Reports, 983.

In this case there was no abuse of discretion, for there was no substantial issue of fact for a jury to determine. The admitted facts were sufficient to justify the judgment of the court. The judgment in this case must therefore be affirmed.

The next case is that of Louis K. Pratt, charged with contempt of court. When case No. 637, United States ex rel. Robert H. Fleming, Plaintiff, v. R. E. Leber, Defendant, was about to be set for trial, it is charged that the defendant entered the private chambers of Judge Wickersham and used the following threatening language to the judge:

"I don't want you to try that case. I want a jury trial for Leber. If you do try it, it will be very disagreeable for you."

It is assigned as error in this case that the court refused to accept the return, answer, and explanation on file in court tendered by the defendant for the purpose of purging himself of the charge of contempt of court. The defendant in his return claims to have gone to the private office of the judge of the court and there stated to the judge privately:

"I want to talk to the judge as a citizen for a minute. In this case versus Leber there has been so much kicked up that is of a disagreeable nature that I don't want to try the case at this term, but if you think it must be tried, then I would like to have it tried by a jury."

To which the judge of the court responded:

"If anything disagreeable has been kicked up in that case, the attorneys did it; I didn't. I don't propose to shirk my duty simply because a thing is disagreeable."

Accepting the version of the defendant as to what was said on this occasion, his conduct can only be viewed as grossly improper. A case in which he was attorney for the defendant was about to be set for trial. He had succeeded in preventing the case being tried by Judge Gunnison, who had been holding the court at Fairbanks from March to August. He was about to make an effort to prevent its trial by Judge Wickersham. If he had any legal grounds for a continuance or for a trial otherwise than by Judge Wickersham, the proper place to make the showing was in the courtroom, where the attorneys on the other side would have an opportunity to hear what was said and meet the issues if any were presented; or if for any reason the application should not have been made in a public courtroom, then the application should have been made to hear the motion in chambers and opposing counsel notified of such application. It was not
proper for the defendant to present the matter to the judge ex parte and in the privacy of his chambers.

The statement of the defendant that he approached the judge privately in chambers because he wanted to "speak to the judge as a citizen" is an admission of improper conduct. The judge had no duty in the case as a citizen that he did not have as a judge, and the defendant knew, or should have known as an attorney, that he had no right to seek to influence the judge in his action by private ex parte threats or statements. That such conduct was in gross violation of professional propriety is so manifest that it does not seem necessary to more than refer to the well-known rule upon the subject, concisely expressed in the Code of Ethics adopted by the American Bar Association at its last session. In a section condemning improper attempts to exert personal influence upon a court it is provided, among other things, in section 3 as follows:

"A lawyer should not communicate or argue privately with the judge as to the merits of a pending cause, and he deserves rebuke and denunciation for any device or attempt to gain from a judge special personal consideration or favor."

It is objected that the court below, under an order to show cause upon the hearing of the contempt, refused to hear the defendant and dealt with him summarily, as courts are only entitled to do with contemnors in case of direct contempt. It is not necessary to discuss this question. In our opinion the admission contained in the return of the defendant to the order to show cause was sufficient to justify the judgment. The judgment of the court in this case must therefore be affirmed.

The next and last case is the charge of contempt against Louis K. Pratt in alleging and charging in an affidavit filed in support of a motion for a change of venue or change of judge in case No. 275, entitled "United States of America v. Louis K. Pratt," that Judge Wickersham—

"In making rulings, decisions, and judgments in cases in which he was interested as an attorney at law, had been blinded by passion and prejudice, and has been led into the doing of arbitrary, illegal, and unjust things by reason thereof. That in a number of instances this affiant has been unable to account for the rulings and decisions of the said judge upon any other theory, and has been led to believe, and does believe, that the rulings and decisions in these instances were not the result of calm judgment, but were arbitrary, vindictive, and apparently actuated by malicious motives as against this affiant."

The defendant offered no evidence in this case, and the court found the charge as true, and thereupon sentenced the defendant to pay a fine of $1 and be imprisoned for the period of one hour. It was also ordered that the defendant be suspended from practicing as an attorney in the courts of Alaska from the 18th day of November, 1907, to the 1st day of February, 1908. There is no bill of exceptions in this case. The error relied on for the reversal of the judgment is that the court erred in suspending defendant from practicing as an attorney at law in the courts of Alaska. The sentence of the court expired on February 1, 1908. The transcript of the record was not
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filed in this court until June 9, 1908. The order of suspension from practice was no part of the judgment in the contempt proceedings, and, as the suspension expired more than four months before the transcript of record was filed in this court, the order no longer presents a question for review.

The judgment of the court is affirmed.

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(Circuit Court of Appeals, Second Circuit. February 16, 1909. On Rehearing May 19, 1909.)

No. 25.

1. TOWAGE (§ 14*)—CONTRACTS—ASSUMPTION OF RISKS BY TOW.
   A contract of towage, by which the tow assumes all risks, releases the tug from liability for her own negligence, resulting in injury to the tow.
   [Ed. Note.—For other cases, see Towage, Cent. Dig. § 28; Dec. Dig. § 14.*]

2. TOWAGE (§ 14*)—INJURY TO TOW—LIABILITY OF TUG.
   Where a contract for the towage of a barge to Buffalo provided that the tow assumed all risks, and after reaching Buffalo, through some arrangement between the masters, the towage was continued for another port, and on the way the barge was wrecked, the tug cannot be held liable therefor, since, if the continuance of the voyage was against the orders of her owner, neither he nor his vessel is liable, because both masters knew that the contract extended to Buffalo only, while, if authorized, the contract must be regarded as extended and applying in all its terms to the towage beyond Buffalo.
   [Ed. Note.—For other cases, see Towage, Cent. Dig. § 28; Dec. Dig. § 14.*]

3. TOWAGE (§ 3*)—CONTRACTS—AUTHORITY OF VESSEL TO REPRESENT CARGO.
   A contract for towage, made by the owners of a vessel, is binding on the owners of the cargo, which, as bailees, the owners of the vessel have authority to represent in all matters necessary to its transportation.
   [Ed. Note.—For other cases, see Towage, Cent. Dig. § 3; Dec. Dig. § 3.*]

4. TOWAGE (§ 14*)—CONTRACT EXEMPTING OWNER FROM LIABILITY—EFFECT ON LIABILITY OF TUG.
   While a towing tug may be liable in rem for negligence as a tort, even though the owner is not liable, yet, when the owner is exempted from liability by contract, his vessel is also exempted.
   [Ed. Note.—For other cases, see Towage, Cent. Dig. § 28; Dec. Dig. § 14.*]

Coxe, Circuit Judge, dissenting.

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

For opinion below, see 144 Fed. 301. See, also, 156 Fed. 306.

Thomas C. Burke (Crangle & Burke, of counsel), for appellant.
George Clinton and Harvey L. Brown (Clinton & Clinton and Brown, Ely & Richards, of counsel), for appellees.

Before LACOMBE, COXE, and WARD, Circuit Judges.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
WARD, Circuit Judge. In this case the steamship Oceanica, laden with iron ore, and the barge Massasoit, laden with lumber, both bound for Tonawanda, N. Y., were lying at Presque Isle, about three miles above Marquette. The Oceanica was owned by the Tonawanda Iron & Steel Company and the Massasoit by John J. Boland and Charles Keenan. Mills, who was the Tonawanda Company's vessel manager, made a contract over the telephone with Boland, who was the managing owner of the Massasoit, that the Oceanica should tow the Massasoit from Marquette to Buffalo, the tow to assume all risks. We find this to be the contract, because Mills so testifies, and because the day after it was made he so stated in a letter to Boland, requesting a reply if there was any difference of understanding, and no reply was sent, and, finally, because Boland, though a witness at the trial, did not contradict Mills' testimony as to the contract. The tug did not drop the tow at Buffalo, but continued on with her towards Tonawanda. On the way down the Niagara river the tug broke her propeller and cut her line to the tow, which was carried by the current against the intake pier and became a total loss.

We are confronted at the outset of the case with the preliminary question whether the agreement made released the tug and her owners from liability for the loss of the tow, even if it was due to the negligence of those in charge of the tug. In this state a common carrier may contract against his own negligence; but such a contract will not be construed to cover the carrier's negligence, unless intention to do so is expressly stated. The reason is that, the stipulation having something besides negligence to apply to, viz., the carrier's liability as insurer, it will not be supposed that the parties intended to cover the carrier's liability for his own negligence, unless that is expressly, or by necessary inference, included. Canfield v. B. & O. R. R. Co., 93 N. Y. 532, 45 Am. Rep. 268; Kenney v. N. Y. C. & H. R. R. R. Co., 125 N. Y. 423, 26 N. E. 626. In England, where a carrier may contract against his own negligence, the law is the same. Beven on Negligence (2d Ed.) p. 1128. The same rule was laid down by the Supreme Court of the United States, before it had decided in Railroad Co. v. Lockwood, 17 Wall. 357, 21 L. Ed. 627, on grounds of public policy, that a common carrier could not contract against liability for his own negligence. New Jersey Steam Navigation Co. v. Merchants' Bank, 6 How. 344, 12 L. Ed. 465.

A tug is not, in relation to its tow, a common carrier, being only bound to the exercise of ordinary care. The Margaret, 94 U. S. 495, 24 L. Ed. 146. It follows that a contract against liability for negligence cannot be construed in the case of a tug as it may be in the case of a common carrier. The tug being only liable for negligence, if the tow agrees to assume all risks, no risks can be meant except those for which the tug is liable, viz., the consequences of her own negligence. There is no other class of risks upon which the clause can operate as in the case of common carriers, viz., those arising from liability as insurer. Unless construed to cover the tug's negligence, the stipulation is meaningless; i. e., an agreement by the tow to assume risks to which she is subject without any stipulation and for which there is no
liability at all on the part of the tug. Still, in the case of The Syracuse, 12 Wall. 167, 20 L. Ed. 382, decided before the cases of The Margaret, supra, and Railroad Co. v. Lockwood, supra, had set at rest all question as to the extent of the tug's liability to her tow and as to the right of a common carrier to contract against the consequence of his own negligence Justice Davis said:

"It is unnecessary to consider the evidence relating to the alleged contract of towage, because, if it be true, as the appellant says, that by special agreement the canal boat was being towed at her own risk, nevertheless the steamer is liable, if through negligence of those in charge of her the canal boat has suffered loss. Although the policy of the law has not imposed on the towing boat the obligation resting on a common carrier, it does require on the part of the persons engaged in her management the exercise of reasonable care, caution, and maritime skill, and if those are neglected, and disaster occurs, the towing boat must be visited with the consequences."

The learned judge must have meant that an agreement by the tow to tow at her own risk should not be construed to cover the tug's negligence. This was the view of Judge Nelson in the court below (The Syracuse, 6 Blatchf. 2, Fed. Cas. No. 13,717), who began his opinion with these words:

"One ground of defense set up is that by the contract of towage it was agreed that the canal boat was to be towed by the steamer at her own risk. The answer to this is that this contract does not exempt the steamboat from liability for damages caused to the canal boat by the negligence of those in charge of the steamboat."

The evidence in that case as to the agreement was that the exemption appeared on a printed receipt for towage, which was signed after the boat had been taken in tow and the tow had started and the towage had been paid. Obviously such a provision could not under those circumstances have been held a contract binding upon the tow. Still it must be admitted that the learned judge was speaking of a special agreement entered into between the tug and the tow that the latter should be towed at her own risk. The Syracuse has never been cited on this point in any subsequent case in the Supreme Court arising out of a towage contract; but it has been followed in the lower courts in the following cases: Deems v. Albany & Canal Line, 14 Blatchf. 474, Fed. Cas. No. 3,736; The M. J. Cummings (D. C.) 18 Fed. 178; The Rescue (D. C.) 24 Fed. 190; The American Eagle (D. C.) 54 Fed. 1010; The Jonty Jenks (D. C.) 54 Fed. 1021; In re Moran (D. C.) 120 Fed. 556; The Somers N. Smith (D. C.) 120 Fed. 569; Alaska Commercial Co. v. Williams, 128 Fed. 362, 63 C. C. A. 92.

ed between tug and tow. This conclusion renders consideration of the other questions involved in the case unnecessary.

Decree reversed, but, in view of the authorities to the contrary, without costs.

COXE, Circuit Judge (dissenting). Starting with the proposition, regarding which there can be no doubt, that the Massasoit, a helpless barge, was towed by the Oceanica upon the pier of the Buffalo Waterworks and impaled there until the barge and her cargo became a total loss, it would seem to be the duty of the court not to permit any harsh or novel interpretation of the law to stand between her and redress. As the tug is only liable for her own negligence, the opinion of the court proceeds upon the theory that if the tow assumes all risks nothing can be contemplated except the assumption of the risk attributable to such negligence. Grant that this is so, it by no means follows that the tow is remediless if injured by the fault of the tug.

In 1870 the Supreme Court decided in the case of The Syracuse, 12 Wall. 167, 20 L. Ed. 382, that the tug could not be relieved by such an agreement from the consequences of her own negligence. This decision has been followed by a long line of authorities, some of them being cited in the opinion of the court, until the principle has been recognized as an established rule of the admiralty courts, not only by lawyers but by vessel owners as well. In the case of The Edmund L. Levy, 128 Fed. 683, 63 C. C. A. 235, this court said:

"The agreement of the canal boat to be towed at her own risk did not exempt the tug from liability for damages occasioned by her own negligence."

The wisdom of the rule cannot be doubted. It ought to be against public policy to permit a vessel to contract against her own fault. To allow her to do so begets recklessness, carelessness and neglect. The same reasons for prohibiting such a contract in the case of common carriers apply, though not, perhaps, to the same extent, in the case of a towage contract. In both cases the design is to prevent those who have the absolute control of another's property from extorting an agreement that they may neglect all reasonable precautions to preserve it. I can see no reason for abrogating the rule and every reason why it should be continued.

If, however, the facts found by the court be correct, it is difficult to perceive how the question arises at all in the case at bar. The court finds that the contract was:

"That the Oceanica should tow the Massasoit from Marquette to Buffalo, the tow to assume all risks."

When the tow reached Buffalo it is obvious that the contract was completed and the agreement to assume all risks which was a part of the contract, ended when the contract ended. The accident happened after the vessels had left Buffalo and were on their way to Tonawanda down the Niagara river. How an agreement to assume all risks on voyage from Marquette to Buffalo can be made applicable to a voyage from Buffalo to Tonawanda I am unable to understand.

I think the decree was right and should be affirmed.
THE OCEANICA.

On Rehearing.

WARD, Circuit Judge. The libelants contend in the first place that, as the court has found the towage contract made between the owners of the steamer Oceanica and the barge Massasoit to have been from Marquette to Buffalo, its terms cannot be held to apply to the subsequent towage from Buffalo to Tonawanda. Therefore it is argued that the agreement of the owner of the barge to assume all risks did not apply to the stranding of the barge in the Niagara river. We think this view erroneous. If the master of the Oceanica to oblige the master of the barge towed the barge beyond Buffalo against his owners' orders, then neither the Oceanica nor her owners are liable because the owners of the barge knew that the contract was to tow simply to Buffalo. The R. F. Cahill, 9 Ben. 352, Fed. Cas. No. 11,735; The Andrew White (D. C.) 108 Fed. 685. On the other hand, if the towage beyond Buffalo was within the authority of the master of the Oceanica, and not contrary to his owners' orders, then the contract must be regarded as extended and applying in all its terms to towage beyond Buffalo.

In the next place the petitioners contend that, the ownership of the cargo being different from the ownership of the barge, the cargo owners have a right to recover, even if the barge owners have not. No difference between the rights of the cargo and of the barge were pointed out either in the pleadings, in the proofs, in the printed briefs, or on the oral argument. It is now, however, admitted by the claimants of the Oceanica that the cargo was owned by third parties, and the question, therefore, arises whether their rights against the Oceanica differ from the rights of the owners of the barge.

The claimant of the Oceanica contends that the cargo owners must claim through, and are therefore bound by, the towage contract. New Jersey Steam Navigation Co. v. Merchants' Bank, 6 How. 344, 381, 13 L. Ed. 465; Stoddard v. Long Island R. R. Co., 5 Sandf. (N. Y.) 180, 188. When the towage contract was made, the owners of the barge were bailees of the cargo, and under the right and duty of representing it in matters necessary to transportation. The contract was certainly to tow the barge and her cargo. If it had contained no exemption, the owners of the barge could have recovered against the Oceanica for damage to both barge and cargo. So if the owners of the Oceanica had refused to perform the towage, and damage had thereby ensued, the contract could have been enforced for the benefit of the cargo as well as of the barge. We think that the cargo owners are not strangers to the contract, and that for the reasons next to be considered the contract is a defense against their claim.

But the libelants claim that, even if the owners of the Oceanica in a suit in personam could not be held by the owners of the barge for the loss of the barge because of the contract, still that the vessel herself is liable to them in rem. The authorities cited only show that a vessel guilty of a tort is personified in the admiralty, and may sometimes be held liable in rem when her owners are not liable at all. For example, a vessel may be condemned as guilty of engaging in piracy, her owners not being liable at all, because it was without their knowledge or
privity (The Malek Adhel, 2 How. 210, 11 L. Ed. 239); or a vessel may be held at fault in rem for a collision because of the negligence of a compulsory pilot, when her owners would not be liable in personam (The China, 7 Wall. 53, 19 L. Ed. 67; and see Homer Ramsdell Co. v. Compagnie Générale Transatlantique, 182 U. S. 406, 21 Sup. Ct. 831, 45 L. Ed. 1155); or a vessel demised by charter party may be liable in rem for negligence of the owner pro hac vice, when her owners would not be responsible in personam (The Barnstable, 181 U. S. 464, 467, 21 Sup. Ct. 684, 45 L. Ed. 954). The subject has been considered by this court in The W. G. Mason, 142 Fed. 913, 917, 74 C. C. A. 83, in which Judge Wallace pointed out that according to the law of this country liability in rem is not necessarily coextensive with the personal liability of the owner.

No doubt a suit in rem against a vessel for negligence is a suit ex delicto, even if there has been a contract between the parties. Suits arising out of negligence are ex delicto, even when charter parties or bills of lading regulate the rights of the parties. This fact, however, does not nullify the contract. In such suits against a vessel in rem the agreement is always pleaded and proved. The books are full of suits against vessels for damage to cargo or baggage, where the vessel was discharged because of exemptions contained in the agreement between the parties. If the claimant shows that by agreement he is legally exempted from liability, his vessel is exempted also. It would, indeed, be extraordinary if a libelant by proceeding in rem could recover against the owner’s property, when by virtue of the contract between the parties he could not recover against the owner in personam. The law is well expressed by Mr. Justice Brown in Bancroft, v. Queen of the Pacific, 180 U. S. 49, 21 Sup. Ct. 278, 45 L. Ed. 419. In that case the libelant sued the vessel in rem for damages to a shipment under a bill of lading containing the following clause:

“It is expressly agreed that all claims against the P. C. S. S. Co., or any of the stockholders of said company, for damage to or loss of any of the within merchandise, must be presented to the company within 30 days from date hereof, and that after 30 days from date hereof no action, suit, or proceeding in any court of justice shall be brought against said P. C. S. S. Co., or any of the stockholders thereof, for any damage to or loss of said merchandise; and the lapse of said 30 days shall be deemed a conclusive bar and release of all right to recover against said company, or any of the stockholders thereof, for any such damage or loss.”

The action was begun four years after the loss. The claimant excepted to the libel because, among other things:

“The causes of action have been waived and abandoned by virtue of a limitation clause of 30 days contained in the bill of lading or shipper’s receipt.”

This exception was overruled by the District Court (The Queen of the Pacific, 61 Fed. 213, 214), but sustained in the Supreme Court; Mr. Justice Brown saying:

“The Court of Appeals in its opinion dwelt upon several propositions arising upon the pleadings and evidence, but in the view we have taken of the case we shall find it necessary to discuss but one, which is, in substance, that the libelants did not, as required by the bill of lading, present to the company their claims for damage to the merchandise within 30 days from the date of the bills of lading, April 27 and 28, 1888. There is no pretense of
a compliance with this condition. Two answers are made to this defense: First, that the limitation applies only to claims against the steamship company or any of the stockholders of said company, and not to claims against the vessel; second, that the limitation is unreasonable.

"4. The first objection is quite too technical. It virtually assumes that there were two contracts, one with the company and one with the ship, the vehicle of transportation owned and employed by the company, and that while the company as to all its other property is protected by the contract, as to this particular property, used in carrying it out, it is not so protected. But, if such be the case with respect to this particular stipulation, must it not also be so with respect to the other stipulations in the bill of lading, to which the company is a party, but not the ship? Thus, 'the responsibility of said company shall cease immediately on the delivery of the said goods from the ship's tackles.' Can it be possible that the responsibility of the ship shall not cease at the same time? 'The company shall not be held responsible for any damage or loss resulting from fire at sea or in port, accident to or from machinery, boilers or steam,' etc. But shall the company be exempt and not the ship? 'It is expressly understood that the said company shall not be liable or accountable for weight, leakage, breakage, shrinkage, rust, etc., nor for loss of specie, bullion, etc., unless shipped under its proper title or name, and extra freight paid thereon.' But shall the ship be liable for all these excepted losses, notwithstanding that the company is exonerated? These questions can admit of but one answer. There was in truth but one contract, and that was between the libelants, upon the one part, and the company in its individual capacity and as the representative of the ship, upon the other.

"There is no doubt of the general proposition that restrictions upon the liability of a common carrier, inserted by him in the bill of lading for his own benefit and in language chosen by himself, must be narrowly construed. Still they ought not to be wholly frittered away by an adherence to the letter of the contract, in obvious disregard of its intent and spirit. It is too clear for argument that it was the intention of the company to require notice to be given of all claims for losses or damage to merchandise intrusted to its care, and as such damage could only come to it while the merchandise was upon one of its steamers, or in the process of reception or delivery, and as the owner would have his option to sue either in rem or in personam, it could never have been contemplated that in the one case he should be obliged to give notice and not in the other. In either event, the money to pay for such damage must come from the treasury of the company, and we ought not to give such an effect to the stipulation as would enable the owner of the merchandise to avoid its operation by simply changing his form of action. It would be almost as unreasonable to give it this construction as to hold that it should apply if the action were in contract, but should not apply if it were in tort. The 'claim' is in either case against the company, though the suit may be against its property."

The Circuit Court of Appeals for the Third Circuit had, before this decision was handed down, said of a similar clause in a bill of lading:

"It is further contended by the libelant that the stipulation as to notice contained in the St. Hubert's bill of lading is not a defense to an action in rem, because the provision was only for the protection of the shipowners, and did not apply to the ship. We do not think there is either reason or authority for so narrow and harsh a construction of this stipulation as to notice. There may be cases in which it is necessary to discriminate between the liability of the shipowner and that of the ship; but this is not one of them. It is an exemption stipulated for in the bill of lading of the ship for injury to goods done on the ship, notice of claim for which is required to be given before removal from the custody of the ship. The shipowner can hardly be said to have secured himself against liability for want of notice of claim, if such exemption is not available when his property is seized and subjected to payment of that very liability. As said by Judge McPherson in the case of The Westminster (D. C.) 102 Fed. 368, where a similar clause was under
consideration: 'This, I think, cannot properly be construed so as to exempt the shipowner if he should be sued personally in a formal proceeding that may end in seizing his property by one kind of writ, and to deny him exemption if he should be sued in another form of proceeding that seizes his property in the beginning by a different kind of writ. * * * Ultimately his property is to be reached in order to satisfy the libelant's claim; and, if he is "liable" when his property is exposed to the danger of a final writ of execution in a personal action, I can see no ground for holding that he is any the less liable when his property is seized in limine by a proceeding in rem. It is familiar law that exemptions are to be strictly construed against the carrier; but even in an exemption a strained construction should not prevail over the plain meaning of words.'" The St. Hubert, 107 Fed. 727, 731, 46 C. C. A. 603, 607.

We do appreciate keenly that the decision of the majority of the court as to the right of a tug to contract against her own negligence is a departure from previous decisions. The question should, and we hope will, be set at rest in this case by the Supreme Court.

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In re SMITH, THORNDIKE & BROWN CO.

SMITH v. WISCONSIN TRUST CO.

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

No. 1,492.

1. CORPORATIONS (§ 432*)—OFFICERS—AUTHORITY OF TREASURER TO DEPOSIT MONEY—PRESUMPTIONS.

Where the action of the treasurer of a corporation in depositing its funds with another corporation of which he was an officer was not in violation of any statute, the presumption is that it was not in violation of the by-laws or regulations of the corporation, and the burden of proof rests upon it, when it alleges that the deposit was unauthorized.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1726–1737; Dec. Dig. § 432.*]

2. BANKRUPTCY (§ 345*)—CLAIMS ENTITLED TO PRIORITY—FUNDS HELD IN TRUST.

Where a bankrupt corporation had been a general depository for the funds of a grocers' association of which its president was treasurer, its other directors having been told by him that such deposits were authorized by the association to be repaid on demand, it did not hold such funds as a special deposit in trust, but the association was a general creditor only, and not entitled to priority.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 345.*]

Groseup, Circuit Judge, dissenting.

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

For opinion below, see 159 Fed. 268.

Appellant filed a petition which her attorneys summarize as follows: "That Smith, Thorndike & Brown Company, a corporation, was duly declared a bankrupt June 24, 1907, and that for two years prior to May 25, 1907, one Ira B. Smith, the president of the said Smith, Thorndike & Brown Company, had also been the treasurer of the National Wholesale Grocers' Association of the United States; that the moneys of the Grocers' Association coming into the hands of Mr. Smith as such treasurer were deposited by him with the

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep's Indexes
Smith, Thorndike & Brown Company, and that said moneys so deposited were known to be and were treated as the moneys and credits of the Grocers' Association; that on or about the 25th day of May, 1907, Mr. Smith resigned as treasurer of the Grocers' Association, at which time the Smith, Thorndike & Brown Company had in its possession $2,150.30 belonging to said Grocers' Association; that said moneys came duly into the possession of the trustee appointed in said bankruptcy proceedings; and that on the 25th of May, 1907, appellant duly purchased from the Grocers' Association its said claim against the Smith, Thorndike & Brown Company."

The district Court, on consideration of the proofs, allowed the claim as an unsecured claim, without preference. In re Smith, Thorndike & Brown Co., 159 Fed. 268. The appeal is prosecuted on the theory that the relation between the Smith, Thorndike & Brown Company and the Grocers' Association was that of trustee and cestui que trust, and that the trust fund is in the hands of appellee as an officer of the bankruptcy court.

S. S. Gregory and Guy D. Goff, for appellant. Jackson B. Kemper, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

BAKER, Circuit Judge (after stating the facts as above). The District Court found from the evidence that Smith as treasurer of the Grocers' Association was authorized by the association to place its funds with the Smith, Thorndike & Brown Company as a general deposit—that is, not as a special fund to be set apart for safe-keeping, but as a fund to be used and repaid as demanded—and that nothing was done with respect to the funds which was not contemplated by the parties. If the finding is correct, the legal conclusion that the only relation between the two companies was that of general debtor and general creditor is inevitable.

But even if the evidence is not sufficient to establish such finding affirmatively, we should consider that point unavailing for the following reason. Against appellant's prima facie case that moneys of the Grocers' Association, a corporation, passed from the hands of Smith as treasurer into the possession of and were used by the Smith, Thorndike & Brown Company, a corporation, of which Smith was president, appellee introduced evidence tending to prove that such use was approved by the president, the secretary, and the "executive part of the board of directors" of the Grocers' Association. But appellee failed to exhibit any provision in the charter and by-laws of the Grocers' Association, and any record of official action of its board of directors, either authorizing or forbidding its treasurer to deposit its funds with another corporation in which its treasurer was a stockholder and president. As the general law of the land does not prohibit the organization of corporations (or voluntary associations) with power through by-laws or action of directors to authorize treasurers to deposit the official funds with other corporations of which such treasurers are presidents, the lack of conclusive proof that the act of Smith as treasurer was authorized cannot be taken as proof that it was unauthoriz ed. On the contrary, the lack of proof that Smith's act was in violation of his duty as treasurer as that duty was fixed by the Grocers' Association made it unnecessary for appellee to undertake to prove that Smith's act was authorized. The presumption is that men do not commit crimes or breaches of trust. The presumption is that if the act of the treasurer of any corporation or association does not violate
any statute of state or nation, neither does it violate the by-laws of
the company or the resolutions of the directors. The Grocers’ Asso-
ciation (in whose place appellant stands) cannot be permitted, in our
judgment of the law and sound public policy, by merely charging that
Smith’s act as its treasurer in depositing its funds with the Smith,
Thorndike & Brown Company, of which Smith was president, was un-
authorized by it, to cast the burden upon Smith (or appellee) of prov-
ing that the act was authorized by resolution or by-law. Where a de-
fendant has control of the proofs from which the liability for an act
complained of might be established, and the plaintiff might be left
remediless if the defendant were not required to produce the proofs,
the defendant is sometimes subjected to an adverse assumption of
fact by reason of his failure to bring forth the full proof from which
nonliability would be established. But where, as here, the full proofs
are in the plaintiff’s hands, the reason for such a rule fails.

This is sufficient to require an affirmance. But even if by any possi-
bility it could be held that Smith acted contrary to the by-laws or di-
rections of the Grocers’ Association, we would be obliged to affirm
on the fact, as found by the District Court, that no part of the sum
claimed ever found its way into the assets of the estate in the hands of
appellee. And, further, the Smith, Thorndike & Brown Company
never became holders of the fund as a special deposit or separate
fund in trust, either by agreement or by reason of knowledge of
or participation in Smith’s (wrongfully assumed) betrayal of trust.
The only evidence on this point is quite to the contrary, namely, that
the board of directors (other than Smith) were told by Smith that he
was expressly authorized by the Grocers’ Association to let the Smith,
Thorndike & Brown Company have the use of the money, repayable
on demand.

The order is affirmed.

GROSSCUP, Circuit Judge (dissenting). I have no disagreement
with the majority opinion, that, as between the depositor in banks and
the depositee, it is contemplated that the deposit, if it be a general and
not a special deposit, shall be used by the depositee, to be repaid when
demanded; my insistence is that in no true sense of the word at all is
the transaction between Smith, and Smith, Thorndike & Brown a
“deposit,” either special or general—that the real transaction was the
personal utilization by Smith, for the private benefit of himself and
his business associates, of the fund put into his possession as treasurer
—a treatment of the fund in his hands that raises the reasonable in-
ference that he was influenced as to the selection of whom should have
its possession, not by the judgment of one who is seeking a place to
deposit the trust funds, unbiased by interest of his own, as the custo-
que trust had the right to expect, but who is influenced by his interest
and opportunity for personal profit; and whatever such transaction
may be called, it is not, in any true sense the act of a trustee in seek-
ing merely the safe-keeping of the trust funds. It is, seems to me,
this mistaken conception of what the real transaction is, that furnish-
es the real ground on which the majority opinion is built up.
Now what are the facts? The National Grocers’ Association is an
organization of grocers residing in all parts of the United States, for
social, educational, and friendly aid purposes, solely. The Associa-
tion is not one intended to bring to the Association, as such, any pec-
cuniary profit. Its funds are not put into the possession of its officers,
as are the funds of associations or corporations for profit, to be em-
ployed or utilized in venture or investment. The sole function of the
officers of associations like this, besides determining the appropriation
of funds for the purposes named, is to safely keep such funds; of all
of which we can, I think, even in the absence of statutes, by-laws or
resolutions of the association, take judicial notice.

Associations of this kind hold stated gatherings or conventions at
different places throughout the country, each one attended probably by
less than a majority of the membership; at which conventions officers
are elected, and business relating to the purposes of the association
transacted. It is not at these conventions, however, that the funds of
the association are collected. The funds are collected by check of the
individual members, sent from their respective homes to the treasurer,
in pursuance of the regularly established association dues. Possibly
the association might, at its stated meetings or conventions, in the ab-
sence of any prohibition thereon by charter or by-law, vote these
funds into the hands of its treasurer, or one of its members, to be util-
ized by him in the private business of himself and his business asso-
ciates, for his and their private benefit only. But this I doubt, in the
absence of consent from the members whose contributions are to be af-
fected, or of power contained in the charter or by-laws; for in the
absence of such consent, or of such general power, it seems to me
that the members who from their homes are sending in their checks
to the treasurer have a right to believe, and do believe, that the funds
are to be kept intact, not as capital to be put into private venture for
the treasurer’s benefit, but as a trust fund, in some regularly accepted
bank or other depositary of funds that are used for the safe-keeping of
moneys.

However, this question does not arise, for there is no pretense that
the association, at any meeting, voted authority to Smith to use these
funds in his business, or the business with which he was connected;
nor is there any pretense that the officers of the association, at any
meeting of themselves, so voted. All that the testimony discloses is
that the president, the secretary, and what Smith called the executive
part of the board of directors, “knew” that the fund was being de-
posited with Smith, Thorndike & Brown. This may have furnished
Smith with a pretext to put these funds into the private business with
which he was connected, but to my mind clearly, it is no “authority”
for so doing. To show authority to a treasurer to use the funds in his
own business and that of his associates, something more than knowl-
dge or connivance on the part of the other officers must be shown;
and in the absence of such authority, such use of the funds is a der-
eliction of the trust that the treasurer undertakes.

Now what is the relation of Smith, Thorndike & Brown to this der-
eliction of trust? The majority opinion says “that the board of di-
rectors, other than Smith, were told by Smith that he was expressly
authorized by the Grocers' Association to let the Smith, Thorndike & Brown Company have the use of the money repayable on demand."

Let that be as it may, the evidence establishes further without question that at the time these funds were put by Smith into the possession of Smith, Thorndike & Brown, Smith was president of that corporation, and had a "general supervision of the affairs of the Company," and that these funds of the Grocers' Association came into the hands of Smith, Thorndike & Brown, with the knowledge of all its directors that they were the treasury funds of the Grocers' Association. And were Smith, Thorndike & Brown, Smith alone, or were Smith's knowledge—the knowledge of the man who was president and had general supervision of the affairs of Smith, Thorndike & Brown—to be imputed to Smith, Thorndike & Brown, that Company's use of funds, in the way they were used would be without authority, and in dereliction of Smith's duty to the Grocers' Association. Indeed, had Smith thus used these funds in a business that was his own entirely, or were Smith, Thorndike & Brown a copartnership instead of a corporation, Smith being a leading partner, there could, on the facts and principles of law stated, be no uncertainty of the right of the Grocers' Association to pursue the funds thus diverted into Smith's or the copartnership's hands.

What meritorious difference does it make that Smith, Thorndike & Brown is a corporation instead of a copartnership? Whether corporation or copartnership, the business got the benefit of the diversion—the use of money that did not belong there. Whether corporation or copartnership, the assets that came into the hands of the trustee in bankruptcy were increased by just what was added by these funds, thus diverted. Whether corporation or copartnership, the actual knowledge of Smith, and the knowledge actual and imputed of the others in interest, was the same. And whether corporation or copartnership, the place of Smith as having "general supervision of the affairs of the Company" was the same—at least it would not have been greater in the case of a copartnership than in the corporation. And where there exists, as the result of the diversion, such identity of benefit; such identity of increase to the assets coming into the hands of the trustee by the funds thus diverted added thereto; such identity of knowledge actual and imputed; and such identity of Smith's place as managing power, I, for one, am not ready to say that the entirely irrelevant fact, from a practical point of view, that in one case the business into which the diverted funds have gone happens to be incorporated, and in the other it is not, makes any difference upon the rights of the party to whom the funds belong, to pursue these funds to the place where they or their proceeds, may be found. In other words, I am not ready to say that the fact that the business that has the benefit of the funds is an incorporated business, standing alone, constitutes a good plea in bar against the equitable pursuit of such funds by the parties who otherwise would be entitled to them. And what the majority opinion means by saying that "no part of the sum claimed ever found its way into the assets of the estate in the hands of the appellee." I do not understand; for beyond any dispute, in either evidence or argument at bar, these funds went into the bank account of
Smith, Thorndike & Brown that was drawn upon by Smith, Thorndike & Brown in the payment of their obligations in the course of their business as grocers—these exact funds either being in the bank at the time the trustee took possession, or in the purchase money of the stock of goods of Smith, Thorndike & Brown that came into the possession of the trustee. Indeed, the bank account, and this stock of goods, together constituted, in the hands of the trustee, the assets that came into his hands for the benefit of creditors; and that such assets were larger by the amount of these treasury funds than they would have been had not the funds been so used, is one of the undisputed facts in the case, unless they were lost in outside ventures, of which there is no evidence, claim, or intimation in the entire record or argument.

The majority opinion turns on this point on the question on whom is the burden of proof. It treats the transaction as if it were nothing but a “deposit” by Smith in another corporation of which he was president (say a bank of which he was president) and then proceeds:

“As the general law of the land does not prohibit the organization of corporations (or voluntary associations) with power through by-laws or action of directors to authorize treasurers to deposit the official funds with other corporations of which such treasurers are presidents, the lack of conclusive proof that the act of Smith as treasurer was authorized cannot be taken as proof that he was unauthorized.”

And on the premise assumed in that statement I have no dispute with the conclusion.

But as already pointed out, the premise is wrong. The use of these funds by Smith in the private business of Smith, Thorndike & Brown, and for their private benefit is not, on its face, a “deposit” such as the contributors to the fund had a right to expect—the selection of a depositary in accordance with the unbiased judgment of the treasurer. On the contrary, in my opinion, the transaction is, on its face, in the absence of authority from the cestui que trust, a clear dereliction of trust; and being so on its face, in the absence of authority from the cestui que trust, the burden is on Smith to show the “authority.” The case of the members of the Grocers’ Association does not turn upon whether there were or were not by-laws that prohibited Smith’s conduct—their case would be just as strong in the absence of by-laws on that subject. Their case is made out on the face of the transaction. When as a member of some Bar Association I send my dues to its treasurer, I expect that he will deposit them with some institution for safe-keeping. And if through error in judgment in the choice of such institution the fund is lost, I have no ground to complain that there was a breach of trust. But I have the right to expect that that choice will be unbiased by any interest of his own—especially that the funds will not be used in his own and his associates’ private business. And when they are so used—put into a business that is always a venture, and in this case was already failing—I have made out a case, I think, that on its face, in the absence of authority shown, is the case of a breach of trust. It is the defense of Smith, Thorndike & Brown that depends on whether such or like authority can be shown. And it is on them that the burden falls. But even were the
The burden to be where the majority opinion places it, the order of the Court below dismissing the petition, ought not to be affirmed; justice would seem to me to require that in that case the party on whom the burden falls should be given an opportunity to put in the omitted evidence.

HAUSER et al. v. CITY OF ST. LOUIS.

(Circuit Court of Appeals, Eighth Circuit. May 21, 1909.)

No. 2,906.

1. DEEDS (§ 123*)—CONSTRUCTION—"HEIRS."

In a deed to the grantee and her heirs, a restriction upon alienation by the grantee is not alone sufficient to show clearly that the grantor used the term "heirs" as meaning "children," or otherwise than according to its recognized legal meaning.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 416, 417; Dec. Dig. § 123.]

2. DEEDS (§ 135*)—CONSTRUCTION—CONVEYANCE OF PROPERTY IN TRUST FOR WIFE—EFFECT OF RESTRICTION ON ALIENATION.

A deed conveying property to trustees for the benefit of a married woman contained a proviso that "it is understood * * * that the above-granted premises are conveyed as aforesaid for the sole and separate use and benefit of the said * * * and her heirs, and not to her assigns."

Held, that it was the evident purpose of the grantors to secure the property to the equitable grantee free from the marital rights and influence of her husband, and construed in the light of such purpose the restriction on alienation continued only during her coverture, and that after the death of her husband, and while she remained a widow, the trustees having conveyed the legal title to her, she had full power to sell and convey the property in fee simple.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 135.]

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

Christy M. Farrar and J. M. Holmes, for appellants.

Charles W. Bates and Charles P. Williams, for appellee.

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

AMIDON, District Judge. This is a suit in equity brought to obtain a decree defining and declaring the rights of complainants to a one-fifth interest in valuable real property situated in the heart of the city of St. Louis. In 1823 this property was owned by William Christy. On the 13th day of October of that year he and his wife executed the following deed, conveying the same to trustees for the benefit of their daughter:

"This deed, made and concluded this 13th day of October in the year of our Lord one thousand eight hundred and twenty-three, between Wm. Christy and Martha Christy, his wife, of North St. Louis, county of St. Louis, and state of Missouri, of the first part, and John O'Fallon, of St. Louis aforesaid, and Charles W. Thruston, of Louisville, state of Kentucky, in trust for Ann C. T. Farrar, the wife of Bernard G. Farrar, of the other part.

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
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"Witnesseth that the said William Christy and Martha, his wife, for and in consideration of the sum of eight hundred dollars lawful money of the United States, the receipt of which is hereby acknowledged, the said sum of eight hundred dollars paid to them by the said John O'Fallon and Charles W. Thruston, in trust as aforesaid, the said William Christy and Martha, his wife, have granted, bargained, and sold, and hereby do grant, bargain, and sell, unto the said John O'Fallon and Charles W. Thruston, in trust for the said Ann C. T. Farrar, now the wife of said Bernard G. Farrar, for her sole, separate, and only use, the following property, to wit:

"A square of ground on the hill in the addition to the old town of St. Louis laid off by said William Christy of two hundred and ten feet French measure in front by two hundred and seventy American feet back, bounded on the east by a street laid off by said Christy through said addition in its present direction, which passes on the north side of Clamoran's, now Thomas Brady's, square on the main street, on the west by Sixth street, and on the south by a street parallel to the one passing up by said Brady's square—the lots in said square above sold known on the plan of said addition by Nos. (25, 26, 27, and 28) twenty-five, twenty-six, twenty-seven, and twenty-eight.

"To have and to hold unto them, the said John O'Fallon and Charles W. Thruston, in trust to and for her, the said Ann C. T. Farrar, the wife of said Bernard G. Farrar, to her sole, separate, and only use as aforesaid, the aforesaid and bargained premises, together with all and singular the privileges and appurtenances to the same belonging or in any wise appertaining, and to her heirs forever.

"It is understood by the said grantors that the above-granted premises are conveyed as aforesaid for the sole and separate use and benefit of the said Ann C. T. Farrar and for heirs, and not to her assigns, and to the use and benefit of no other person whatever, to have, hold, enjoy, or posses any part thereof.

"In testimony whereof the parties to these presents have hereunto set their hands and seals at St. Louis the day, month, and year above written.

"W. Christy. [Seal.]
"Martha Christy. [Seal.]

At the date of this conveyance Ann C. T. Farrar was the wife of Bernard G. Farrar. In 1847 the trustees, by quitclaim deed, transferred the legal title vested in them to Mrs. Farrar "for her sole, separate, and only use." Mr. Farrar died in the year 1849. On June 4, 1866, Ann C. T. Farrar, then being a widow, conveyed the property in question to the city of St. Louis, by warranty deed, in consideration of the sum of $245,000. The city rests its right to the property upon that grant. The complainants claim as heirs at law of Ellen Farrar, a daughter of Ann C. T. Farrar, being one of five children, the issue of the marriage between Ann C. T. Farrar and Bernard G. Farrar. It is not necessary for the purposes of this case to set forth fully the facts upon which they base their right, nor the peculiar reasons why that right is not barred by the statute of limitations. The bill was dismissed on general demurrer.

The whole controversy turns upon the proper interpretation of the deed above set out in full. The primary object of the grantors was to secure the property to their daughter, free from the marital rights and influence of her husband. That object is conspicuous, not only in the peculiar form of the conveyance but in all its provisions. The grantors show no solicitude as to the respective rights of their daughter and her children. Their concern was to protect the property against the rights and solicitations of Bernard G. Farrar. Every term of the deed should be interpreted in the light of this primary purpose.
By the first paragraph of the habendum clause an equitable estate in fee is granted to Ann C. T. Farrar and her heirs, forever. The next paragraph, however, says:

"It is understood by the said grantors that the above-granted premises are conveyed as aforesaid for the sole and separate use and benefit of the said Ann C. T. Farrar, and her heirs, and not to her assigns, and to the use and benefit of no other person whatsoever, to have, hold, enjoy, or possess any part thereof."

Seizing upon the phrase that the grant is not to the assigns of the grantee, counsel for the complainants make the following argument: They say, first, that, because the grant does not extend to the assigns of the grantee, it is impossible that she should take a fee in the property; hence they say that Ann C. T. Farrar took only a life estate. To support such a contention it is necessary to get rid of the words "heirs forever" in the paragraph preceding. This is accomplished by the familiar doctrine that the word "heirs" will be construed in a popular sense as meaning "children," when the entire grant shows clearly that such a meaning was in the mind of the grantor; and it is insisted that such a meaning in the present grant follows as a necessary conclusion from the restriction as to "assigns." The effect of the deed as thus interpreted is to convey to Ann C. T. Farrar a life estate in the property, with a remainder to her children then in being, opening, however, to let in after-born children, under the rule applied and explained by the Supreme Court of Missouri in Kinney v. Mathews, 69 Mo. 520.

This argument is based upon two fundamental fallacies: First, it is urged that the equitable fee granted to Mrs. Farrar is by a proper interpretation of the deed cut down to a life estate by the restraint upon her alienation of the property, and that the word "heirs" for this reason should be interpreted to mean "children." So far as we are aware, a restraint upon alienation alone has never been held to show clearly that a grantor used the term "heirs" as meaning "children." All the authorities agree that in order to justify such an interpretation the intent of the grantor must be clear. McDowell v. Brown, 21 Mo. 60; Allen v. Craik, 109 Ind. 476, 9 N. E. 919, 58 Am. Rep. 425; Roth v. Rauschenbusch, 173 Mo. 584, 73 S. W. 664, 61 L. R. A. 455. No case has been brought to our notice, nor have we been able to discover any case, in which a restraint upon alienation alone has been held to show that the grantor used the terms "heirs" other than according to its recognized legal meaning. In all the decisions brought to our notice by counsel for complainant, the restraint upon alienation was coupled with other language in the deed evidencing the intent. It was a cardinal rule of the common law that the grant of a fee, coupled with a restraint against all alienation of the property, did not limit the fee; but the restraint was held to be repugnant to the grant, and for that reason was rejected as of no force. 4 Kent, Com. 131; Potter v. Couch, 141 U. S. 296, 315, 11 Sup. Ct. 1005, 35 L. Ed. 721. If such an interpretation was necessary in the present case, we should not feel the slightest hesitancy in applying the rule and treating the restraint upon alienation as void.
Second. But no such interpretation is necessary. The limitation of the power of alienation, even when a fee is granted, has no application to estates in trust for the benefit of married women. This exception was found necessary in order to protect the rights of married women during coverture. It was at first held that restraints upon alienation, when married women were given the equitable ownership of property, were void, the same as in the case of legal estates. This, however, resulted in defeating the whole object underlying such separate estates. The subject is clearly explained by Lord Cottenham in Tullert v. Armstrong, 4 Myne & Craig, 377, 405, as follows:

"When the court first established the separate estate, it violated the laws of property as between husband and wife; but it was thought beneficial, and it prevailed. It being once settled that a wife might enjoy a separate estate as a feme sole, laws of property attached to this new estate; and it was found, as a part of such law, that the power of alienation belonged to the wife, and was destructive of the security intended for it. Equity again interfered, and, by another violation of the laws of property, supported the validity of the prohibition against alienation."

See, also, 1 Leading Cases in Equity, pt. 2, p. 713.

The whole doctrine of the separate estate of married women is equitable, and the ancient common-law rules of property are applied to it only in so far as they are compatible with the object which courts of equity sought to attain in the creation of such separate estates. Mr. Pomeroys, after fully explaining the subject in his work on Equity Jurisprudence (section 1107 et seq.), says:

"The subject-matter on which the restraining clause is to operate may be any kind of property, real or personal, and any estate therein, absolute, for life, or for years." Section 1108.

Prof. Gray, in his work on Restraints on Alienation, says, at section 135:

"There is one exception to the invalidity of restraints on the alienation of fees, or absolute interests. When, in the case of married women, the doctrines of separate use and restraints upon anticipation came into existence, the interests, alienation of which it was sought to restrain, were life interests. It was only in Baggett v. Meux, 1 Coll. 138 (1844), that the question as to the validity of a clause against anticipation upon a gift of an absolute interest came up. In this case the legal estate in land was devised to a married woman, in fee, for her separate use, with a direction that she should not sell or incumber it. She did incumber it. Vice Chancellor Knight Bruce held that a restraint on anticipation was equally valid upon a fee simple as upon a life estate, and that the incumbrance was void. The decision was confirmed by Lord Lyndhurst. 1 Phil. 627."

See, also, Tiffany on Real Property, p. 1138; Perry on Trusts (5th Ed.) § 671; Brown v. Foote, 2 Tenn. Ch. 255, 259.

In speaking of a devise of a fee, coupled with an absolute restriction upon alienation during coverture, the court says in Robinson v. Randolph, 21 Fla. 629, 58 Am. Rep. 692:

"The court of equity having created such estate, it was held that it could modify its creature by annexing to it the restraining feature."

Such being the law, the entire foundation of complainant's argument is swept away. The deed being a grant for the benefit of a married woman, an absolute restraint upon her alienation of the property
during coverture was entirely consistent with her taking an equitable fee to the property, which, upon the death of her husband, became an absolute estate free from the restriction; for it is well settled that the trust continues only during the marriage relation. Pomeroy’s Equity Jurisprudence (3d Ed.) § 1109. Upon its termination the wife became vested with all the powers over the property possessed by a feme sole. The deed of Mrs. Farrar, therefore, after the death of her husband, passed the entire estate to the defendant.

It is urged, however, that the exclusion of “assigns” should be interpreted as a limitation upon the quantum of the estate, instead of a restriction upon the grantee’s power of alienation. But why should such an interpretation be adopted? There is nothing in the deed supporting it, and it is out of harmony with the primary purpose which caused the conveyance of the property to trustees. It may be conceded that the deed is not drawn with legal accuracy; but it seems to us that the general purpose of the grantors is not open to doubt. They were apprehensive that the provision which they were making for their daughter would in some way be lost through the imprudence or solicitation of her husband. The whole last paragraph of the deed seems to us to be simply the language of a layman seeking to emphasize that purpose. It may be that there was also in the minds of the grantors a desire that the property should continue for all time to be the family seat. If that was in fact an end desired, its accomplishment would cause such a restriction upon the power of alienation as the law could not sustain. Again, if we should interpret the word “heirs” in the deed as meaning “children,” then it would contain no general words of inheritance. The result would be, as counsel for complainant says, that Mrs. Farrar would take an equitable estate for life, with a legal remainder to her children. Their estate, however, would also be for life, as the change of “heirs” to “children” would leave no words of general succession. As a result, upon the death of Mrs. Farrar’s children, the estate would then revert to the grantors, or their heirs. Such a result, it is conceded by both parties, was never in the contemplation of the grantors. A fair interpretation of the last paragraph of the deed seems to us simply to limit Mrs. Farrar’s power of alienation during her coverture.

The decree must therefore be affirmed.

S. S. McClure Co. v. Philipp.
(Circuit Court of Appeals, Second Circuit. May 19, 1909.)
No. 219.

1. Libel and Slander (§ 107)—Damages—Mental Suffering—Evidence.
In view of the settled law that in an action for libel the jury may consider the mental suffering of the plaintiff attributable to the libelous article, it is not error to permit him to testify as to his feelings, not only on reading the alleged libelous article, but also a subsequent article pleaded and introduced by defendant as a retraction, as bearing on the question whether the alleged retraction diminished the injury, where the jury are

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep’r Indexes
properly instructed that they cannot allow damages on account of the second article.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 299; Dec. Dig. § 107.*]

Retraction, apology, or separation as ground for mitigation of damages, see note to Post Pub. Co v. Butler, 71 C. C. A. 315.]

2. Libel and Slander (§ 110*)—Action—Evidence in Mitigation.

Where an alleged libelous article charged plaintiff with having received rebates from a railroad company between certain dates, in violation of the statute making such receipt a criminal offense, it was not error to exclude as irrelevant testimony offered to show that plaintiff, as manager of a corporation, had received rebates several years before the enactment of such statute.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 308, 311; Dec. Dig. § 110.*]


An instruction in an action for libel considered, and held without prejudice to the defendant, even if a statement contained therein was not technically correct.

[Ed. Note.—For other cases, see Libel and Slander, Dec. Dig. § 124.*]


In an action for libel in publishing an article charging plaintiff with having received rebates from a railroad company, which was a criminal offense under the statute (Act Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1907, p. 880]), and referring to the same as a "private graft,” it was not error for the court to instruct the jury as to the effect and meaning of the word "graft," as used therein.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 366; Dec. Dig. § 124.*]

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

On writ of error to the Circuit Court for the Southern District of New York to review a judgment entered upon the verdict of a jury, in an action of libel, for $15,000 in favor of the plaintiff.

Roe & McCombs (Gilbert E. Roe, W. F. McCombs, Jr., and Charles L. Burr, of counsel), for plaintiff in error.

Huntington, Rhinelander & Seymour (Francis C. Huntington, Thomas N. Rhinelander, Origen S. Seymour, and Wm. C. Quarles, of counsel), for defendant in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. The action is for libel. The article alleged to be libelous was published in the January, 1906, number of the defendant’s magazine. In brief, the article charges that the plaintiff, acting as president and manager of the Union Refrigerator Transit Company of Wisconsin, had received rebates, and other unlawful perquisites, in the form of “commissions” from the Chicago, Milwaukee & St. Paul Railroad Company at Milwaukee, Wis., where the plaintiff resides. The answer alleges justification, privilege and mitigation. After it had been discovered that the January article was, in certain important particulars, erroneous, a second article was published, in April, 1906, which the defendant considers “a complete retraction.” The plaintiff, on the contrary, regards it as an aggravation of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep’t Indexes
the original libel. The April article was received under a stipulation providing for an amendment of the answer permitting its reception in evidence.

The first assignment of error which, in our judgment, requires serious consideration, challenges the action of the trial court in permitting the plaintiff to describe his feelings after reading the articles in question. He testified, after objection and exception, that when he read the January article he was much distressed because of the effect it would have upon his family, friends, business acquaintances, and his social and financial standing. He was then asked, "How did you feel after you read the article that was published in the April magazine?" The answer was, "I felt worse." It is well settled that in an action of libel the jury may in awarding damages consider the mental suffering of the plaintiff attributable to the libelous article. It is quite true that in, perhaps, the majority of cases the question is presented to the jury as a deduction from established facts. In the case at bar, with all the facts relating to the plaintiff's domestic, social and business relations established, argument as to effect of the false charges upon his mind might, it would seem, have been presented as effectively without the testimony complained of as with it. Before coming to the question of damages the jury necessarily had to reach the conclusion that the defendant had falsely accused the plaintiff of being a criminal and the conclusion that he had suffered great mental anguish from such a charge would naturally follow. But what may be considered by the jury may be proved, and where the question relates to the mental suffering of the plaintiff no witness can speak ex cathedra but the plaintiff himself.

Regarding the April article, which was introduced by the defendant as a retraction of the January charges and to show that the January article was not written maliciously, we see no reason why the plaintiff was precluded from showing that it did not have the effect upon his mental condition which the defendant thinks it should have had. To illustrate: Assume that in an action for malpractice the defendant admits that the initial treatment prescribed by him was improper, but that at a later date, by giving the proper remedy, he effected a complete cure. It will probably not be contended that the plaintiff in such an action is precluded from showing that his health was worse after the alleged cure than it was before; in other words, that the wound was not healed. If the jury found that instead of being straightforward, manly and open disavowal which the case demanded, the April article was a disingenuous subterfuge which made an unimportant correction but left the main accusation unaltered, they were, it seems to us, justified in reaching the conclusion that the April article was not calculated to diminish the injury. In any view, therefore, the effect of the answer was inconsequential and negligible if the jury found, as they must have done, that instead of a recantation the defendant, after three months of investigation and reflection published a reiteration of the charge of criminal wrong doing. In such circumstances it is hardly possible that the plaintiff's state of mind could have remained unchanged, surely the April publication
could not have made him feel better and when he testified "I felt worse" he was stating a conclusion which, on the assumption that he was innocent of the charge of rebating, was inevitable.

That evidence of mental suffering is admissible in actions of this character has frequently been upheld by the courts. In the case of Chesley v. Thompson, 137 Mass. 136, the Supreme Court of Massachusetts says:

"In all cases in which the plaintiff is entitled to recover damages for mental suffering, evidence of the actual suffering caused by the act of the defendant is admissible; and, since parties have been admitted as witnesses, the testimony of the plaintiff as to his sufferings is admissible, for he knows best what he has suffered. His interest in the action only affects his credibility. Damages for mental suffering naturally resulting from the publication of the slander are not special damages which must be specifically alleged in the declaration." See, also, 25 Cyc. pp. 533, 534.

That the general objection interposed to the question above quoted is insufficient to sustain the specific objections which are now urged is established so far as this court is concerned by Sigafus v. Porter, 84 Fed. 430, 28 C. C. A. 443. But assuming all for which the defendant contends, any misapprehension in the minds of the jury was set at rest by the clear and explicit statement of the court to the jury that they could not "allow any damages for the publication of the April article or anything therein contained."

It is contended that the court erred in sustaining the objection to questions asked the plaintiff on cross-examination relating to rebates received by him as traffic manager of the Schlitz Brewing Company. The defendant charged the plaintiff with having received rebates under the name of commissions from December, 1902, to June, 1903. The testimony excluded related to transactions in 1892-1894, ten years before the date of the charge in defendant's article, occurring under different conditions and prior to the Elkins act of February, 1903 (Act Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1907, p. 880]). We think this ruling was correct under the authority of Sun Co. v. Schenck, 98 Fed. 925, 929, 40 C. C. A. 163, and cases there cited. The question did not relate to rebates received by the plaintiff but by the Schlitz Brewing Company, while he was traffic manager, and at a time long prior to the passage of the law which set at rest many doubts which had before existed as to the criminality of such payments. The admission of the testimony, even though the question were answered in the affirmative, would have added no relevant fact and would have tended only to confuse still further a controversy already sufficiently complicated.

The court, after stating that between the January and April articles, Mr Baker, the defendant's editor, who wrote them, was informed of the complete falsehood in every material detail of the accusations made in the January article, charged the jury as follows:

"By the time he [Mr. Baker] interviewed Mr. Philipp the decision of the Circuit Court of the United States in vindication of the position asserted by Mr. Philipp was a matter of public record, being reported in the usual manner under date of December 28, 1903."

It will be observed that the court does not say that Baker knew of this decision or that he was informed of it, but simply that such a de-
cision had been rendered. This was true. United States v. Milwau-
kee Ref. Transit Co. (C. C.) 142 Fed. 247. Whether this decision,
being on demurrer, is correctly characterized as “in vindication
of the position asserted by Mr. Philipp” is a question depending
upon a variety of disputed facts and complicated propositions which it is
unnecessary to decide for we are convinced that even if the charac-
terization were incorrect the mistake in no way injured the defendant.
The court was endeavoring to impress upon the jury that before he
wrote the April article Mr. Baker knew, or could have known, all of
the facts relating to the falsity and injustice of his charges in the Jan-
uary article. The fact that the United States had brought an action
against the Milwaukee Company had been called to his attention and,
had he shown the slightest interest in that litigation, he would have
discovered by an examination of the decision, at least, the fact that
defendants had interposed a demurrer which had been overruled aft-
er an elaborate discussion of the law, by the court. The court con-
tinued its charge as follows:

“Having been told of these things or having an opportunity to discover these
things, and fully recognizing the admitted inaccuracy of the statements origi-

nally made by Thomas, both orally and in writing, Mr. Baker wrote and the
defendant published the April article.”

The mistake, assuming it to be one, in describing the decision of the
Circuit Court was innocuous. The point which the court was endeav-
oring to make was that the defendant’s editor, knowing of a litiga-
tion which might throw light on the question between him and the
plaintiff had not taken the trouble to examine the opinion rendered
in that litigation. But, irrespective of the character of the decision,
the question whether the defendant’s editor should have examined it
seems quite inconsequential in view of what he conceded knew.
The libelous article was based almost wholly upon a letter written by
Railroad Commissioner Thomas to Gov. La Follette. On January
10, 1906, Thomas and his two accountants, Gilman and Mason, ac-
knowledged over their own signatures as follows:

“We are now satisfied that neither the Union Refrigerator Transit Com-
pany, the Northern Refrigerator Transit Company, nor E. L. Philipp was
interested in the commissions paid, as shown by the copies of vouchers en-
closed herewith to the Furst Refrigerator Line.” • • • Nothing in the
investigation indicates or discloses that Mr. Philipp or the Union Refrigera-
tor Transit Company of Kentucky, of which he was president at the time,
or the Union Refrigerator Company of Wisconsin, of which he is now presi-
dent, ever received any commissions, rebates or refunds of any kind.”

All this being true, how could Mr. Baker’s knowledge or ignorance
of the court’s decision exercise a controlling influence over the de-
fendant’s duty to publish a fair retraction? Knowing, as it did, that
the official who originated the charge had made a full retraction, the
jury must have considered the defendant’s action in the light of that
knowledge. It is inconceivable that they could have been influenced by
anything said by the court upon a collateral and wholly different issue,
pending between other parties. The admission, by the man who origi-
nated it, that the charge against the plaintiff was false made it un-
necessary to examine the previous opinions of others, whether courts
or individuals, in considering the duty of the defendant in the premises.
The defendant devotes nine pages of its brief to a consideration of the proposition that it was error for the court to instruct the jury as to the effect and meaning of the word "graft," it being contended that it should have been left to the jury to say what was its real meaning. We confess our inability to appreciate this contention. In our judgment no man of mature age and ordinary intelligence who has lived in this country for the past ten years could have a moment's doubt as to the meaning of the word "graft" when applied to one who is charged with receiving unlawful compensation from a railroad corporation. In an article which deals with "criminal cash rebates" and unlawful emoluments the inference would be somewhat forced that the writer intended to refer to the recipient of "private graft" as one who had received "large compensation" or "unusual gains." The article was not meant to convey any such impression; it was intended to convince its readers that another dishonest official had been discovered who was enriching himself by practices, which were not only immoral but forbidden by law.

It would extend this opinion unduly were we to attempt a discussion of the 27 assignments of error referred to in the defendant's brief. We have considered those which we deem most important and think that none of the others discloses reversible error. It is impossible that an action like the present, which was fiercely contested for five or six days, can be tried without some ruling being made which would not have been made if the court had been aware at time of its full significance. But unless these mistakes are prejudicial a just result should not be disturbed. The endeavor of all courts should be to reach a correct conclusion as expeditiously as possible and, after a careful examination of the record, we are convinced that this has been done in the present case.

The judgment is affirmed with costs.

THE MAINE.

THE MANHATTAN.

(Circuit Court of Appeals, Second Circuit. May 19, 1909.)

No. 229.


A steam lighter, proceeding up the East River on the Brooklyn side with a barge in tow, held solely in fault for a collision between her tow and a steamer coming down the river, caused by her turning across the river in front of the steamer without having signaled her intention, and for stopping directly ahead of the steamer when her signal, given after she changed her course, was not answered. The steamer held not in fault for failing to sooner reverse, where she had already stopped her engines, and a reversal did not appear necessary until too late to prevent the collision.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 200-202; Dec. Dig. § 95.*

Signals of meeting vessels, see note to The New York, 30 C. C. A. 63.]

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
2. Shipping ($140*)—Liability for Cargo Lost—Contract for Exemption by Private Carrier.

A contract by a lighterage company to carry the product of a manufacturing company in and about New York Harbor, furnishing the full capacity of its vessels, made it a private carrier; and a provision of its contract that it should not be liable for goods lost or damaged, but requiring the owner to insure against such loss, is valid.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 493; Dec. Dig. § 140.*]

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

For opinion below, see 153 Fed. 635. See, also, 131 Fed. 401.

Kneeland & Harison (Lawrence Kneeland, of counsel), for libelant. Wing, Putnam & Burlingham (Charles Burlingham, of counsel), for the Maine.

Carpenter, Park & Symmers (Samuel Park, of counsel), for the Manhattan.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

PER CURIAM. The libelant delivered to the barge Abram Collerd, owned by the Commercial Lighterage Company, a cargo of pig lead and boxes of vitriol, to be towed by the steam lighter Manhattan, also owned by the same company, from Perth Amboy to the Joy Line Pier, East River. A little above the Brooklyn Bridge a collision occurred between the Collerd and the steamer Maine, which was coming down the river, as a result of which the barge and cargo sank. The libelant, owner of the cargo, but acting on behalf of the underwriters, who have paid its claim, brought this action in rem against the Manhattan and the Maine to recover its cargo damage. The district judge found both vessels at fault, directed a decree for half the damages against the Maine, and dismissed the libel as to the Manhattan.

The Manhattan, coming up river on a flood tide, kept over towards the Brooklyn side, so as to have ample space to round to at her destination, the Joy Line Pier on the Manhattan shore. There was no fault in this; but so long as she held this course on the Brooklyn side she conveyed the impression to all vessels which might encounter her that she was bound up river and that she would pass such as were navigating further out than herself on her port hand. She had no right to depart from this apparent course, and to head to the westward (for Manhattan) across the bows of a downcoming vessel, unless she had first signaled her intention to make such a change of course and had received the assent of the other vessel, which by such assent would promise to co-operate. Her witnesses admit that she starboarded, not only before she received any assenting signal, but even before she blew her own two blasts. This was an obvious fault, as the district judge finds, and it was undoubtedly the fundamental cause of the collision. Had the Manhattan not undertaken to deviate from the rule which required her to pass on the port side of the Maine, they would have passed in safety. For this fault the Manhattan was rightly condemned. It is probable that, if she had kept on the new course with-
out checking her speed, she would have crossed the bows of the Maine without being hit. She stopped broadside in front of the latter, because she heard no answer to her two-blast signal; but that circumstance does not excuse her. By changing course before assent was received, she had moved so far in the new direction that a belated effort to hold back only precipitated the catastrophe.

We think, however, the libel was properly dismissed against the Manhattan because of the contract between the Commercial Lighterage Company and libellant under which the goods were carried, the material provisions of which are as follows:

“Sixth. The lighterage company is to be held responsible for the full actual value of all material short-delivered at Perth Amboy or in New York Harbor, unless such short delivery is caused by fire or perils of the sea. It is understood however, that the lighterage company is responsible for all receipts given and taken by their barge captain in the dealings with steamship lines, consignees, or the shipping plant. Insurance will be effected by the smelting company at their expense, and no underwriter claiming through the smelting company is to have any claim upon the lighterage company, or upon their equipment or boats that they may charter or control, in case of loss. Should the smelting company fail to effect the necessary insurance, no claim for such loss will be made upon the lighterage company owing to such failure; neither will the lighterage company be held liable for any such loss, no matter how occurring, because of the failure of the smelting company to insure. * * *

“Ninth. All rates mentioned shall include the hiring of all barges, necessary tools, and equipment, and towing, also the shifting to and between different deliveries, and the rate shall cover deliveries at docks. * * *

As to the faults alleged against the Maine: The district judge found that there was delay in answering the Manhattan’s two-blast signal. We do not think the testimony warrants such a finding. The witnesses from the Maine all testify that they answered promptly with a like signal. If the witnesses from the Manhattan had testified that this answering signal was delayed, there would be a conflict of testimony; and the conclusion of the district judge, who heard the witnesses testify, as to their credibility, would be of great weight. But the witnesses from the Manhattan, including the master of the Conférence, do not so testify. They insist that the Maine did not answer the two-blast signal at all, or that they did not hear any answer. The master of the Lancaster, which with car floats was “very near abreast of the Maine” at that time—a disinterested witness—stated positively that she not only answered his own two-blast signal, but also blew another one, which was undoubtedly her answer to the Manhattan, although the witness did not notice the latter’s signal, and the district judge accepts his statement as correct. In the face of this testimony we do not think that the Maine can be held in fault for not answering promptly.

The charge that the Maine was in fault for her position in the river is satisfactorily disposed of by the district judge.

As to the speed of the Maine: That she exceeded the statutory rate in the upper part of the river, or was going hooked up when she found the river comparatively clear as she rounded Corlear’s Hook, is not material. Her witnesses all testify that her speed reduced as she found the river congested below that point, and we do not think the testimony of chance observers located on the Manhattan piers is sufficient-
ly persuasive to induce a rejection of their evidence. The real question is whether she stopped and reversed in time. As to stopping her engines, the testimony of her witnesses that they were stopped before she received the two-blast signal from the Manhattan is corroborated by the engine room log, which shows that they were stopped two minutes before the order was given to reverse. And the position of the schooner, which was the nearest source of danger at the time, makes it highly probable that this had been done. It seems to be the universal opinion that, had the Manhattan not checked her speed (as she did because of her failure to hear the assenting signal), she would have passed in safety; the reduction of speed effected merely by keeping the engines of the Maine stopped giving her sufficient clearance. It seems to us that the Maine was not bound to do more, nor bound to reverse and thus increase the margin of safety, until she was in some way advised that the Manhattan was not proceeding on her new course as it was to be expected she would, and that for that reason the margin of safety already secured by stopping would not be sufficient. But from all the testimony in the case it seems clear that the schooner, which suddenly shifted her course, and whose sails were thus interposed between the two approaching vessels, blanketed the Manhattan, so that her stopping could not be observed on the Maine. As soon as that obstruction was removed, the Maine promptly reversed full speed; and in view of the initial fault of the Manhattan in undertaking to navigate otherwise than as the rules prescribed, we are not prepared to hold the steamer in fault for not reversing before the necessity for so doing became apparent.

The decree is reversed, with directions to the District Court to enter a decree dismissing the libel against both vessels, with costs of both courts to each.

STOOMVART MAATSCHAPFY NEDERLANDSCHE LLOYD v. LIND et al

(Circuit Court of Appeals, Second Circuit. May 19, 1909.)

No. 228.

1. SHIPPING (§ 175*)—Demurrage—Rights of Charterer,

A vessel, under charter to load at either one of three ports at the charterer’s option, and which has been ordered to one where she cannot be loaded without delay, is not bound to remove to another to save the charterer demurrage, and does not forfeit the right to demurrage because she demands for such removal a sum which the charterer refuses to pay.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 175.*

Demurrage, see notes to Harrison v. Smith, 14 C. C. A. 637; Randall v. Sprague, 21 C. C. A. 337; Hagerman v. Morton, 46 C. C. A. 4.]

2. DAMAGES (§ 62*)—Breach of Contract—Duty of Party to Prevent Damage to Other Party.

A party to a contract, whose rights have not been violated, is not bound to take steps to reduce the damages which the other party, without his fault, may sustain if the contract is performed.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 119–132; Dec. Dig. § 62.*]

*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.

J. Parker Kirlin and John M. Woolsey, for appellant.

Wilcox & Green (Herbert Green, of counsel), for appellees.

Before LACOMBE, WARD and NOYES, Circuit Judges.

WARD, Circuit Judge. The respondent, having a contract with the government to transport coal to Honolulu, chartered the steamer Nederland to carry a cargo from Baltimore, Norfolk, or Newport News, at charterer's option. The charter provided that the steamer was to be given government dispatch for loading, and the parties agree that demurrage was to be at the rate of 8 cents per net registered ton, or $207.04 per day. Government dispatch at Newport News gives steamers loading for the government precedence at the loading berths over all other vessels and the greatest dispatch in loading. The charterer exercised its option by ordering the steamer to Newport News, where she arrived August 7th at 5:30 p.m. and reported ready to load.

The district judge found she could have been loaded in less than three days, beginning August 8th at 7 a.m.; that is, by August 11th at 7 a.m. The only thing that prevented immediate loading was the fact that the government had no coal ready. Accordingly August 9th the charterer, after communicating with Washington, ordered the steamer to go to Baltimore for her cargo. This they had no right to do, because the charter had become, by virtue of their ordering her to Newport News, an agreement to carry from Newport News to Honolulu. The owners, however, consented to the change, provided the charterer would pay for loss of time and port charges at Newport News and expenses of shifting to Baltimore. August 10th the charterer refused this proposition, saying that unless the steamer agreed to go to Baltimore she might wait at Newport News to load. August 13th the charterer ordered the steamer to shift to Norfolk for cargo, agreeing to pay the shifting expenses. The owners replied they would go there on payment of £400, which proposition the charterer refused. The steamer accordingly lay at Newport News and did not begin loading until September 3d at 7 a.m., finishing with her cargo September 5th at 2 p.m.

The libel was filed to recover for 26 days' demurrage; that is, from August 10th at noon to September 5th at 2 p.m. This allowed the charterers 2½ days for loading cargo, which was the time actually used. The district judge, however, allowed demurrage only from August 8th to 13th, inclusive, being 6 days, aggregating $1,242.24, and expenses of cables to August 10th, $5.95—in all, $1,248.19. He refused demurrage after August 13th on the ground that the demand of £400 as a condition of shifting to Norfolk was wholly unreasonable. We cannot agree with this conclusion. If unreasonable ness is to be considered, it was no more unreasonable for the steamer to refuse to move for a sum in excess of what was subsequently awarded her than it was for the charterer to refuse to pay any part of that sum. Besides, the proofs indicate that the owners, because of the negotiations, incurred legal traveling and cable expenses, amounting to several hun-
dred dollars, which, if proved, would bring their actual loss nearly up to £400.

We think that the district judge proceeded upon an erroneous view of the law in holding that the owners were bound to reduce the charterer's loss as much as possible. The owners' rights had not been violated, and they had sustained no loss because of the charterer's order to shift, first to Baltimore and afterwards to Norfolk. When a contract is entirely repudiated, the party whose rights are violated is bound to take all reasonable steps to reduce his own loss, and cannot recover damages which by reasonable care he might have prevented. Warren v. Stoddart, 105 U. S. 224, 26 L. Ed. 1117. This charter, however, never was repudiated. On the contrary, the steamer actually loaded and carried the cargo under it.

It is also true that one party cannot insist upon performing any part of a contract for the benefit of the other which the other notifies him not to perform. It is, however, equally true that one party cannot compel the other affirmatively to do something which the contract does not require of him. Men generally being reasonable, such departures from agreements are usually accomplished amicably; but they cannot be compelled. Whether the shipowner in this case was reasonable, or not, in its refusal to shift to Norfolk except upon its own terms, it had a right to refuse, because there was nothing in the charter compelling it to shift.

The decree is reversed, and the court below instructed to enter a decree in favor of the libelant for 26 days' demurrage, together with any expenses it may be found entitled to recover if it elect to take a reference.

MCKINNON v. BOARDMAN.
(Circuit Court of Appeals, Second Circuit. May 19, 1903.)

No. 240.

**Guaranty (§ 35*)—Unauthorized Indorsement of Check—Liability on Guaranty of Indorsement.**

Where the indorsement of the payee's name on a check was without authority, but was guaranteed by a bank, and on such guaranty the check was paid, the guarantor is liable for any loss sustained thereby by the paying bank.

[Ed. Note.—For other cases, see Guaranty, Dec. Dig. § 35.*]

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

For opinion below, see 164 Fed. 527. See, also, 169 Fed. 496.

On writ of error to the Circuit Court for the Southern District of New York to review a judgment entered upon findings by the court (a jury having been duly waived) in favor of the defendant in error (plaintiff below) for $106,233.34. The action was originally brought against Charles A. Hanna, as receiver of the National Bank of North America in New York. After judgment and on November 17, 1905, by consent of both parties, the action was continued in the name of John W. McKinnon, as agent for the share-
holders of the said bank, and he was duly substituted as defendant in the place and stead of the said Hanna.

The complaint alleges that on May 6, 1907, the Mercantile National Bank of the City of New York made a check upon itself directing the payment of $100,000 by itself to Morgan J. O'Brien, or order, and immediately delivered the check to Charles W. Morse, who on the same day indorsed the same in the name of O'Brien and delivered it to the National Bank of North America. The check and indorsements are as follows:

"No. 27575 L

New York, May 6, 1907.

"The Mercantile National Bank of the City of New York: Pay to the order of Morgan J. O'Brien, one hundred thousand dollars.

"$100,000.

Miles M. O'Brien, V. P.


The said Bank of North America, having indorsed the said check, presented the same for payment through the New York Clearing House and it was duly paid by the Mercantile National Bank.

The complaint further alleges that the indorsement by Morse of O'Brien's name was made without the authority, knowledge or consent of O'Brien; that the check with all rights thereunder was transferred to plaintiff and demand for payment of the amount received by the National Bank of North America was made and refused.

The defendant denies that the indorsement of O'Brien's name on the check was without his knowledge and consent, alleges that he has no knowledge of the assignment of the chose in action to plaintiff, and denies, on information and belief, that no part of the $100,000 has been paid.

For a first separate defense the defendant alleges, on information and belief, that in January, 1907, Morse sold to O'Brien 1,000 shares of the capital stock of the National Bank of North America and received in payment therefor $100,000 in cash and two notes for $100,000 each to the order of himself and by him indorsed in blank and delivered with the $100,000 in cash to said Morse; that on May 6, 1907, Morse discounted one of the said notes to the Mercantile National Bank and received a cashier's check of the said bank therefor drawn to the order of said O'Brien, which check is the one mentioned in the complaint; that in July, 1907, the said note matured and the amount thereof was duly paid by said O'Brien to the Mercantile National Bank and the note was delivered by it to him; that by reason thereof neither the bank nor its assigns have suffered any loss or damage by the payment of the said check to the National Bank of North America and the Mercantile Bank is not liable to any one because of such payment.

For a second separate defense the defendant, repeating the allegations of the first separate defense, alleges on information and belief that after the payment and discharge of the said note and check for $100,000 each, Morse re-purchased from O'Brien so much of the stock of the National Bank of North America theretofore sold by the said Morse to the said O'Brien as was represented and paid for by the two promissory notes before mentioned and paid therefor to O'Brien the same purchase price as the price at which the said O'Brien had theretofore purchased the stock from the said Morse, to wit, $200,000, and thereupon said Morse received full acquittance from the said O'Brien of all claims arising out of the said transactions between them; that by reason of the facts aforesaid the said O'Brien has suffered no loss by reason of the payment of said check of $100,000 to the National Bank of North America and neither O'Brien nor the plaintiff has any claim against the Mercantile National Bank thereon.

Underwood, Van Vorst & Hoyt (J. Markham Marshall, of counsel), for plaintiff in error.

Parker, Hatch & Sheehan (Alton B. Parker and Henry W. Clark, of counsel), for defendant in error.

Before COXE, WARD, and NOYES, Circuit Judges.
COXE, Circuit Judge (after stating the facts as above). The allegations of the complaint were found to be facts in the exact language as pleaded. But three witnesses were called—Morgan J. O'Brien, Miles M. O'Brien and the plaintiff. Morgan J. O'Brien testified as follows:

"I never gave C. W. Morse a written power of attorney. I did not authorize him to indorse the check in my name. I do not know that indorsement nor do I know the time it was made. It was done without my knowledge and consent."

Morse was not called as a witness, and the above testimony stands wholly uncontradicted. It is plain, therefore, that the indorsements by Morse were unauthorized and that the check would not have been paid but for the guaranty of the indorsements by the National Bank of North America.

The note presented for discount was signed by Morgan J. O'Brien payable to his own order and was indorsed by him, the check of the Mercantile National Bank was made out to his order and the money would, presumably, have been paid to him but for the fact that Morse indorsed O'Brien's name "per C. W. Morse" and also indorsed his own name and procured both to be guaranteed by the National Bank of North America. Miles M. O'Brien, vice president of the Mercantile Bank, testified:

"I made out the check to Morgan J. O'Brien. I did that because the note was his. I wanted him to get the money."

Whether a check payable to Morse would, upon request, have been made in exchange for the check as made is, of course, problematical. The facts do not warrant the conclusion that compliance with such a request could have been compelled. It is enough, however, that no such request was made.

The note was discounted at the request of Morse, but there is no finding that the proceeds of the discount were solely for his benefit. The inference from the facts as they occurred at the bank would seem to point to a different conclusion. But, however this may be, there can be no doubt that Morse sold the note without authority, received a check which he could not legally cash and was enabled to procure the money by an indorsement which he was not authorized to make and by procuring a guaranty of the indorsements by the Bank of North America. In other words, the bank's guaranty procured the money.

Those who have relied upon the bank's assurance that these indorsements were authorized and have lost thereby, are entitled to redress. The Circuit Court found:

"That said note discounted by the Mercantile National Bank of the City of New York at the request of said Morse, was delivered by said O'Brien to said Morse under an agreement between them that said Morse should retain the same in his possession, and renew the same, at the maturity thereof, which said agreement was in full force and effect between said O'Brien and said Morse on the 6th day of May, 1907, when said note was discounted by the Mercantile National Bank of the City of New York at the request of said Morse."

It is true that on June 17, 1907, six weeks after the check was paid, an agreement was made between Morse and O'Brien and his
partners changing materially the original understanding between Morse and O'Brien. As Morse had already discounted the note in question he quite naturally refused to have inserted a clause providing that he was to retain the notes in his possession. But even if the elimination of this clause might be considered as permitting future discounts it could have no retroactive effect and change the status of the transaction of May 6th, which was already established.

In no sense can it be considered a ratification of Morse's act for the reason, among others, that O'Brien did not know of the occurrences of May 6th until after October 22d when the note matured. It must be remembered that this is an action at law based upon the guaranty by the Bank of North America of unauthorized indorsements on the cashier's check. The controversy must be determined upon the facts as they existed at the time these indorsements were made, uninfluenced by subsequent occurrences arising under changed conditions. As pointed out by the trial judge these matters may be available in an equity action for an accounting but cannot be considered here. The acts of Morse in selling the note and in indorsing O'Brien's name upon the check were wholly unauthorized. The Mercantile Bank was induced to accept them as genuine because of the guaranty of the Bank of North America and we agree with the trial judge in thinking that these facts give to the plaintiff, who succeeds to the rights of the Mercantile Bank, a good cause of action against the Bank of North America which was paid the money because of its guaranty.

The judgment is affirmed.

DEVELOPMENT CO. OF AMERICA v. KING.

(Circuit Court of Appeals, Second Circuit. May 19, 1909.)

No. 236.

1. APPEAL AND ERROR (§ 1097*)—PRIOR DECISION AS LAW OF CASE.

The decisions of a Circuit Court of Appeals on questions presented on an appeal become the law of the case, and will be followed on a subsequent appeal therein.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Digs. §§ 4358-4368; Dec. Digs. § 1097.*]

2. MASTER AND SERVANT (§ 40*)—CONTRACT OF EMPLOYMENT—ACTION FOR WRONGFUL DISCHARGE—EVIDENCE.

Upon the question whether a service required of an employé was or was not reasonable, and such as he was required to perform under his contract of employment, his testimony as to his ability to perform it, which was known to his employer, is admissible.

[Ed. Note.—For other cases, see Master and Servant, Cent. Digs. § 48; Dec. Digs. § 40.*]

3. MASTER AND SERVANT (§ 41*)—CONTRACT OF EMPLOYMENT—DAMAGES FOR WRONGFUL DISCHARGE.

Where plaintiff, after his wrongful discharge from defendant's employment, bought stock in a corporation on an agreement that he should be elected an officer and receive a salary, but the corporation became insolvent before he had received sufficient salary to equal the loss on his

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
stock, the purchase of the stock and the employment must be regarded as a single transaction, in which plaintiff was loser, and he cannot be required to deduct from a recovery of salary from defendant the amount of salary received from such corporation.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 41.*]

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

On writ of error to review a judgment entered upon the verdict of a jury in the Circuit Court for the Southern District of New York, for $8,271.46 in favor of George H. King, who was the plaintiff below. The decision on the previous appeal to this court is reported in 161 Fed. 91, 88 C. C. A. 255.

Graves & Miles (Harmon S. Graves, Robert H. Miles, Jr., and Charles S. Yawger, of counsel), for plaintiff in error.

Putney, Twombly & Putney (Henry B. Twombly and Louis H. Hall, of counsel), for defendant in error.

Before COXE, WARD, and NOYES, Circuit Judges.

COXE, Circuit Judge. The facts appear sufficiently in the opinion of this court upon the former appeal and need not be restated. Notwithstanding the opinion of Judge Ward (161 Fed. 93, 88 C. C. A. 255), in which he dissented from the interpretation, by the majority of the court, of the order of July 23d, and notwithstanding, also, the opinion of the writer in Meyerson v. Hart (C. C. A.) 167 Fed. 965, we feel constrained to follow the former decision. The mere fact that the personnel of the court has changed furnishes no reason for departing from the construction heretofore placed upon the order. This is true, even though the court, as now constituted, might, were the controversy here for the first time, reach a different conclusion. The former decision is res judicata.

It is argued that the question whether the directions of the defendant requiring Rorison, the plaintiff's assignor, to proceed to Mexico and follow the instructions set out in the letter of July 23d were or were not reasonable, rested upon undisputed facts and should have been determined by the court. Again, it is argued that as Rorison was, concededly, capable of performing some of the duties assigned to him he was not justified in refusing to go to Mexico at all. It is contended that, at least, it was his duty to point out specifically the directions which it was impossible for him to perform, thus enabling the defendant to modify the letter of instructions. Had the defendant done so, limiting the work required to those things which Rorison admits he could have done there would, it is argued, have been no legal excuse for his failure to go to Mexico. On the other hand, had the defendant insisted upon the instructions being carried out ipssissimis verbis, Rorison might then have been justified in his peremptory refusal. All of these contentions are, however, covered by the decision of this court where it is said that "it was for the jury to determine whether the order was reasonable." That the attention of the court was sharply drawn to this question is manifest because of the dissent of Judge

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
Ward from the proposition that the question of the reasonableness of the order was one of fact. The court having found that the facts were in dispute and within the province of the jury, we are not justified in making a different ruling now.

The trial court was right in permitting Rorison to testify as to his inability to perform the duties assigned to him in Mexico. The defendant, through its vice president, had known Rorison for several years prior to June, 1902, and the work he had done in the past and, generally, the work he was competent to do in the future. The defendant was fully informed of these disabilities by Rorison himself before he was discharged. The jury were entitled to know what manner of man Rorison was and whether he was warranted in taking the position he did take with reference to the order to go to Mexico.

The court properly instructed the jury upon the question of damages. It is said that the $3,000 received as salary from the Federal Asphalt Company should have been deducted from the amount found due from the defendant. It appears that in order to obtain what he supposed would be permanent employment with the Asphalt Company Rorison, in January, 1903, invested $5,000 in its stock and was elected vice president at an annual salary of $4,000. In September, 1903, the company became insolvent and the amount invested became a total loss, leaving as the result a net loss of $2,000. We think that the purchase of the stock and the employment as vice president must be considered as a single transaction, the payment of the salary being conditioned upon the acquisition by Rorison of an interest in the company. In legal effect it was as if he had loaned the company $5,000 on condition that he should be permanently employed at a yearly salary of $4,000. The purchase of the stock was an expense incident to obtaining the employment. The charge fairly presented the issue to the jury and stated the law as enunciated by this court. None of the exceptions to the charge are well taken.

The judgment is affirmed with costs.

ABEL v. WARD et al.
(Circuit Court of Appeals, Second Circuit. May 19, 1909.)
No. 238.

SALES (§ 172)—ACTION BY SELLER FOR BREACH OF CONTRACT—DEFENSES.
Under a contract for the sale of a stated number of car loads of potatoes, to be shipped between January 1st and February 28th following, where the sellers had the potatoes ready for shipment, and a few days before the expiration of the time for delivery, having shipped all those ordered, requested the buyer to order or receive the remainder, but at his request, and on his assurance that he would receive the same later, delayed shipment until after the time stipulated in the contract had expired, the buyer cannot urge such delay as a breach of the contract, which justified him in refusing to receive any further shipments.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 172.*]

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

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rop'r Indexes
On writ of error to review a judgment entered on the verdict of
a jury in favor of the defendants in error (plaintiffs below) in the Cir-
cuit Court for the Southern District of New York for $2,382.28.

Truax & Watson (Isaac H. Levy, of counsel), for plaintiff in error.
Frank H. Reuman (Adolph Kiendl, of counsel), for defendants in
error.

Before COXE and WARD, Circuit Judges, and HOLT, District
Judge.

COXE, Circuit Judge. This is an action to recover damages for the
breach of a written contract entered into between the parties October
22, 1904, whereby the plaintiffs below agreed to sell to the defendant
22 car loads of potatoes to be shipped from Maine to New York be-
 tween January 1 and February 28, 1904. The contract was in the
form of a letter addressed by the plaintiffs to the defendant and ac-
cepted by him. It is as follows:

"Dear Sirs: We have sold to Abel & Co. 22 cars of Potatoes to be put up
165 lbs. net, all good stock and free from frost, and to be shipped between
January 1st and February 28th.

"5 cars of Rose at $2.10.

"5 " " Hebrons at $2.10.

"10 " " Green Mountains at $2.00.

"2 " " Bliss at $2.40.

"All stock to be shipped in first-class order, delivered New York free from
frost.

"Yours very truly,

W. B. Ward & Co."

Nine car loads were shipped by plaintiffs and were received and
accepted by the defendant, but the remaining 13 cars were refused
by him, for the reason that they were not shipped before February 28th,
pursuant to the terms of the agreement. The plaintiffs contend that,
although they were at all times ready and anxious to make the ship-
ment of the remaining cars, they were prevented from doing so by
the conduct of the defendant, who adopted a policy of procrastination,
obstruction and delay which prevented the shipment before February
28th and was in legal effect a refusal to take the goods. The ques-
tion submitted to the jury was, in substance, whether or not the de-
fendant had broken the contract by delaying his orders for the 13
cars until it was too late to make the shipments during the life of
the contract and then, at the last moment, refusing to receive more
cars.

The court charged the jury in the following language:

"If you find that after delaying and delaying, finally towards the end of
the contract, but before the time had come when it actually expired, the
defendant through the bookkeeper to whom he had entrusted the matter,
 notified the plaintiffs that he would not take any more, to stop sending the
potatoes on, then the plaintiffs would have a cause of action."

The proposition, as thus stated, was pronounced satisfactory by
the defendant's counsel and no exception was taken. It seems to be
conceded on all hands that it is the custom of the trade for the pur-
chaser in a contract for future delivery like the present to notify the
seller when he is ready to receive the goods, in other words to "order
them out.” This was the course pursued in the present instance. The plaintiffs had the potatoes on hand and were at all times ready to fill the defendant's orders. Owing to the decline in the market from $2 to $1.30 per bag, orders were slow in arriving and during the last two weeks of February the plaintiffs became apprehensive lest the defendant should delay the delivery until after the time stipulated in the agreement.

William B. Ward, one of the plaintiffs came to New York and saw the defendant on the 17th of February. He says:

“I told him then as our time was getting short I wished to ask him what about the balance of the goods, and I told him I had made up my mind to wire Simonson, my partner, to ship them all at once as our time was getting short; and he told me not to do so, that he would take every one of them and pay for them, but he wanted a little more time.”

As the potatoes were ready to ship and as ten days remained in which to comply with the terms of the contract, there can be no doubt that the plaintiffs would have made the delivery but for the request of the defendant for more time. The condition of the market made the request a natural one and one which the plaintiffs would wish to grant, but it probably did not occur to them that the defendant would urge as a breach of the contract the delay which had been granted as a favor to him.

After the 20th of February the defendant's agent, the defendant having left the city of New York, informed the plaintiffs, in reply to a request that he “order out” the balance of the goods, that he would order no more until the arrival of those already ordered. This was tantamount to saying: “I decline to receive the goods pursuant to our agreement.” If the jury believed the plaintiffs’ testimony they were justified in finding that the defendant by representations and promises which he did not intend to fulfill lulled the plaintiffs into inactivity until it was too late to make deliveries and then repudiated the contract. It is true that the plaintiffs' testimony is disputed but the only question for us to determine is whether there was sufficient evidence to submit to the jury on this issue and we are clearly of the opinion that there was, especially in view of the fact that defendant's counsel pronounced the charge “satisfactory” in this respect.

The rule of damages was correctly stated by the trial judge.

The defendant seems to think that his rights have in some manner been jeopardized by the fact that at a previous trial the plaintiffs were permitted to withdraw a juror and amend their complaint by alleging an extension of the contract beyond the 28th of February. The defendant complains that the plaintiffs have not proved this extension, but have been permitted to recover upon a different theory. If this were true it is difficult to see how the defendant has been injured. A controversy more simple upon the facts can hardly be imagined. A contract to ship 22 cars of potatoes between January 1st and February 28th, the seller at all times ready to deliver and the buyer, because of a falling market, urging delay and inducing the seller to defer delivery until too late to complete it by the stipulated time. It is inconceivable that a party to such a controversy could be misled to his injury because the cause of action or defense was based upon a different
"theory" than the one anticipated. The testimony was the same no matter what inference might be drawn therefrom and there could be no "surprise" in the legal sense, because the plaintiffs argued that the jury might find from the testimony that the defendant had broken his contract. The most that can be said is that the situation is one which frequently arises where the court permits an amendment conforming the pleadings to the proof. In the case at bar, however, the complaint, though not artistically drawn, does allege:

"That on or about the 28th day of February, 1905, * * * the defendant did notify the plaintiff that he could not accept or receive any further deliveries of potatoes under the said contract."

The proof of repudiation was admissible under this allegation. But, as before stated, the defendant having acquiesced in the charge which presents this question, and having pronounced it satisfactory, is not now in a position to insist that the question should not have been submitted to the jury.

We are convinced that a correct result was reached and that no error warranting a reversal is presented by the record.
Judgment affirmed with costs.

THE EUGENE F. MORAN.
THE CHARLES E. MATTHEWS.
SCOWS 15 D AND 18 D.
Circuit Court of Appeals, Second Circuit. May 25, 1909.
Nos. 282, 283.

COLLISION (§ 75*)—TOW—CONTRIBUTORY FAULT OF TOW—FAILURE TO CARRY PROPER LIGHTS.

Under rule 11 of the supervising inspectors of steam vessels, adopted pursuant to section 2 of the Inland rules (Act June 7, 1897, c. 4, 30 Stat. 102 [U. S. Comp. St. 1901, p. 2884]), the lights thereby required to be carried by a scow in tow are not solely to prevent collision with herself, but also to assist in indicating to approaching vessels the number and length of the tow and positions of the vessels; and she may be charged with contributory fault for a collision with another vessel of the tow because of her failure to comply with such rules.

[Ed. Note.—For other cases, see Collision, Dec. Dig. § 75.*]

Appeals from the District Court of the United States for the Southern District of New York.
See, also, 154 Fed. 41, 83 C. C. A. 153; 212 U. S. 466, 29 Sup. Ct. 339, 53 L. Ed. —.

James E. Carpenter, for the scows.
W. S. Montgomery, for the Charles E. Matthews.
Archibald Thatcher, for New York C. & H. R. R. Co.
Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. These causes came here upon appeals from decrees of the District Court, Southern District of New York, holding

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
the tugs Moran and Matthews and the scows 15 D and 18 D all in
fault for a collision between 15 D and a car float belonging to the
New York Central & Hudson River Railroad Company. Both colliding
vessels sustained damages. This court affirmed the conclusions of the
District Court as to faults of navigation and responsibility therefor.
154 Fed. 41, 83 C. C. A. 153. A question was presented as to the as-
se ssment of damages between the different vessels, which will be
found stated and the authorities bearing upon it cited in our former
opinion. We decided to certify that single question to the Supreme
Court, stating that when it might be answered this court would dispose
of the decrees appealed from. Such question was therefore so certi-
fied, as follows:

"In what proportions shall the damages sustained by the libelants be as-
 sessed upon the offending vessels?"

A mandate has now been received from the Supreme Court, declar-
ing that it is the opinion of that court that such damages should be
assessed equally upon the offending vessels. The opinion of the Su-
preme Court was filed February 23, 1909, reported in 212 U. S. 466,
29 Sup. Ct. 339, 53 L. Ed. ——.

Our attention has been called by counsel for the scow 18 D to a
passage in that opinion, and we are asked to reconsider our former
decision as to the liability of that vessel. The passage reads as fol-
 lows:

"The only fault on the part of the 18 D, that is set out in the statement,
is the absence of a light, and it is said that 'therefore' it was party to a
common fault. We doubt whether the conclusion follows from the premises.
When a duty is imposed for the purpose of preventing a certain consequence,
a breach of it that does not lead to that consequence does not make a de-
fendant liable for the tort of a third person, merely because the observance
of the duty might have prevented the tort. See Gorris v. Scott, L. R. 9 Ex. 125;
Ward v. Hobbs, 4 App. Cas. 13, 33. The question arises, therefore, whether
the duty to give warning by a light was imposed upon 18 D for any other
purpose than to prevent collision with itself. If not, then, as the boats are
dealt with as individuals, and not as parts of a single whole, we do not see
how the absence of a light on 18 D can be said to have contributed to the
loss. * * * A duty of wider scope has been thought to exist in a some-
what different case. The Lyndhurst (D. C.) 92 Fed. 681, 682."

Act June 7, 1897, c. 4, § 2, 30 Stat. 102 (U. S. Comp. St. 1901, p.
2884), being the inland rules of 1897, provides that the supervising
inspectors of steam vessels and the supervising inspector general shall
establish such rules to be observed as to the lights to be carried by
ferry boats and by barges and canal boats when in tow of steam ves-
sels as they from time to time may deem necessary for safety. The
rule adopted by them and in force at the time was rule 11, which,
among other things, provides that:

"All scows without rudders or other means of guidance, being towed by
hawser behind steam vessels on any navigable waters of the United States,
shall carry a regulation white light at each end of each scow (such lights to
be carried not less than 6 feet above the deck) as shown in diagram No. 4,
department circular No. 27, dated February 13, 1894."

The same rule also provides in great detail for barges or canal boats
when towed tandem and when towed in tiers, prescribing the locations
and character of the lights to be carried by them. These regulations of the inspectors, taken in connection with the statutory regulations for steam vessels when towing, undertake to provide a scheme of illumination which may enable vessels approaching a towed flotilla to make out, with some measure of accuracy, not only the course of the tug and tow, but also the tow's make-up (whether tandem or in tiers), and its length. We find nothing in the language of the rule nor in the context to indicate that it was the intention to provide for the carrying of lights by a scow thus towed solely to prevent collision with herself. Apparently this rule, like all other regulations for carrying lights, was devised for the purpose of conveying information as to the scow's whereabouts, so as to enable all vessels navigating in her vicinity to do so with greater safety to themselves and to each other, as well as to the scow.

Having violated an express rule of navigation, scow 18 D would seem to be an offending vessel, and on the record in this cause we cannot say that her fault did not contribute to the catastrophe. The Moran was towing these two scows tandem on a hawser, 40 to 45 fathoms to the leading scow 15 D, which 18 D followed closely. The Moran displayed her vertical towing lights, three of them, which indicated that she had more than one vessel in tow. The Matthews saw these lights, understood their meaning, and looked for the tow, but could not locate it. The Moran's lights gave timely warning to all approaching her, as the Matthews did, that she had two or more vessels in tow; but they did not indicate whether the towed vessels trailed directly astern of her, or swung off to port or starboard, nor did they indicate where the tow ended. Lights were prescribed by authority to be carried by the towed vessels in order to indicate these facts. Had 18 D carried the lights which the rule required, presumably they would have been seen, and, if seen, would have warned the Matthews that between the vessel that carried them and the tug carrying the three vertical lights there would be found a towing hawser. With such a warning, it may well be that the Matthews would have navigated so as to avoid coming in contact with such hawser, and thus she might have avoided collision with 15 D, which was fastened to it. We cannot hold that the fault of 18 D did not contribute to the collision.

The District Court assessed the damages in the proportions indicated by the Supreme Court. Therefore the decrees are affirmed, with interest and a single bill of costs.

THE MACY.

(Circuit Court of Appeals, Second Circuit. May 25, 1909.)

No. 276.

NAVIGABLE WATERS (§ 24*)—OBSTRUCTION BY WRECK—LIABILITY OF OWNER FOR FAILURE TO MARK WRECK.

The owner of a canal boat which was sunk in the channel of the Hudson river, who failed for two days without good excuse to mark the place, as required by Act March 25, 1899, c. 425, § 15, 30 Stat. 1152 (U. S.  

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
Comp. St. 1901, p. 3543), did not act within a reasonable time, and was liable for damage done to another vessel by collision with the wreck.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. § 66; Dec. Dig. § 24.*]

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

This cause comes here upon appeal from a decree of the District Court in favor of the owners of the tug boat Hiawatha against the canal boat Macy for damages resulting from a collision.

Armstrong, Brown & Boland (Pierre M. Brown, of counsel), for appellant.

Wing, Putnam & Burlingham (Charles C. Burlingham, of counsel), for appellee Baxter.

J. A. Nelson, for appellees Egerton et al.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. On February 14, 1907, about 3 p. m., the tug Hiawatha was proceeding down the North River about 1,000 feet out from the Jersey shore in the vicinity of Ft. Lee, when she came into collision with the sunken canal boat Macy. The latter, through some mishap into which it is not necessary to inquire, sank, at about the place where the Hiawatha collided with her, on February 12th between 7:30 and 8 a. m. No part of her projecting above the surface gave notice of her presence, nor was her wreck marked by any buoy or beacon.

Act March 25, 1899, c. 425, § 15, 30 Stat. 1152 (U. S. Comp. St. 1901, p. 3543), provides as follows:

"Whenever a vessel, raft, or other craft is wrecked and sunk in a navigable channel, accidentally or otherwise, it shall be the duty of the owner of such sunken craft to immediately mark it with a buoy or beacon during the day, and a lighted lantern at night, and to maintain such marks until the sunken craft is removed or abandoned, and the neglect or failure of the said owner so to do shall be unlawful."

This statute was before us in The Anna M. Fahy, 153 Fed. 866, 83 C. C. A. 48, where it was held that the duty of marking the location of the wreck was placed by the statute upon the owner, and no one else, and that there is no divided responsibility. It was further held that when the owner of a sunken wreck has neglected to comply with the statute, and by reason of the absence of buoy, beacon, or mark of any kind, a vessel herself free from fault has sustained damages by a collision with the wreck, recovery therefore may be had against the offending vessel. We also held that the word "immediately," as used by the statute, means within a reasonable time, having in view the circumstances of the particular situation in hand.

It is apparent, therefore, that the decree against the Macy should be affirmed, unless some special circumstances require such a construction of the word "immediately" as would excuse her owner for his failure to mark her location for more than two days after she sank. It is contended that the river during this period was so obstructed

*For other cases see same topic & § number to Dec. & Am. Digs. 1907 to date, & Rep'r Index*
with ice that the wreck could not be located. The testimony does not support any such contention. Probably the conditions were such that nothing could be done in the way of raising the wreck, or even in beginning that operation; but the mere locating of the wreck is a different matter. The master of the tug Terry, which had the Macy in tow when she sank, took his bearings at the time, and, when asked afterwards, stated that she lay about 1,000 feet off the powder dock at Ft. Lee. She was eventually found between 900 and 1,000 feet off that dock, and, as the witness who found her says, "just where they told me she was from the office." Moreover, when the searchers reached there, they found that by some chance one of her fenders was floating above her; its line being still fast to the wreck. There is nothing to indicate that, if the owner had bestirred itself to get into communication with those on the tug who knew where she sank, and to employ some one to do what the statute required, it could not have complied with those requirements long before the Hiawatha struck the wreck.

The owner of the Macy also contends that it contracted with John F. Baxter (the Baxter Wrecking Company) to do this, and has brought the latter in under the fifty-ninth rule. As to what contract was made between them we have the evidence only of the two individuals who entered into it, Baxter and Hill, the president of the claimant. The latter says it was to "locate buoy and raise the wreck"; the former, that it was "to recover the boat." The conversation was through telephone. We are persuaded that Baxter's recollection as to the conversation is the correct one. It certainly is inherently more probable. No doubt, in order to recover the boat it would be necessary to locate her, and after she was located the usual course would be to mark her position for the guidance of the wrecking crews who might be sent to her. But that enterprise did not call for immediate action. We are not satisfied from the proof that it was agreed between the parties that, aside from recovery of the boat, Baxter agreed to carry out the special obligation, which the statute imposed upon the owner, of marking the position of the wreck by a buoy or beacon during the day and a lighted lantern at night, and maintaining such marks until the sunken craft might be removed.

The decree of this District Court is affirmed, with interest, and with costs to Baxter against the Macy.

THE NO. 32.

THE TRANSFER NO. 18.

(Circuit Court of Appeals, Second Circuit. May 25, 1900.)

No. 268.

COLLISION (§ 102*)—TUGS WITH TOWS—MUTUAL FAULT.

One of two car floats, on either side of a transfer tug coming out of the Greenville channel in upper New York Bay, about half way between Bedloe's Island and Robbins' Reef, at night, came into collision with a

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
coal barge, which formed one of a tow of 34 vessels which was being
taken down past the mouth of the channel at a distance of 400 or 500
feet; the entire tow being about 1,300 feet long. Held, that both tugs
were in fault; the one passing down for proceeding with so long a tow
so near the mouth of the channel without taking precautions to observe
and warn any vessels coming out, and the transfer tug in failing to see
and avoid the barge, there being no evidence that the latter did not carry
proper lights.

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

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

This cause comes here upon appeal from a decree of the District
Court, Southern District of New York, holding the steam tug No. 32
solely responsible for the damages resulting from a collision between
the coal barge West Farms, in tow of No. 32, and a car float, which it
is alleged was in tow of Transfer No. 18.

Robinson, Biddle & Benedict (W. S. Montgomery and Roderick
Terry, Jr., of counsel), for appellant,
Wilcox & Green (Herbert Green, of counsel), for appellee Williams.
James T. Kilbret, for the Transfer No. 18.
Before LACOMBE, COXE, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. The collision happened in the upper
bay of New York, off the mouth of the dredged channel to Greenville,
a Pennsylvania Railroad terminal on the west shore of the bay, the
channel lying about half way between Bedloe's Island and Robbins' 
Reef. No. 32 was proceeding down the bay with 34 boats in tow, the
flotilla extending about 1,300 feet, and passed the mouth of Greenville
channel about 400 or 500 feet out. As her tow was passing the mouth
of the channel, the West Farms, which was the starboard boat in the
last tier, was run into by one of two car floats which came out of the
channel and were heading towards Brooklyn. The District Judge held
No. 32 in fault for failing to keep a proper lookout, and for proceeding
with so long a tow so closely to an outlet into the bay, without taking
special precautions to observe whether anything was coming out.

The testimony of the master of No. 32 as it is found in the record is
contradictory and very unsatisfactory. Apparently the District Judge
who heard him testify did not credit his account of what took place,
and we see no reason to dissent from the conclusion that he was in
fault. There is nothing in the evidence to indicate that there were no
lights on the tow, or that it could not be seen and easily avoided by the
tug which brought the car floats out of the channel. In the absence of
any testimony explaining and excusing her navigation, she should be
held in fault. The defense presents solely a question of identity, it
being insisted that neither of the car floats which Transfer 18 had in
tow that night collided with anything. If the record contained only the
testimony of the master and deckhand of No. 32 as to their observa-
tions of the colliding flotilla, identification would not be established.
But there is other evidence which we find conclusive.

No one challenges the truthfulness of the story told by the master

*For other cases see same topic & § Number in Dec. & Am. Digs. 1907 to date, & Rep'rs Indexes
of the West Farms that she was run into that night by one of two car floats in tow of a tug somewhere between the Statue of Liberty and Robbins' Reef; nor is it disputed that she was damaged by such collision. Apparently the blow was not a very severe one. The cost of repairs was only $250. Since the heavy loaded car floats projected far in advance of the tug, it is quite conceivable that the impact of the blow might not be felt by the witnesses called from the tug, who testify that they did not hit anything. There has been much inconsistency in the averments and assertions made on behalf of No. 32 as to the hour when the collision took place; but there is record evidence which definitely establishes it. Her tow was made up at the scow Amboy at Liberty Island. The regulations of the Pennsylvania Railroad Company require a blank "report of towing by tugboat" to be filled up, which gives the name or number of the tug, enumerates the units of the tow, and sets forth various other particulars in reference to them. Such report of towing by tugboat 32 from 2:35 a. m. June 6, 1907, to 10:40 a. m. of the same day, is produced from the records of the company. The first hour therein given, "2:35 a. m.," was taken by the deckhand, as he testified, from the clock in the pilot house at the time the lines were cast off from the scow, and he entered it in the report. This establishes the time the tug and tow started, and, although the tow was a large one, they could easily have reached the mouth of Greenville Channel by a little after 3.

A record of the movements of boats was also kept at the Pennsylvania terminal docks, head of Greenville Channel, and the entries in that record were testified to by the man who made them and put in proof. From this record it appears that the only floats and tugs which left between midnight and 6 a. m. were as follows: Transfer No. 16 left at 12:50 a. m., with car floats Nos. 12, 50, and 53 in tow. Transfer No. 18 (N. Y., N. H. & H.) left at 3:10 a. m., with car floats 46 and 48 in tow. The tug Gladiator left at 4:03 a. m., with a Long Island Railroad float No. 15 in tow. The Maryland left at 5:30 a. m. There is nothing to impugn the accuracy of this record, and in view of its disclosures we cannot escape the conviction that the tug, with two car floats, which the West Farms encountered when about halfway between Bedloe's Island and Robbins' Reef, off the mouth of Greenville Channel, was Transfer No. 18; and, having no sufficient explanation of her failure to observe and avoid the barge, we think she should be held in fault.

The decree of the District Court is reversed, without costs, and cause remanded, with instructions to decree against both vessels.

F. W. WOOLWORTH & CO. v. CONBOY.
(Circuit Court of Appeals, Eighth Circuit. June 3, 1909.)
No. 2,909.

1. NEGLIGENCE (§ 44*)—DANGEROUS PREMISES—STAIRWAY IN STORE.
It is not negligence for a mercantile firm to maintain an open stairway in its storeroom, inclosed except in front; and it is not liable for an in- 

*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 District of Minnesota.

This is an action for personal injury. The plaintiff in error, the defendant below, is the owner of the Five and Ten Cent Store at Minneapolis. The store room is 44 feet wide and 127 feet deep, and extends east and west fronting on Nicollet avenue. It advertised a special sale of granite ware, which attracted a large crowd, and among them the plaintiff. The counter at which this ware was sold was a long wall counter on the north side of the store, and situated a little to the west of the center. In front of it was a broad aisle extending the entire length of the store. To the west, and separated from this counter two or three feet, was a small counter, immediately back of which was an open stairway leading to the basement. The counter served to protect the stairway on the south side. On the east side it was protected by a railing, and on the north side by the wall of the building. A short distance back of this counter and the stairway was the partition of a private toilet room for the employees. Between this partition and the end of the counter was an aisle leading to the stairway. The entrance to the stairway was guarded by a gate, which was open at the time of the accident. The store was well lighted by windows, and also by arc lights, one of which was situated about 11 feet from the stairway. The basement was used only for storing goods, and not for their sale. The aisle leading to the head of the stairs was for the use of employes and patrons had no occasion to enter it. At the time of the accident a clerk was standing on the long counter above referred to, handing out goods to purchasers, who were required to approach him with the correct change for their purchases in their hands. The crowd became violent. Some of the women fainted, and others clambered on the counter. So great was the crush that the plaintiff was pushed past the man on the counter. She claims that she was crowded along down the aisle past the small counter, and then into the side aisle between it and the partition. Plaintiff, all the time that she was moving along, claims to have had her eyes on the clerk, and was hoping to attract his notice. But she says that she was pushed sidewise or backwards, head foremost, down the stairs. The negligence charged in the complaint is the unguarded stairway, and the permitting of a large and violent crowd to assemble on the store premises. A motion for a directed verdict was made by the defendant at the conclusion of the evidence, and denied. The case was then submitted to the jury, and resulted in a verdict and judgment in favor of plaintiff for $500. The denial of the motion for a directed verdict is the chief error assigned in this court.

Arthur M. Keith (Charles T. Thompson and Edwin K. Fairchild, on the brief), for plaintiff in error.

W. H. McDonald (F. H. Ayers, on the brief), for defendant in error.

Before HOOK, Circuit Judge, and RINEK and AMIDON, District Judges.
AMIDON, District Judge (after stating the facts as above). The motion should have been granted. It was not negligent to maintain the open stairway. It was separated from the part of the store to which patrons were invited or accustomed to resort. Indeed, if it had been situated in a portion of the room used by the public, that would not have constituted negligence. Important retail establishments are now accustomed to occupy several stories of the building in which their business is carried on. Open stairways leading from one story to another are a part of the ordinary equipment of such premises. Even when elevators are provided, there is usually a stairway adjacent to the shaft, and there are frequently other stairways in such rooms. Such stairways are closed on three sides, as was the one in this case; but the entrance is left open. Any other arrangement would be manifestly impracticable, and defeat the very object which the stairways are designed to accomplish. Such open stairways being an ordinary feature of store premises, the public, when resorting there, assume the risk arising therefrom, and are bound to protect themselves by the use of their eyes against such dangers. Mr. Justice Holmes, then speaking as Chief Justice of the Supreme Court of Massachusetts, states the rule applicable to such a situation as follows, in Hunnewell v. Haskell, 174 Mass. 557, 55 N. E. 320:

"There is no duty on the part of a shopkeeper to give warning of the presence of an ordinary flight of stairs in broad daylight, or to guard the necessary access to it, even if there is a crowd in his shop. The sides of the opening were guarded. Every one who is on an upper story knows that there probably are stairs from it somewhere, and must look out for them. The case is different from that of a hole in the floor which commonly is covered, and which is of a kind not to be expected."

See, also, Dunn v. Kemp, 36 Wash. 183, 78 Pac. 782.

The crowd on the present occasion seems to have been somewhat more violent than usual. Still such crowds are often found in large stores at the time of special sales, and during holiday seasons. They are an unavoidable feature of mercantile life in large cities. The defendant on the occasion in question had no reason to believe that such a sale as it was conducting would lead to any uncontrolled or violent conduct on the part of customers visiting the store, and was not therefore required to maintain its store in an unusual condition of safety to meet such an emergency. It had no reasonable cause to anticipate such violence, but, on the contrary, had a right to believe that patrons would demean themselves with a proper regard to others using the store. It was not, therefore, guilty of any negligence by reason of anything done by the crowd. In the excitement plaintiff seems to have lost her head and become wholly oblivious of her own safety or environment. She has met with an accident which is quite frequent, and there is nothing in this record justifying the shifting of her misfortune upon the defendant.

The judgment must be reversed, and a new trial granted.
THE SENECA.

NEW YORK & CUBA MAIL S. S. CO. v. DE BUHR.

(Circuit Court of Appeals, Second Circuit. May 25, 1909.)

Nos. 273, 274.

COLLISION (§ 82*)—STEAMSHIP AND BARK MEETING IN FOG—EXCESSIVE SPEED.

A decree affirmed, holding a steamship solely in fault for a collision at sea, at night, in a dense fog, with a meeting bark, for excessive speed and inattention to the bark's fog signals.

[Ed. Note.—For other cases, see Collision, Cent. Dlg. §§ 170-174; Dec. Dlg. § 82.*

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

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

For opinion below, see 159 Fed. 578.

Wing, Putnam & Burlingham (Harrington Putnam, of counsel), for appellant.

Convers & Kirlin (J. Parker Kirlin, of counsel), for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. Decrees affirmed, with interest and costs.

THE GUTENFELS.

(Circuit Court of Appeals, Second Circuit. May 19, 1909.)

No. 275.

SHIPPING (§ 118*)—DELAY IN FORWARDING GOODS—LIABILITY OF SHIPOWNER.

The owner of a steamship, which issued bills of lading acknowledging the receipt of merchandise on board for transportation from Calcutta to New York, is liable for loss resulting to the consignee because of the failure to forward by such vessel and the delay resulting.

[Ed. Note.—For other cases, see Shipping, Cent. Dlg. § 436; Dec. Dlg. § 118.*]

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

The decree of the District Court was for $720.69 in favor of the libelants for damages sustained by them through the failure of the steamship Gutenfels to deliver a quantity of shellac in New York.

For opinion below, see 166 Fed. 989.

Wing, Putnam & Burlingham (Charles C. Burlingham and Henry E. Mattison, of counsel), for appellant.

Alfred W. Varian (George Whitfield Betts, Jr., of counsel), for appellees.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
PER CURIAM. The amended libel unites a proceeding in rem against the steamship Gutenfels and a proceeding in personam against the Hansa Line, her owner. The Hansa Line answers as claimant and respondent. In these circumstances we do not deem it important to decide the somewhat perplexing question whether an action in rem against the vessel alone can be maintained.

In view of the exceptional conditions existing at Calcutta and the fact that the shellac in question was actually carried to New York by the Lindenfels, we think that there is some room for doubt whether the cargo was bound to the vessel, so as to create a lien. We have no doubt, however, that the Hansa Line is liable in personam under its contract. It would seem, therefore, that it is a matter of no moment whether it pays the damages as claimant or respondent.

The bills of lading acknowledged the receipt of the libelants' property in good condition on board the Gutenfels, to be transported from Calcutta to New York. There was a total failure of the Gutenfels to perform this obligation, in consequence of which the arrival of the cargo at New York was delayed nine days, with a loss of $67'2.94 to the libelants. No valid excuse is offered for the breach of the contract. The shellac was in the deck sheds ready for shipment, and the only reason why it was not received on board was that there was no room. But the carrier is bound to know the cargo space of his ship, and, where loss occurs, he, and not the shipper, who is wholly ignorant of the ship's capacity, must bear the loss.

The contract of affreightment was clear and definite, and there was a total failure by the respondent to perform the agreement to carry the cargo on the Gutenfels.

The decree is affirmed, with interest and costs.

In re SAMPETER.
(Circuit Court of Appeals, Second Circuit. May 19, 1900.)
No. 239.

BANKRUPTCY (§ 310*)—CLAIMS—TIME FOR PROVING.
A mortgagee, whose mortgage is foreclosed within a year after the mortgagor’s bankruptcy, is not entitled to prove his claim for a deficiency after the expiration of such year, having the right to prove it in the first instance as a secured claim, under Bankr. Act July 1, 1898, c. 541, §§ 57a, 57e, 30 Stat. 560 (U. S. Comp. St. 1901, p. 3443).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 505; Dec. Dig. § 310.*]

Appeal from the District Court of the United States for the Southern District of New York.
Thomas & Oppenheimer (Leo Oppenheimer, of counsel), for appellant.
James, Schell & Elkus (Abram I. Elkus, of counsel), for appellee.
Before LACOMBE, WARD and NOYES, Circuit Judges.

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
WARD, Circuit Judge. This is an appeal from an order of the District Court confirming the report of a referee in bankruptcy expunging the claim of Abraham Marks against the individual estate of Arnold Sampter. July 29, 1904, the firm of M. Sampter Son & Co. and the partners composing it, of whom Arnold Sampter was one, were adjudicated bankrupts. Marks, father-in-law of Sampter, was the owner of three mortgages on three lots of land belonging to Sampter to secure the payment of his three bonds, aggregating some $36,000. These mortgages were foreclosed, and judgment of foreclosure and sale entered April 4, 1905. Marks was in Europe from June, 1904, to October, 1905, on account of his health; but the foreclosure of these mortgages was in the hands of competent counsel here.

In the summer of 1907 the sale of other premises mortgaged by Sampter to Marks to secure the repayment of advances made to the firm produced a large surplus, which, his individual creditors being paid in full, will go to the firm creditors. In this state of things Marks filed August 16, 1907, more than two years after the adjudication, his claim against the individual estate of Arnold Sampter for the deficiency resulting in the foreclosure actions above mentioned, amounting to $8,866.36.

Section 57n of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 561 (U. S. Comp. St. 1901, p. 3444) provides:

"Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication; or if they are liquidated by litigation and the final judgment therein is rendered within thirty days before or after the expiration of such time, then within sixty days after the rendition of such judgment: Provided, that the rights of infants and insane persons without guardians, without notice of the proceedings, may continue six months longer."

Under sections 57a and 57e, of the bankruptcy act, Marks could have proved his claim, though it was secured, and not liquidated. Besides this, it was liquidated within a year of the adjudication. Service of copies of the complaints in the foreclosure actions on the trustee was not a proof of claim in bankruptcy. There is no ground for holding, assuming the power to do so, that the peremptory requirements of section 57n should be disregarded.

Order affirmed.

HOOD RUBBER CO. v. ATLANTIC MUT. INS. CO.
(Circuit Court of Appeals, Second Circuit. May 19, 1909.)

No. 284.

INSURANCE (§ 472)—MARINE INSURANCE—CONSTRUCTION OF POLICY.
An open policy of marine insurance on goods to be shipped from time to time by plaintiff by rail and lake contained a marginal clause providing that "this insurance is not to cover more than $100,000 by any one steamer or in any one place at one time." Held, that such clause did not relate to the amount of the loss, but of the insurance, and that where goods, although comprising different shipments, were assembled on one steamer to the value of $349,000, the policy was one for $100,000 on the whole, and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
the insurer was liable for $100,000 of a loss occurring, not exceeding $100,000.
[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 472.]

In Error to the Circuit Court of the United States for the Southern District of New York.
For opinion below, see 161 Fed. 788.
Wing, Putnam & Burlingham (James L. Putnam and Harrington Putnam, of counsel), for plaintiff in error.
Carter, Ledyard & Milburn (John G. Milburn and Walter F. Taylor, of counsel), for defendant in error.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

WARD, Circuit Judge. The plaintiff had a running policy with the defendant on goods from Boston by rail and water to lake ports, valued at net invoice and 20 per cent. added, sum insured $1,000,000. On the margin was written:

“This insurance is not to cover more than $100,000 by any one steamer or in any one place at one time.”

The plaintiff’s shipments were never over the value of $12,500, but the rail carriers bunched its shipments to a value of $349,426.70 on the lake steamer F. H. Prince, which during the voyage sustained damage in the sum of $85,996.70.

The defendant, contending that its insurance was to be treated as $100,000 on goods valued at $349,426.70, paid in accordance with the rules of marine insurance of the loss and of the expense in general average and under the sue and labor clause. The plaintiff brings this suit to recover the difference between the sum so paid and $100,000, on the ground that the purpose of the marginal clause was to limit the amount of loss payable by the defendant to $100,000.

The plaintiff contends that, as each shipment under the policy constitutes a distinct insurance, the marginal clause must be read as applying to each shipment. We do not concur in this view, but think, on the contrary, that the clause was intended to apply to the goods on any one vessel or in any one place, without reference to the time of the original shipment.

It is said that the clause may be read either as limiting the amount of insurance on the goods or as limiting the amount of loss payable, and that the latter construction being most favorable to the assured should be adopted. The judge of the Circuit Court held that the clause meant that the policy attached only to the extent of $100,000 on all goods on one steamer or in one place, and that for their value over that sum the plaintiff was a co-insurer. We think this conclusion right. “This insurance” means this policy of insurance. “Is not to cover more than $100,000” means, though for $1,000,000, it is to be treated as only for $100,000 upon goods in any one steamer or in any one place. No authorities are cited which are of any assistance.

The whole case turns upon the construction of the marginal clause; and, as we agree with the judge of the Circuit Court, the decree is affirmed, with costs.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1901 to date, & Rep’y Indexes
LEARY v. UNITED STATES.

(circuit court of Appeals, second circuit. May 19, 1909)

No. 260.

Bail (§ 84*)—Action on Criminal Recognizance—Defenses.

In an action in a federal court against the surety in a criminal recognizance given in another district and there duly estreated, that the record pleaded and introduced to show such fact also shows that a judgment was there entered against the surety, which was void for want of jurisdiction over his person, is immaterial; the action not being based on such judgment, but on the recognizance, which was not merged in the void judgment.

[Ed. Note.—For other cases, see Ball, Dec. Dig. § 84.*]

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

On writ of error to the Circuit Court for the Southern District of New York to review a judgment entered upon a verdict directed by the court in favor of the plaintiff below for $35,377.46. The controversy grows out of the litigation against Greene and Gaynor in the Northern District of Georgia. This action is upon a recognizance providing for the appearance of Greene in Georgia to answer any indictment which might be found against him. He failed to appear, and the bond was duly estreated. There are no disputed facts. Both sides moved for a direction of a verdict. The facts are fully stated in Kirk v. U. S., reported as follows: (C. C.) 124 Fed. 324; 130 Fed. 112, 64 C. C. A. 446; (C. C.) 131 Fed. 331; 137 Fed. 753, 70 C. C. A. 187; 204 U. S. 668, 27 Sup. Ct. 788, 51 L. Ed. 671.

Kellogg & Rose (Abram J. Rose and Alfred C. Petté, of counsel), for plaintiff in error.


Before LACOMBE, COXE, and NOYES, Circuit Judges.

COXE, Circuit Judge. The previous litigation in this court related to the bond given by John F. Gaynor with William B. Kirk as surety. The facts in the case at bar, so far as they relate to the proceedings in Georgia, are in all respects substantially similar to those in the Kirk Case, except that they relate to the bond given by Benjamin D. Greene with James D. Leary (the defendant’s intestate) as surety. The defendant argues that the proceedings in the District Court of Georgia were illegal for the reason that the recognizance was not in the form required by statute and was not properly estreated. We deem it unnecessary to consider this contention further than to say that, after a careful consideration of the facts upon which defendant’s argument is based, we decided, in the Kirk Case, that the recognizance was properly estreated and that the United States acquired a perfect cause of action thereon.

It is argued that the action is founded upon a judgment alleged to have been entered in the Georgia court upon scire facias proceedings instituted thereon, which judgment has no extraterritorial effect and cannot, therefore, be enforced in the Southern district of New York.

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep’t Indexes
The defendant further contends that the right of recovery upon the
recognizance was merged in the Georgia judgment and cannot be
made the basis of an action in New York. The short answer is that
this is not an action upon a judgment but upon a recognizance. In
order to prove that the bond was properly estreated, the default duly
declared and the forfeiture made final, it was necessary to introduce
the record of the Georgia court. If this record proves these facts it
is of no moment that it proves other facts.

In order to test the question, let it be conceded that the complaint
contains unnecessary allegations and that the cause of action would
have been established by the simple proof that the bond was duly
estreated; how is the defendant injured? If a new trial were granted
and the alleged redundant allegations and proof were stricken out the
same result must inevitably follow, because on the undisputed relevant
facts the plaintiff is entitled to a verdict. It has a cause of action
upon the recognizance and, with all allusion to the scire facias pro-
ceedings stricken from the record, it will still be entitled to a verdict.

We have examined the other assignments of error and think none
is well taken.

The judgment is affirmed.

JAMES v. UNITED STATES.
(Circuit Court of Appeals, Eighth Circuit. May 11, 1909.)

No. 2,778.

LARCENY (§ 40*)—VARIANCE—DESIGNATION OF OWNER OF PROPERTY.

Under an indictment charging the theft of a horse from "S. K. Canady,"
proof that the name of the owner was "S. K. Kennedy" did not constitute
a fatal variance, where there was no claim that there were persons by
both names, by reason of which the defendant could have been misled.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 120; Dec. Dig. §
40.*]

In Error to the United States Court of Appeals in the Indian Terri-
tory.

For opinion below, see 7 Ind. T. 250, 104 S. W. 607.

J. E. Whitehead, for plaintiff in error.


Before HOOK and ADAMS, Circuit Judges, and CARLAND, Dis-
trict Judge.

PER CURIAM. The defendant, Charley James, who is plaintiff
in error, was indicted in the United States Court in the Indian Terri-
tory, Central District, for stealing a horse. The indictment charged
that the horse was owned by one S. K. Canady. The proof showed
that it was owned by one S. K. Kennedy. The only assignment of er-
ror pressed upon us is that such proof disclosed a fatal variance from
the allegation. To this we cannot give our assent. The names "S. K.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.
Canady" and "S. K. Kennedy" sound so much alike when spoken colloquially as to be distinguishable only by the keenest attention. The rule *idem sonans* applies. There being no claim that any one by the name of "Canady," as distinguished from "Kennedy," owned the stolen horse, the defendant was not misled by the misspelling.

The judgment of the Court of Appeals in the Indian Territory, affirming the judgment of conviction, is accordingly affirmed.

NORTHERN PAC. RY. CO. v. POST.

(Circuit Court of Appeals, Eighth Circuit. June 14, 1909.)

No. 3,035.

MASTER AND SERVANT (§ 236*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—DANGEROUS PREMISES—CONTRIBUTORY NEGLIGENCE.

Plaintiff was employed as a workman in the engine house of defendant railroad company, and while in front of the locker, in which he kept his tools, in the evening, after dark, fell into a drive wheel drop pit three feet from the locker and was injured. There were a number of open pits in the building, constructed in the usual manner, as he knew. The house was a new one, and the work of moving into it was still going on. He knew there was one pit near his locker, but had not observed the one into which he fell. He had a torch among his tools, which was lighted when he quit work, but he extinguished it and proceeded to the locker in the dark. Held, that in doing so he was guilty of contributory negligence, which precluded his recovery.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 631, 633, 723–742; Dec. Dig. § 239.*]

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

Charles A. Hart (C. W. Bunn and Charles Donnelly, on the brief), for plaintiff in error.

E. E. Sharp (C. R. Chapin, on the brief), for defendant in error.

Before VAN DEVANTER, Circuit Judge, and CARLAND and POLLOCK, District Judges.

PER CURIAM. This was an action to recover for an injury sustained by the plaintiff by falling into an open "drive wheel drop pit" in a railroad engine house in which he was employed as a boiler maker. Taken in that view which is most favorable to him, the evidence established these facts: As was usual in such engine houses, there were in this one several open pits, from 3 to 5 feet in depth, which were intended to facilitate the work of cleansing, caring for, and repairing engines. The pit into which the plaintiff fell was of a customary or standard type, and was intended to be used in removing drive wheels from engines. One corner of it came within 3 feet of a locker in which he kept his dinner pail, some of his clothing, and his tools. For three or four days prior to his injury he had used this locker each morning, noon, and evening, and in so doing had learned that the engine house was not sufficiently lighted at any time and was quite dark in the even-
ing. In the same way he had learned that between the rails of a track which was 41\(\frac{1}{2}\) feet in front of his locker there was a long open pit known as an "ash pit." The pit into which he fell crossed the long one at right angles, and the end which was nearest his locker extended across the track just mentioned 18 inches, but was somewhat to the right of the locker, rather than in front of it. He had not observed this cross-pit, and did not know how far he safely could move in that direction. He had worked for several months in engine houses, and knew in a general way how they were constructed and how the work therein was performed. He also knew, as was the case, that this engine house was a new one, that the work of moving thereto was still going on, and that the surroundings were in an unsettled state. At the time of his injury he had gone to his locker to deposit his tools therein and to make the usual preparations for going home; his day's work being done. Among his tools was a hand torch, which was lighted when he quit work; but he extinguished it and proceeded to his locker in the dark. After reaching the locker, and while he was moving about in the dark, in the course of making preparations for going home, he stepped to the right farther than he had ever gone before, and in doing so fell into the drive wheel drop pit. It was open and unguarded; but in that regard it was like the other pits actually observed by him, including the one in front of his locker. In short, knowing that the surroundings were in an unsettled state, and that the place was one of danger unless he made use of his hand torch, and not knowing how far he safely could move to the right of his locker, he failed to make use of his torch, and took chances upon being able safely to move about in such a place in the dark. In so doing he plainly was guilty of negligence which contributed proximately to his injury, and, therefore, was without any right of recovery. McDonnell v. Illinois Cent. Ry. Co., 105 Iowa, 469, 75 N. W. 336; McCann v. Atlantic Mills, 20 R. I. 566, 40 Atl. 500.

It follows that the court erred in refusing the defendant's request for a directed verdict in its favor, and for that error the judgment is reversed, with a direction to grant a new trial.

THE TRANSFER NO. 9.

THE CALDERON.

(Circuit Court of Appeals, Second Circuit. May 19, 1909.)

Nos. 226, 227.

COLLISION (§ 102*)—STEAM VESSELS CROSSING—MUTUAL FAULTS.

A collision in New York Harbor, about halfway between the Battery and Governor's Island, in the early morning, between a steamship passing out of the East River to sea and a tug with a car float on each side, held due to the fault of both vessels, on a finding that they were on crossing courses, with the red light of the tug showing on the starboard hand of the steamship, which made the starboard hand rule applicable, whereas at the instance of the steamship a two-blast signal was made and agreed to. The steamship held in fault for not navigating in accordance

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
with such agreement, and the tug for assenting thereto, and both for not sooner stopping when it became apparent that there was a misunderstanding.

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

Signals of meeting vessels, see note to The New York, 30 C. C. A. 630.]

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

For opinion below, see 148 Fed. 456.

This cause comes here upon cross-appeals from decrees of the District Court, Southern District of New York, holding Transfer No. 9 and the Calderon both in fault for a collision between the latter and a car float in tow of the former. The opinion of the District Judge will be found in 148 Fed. 456.

Wing, Putnam & Burlingham (Harrington Putnam, of counsel), for the Calderon.

William Greenough (W. S. Montgomery, of counsel), for the Transfer No. 9.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. The District Judge has set forth the facts and the contentions of both sides with great fullness, and they need not be restated here. The case is a very perplexing one, and it is impossible to reconcile the testimony. The District Court had the advantage of hearing all the disinterested witnesses, and also the pilot who navigated the steamer. There is plausibility in the theory presented by counsel for the steamship that the collision resulted from a sudden swerve to the northward on the part of the unwieldy tow at the moment her bow passed the “rip” which marks the boundary of the oppositely moving tides of the North and East Rivers. This same tidal rip was the real cause of the collision between the Britannia and Beaconfield, reported in 153 U. S. 130, 14 Sup. Ct. 795, 38 L. Ed. 660. Its existence at certain periods is well known, and apparently the master of the tug did not appreciate its force. But the difficulty is that the theory does not fit in with the testimony. The mutual sighting of the two craft and their exchange of signals took place, according to the evidence of both sides, when they were a considerable distance apart and before the tug had drawn near to the rip. By the whistles then exchanged the case must be determined.

We concur in the finding of the District Judge that, when they came in sight of each other and exchanged navigating signals, the Calderon had the red light of the tug on her starboard hand. We do not concur, however, in the conclusion that the bend rule, laid down in The Victory and The Plymothian, 168 U. S. 410, 18 Sup. Ct. 149, 42 L. Ed. 519, should be applied. The two vessels were not following the sinuosities of a river or narrow channel. The Calderon was bound out of the mouth of the East River and down the bay, and the fact that such was her course was apparent to everyone, for there was light enough to see just what she was. The vessels were on crossing courses, and the starboard hand rule applied. The tug, as the privi-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
leged vessel, should have kept her course, and the steamship should have kept out of the way. The natural way to navigate under those circumstances would be to exchange one-blast signals and pass to port of each other.

The crucial point in the case is the determination of the question what signals were actually exchanged. There is the sharpest sort of conflict in the testimony on this branch of the case; but after a careful study of it all we are not persuaded that the District Court erred in finding that two-blast signals were exchanged when the vessels came in sight of each other. Of the two disinterested witnesses, one merely did not hear any two-blast signal. The other positively and substantially testified to the exchange of such signals. We do not find in his narrative any such discrepancies and contradictions as should tend to discredit him, while the District Judge, who heard him testify, accepted his statement as accurate.

Concurring in this finding of the District Judge, we also assent to his conclusion. The Calderon was in fault because she did not navigate in conformity with a two-blast signal. The tug was in fault because, instead of holding her course as privileged vessel, she initiated a change which would bring her over into that part of the river where down-coming vessels were to be expected, and because she did not observe that the steamer was not changing course to port in conformity with the signals, and failed to take any steps to prevent the consequences of the apparent misunderstanding until it was too late.

Decrees affirmed, with interest and single bill of costs.

NOVELTY GLASS MFG. CO. v. BROOKFIELD et al.

(Circuit Court of Appeals, Third Circuit. June 1, 1900.)

No. 6, October Term, 1908.

   
   The Kribs patent, No. 542,565, for improvements in presses for making screw insulators, although made up of old elements and of narrow scope, was not anticipated and discloses invention; and claim 2, which is accurately expressive of the device is valid, although claim 1 is bad as being too broad, as well as claims 3, 6, 7, and 8, which are merely duplicates of 1, and 2, differentiated by elements necessarily implied or by simple mechanical expedients, which any one could supply. Claim 2 also held infringed.

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

2. Patents (§ 34*)—Invention—Efforts of Other Inventors—Success of the Device.

In judging of invention, in case of doubt, regard may be properly had to the efforts of other inventors in the same field, particularly where there are not a few both before and since, as well as to the difficulties to be overcome and the success of the device, where in the number and quality of the articles produced it has been marked.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 38; Dec. Dig. § 34.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
The test as to whether a device is a patentable combination or a mere aggregation of parts having no combined action is whether there is a new unitary result to the production of which the different elements contribute; and where this appears it is immaterial that there are different steps in the operation to which the different parts are successively addressed. It is not necessary that the article manufactured shall be produced at a single stroke, in which all the elements are involved.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 27-30; Dec. Dig. § 26.*]

4. Patents (§ 91*)—Original Inventor—Minor Features.
Upon conflicting claims of different parties to have been the originator of the invention, the question is whose was the main idea, and the fact that minor features may be attributable to others is not controlling. Evidence examined, and Kribs, and not Jordan or others at the Brookfield Works, where experiments were made, held to be the original and first inventor of the device in suit.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 121-123; Dec. Dig. § 91.*]

Where, upon conflicting applications, interference proceedings have been declared, upon which the application of one party is dropped and the other decided to be the original and first inventor, and a patent issued to him, upon a subsequent suit for infringement, in which the same issue is raised, while the interference proceedings are not conclusive, it is for the losing party to overcome their effect.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 162-165; Dec. Dig. § 112.*]

6. Patents (§ 176*)—Claims—Omission of Essential Element—Duplication—"Movable Mold Adapted to Travel."
Where, in a press for making screw insulators, an essential element, to differentiate the prior art, is a rotary table or its equivalent to support the molds and carry them in a fixed and predetermined path to and from the other parts of the machine, by which the process involved is carried out, the specification of a "movable mold adapted to travel," although under some circumstances competent to imply a structural arrangement by which the mold is moved back and forth mechanically, in a predetermined way, between designated points, the specific means employed for doing so in the patent in suit being of the essence of the invention, a claim in which it is not made an element of the combination is invalid, as being too broad; or if, disregarding this, the omitted element is read into the claim as being implied, it will also be bad where, as here, it thereby duplicates another claim.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 251-252; Dec. Dig. § 176.*]

7. Patents (§ 218*)—Infringements—Accounting for Profits for Use of Infringing Machine—Measure of—Saving Thereby Over Use of Other Noninfringing Machines.
In an accounting for profits for the use of an infringing machine, the patent not being for the product, but for the machine itself, the complainant is entitled merely to what was saved to the defendants by the use of the patented machine over others which were open to them to use; that is to say, in the present instance, the difference between the cost of insulators as made by the machine of the patent and the cost as made by other machines which had gone into public use which it displaced. But where, according to the evidence, salable articles at the market prices could not be so made without loss, the whole profit on such arti-
cles made by the use of the infringing machines may properly be taken
as having been so saved.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 566-576; Dec.
Dig. § 318.*]

8. Patents (§ 318*)—Infringement—Accounting for Profits—Nonessential
Features Not Used.
Incidental, but nonessential, features not used, which do not enter into
the profits made, although contributing possibly to the general efficiency
of the patented machine, do not need to be considered in the result.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 566-576; Dec.
Dig. § 318.*]

9. Patents (§ 312*)—Accounting for Profits—Willful and Deliberate In-
fringement—Burden.
Where an infringement is deliberate, with every means taken to avoid
being responsible for it, if there is any uncertainty on the subject of
profits made, it is for the defendants, and not the complainant, to clear
it up.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 545; Dec. Dig.
§ 312.*]

10. Patents (§ 318*)—Accounting—Use of Infringing Machine as Dis-
tinguished from Infringing Sales—Profits from Single Distinguishing
Noninfringing Feature.
Although the difference between an infringing and a noninfringing ma-
chine may consist of a single feature, the profits recoverable upon an ac-
counting for the use of such machine are not to be confined to the saving
secured by this one feature. Infringement being of the whole machine,
and the defendants having got the benefit, not of one feature, but of the
whole, it is not to be divided around. It is not as though they were being
charged for infringing sales, where the profits recoverable would proper-
ly be so limited.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 566-576; Dec.
Dig. § 318.*]

11. Patents (§ 226*)—Infringement to be Judged by State of Art at the
Time.
Infringement is to be judged by the state of the art when it took place,
and not by something which has been brought in since, and is not, there-
fore, to be stated in terms of such subsequent device. Nor, in holding the
defendants liable for profits on the use of the infringing machine, can it
be said that they are made responsible for the improvements so subse-
quently introduced.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 357; Dec. Dig.
§ 226.*]

While courts of equity will do nothing directly or indirectly to aid ei-
ther party to realize or recover fruits of a transaction prohibited by law,
it is immaterial, in the present case, that the defendants' profits may
have been enhanced by a combination in restraint of the trade in glass
insulators, in violation of the Sherman anti-trust act, which combination
was negotiated by Mr. Brookfield, the controlling stockholder in the
Brookfield Glass Company, one of the participating parties; the illegal
contract having been fully executed, and the complainants not having to
set it up or rely upon it in order to recover, which is a test, the law un-
der such circumstances leaving the parties where they are.
[Ed. Note.—For other cases, see Patents, Dec. Dig. § 318.*]

13. Patents (§ 318*)—Infringement—Profits.
Neither could the complainants be made responsible for the illegal
agreement charged, whatever be its character, or whatever stage it had
reached; the Brookfield Glass Company being the party who got the bene-

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep'y Indexes
fit of it, and not Mr. Brookfield, the complainants’ testator, even though he may have assisted in bringing it about.

[Ed. Note.—For other cases, see Patents, Dec. Dugs. § 318.*]

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

Joseph C. Fraley and Walter H. Bacon, for appellant.
John G. Johnson and Robert N. Kenyon, for appellees.

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

ARCHBALD, District Judge. The patent in suit—or at least the one with which we are particularly concerned—was issued to Seraphin Kribs, July 9, 1895, for a press for making screw insulators for use on telegraph and other electric lines to support and insulate the wires. These insulators are of glass, with an interior central screw thread impressed upon them while in a molten state, by which they are secured in place on screw pins affixed to the crossarms of the supporting poles. The patent was sustained and found infringed by Judge Bradförd ([C. C.] 124 Fed. 551); and, upon an account being taken profits, realized by the defendants, amounting to $29,910.48, were allowed to the complainants by Judge Lanning, but damages, additionally claimed to the extent of $54,701.08, were refused ([C. C.] 170 Fed. 830); and there is an appeal in consequence by both parties.

Infringement is conceded, and the liability of the defendants depends, therefore, on the validity of the patent. Its validity is denied on the ground that the device covered by it is a mere aggregation of old and familiar elements, which it involved no invention to put together; or if, notwithstanding this, invention be found, that the credit of it belongs not to Kribs but to Jordan, or to perhaps no one person in particular, being the combined idea of different parties at the Brookfield factory, where the patentee was a workman.

The making of glass insulators is beset with some difficulty, and requires considerable observation and careful management, due in large measure to the fact that the molten glass must be at just the right temperature at different stages of the operation; and the particular difficulty experienced in the production of the kind in question consists, while shaping them accurately, in keeping them free from superficial cracks and “shreends,” where water will lodge and form a conducting path for the escape of the electric fluid, which is liable to occur with the powerful currents at present carried. The object of the invention was to improve the character and quality of such insulators in this respect, and at the same time to increase and thus cheapen the output. And the success in both directions which it attained, which was quite marked, having completely monopolized the field until the introduction in 1903 of the Duffield improvement, is one, if not the main, reason urged in its behalf.

The device consists substantially in a rotary table or movable support carrying a suitable number of molds in which the insulators are formed; a detachable screw plunger, which, by a single downward

*For other cases see same topic & § NUMBER in Dec. & Am. Dugs. 1907 to date, & Rep’r Indexes
thrust, is forced into the molten glass, by means of an actuating rod to make the screw thread, the rim or Petticoat of the insulator being at the same time pressed into shape by a former and follower above the plunger, on the end of the actuating rod; a rotary spindle to withdraw the plunger, after it has remained a sufficient time to set the glass, the plunger being so arranged as to be easily and quickly brought into engagement with and attached to the actuating rod, and be easily detached therefrom and brought into engagement with the rotary spindle, by which it is removed; the different parts being so further coördinated and assembled that the molds shall be carried from the screw pressing mechanism to the removing spindle and back within a certain time, and in a fixed and predetermined path, so as to produce definite and desirable results.

The operation of the machine conforms to the mechanism employed, and so proceeds that at every step the several workmen at each machine are simultaneously engaged upon different points in the process, the insulators, in consequence, being turned out with a minimum of imperfections, expeditiously and in complete form. Thus the gathering boy measures out the glass and pours it into the mold. The presser sees that it is brought under the actuating rod, and by means of a lever brings down the screw plunger, which he detaches and leaves in the glass, the edge of the insulator being at the same time, and by the same act, pressed into form by the former and follower, which are promptly withdrawn, so as not, by too long contact, to overcool and crack the glass. The mold with the screw plunger is then passed on by the revolution of the table to the boy at the rotary spindle, which is located a sufficient number of molds off to have the glass properly set, and the plunger is then screwed out, and, with another partial revolution of the table, the mold goes to another boy, who opens it and takes out the completed insulator, which brings the operation around to the beginning to be gone over again. This, however, is the mere mechanical side of the process, which calls for judgment as well, and can only be carried to a successful issue where due regard is had at all times to the relative temperature of the glass and the plunger at different points, which has therefore to be carefully watched. This varies not only on different days, but at different times of the same day, and necessitates the use of a greater or less number of plungers to correspond. And it is in the adaptability of the machine to this requirement that its chief merit, if not its real claim, to invention consists.

But as is well said in Brookfield v. Elmer Glass Works (C. C.) 144 Fed. 418, 421, a suit on the same patent against another defendant, the novelty as well as the virtue of the invention depends on the machine as a whole, or at least on its predominant features, no one of which can be spared in the account. Invention does not reside, for instance, in the detachable screw plunger, however that may be an essential and distinguishing part (Brookfield v. Elmer Glass Works, 154 Fed. 197, 83 C. C. A. 180); nor in the actuating rod by which the screw thread is formed with a single downward thrust, although undoubtedly a point of great merit; nor in the separate rotary spindle, by which the plunger is screwed out after the glass has set; nor yet
in the molds adapted to travel from the one to the other in a carefully timed course, nor in the movable support by which this is brought about; but in the combination or united effect of them all in the one conjoined mechanism, with such additional incidental appliances as are necessary to produce efficient work. We are not prepared, in view of this, to sustain any broad claim; nor, on the other hand, to sanction any which are merely differentiated by simple mechanical expedients which any one could supply, or by elements necessarily implied. But these things aside, taking the device as a whole, according to which it is entitled to be judged, invention, as we think, is disclosed.

Admittedly there is nothing which exactly anticipates it in the prior art. The separate features of it may be there, but not brought together into one machine. In the Brookfield (1871) patent, for instance, taken out by the original complainant, assignee of the patent in suit, a detachable plunger was used, which was pressed, as here, into the molten glass, in a single downward thrust, by means of an actuating lever or rod. The screw plunger, being then detached, was also left in the mold until the glass had set, and was subsequently removed by any suitable means, as it is said, a screw spindle being among those named. Three distinctive features of the present invention thus appear: A detachable screw plunger impressed into the glass by an actuating lever to make the screw thread; movable molds in which the plunger remains until the glass is set; and a rotary spindle by which, after a proper interval, the plunger is removed. The use of two or more plungers, which was thus made possible, is also recognized, and as many molds as were found necessary to dispense with screwing out the plunger until the glass had cooled. But there was no rotary table or movable support, by which the insertion and removal of the plunger could be effected by the same machine; nor any correlation of the two operations by separating them a certain number of molds apart, by which the glass could be allowed to cool and set to just the right extent. The failure to appreciate the advantage of this necessitated the use of two machines, one at which the plunger was inserted and the other at which it was taken out, the molds being carried from one to the other by hand, a by no means easy job, the molds weighing from 40 to 60 pounds apiece. This step in the process not being able, therefore, to be accurately timed, the insulators were liable to be spoiled if it happened at any time to be either too long or too short. The Brookfield was thus never a successful machine, and, after repeated efforts to improve upon it at the Brookfield factory, it was given up, and the process which had previously prevailed under the Homer Brooke (1870) patent was resumed and continued down to that of the patent in suit. According to the practice under the Brooke patent and the modification of it known as the "Brookfield process," a plain plunger, actuated by a lever, was first forced down into the glass by a single quick thrust, the end of it being so shaped as to form a countersink as well as a small hole in advance of that where the screw thread was to be subsequently made. The mold was then taken to a second machine, and, by means of a screw press or rotary spindle, a second plunger, having a screw tap extension, was screwed into the hole
already formed, and a screw thread cut, the main or enlarged end of
the plunger being used to retain the form of the countersink into
which it fitted and pressed, while the screw tap extension made the
thread. But the screw plunger was not detachable, as in the patent
in suit, although it could be taken off when required to be removed by
reason of wear or otherwise, and had thus to be left in the mold until
the glass had cooled, and then rotated or screwed out. In the modi-
fied Brookfield practice, the bulging end of the screw plunger was
made smaller than the countersink, so as not to come into contact with
the glass when being screwed in and out, the rim of the insulator be-
ing liable to be twisted or cracked if it did, a difficulty appreciated
and similarly remedied in the A. P. Brooke (1871) patent. Except as
expressive of the state of the art at the time of the present inven-
tion, and as showing a rotary spindle in use for screwing the screw
plunger in and out, there is nothing of any particular significance
in this device. Neither is there in the Krell (1884), more than that
it further shows a rotary table to carry the molds from the place of
inserting the screw plunger to that of its removal, a not uncommon
expedient in the glass-making art to convey an article progressively
and in collective numbers through the successive steps of an opera-
tion, the recognition of this common feature in use in the same con-
nection and for the same purpose, as in the patent in suit, being the
only thing in it with which we are concerned. The Hemingray process
(unpatented), which was also practiced for a time at the Brookfield
factory, in the hope of making something out of it, while having
some suggestive features, stopped considerably short of the machine
of the patent. The screw plunger was detachable, the same as here,
and was forced into the molten glass by means of a lever, in a single
downward thrust to form the thread, and, after being left in the glass
for a suitable time, was removed by a spindle by which it was screwed
out. But the same as the Homer Brooke, it was a two-machine ar-
rangeinent, the first one having nothing but the actuating rod and
the detachable screw plunger, and the other the removing spindle;
the heavy molds, as in the Brookfield, having to be shoved along the
intervening table from one to the other, and centered under each, by
hand, a slow and laborious process which soon discredited it. The
Hemingray people recognized the advance over this, which was made
by the Kribs machine, which they found it necessary to adopt in
order to compete with the Brookfield Company, and after infringing
for a while they took out a license, which is still in force. It is sought
to lessen the effect of this by the suggestion that the license is con-
ditioned on the result of this suit; but so far as that is the case it
is not an unusual arrangement, and does not in any event detract from
the concession made to the novelty and importance of the Kribs de-
vice. There is nothing in particular to stop over, in the so-called "New
England press," which was also in use, along with others, shortly be-
fore the present invention, at the Brookfield shop. Like the Krell, it
had a rotary table, which revolved about a central standard upon
which the actuating rod was hung, the same as in the patent in suit,
but the plunger was permanent and not detachable, and just how or
when it was removed is not made clear. It is only to be noticed because of the argument that the inventor got the idea of a rotary table from it, which is not important, although it may be so.

But while there were these different features, with practically the same functions, employed in much the same way, at hand in the art, on which no doubt the inventor freely drew, they had not been brought together previously in one device; nor, with them all, was there a really successful machine. It remained for Kribs, or whoever is to be credited with the idea, to appreciate that, by assembling and coördinating them in the way that was done, the results which followed could be secured, the value and success of which the sequel attests and every one concedes. And it affirms rather than lessens the achievement that the different parts were brought together from the company's scrap heap, to which they had been consigned, if that is the way it came about.

It is contended, however, that, at least this was merely a mechanical and not an inventive act, the detachable screw plunger pressed into the molten glass by an actuating lever in a single downward thrust to make the screw, and the rotary spindle to remove the plunger again, being taken bodily from the dismantled Hemingray machines, and, with a few adaptive changes, combined with the turntable and stop taken from the New England presses, the device of the patent being thereby produced without more. It must be confessed, without intending to recede from anything which has been said, that the putting together of the several parts so employed, which, with the results from each, as we have seen, were old, has the appearance of being mechanical rather than inventive in the best sense, which the way it is said to have occurred goes to confirm. The success achieved, also, to a certain extent, no doubt, results from the practice of the process rather than the immediate operation of the machine, which, if made possible, is not necessarily induced thereby. But with all that may be so said, and admitting that no high order of invention is displayed, having regard to the efforts of other inventors in the same field, of which there have been not a few both before and since, as well as the difficulties to be overcome and the success of the device, both in the number and quality of the insulators produced, which, to whatever to be attributed, as already stated, has been somewhat marked, we are inclined with the court below to give the inventor the benefit of the doubt, and to hold that sufficient inventive ingenuity is disclosed to sustain his claim. As the litigation over the Duffield machine shows, the place in the art which is monopolized is not large, it being apparently not difficult to differentiate and improve on the immediate construction to which the inventor is confined; and others have not in consequence been prevented to any great extent from exercising their inventive faculties to that end. It is to be borne in mind that the invention consists, not simply in selecting and assembling the different parts, but in adapting and coördinating them to the work to be performed as well, and that, as pointed out above, it is the adaptability of the machine to the demands of the process that is its chief inventive claim. All things considered, we are therefore of opinion
that enough originality is shown, and of a sufficiently inventive kind, to meet the requirements of the law with respect to the particular features involved, which the defendants have considered of such merit as to adopt without material change.

It is said, however, that the machine is a mere aggregation, the different parts which are brought together having no combined action, but simply operating in juxtaposition, each by itself as a complete and independent piece of mechanism, under the manual control of separate workmen. And this view is confirmed, as it is urged, by the way the claims are progressively built up, starting out with a certain number of elements and adding one at each step, even the stop or detent to lock the table, and the standard about which it turns, being utilized to that end. But whatever may be said of the attempt so made, of which more anon, the different parts in our judgment sufficiently coöperate to a common end to dispel any such idea. The test is whether there is a new unitary result, to the production of which the different elements coact (Bliss v. Reed, 106 Fed. 314, 45 C. C. A. 304; National Tube Co. v. Aiken [C. C. A.] 163 Fed. 264), which certainly is the case. The purpose of the mechanism which is brought together is to make glass insulators, and this it most successfully and expeditiously does, a completed article being produced at a single turn. No doubt there are different steps in the operation to which the different parts are successively addressed. But it is not necessary that the insulators shall be made at a single stroke, in which each of the parts shall be involved. That may be desirable, and through the genius of some one, if the nature of the material permits, may possibly be attained. But for the present, a machine which embodies and is adapted to carry out the process, as it is understood and supposedly has to be performed, in which there are distinct parts for the several steps, is not to be condemned as an aggregation on that account.

It is contended, however, that the merit of the invention, whatever it is, belongs to Jordan, and not to Kribs, if not to different parties at the works. But of this we are not convinced. Both were employed at the Brookfield factory, where it was produced. And Jordan, with others, may have had a hand in certain parts. But the main idea evidently was that of Kribs, and it is this, rather than the minor features attributable to others, that controls. Kribs, who was a machinist, as Jordan was not, admittedly constructed the first machine that was built, and the device was always known about the works as the "Kribs press." When it was first put together, Jordan, according to some of the witnesses, declared that it would not work, and himself admits that he did not appreciate its value at the start. It is also significant that when, at the instance of Pease, he concluded to claim the invention and apply for a patent, notwithstanding his supposed acquaintance with the machine, if he was the real inventor, he got Flohl, a draftsman at the factory, to make drawings for him secretly, a press being set up in a separate room where Flohl, with the connivance of Pease, was locked in by Jordan for that purpose. The fact is that, although the experiments, which were carried on
at the factory to try and evolve something by way of improvement on existing methods, out of which the present invention grew, were knowingly conducted in the interest, as they were at the expense, of Mr. Brookfield, the subsequent assignee of the patent, there was a conspiracy by Pease, the superintendent, and Jordan, his assistant, into which one or two others were drawn, to get advantage of the result, on the discovery of which they were discharged. Jordan, at the instance of Pease, a few days afterwards, made application for a patent, claiming the invention, but dropped it when it was thrown into interference with the application of Kribs, which was subsequently put in. Two years later, when he and Pease had organized a company to exploit the device, he tried to get the question reopened on the ground that he had been deceived by his attorney, which was shown to be false. Taken altogether, his testimony is not calculated to impress one with its truth; and the others called in the same behalf are not in much better plight. All of them were discharged employees, except Anthony Kribs, a brother of the inventor, whose ill will is equally marked; and against this we have the testimony of a number of apparently disinterested parties who worked at the factory, and were thus in a position to know, who one and all declare that the invention was not that of Jordan, but of Kribs. It was so decided in the interference proceedings, which, while not conclusive upon us, it is for the defendants to overcome (Morgan v. Daniels, 153 U. S. 120, 14 Sup. Ct. 772, 38 L. Ed. 657), and this, as is shown by this review of the evidence, they have not done.

The patent is therefore valid, and to be sustained; not necessarily in all its parts, but to the extent that the real invention goes. There are 10 claims in all, of which 6 are relied on, as set forth below:

"1. An actuating rod provided with a detachable screw plunger, combined with a rotary spindle adapted to engage the screw plunger, and a movable mold adapted to travel from the actuating rod to the spindle, substantially as described.

"2. An actuating rod provided with a detachable screw plunger, combined with a rotary spindle adapted to engage the screw plunger, a mold, and a movable support for the mold, substantially as described.

"3. An actuating rod provided with a detachable screw plunger, combined with a rotary spindle adapted to engage the screw plunger, a mold, a movable support for the mold, and a lock for holding the support with the mold in operative position relatively to the actuating rod and spindle, substantially as described."

"6. An actuating rod provided with a detachable screw plunger, combined with a rotary spindle adapted to engage the screw plunger, and a movable mold adapted to travel from the actuating rod to the spindle, said actuating rod and spindle being independent of one another, substantially as described.

"7. An actuating rod provided with a detachable screw plunger, combined with a rotary spindle adapted to engage the screw plunger, a movable mold adapted to travel from the actuating rod to the spindle, and independent actuating levers for the rod and the spindle respectively, substantially as described.

"8. An actuating rod provided with a detachable screw plunger, combined with a rotary spindle adapted to engage the screw plunger, a mold, a movable support for the mold, and a standard for supporting the actuating rod and spindle and about which the support is movable, substantially as described."

Of these the first is the broadest, the elements being (1) an actuating rod, provided with (2) a detachable screw plunger, (3) a rotary
spindle, adapted to engage the plunger, and (4) a movable mold, adapted to travel from the rod to the spindle. The second varies from this in calling for (4) a mold, otherwise undescribed, and (5) a movable support for the mold. The third differs from the second only in having a lock or detent to hold the rotary table in place relatively to the rod and spindle; while the sixth and seventh differ from the first, the one in specifying that the actuating rod and the spindle shall be independent of each other, and the other that there shall be independent actuating levers for the rod and spindle respectively. No one of the distinguishing features which are so relied on, however, is of sufficient significance to be made the subject of a separate claim. And the same is to be said also of the standard supporting the rod and spindle, about which the table turns as specified in the eighth claim—which in other respects follows the second—a standard being necessarily implied in all, and resulting, if allowed, in a clear duplication of claims. The third, sixth, seventh, and eighth cannot, therefore, be sustained.

Neither, in our judgment, can the first. The difficulty with it is that it is too broad. The invention, as stated by complainants' counsel in their brief, "consists in the combination of five elements, to wit, an actuating rod, a detachable screw plunger, a rotary spindle adapted to engage the screw plunger, a movable mold, and a rotary table or its equivalent to support the mold and carry it in a fixed and predetermined path from the actuating rod to the spindle and back again from the spindle to the actuating rod." And this is repeated in substance at other places, claim 2 being also referred to as accurately describing the combination named. This corresponds with our own view. But of the elements so specified, the first claim has only four, the rotary table or movable support being left out. Nor is this to be supplied from the description given to the movable support, as adapted to travel from the rod to the spindle. Granting that, under some circumstances, "adapted to travel" might imply a structural arrangement by which the mold is to be moved back and forth mechanically, between the designated points, in a fixed and predetermined path, yet this is not all. There is also the means employed, which is of the essence of the invention, being necessary to differentiate it from the prior art, and entering directly into the result. It is not alone, in other words, that the molds go back and forth, but that they do so in a specific way. A movable support of some kind is thus required, short of which the invention is not found, and this the first claim does not have. Moreover, if, disregarding this, this element is read into the claim, it is not distinguishable from the second claim, which it thus duplicates and destroys. Whichever way, therefore, it is regarded, it is invalid and cannot be sustained.

Not so, however, the second claim, which still remains. This, for the reasons given in this discussion, accurately represents the invention, within the narrow limits to which it is necessarily confined, and is good. There may be other features, not found in it, such as the measure or filling vessel, the shell, and the detent, which make for greater convenience or efficiency; but the mold, the detachable plung-
er, the actuating rod, the rotary spindle, and the movable support, all of which coordinated together, constitute the working machine, and no one of which can be left out, are here, and establish the validity of the claim. And, so far as the decree of the court below is based upon this part of the patent, it is correct, and is to be affirmed.

In the account which was directed, the complainants were awarded the entire profits derived by the defendants from the sale of insulators made on infringing machines. Exception is taken to this, that the patent is not for the product, but for the machine alone, and that all that the complainants are entitled to in consequence is what was saved to the defendants over the use of other machines. The answer to this is, that they could not have made anything by the old way. The Kribs press superseded all others, and went at once into general use, both by reason of increased output as well as better work. Insulators made according to previous methods were practically unsalable, costing too much and not coming up to the mark. No doubt the saving or advantage to the defendants is the true measure. Ca-
wood Patent, 94 U. S. 695, 24 L. Ed. 238. But this may well be taken as represented by the difference between profitable and unprofitable commercial manufacture. More accurately, it would be the difference between the cost of insulators as made by the machine of the patent and the cost as made by those open to the defendants, which it displaced. But for all practical purposes, the two under the evidence are the same. If salable articles, in other words, could not be made at the ruling prices, by the old methods, without a loss, while with the machine of the patent there would be a profit, the profit so made has certainly been saved or gained from the invention. The saving might be more than this, dependent on the extent of the loss with other machines. It is clear that it would not be less. But the reckoning, as it is to be observed, is not up, but down. That is to say, we start with the price at which marketable insulators could not be profitably made on the old machines, and fall to their cost by the new, and the difference represents the saving or gain between the two. It does not matter, in this estimate, how the price which is so taken for the test happens to have been brought about, whether by natural agencies or not. It is the point where selling price and cost of production are the same, so that there is no profit in manufacture, that is the guide; by the price, meaning that which prevails in the market, which eliminates the cause of it, whether from one thing or another. And it is to this price that we must assume that the witnesses speak when they say that salable insulators could not be produced without loss on old-style machines.

It is said, however, that the so-called Kribs press, on which the estimate of profits is based, had other features, including some taken from the second Kribs patent, on none of which the defendants infringe. But the devices which are so referred to, which, no doubt, contribute to the general efficiency of the machine, are incidental rather than essential, and it is the latter that count. So far as the other Kribs patent is concerned, the parts are a little more highly organized; that is all. Considerable stress is laid, however,
on the importance of the filling piece, which has a great deal to do, as it is said, with the usefulness of the machine. But the filling piece plays no part in molding "pony" insulators, so called, which, as we understand it, constitute by far the bulk of those made; besides which—and this applies to all the features which the defendants do not infringe—if not used by them, they have not contributed to and do not enter into the profits derived by them from those which they did use; and it is with these profits alone that we are at present concerned. Further than this, the infringement in this case was deliberate, with every means taken to avoid being responsible for it, and, if there are any uncertainties in the situation, it is for the defendants, and not the complainants, to clear them up. Rose v. Hirsh, 94 Fed. 177, 36 C. C. A. 132, 51 L. R. A. 801; Regina Music Box Co. v. Otto (C. C.) 114 Fed. 508.

In the spring of 1903, the defendants secured the right to use a Duffield machine, from which time on no profits are claimed. In this machine the screw plunger is permanently attached to the rotary spindle, and so is not detachable as specified in the patent, on which, in consequence, it was held not to infringe. Brookfield v. Elmer Glass Works, 154 Fed. 197, 83 C. C. A. 180. It is contended, on the strength of this, that the Duffield being a successful machine, and the invention in suit being only distinguishable from it by the detachability of the plunger, the profits which are recoverable here are to be confined to the saving from this one feature, and cannot extend to the whole device. But this overrefines, as well as confuses, the case. The infringement was of the invention as a whole. The defendants got the benefit, not of one feature, but of all, and the saving thereby effected cannot be divided around. It is not as though they were being charged for infringing sales of the machine, where the profits recoverable would properly be confined to those realized from the features which constituted the patentable advance on the prior art. Force v. Swoyer Boss Mfg. Co., 143 Fed. 894, 75 C. C. A. 102. The infringement here is in the use of the patented machine, and response must be made in consequence for the saving effected, not from any particular part, but from the whole. It is said that this makes the defendants pay $29,910.48 for the difference between a detachable plunger and one where the spindle is attached, and, contrasting what they have now in the Duffield machine with what there was then, this may be the case. But infringement is to be judged by the state of the art when it takes place, and not by something like the Duffield, which has come in since. It is not, therefore, to be stated in terms of that device, as this is. Had the defendants had the Duffield machine, with its spindle attachment, they would not, of course, have had to resort to the Kribs, as they did, and would thus have saved what they are now called upon to meet. But this does not make them any less liable therefor. Nor can it be said that $29,910.48 is the price they pay for the slight difference between the two. That is the cost to them of the infringement. That is all. And, if it comes high, the time to think of that was at the start.

But it is further said that the profits with which the defendants are charged were largely brought about by an illegal combination in
restraint of trade, negotiated by Mr. Brookfield in violation of the Sherman anti-trust act, by which the only three manufacturers of glass insulators in the United States—the Brookfield Glass Company, of Brooklyn, N. Y., the Hemingray Glass Company, of Munice, Ind., and the defendants, represented by C. S. Knowles, a jobber of Boston, Mass., who controlled their output—were brought together in an agreement to maintain prices. The agreement referred to was made in April, 1901, and continued in force until about October 1, 1902, when it was abrogated at the instance of Mr. Brookfield, because it was not being lived up to by the defendants, as claimed. By it the different manufacturers named were to limit their production, and to sell according to an established schedule of prices, with preferences to certain favored customers. Two points are made with respect to this: (1) That, being prohibited by law, as a combination in restraint of trade, a court of equity will not do anything, directly or indirectly, to aid either party to recover the fruits of it; and (2) that, being only answerable for mechanical advantages derived from the invention in the manufacture of insulators, the defendants cannot be held for profits on sales which are the result of prices artificially stimulated by purely commercial activities. But neither of these contentions is sound. This is not a suit to recover the fruits of the agreement, but to charge the defendants with their wrongdoing without reference to that. It is true that they may have realized more because of the agreement, but that does not draw it directly or indirectly into the relief sought. The complainants do not have to set it up or rely upon it, which is the test. And, on the contrary, it is the defendants who seek to make use of its illegality as a shield behind which to escape. The law under such circumstances leaves the parties to an illegal contract as they are found. St. Louis R. R. v. Terre Haute R. R., 145 U. S. 393, 12 Sup. Ct. 953, 36 L. Ed. 748. It will not aid the one to get off, any more than the other to get on, by means of it. Its sole concern, if the contract is unexecuted, is that it shall do nothing to carry it out. And where it has been executed, as here, that is the end. Neither can the complainants be made responsible for the agreement, whatever its character, or whatever stage of it has been reached. It is true that Mr. Brookfield, their testator, representing the company of which he was the head, assisted in negotiating it and bringing it about. But the party who got the direct benefit from it was not Mr. Brookfield, but the Brookfield Glass Works, and, unless the distinction between corporate and individual interests is set aside, they are not to be confused here. Nor, aside from this, does it matter that by the concerted action of the several manufacturers of insulators, including the defendants, prices were put up to a figure beyond what they otherwise would have been, contrary to law. As already pointed out, the question is the profit or advantage, in matter of fact, which the defendants got out of the infringement, and this depends on whether or not they could manufacture without loss by the old methods at market prices, not how those prices came about, whether naturally or artificially, or what under other conditions they might have been. And for this comparison the prices established by the combination of manufacturers com-
plained of may properly be taken, the defendants, according to the evidence, being reasonably prosperous when they were maintained, but being put out of business, although having the help of their infringing machines, when the agreement was abrogated and prices went down.

Finding, therefore, no material error in the record, the decree is affirmed.

BROOKFIELD v. NOVELTY GLASS MFG. CO.

(Circuit Court of Appeals, Third Circuit. June 1, 1903.)

No. 7, October Term, 1908.

1. PATENTS (§ 286*)—SUITS FOR INFRINGEMENT—DAMAGES RECOVERABLE.
The individual owner of a patent suing for its infringement for himself alone cannot recover damages sustained by reason of the infringement against a corporation licensee in which he is a stockholder, such damages being recoverable only in a suit by or on behalf of the corporation.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 455–456; Dec. Dig. § 286*]

2. PATENTS (§§ 286, 310*)—PLEADING (§ 236*)—APPEAL AND ERROR (§ 953*)—
SUIT FOR INFRINGEMENT BY OWNER—DAMAGES TO NONEXCLUSIVE LICENSEE
—PLEADINGS—AMENDMENT AFTER PROOFS—DISCRETION OF COURT.

While, no doubt, the damages suffered by the nonexclusive licensee by suforence of a patent, by reason of its infringement, must be recovered, if at all, by the owner of the patent prosecuting in behalf of such licensee, yet, where a bill apparently proceeds in the interest and for the benefit of the owner alone, nothing by way of damages can be claimed thereunder on such licensee's account. There should be something in the bill to indicate it, both on the ground of estoppel and notice, if that is to be the case; and the refusal to allow an amendment to meet this, after the proofs are all in, while not necessarily too late on that account, is within the discretion of the court below, with which, under all the circumstances in this case, the appellate court will not interfere.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 455; Dec. Dig. §§ 286, 310*; Pleading, Cent. Dig. § 691; Dec. Dig. § 236*; Appeal and Error, Cent. Dig. §§ 3825–3833; Dec. Dig. § 559.*]

3. PATENTS (§ 310*)—SUITS FOR INFRINGEMENT—SUPPLEMENTAL BILL TO CHARGE OFFICERS OF CORPORATION.
The granting of leave to the complainant in a suit for infringement against a corporation to file a supplemental bill to charge the officers of the corporation with personal liability for the profits recovered, on the ground that they fraudulently disposed of the property of the corporation to evade payment, is within the discretion of the court, and its action in refusing such leave will not be disturbed by the appellate court, complainant having a complete remedy by an independent creditors' bill.
[Ed. Note.—For other cases, see Patents, Dec. Dig. § 310.*]

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

For opinion below, see 170 Fed. 830.

John G. Johnson and Robert N. Kenyon, for appellant.

Joseph C. Fraley and Walter H. Bacon, for appellee.

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

*For other cases see same topic & § NUMBERS in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
ARCHBALD, District Judge. The cross-appeal of the complainants brings up the question of damages, which the court below denied. It is contended that the Brookfield Glass Company, of which William Brookfield, the complainants' testator and owner of the patent, was the controlling stockholder, the glass company being his licensee, was equipped to take care of the demands of the market of which it was deprived by the defendants' infringement, and that the complainants, suing not only for themselves but in its behalf, are entitled to recover by way of damages what the glass company would have made on the 7,500,000 insulators which the defendants manufactured and sold during the time of their infringement, amounting to $45,514.26, as found by the master; as well as the losses incurred by that company for the same period by the reduction in profits on those which it did make, due to the competition of the defendants, amounting to $9,186.82—making a total claim of $54,701.08. But unfortunately for the claimants, there are several things which stand in the way. In the first place, it is by no means certain, nor even reasonably probable, that, if the defendants had not been in the market, the glass company would have got the orders which the defendants filed, the Hemingray Glass Company having also to be reckoned with, who no doubt would have got a share, the amount of which no one with any degree of approximation can say. But more than this, it was the Brookfield Glass Company, in any event, that was damaged, with which Mr. Brookfield individually had no concern. It may be that he failed by just so much of what he otherwise would have got in dividends, and that this would have been quite considerable, holding 1,370 out of a total of 1,500 shares, as he did. But the distinction between corpora
tion and stockholder, already recognized in another connection for the complainants' benefit, being preserved, he would not be entitled to assert as his own the profits lost to the company, nor to claim his unapportioned share of them, whatever that might be.

It is said, however, that the glass company was a non-exclusive licensee by sufferance, and that the damages which it suffered by the infringement must be recovered, if at all, by Mr. Brookfield as owner of the patent prosecuting in its behalf. This, no doubt, is the law. Birdsell v. Shaliol, 112 U. S. 485, 5 Sup. Ct. 244, 23 L. Ed. 768. But it does not necessarily dispose of the case. Neither is it ruled by Yale Lock Company v. Sargent, 117 U. S. 552, 6 Sup. Ct. 934, 29 L. Ed. 954, where the owner of the patent was allowed to recover damages to a partnership of which he was a member, to which, having a direct interest in the whole, he no doubt had the right. Nor is Tilghman v. Proctor, 125 U. S. 136, 8 Sup. Ct. 894, 31 L. Ed. 664, applicable, there being no proof there that any one beside the plaintiff had any interest legal or equitable in the patent, and the question being not as to the plaintiff's damages, but the defendants' profits, which the plaintiff was held entitled to recover, no matter to whom they were eventually to go. It is not as though suit were brought in the present instance for the benefit of the Brookfield Glass Company as licensee, or for the joint benefit of that company and the owner of the patent. So far as appears, the bill proceeds in the interest and for the benefit of the owner of the patent alone, and it is not at this stage to be trans-
formed into something else. It is only where the licensee, exclusive or nonexclusive, is in fact in whole or in part, the beneficial party, that anything can be claimed by way of damages on his account. And it should be made clear in some way that recovery is sought on the strength of it, if that is to be the case. Indeed, without some such averment in the bill, we have no record by which either the owner of the patent or the licensee is bound, and with the relation so loose as it is said to have been here, and as is true in the case of every licensee by sufferance, it is all the more necessary for the purpose of notice and estoppel that the defendants should be apprised of what they are to meet, and the complainants put on record what they intend to claim. Even, therefore, if the Brookfield Glass Company, as a mere licensee, could not be made a party (Blair v. Lippincott Glass Company [C. C.] 52 Fed. 226), which we do not undertake to decide, we cannot resist the conclusion that, if anything by way of damages is to be recovered on its account, there should have been something in the bill to indicate, if that was indeed the case, that it was prosecuted in part in its behalf; and that, without this, the owner of the patent, proceeding to all intents and purposes for himself alone, is to be confined to the damages which he has himself received, of which those of his licensee are not a part.

Feeling the stress of this, or at least to obviate it, a motion was made to amend the bill in this respect, the refusal of which is assigned for error here. But the amendment was applied for after the proofs were all in, and, while not necessarily too late because of that, it was within the discretion of the court to refuse or allow it, and we see no occasion to interfere with what was done. Nor is this all that there is to be said. As just stated, at the instance of the complainants, we held, on the defendants' appeal, that Mr. Brookfield was not to be identified with the Brookfield Glass Company, so as to make him answerable here for the combination in restraint of trade, in which the glass works was involved, as there shown; and if now, disregarding the state of the record, we recognize the suit as nevertheless proceeding for the damages to that company, it will be necessary for the sake of consistency, if nothing else, to go back and revise the conclusion reached on the strength of it, that, being brought by Mr. Brookfield and not by the glass company, it was immaterial whether there had been an unlawful combination to enhance prices, the evidence of which was chargeable to the company alone. Following this out also, the conduct of the company by which the profits lost to it, which are now claimed as damages, were made possible in the face of the statute, will also have to be looked into, as well as the means taken, by the cutting of the prices of those insulators which the defendants particularly dealt in, whereby, as it is charged, the defendants were driven out of the business. In so identifying Mr. Brookfield with the glass company as a party to the agreement which was entered into in its name to restrict production and put up prices, it may be further necessary to inquire whether, in treating with the defendants in that way and drawing them into the combination, knowing that they were making use of the invention, there was not an implied sanction or license to use the invention, which they would be entitled to set up. All things
considered, therefore, it is doubtful whether it would profit the complainants to break down the distinction which has so far been recognized between Mr. Brookfield and the company, and throw these matters into controversy, the result of which it would be difficult to presage. And, while we are not to be influenced by matters of policy which do not concern us, we may well decline to vary from what we have already decided at the instance of the complainants, in order to correct a supposed error for their benefit, when it is so little likely to do them any good.

The complainants also asked leave to file a supplemental bill to hold the several members of the defendant company individually. It is charged that, anticipating the outcome of this litigation, and for the purpose of avoiding it, these parties deliberately disposed, as directors, of all of the tangible assets of the company, paying themselves exorbitant salaries, which absorbed the profits and left the concern practically bankrupt; and that, finally, default was allowed in the payment of interest on the mortgage which had been given on the company's plant, although there was abundant means to meet it, which resulted in a foreclosure and sale by which the company was stripped of the last vestige of its property. But the allowance of a supplemental bill is largely a matter of discretion, and entirely outside of it there is a complete means of redress. If the individual members of the company have acted in the way that is charged, there can be no question that a new and independent suit, in the nature of a creditors' bill to hold them personally, can be maintained. 10 Cyc. 665. Jackson v. Ludeling, 21 Wall. 616, 22 L. Ed. 492; Weston Electrical Company v. Empire Electrical Company (C. C.) 166 Fed. 869. And the complainants may well be remitted to the pursuit of that remedy, instead of being given leave to file a supplemental bill.

The decree is affirmed.

ACME-KEYSTONE MFG. CO. v. DEARBORN et al.
(Circuit Court of Appeals, Second Circuit. May 25, 1909.)
No. 288.

PATENTS (§ 328*)—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

The Dearborn patent, No. 639,669, for a blind stitch sewing machine, held not so clearly infringed on the evidence as to warrant the granting of a preliminary injunction; but the granting of such an injunction restraining infringement of claim 3 of the Dearborn patent, No. 705,326, relating to the same subject-matter, held within the discretion of the trial court.

[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 167 Fed. 568.

This cause comes here upon appeal from an order granting an injunction pendente lite in an infringement suit under patents No. 639,669, of December 19, 1899, No. 679,553 of July 30, 1901, and No.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
705,326 of July 22, 1902, all granted to Charles A. Dearborn, and all relating to blind stitch sewing machines.

Harry E. Knight (William E. Knight, David J. Newland, and Charles C. Gill, of counsel), for appellants.

Hillary C. Messimer, for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges,

PER CURIAM. As to claim 1 of the first patent we concur with the opinion of the Circuit Judge that the question whether defendant's device has the particular rocking movement required by the claim in question, in view of the conflicting testimony, is too doubtful to be determined as the basis for granting a preliminary injunction.

As to claim 2 of the second patent it was held that one type of machine made by defendant infringed and that another type did not. Since defendant is now making solely the noninfringing type, it is not concerned with the continuance of the preliminary injunction, and therefore did not argue for a reversal. No question as to this claim, therefore, requires consideration. The order in that particular is affirmed.

Claim 3 of the third patent (No. 705,326) reads as follows:

"In a blind stitch sewing machine, the combination of a suitable stitch-forming mechanism and a stationary presser-foot with a ridge-forming rib constructed and arranged to engage the work beneath the presser-foot, and an upper feed device constructed and arranged to engage the upper exposed face of the work adjacent to said ridge-forming rib, substantially as set forth."

One type of defendant's machines concededly infringes. Of the other type it is contended that it avoids infringement because its presser-foot has a slight vibratory motion during the time the goods are being fed forward. Such vibratory motion, complainant insists, is wholly without function. The Circuit Judge inclined to the opinion that defendants were merely attempting to get away from the precise form of the patent while retaining its advantages, and he granted an injunction against both types unless defendants should file a bond in the amount of $2,000. It is undesirable, especially in the Court of Appeals, to discuss the details of mechanism and the construction of claims, where a crowded art is concerned, upon a record composed of ex parte statements, and which may possibly be materially modified when the cause is presented at final hearing.

It is sufficient to say that in our opinion the disposition made in the Circuit Court of the motion for preliminary injunction was, upon the record before it, a proper exercise of its discretion. The order, however, should be modified by eliminating the first patent (No. 639,669), and, as modified, it is affirmed, without costs.
BENBOW-BRAMMER MFG. CO. v. RICHMOND CEDAR WORKS et al.

(Circuit Court of Appeals, Seventh Circuit. March 18, 1909.)

No. 1,541.

PATENTS (§ 328*)—INFRINGEMENT—MEANS FOR OPERATING WASHING MACHINES.

The Schroeder patent, No. 535,465, for means for operating washing machines, discloses novelty and invention. It covers a combination of elements in a washing machine, and is entitled to the benefit of equivalents. 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 Eastern Division of the Northern District of Illinois.

This appeal is from a decree of the Circuit Court, dismissing the appellant's bill, alleging infringement of claim 1 of letters patent No. 535,465, for "means for operating washing machines," issued to John Schroeder March 12, 1895. The opinion of the trial court on final hearing is reported in 159 Fed. 161, and a prior opinion on motion for an interlocutory injunction appears in 149 Fed. 430.

Taylor E. Brown and Philip Mauro, for appellant.

Charles C. Bulkeley, for appellees.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

SEAMAN, Circuit Judge. The Schroeder patent in suit, No. 535,465, now owned by the appellant corporation, has been extensively involved in litigation over various infringements, in different circuits (successively in the Eighth, Seventh, and Second circuits), and adjudications appear in all such cases, except the one at bar, upholding both validity of the claim in suit and the charge of infringement in each instance. The cases so appearing in the reports, prior to the adverse decree from which this appeal is brought, are: Schroeder v. Brammer (C. C.) 98 Fed. 880; Brammer v. Schroeder, 106 Fed. 918, 46 C. C. A. 41; Benbow-Brammer Co. v. Simpson Mfg. Co. (C. C.) 132 Fed. 614; Benbow-Brammer Co. v. Heffron-Tanner Co. (C. C.) 144 Fed. 429; Benbow-Brammer Co. v. Wayne Mfg. Co. (C. C.) 157 Fed. 559. Other decisions of like effect are referred to in the record, which are unreported.

The patent claim alleged to be infringed reads as follows:

"1. An operating shaft having a rotary reciprocating motion, a cylinder placed upon the shaft and having a sliding movement thereon, and through which cylinder motion is alone communicated to the shaft, and a double row of teeth or cogs upon the cylinder extending at an angle to the shaft, combined with a driving shaft having means for revolving it attached to one end, and a wheel for engaging the teeth on the cylinder at the other, the driving shaft being driven continuously in one direction, substantially as shown."

For description of the operating means of the patent and the general scope of the patentee's invention, as recognized and defined in these several decisions, reference to the opinions so reported, to-

*For other cases see same topic & § NUMBER in Dec. & Am. Digis. 1907 to date, & Rep't Indexes
gether with more recent opinions hereinafter mentioned, is deemed sufficient, without further specification in the present opinion.

This decree dismisses the appellant's bill, upon the ground, stated in the opinion (159 Fed. 161, 165) of the trial court (in substance), that any novelty in the patent device "must be found in the use of the sliding cylinder" (as described in the patent), and that element was not present in the defendants' (appellees') washing machine, so that the patent, "if valid in view of the prior art," is not infringed. Another suit brought by the appellant in the Circuit Court for the Southern District of New York, wherein use was alleged of the same infringing machine made by the appellees, was co-pending for final hearing—with the appellee Richmond Cedar Works, impleaded as a party defendant—and the appellant subsequently obtained a decree therein in its favor, under an opinion reported in Benbow-Brammer Mfg. Co. v. Straus et al., 158 Fed. 627. On appeal, this decree was affirmed by the Circuit Court of Appeals for the Second Circuit, in an opinion filed December 15, 1908. 166 Fed. 114. Counsel for the appellees frankly concedes that the last-mentioned suit was substantially identical, in the controversies involved and evidence submitted, with the instant case, and that the final decision therein "must and should have its influence upon this court, if, from a consideration of the opinion, it appears that the defendants' position assumed and presented here was considered."

The operating means of the appellees' machine are fully described in these several opinions, and the distinctions in structure of elements which are relied upon to escape infringement are pointed out in each of the opinions referred to (159 Fed. 161, and 158 Fed. 627) in the Circuit Court. As well remarked in the opinion of the Circuit Court of Appeals above cited, "the defendants' machine performs the same function and accomplishes the same result" as that of the patentee, so that the only question "to be decided is whether they perform that function and accomplish that result in substantially the same manner."

The contention in support of the present decree, notwithstanding this decision contra, may be thus summarized: (a) That the patentee's invention, as claimed and allowed, is for "a mechanical movement," and not for a combination of elements in a machine; (b) that its sliding cylinder, as described, is the essential and "distinguishing element"; (c) that the appellees' machine employs a different mechanical movement, which was old, and not the sliding cylinder; (d) that the means so used by appellees is shown and described in prior patents in evidence. Laying aside the force of the prior decisions—both in reference to the validity and interpretation of the patent claims and the present issue of infringement—we deem it sufficient to remark, for dismissal of the foregoing propositions, that the invention is plainly described and allowed, as we believe, for a combination of means or elements in a washing machine, and thus entitled to the benefit of the rules applicable to such claim; so that, novelty appearing in the combination, the patent can neither be defeated by proof that individual elements were old, nor evaded by the
substitution of a well-known equivalent element for like function and combination.

The validity and scope of the Schroeder patent in suit, however, are not fairly open to question, in the light of the harmonious line of decisions thereupon (above cited) in prior litigation, and we believe the last-mentioned opinion of the Circuit Court of Appeals for the Second Circuit sufficiently states the rule to be applied in support of the like charge of infringement under the present bill. In that view it is neither needful to determine the effect otherwise of such final decision, upon like issues, in favor of this appellant and against the appellee Richmond Cedar Works, nor to discuss the evidence offered by way of defense.

The decree of the Circuit Court is therefore reversed, with direction to enter decree in favor of the appellant complainant for the relief sought in its bill, in conformity with the foregoing opinion.

KAPP v. BENBOW-BRAMMER MFG. CO.

(Circuit Court of Appeals, Seventh Circuit. March 18, 1909. Rehearing Denied May 6, 1909.)

No. 1,478.

PATENTS (§ 328*)—INFRINGEMENT—MEANS FOR OPERATING WASHING MACHINES.
The Schroeder patent, No. 555,465, for means for operating washing machines, held infringed.
[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

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

Frank D. Thomason, for appellant.
Taylor E. Brown, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

SEAMAN, Circuit Judge. The appellant is defendant in a bill filed by the appellee, alleging infringement of letters patent No. 535,465, issued to John Schroeder and owned by the appellee corporation, and this appeal is from a decree against the appellant for equitable relief on final hearing of the issues. So the decree rests upon the same patent involved and considered in the case of Benbow-Brammer Manufacturing Co. v. Richmond Cedar Works, 170 Fed. 965, wherein opinion is filed herewith, and pronounces infringement of claim 1, which was likewise involved in that case. Reversal is sought upon like contentions for limiting the scope of invention to a particular element (as described) in the operating means, and thus escaping infringement through departure from its specific form.

The evidence is undisputed that the appellant’s structure for a washing machine is substantially identical in the function and result of the several elements in the combination. In one of the operating means or elements, however, a departure from the patent specifica-

*For other cases see same topic & § NUMBER in Dec. & Am. Dig. 1907 to date, & Rep’s Indexes
tions appears, at least in form. This element is referred to in the brief for appellant, as "a means for converting the continuous revolution of the drive pinion into a rotary reciprocal motion," for which the patent claim specifies "a double row of teeth or cogs upon the cylinder extending at an angle to the shaft," while the appellant's means are described in the brief as "a segmental series of pins that extend radially from a hub." Both forms are identical in function, for upper and under engagement successively and continuously with the driving pinion or gear, to give the desired rotative motion—the so-called "single row of pins" presenting their upper and under face for such engagement alike with the "double row of teeth," described in the patent—and their substantial equivalency is indisputable.

As referred to in Benbow-Brammer Manufacturing Co. v. Richmond Cedar Works, supra, preservation of the monopoly granted under this patent has required much and constant litigation, and the line of opinions there cited, upholding both validity of the claim in suit and invention therein of sufficient merit to entitle the patentee to a fair range of equivalents, plainly authorize such interpretation under the present evidence to charge infringement. The merit of the invention has been well recognized, both in judicial opinions and in the repeated efforts of other manufacturers to supply the market with imitations; and we believe the appellant has appropriated the essence of such invention, with the deviation above mentioned in the nonessential form of one of the operating means—a mere colorable evasion—so that the appellee is entitled to the relief granted by the decree.

The decree of the Circuit Court, accordingly, is affirmed.

CHICAGO RY. EQUIPMENT CO. et al. v. PERRY SIDE BEARING CO. et al.
(Circuit Court, N. D. Illinois, E. D. January 9, 1909)
No. 28,674.

1. PATENTS (§§ 140, 144*)—REISSUES—VALIDITY—PREASSUMPTIONS FROM GRANT.
On an application for a reissue of a patent, where it is sought to broaden the claims, the burden rests on the applicant to clearly establish inadvertence, accident, or mistake; but the grant of the reissue raises a presumption that proper ground therefor was shown, and the courts will not review the decision of the Commissioner, unless unsupported by the record.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 205, 216; Dec. Dig. §§ 140, 144.*]

2. PATENTS (§ 147*)—REISSUES—VALIDITY.
Unless the court can find that the invention of a reissue is described as the invention in the original patent, and that the patentee intended to secure it as his invention in the original, the reissue is not for the same invention, and is invalid.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 220; Dec. Dig. § 147.*]

3. PATENTS (§ 329*)—VALIDITY OF REISSUE—SIDE BEARING FOR CARS.
The Wands reissue patent, No. 11,611 (original No. 533,763), for a side bearing for railway cars, granted on an application made 23 months after

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep's Indexes
the issue of the original patent, is void, both on the ground that the claims are a departure from and broader than those of the original, and also for anticipation in the prior art.

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

4. PATENTS (§ 328*)—VALIDITY—ABANDONMENT OF INVENTION.
The Wands patent, No. 590,286, for a side bearing for railway cars, is void on the ground that such features of the device as disclose invention were abandoned to the public.

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

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

5. PATENTS (§ 328*)—INFRINGEMENT—SIDE BEARING FOR CARS.
The Wands patent, No. 694,503, for a side bearing for railway cars, discloses invention in the feature designed to prevent the accumulation of dust in the structure, and is valid; also held infringed.

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

6. EQUITY (§ 330*)—MULTIFARIOUSNESS OF BILL—WAIVER.
The defense of multifariousness is one for the discretion of the court, and will not be allowed to prevail in a case in which the testimony has been taken and final argument made.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 663; Dec. Dig. § 330.*]

7. PATENTS (§ 328*)—INFRINGEMENT—SIDE BEARING FOR CARS.
The Huntoon patent, No. 694,549, for a side bearing for cars, was not anticipated, and discloses invention; also held infringed.

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

8. PATENTS (§ 287*)—LIABILITY FOR INFRINGEMENT—OFFICER OF CORPORATION.
An individual who owns practically all of the stock of a corporation and personally controls and directs its action may be held jointly liable with it for infringements of a patent by the corporation.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 459; Dec. Dig. § 287.*]

In Equity. On final hearing.

See, also, 170 Fed. 982.

Jesse A. Baldwin, Paul Bakewell, and F. R. Cornwall, for complainants.

Offield, Towle & Linthicum and Albert H. Graves, for defendants.

KOHLSAAT, Circuit Judge. The bill herein seeks to enjoin defendants from infringing (1) claims 4, 5, and 6 of reissue patent No. 11,611, granted to John C. Wands June 15, 1897; (2) claims 1 and 3 of patent No. 590,286, granted to said Wands June 15, 1897; (3) claims 23, 24, 25, 26, and 27 of the patent No. 694,503, granted to said Wands March 4, 1902; (4) claims 17, 18, 19, 20, 21, 22, 23, 24, and 25 of patent No. 708,601, granted to said Wands September 9, 1902; (5) claims 1 to 11, inclusive, of patent No. 694,549, granted to C. P. Huntoon March 4, 1902—all having reference to side bearings for railway cars.

The reissue patent above named is based upon the application filed November 21, 1894, for patent No. 533,763, granted to John C. Wands for a side bearing for railway cars, June 15, 1895, and the four claims of that patent are made a part of the reissue patent as claims 7, 8, 9,
and 10 thereof. The substance of the matter claimed in the reissue, so far as is material herein, is the centering or spring device. An inspection of the file wrapper in patent No. 533,763 discloses the fact that all of the claims asked for were rejected by the examiner except those calling for this resilient centering device.

The application for the reissue was filed December 31, 1896. In this latter application the inventor, Wands, states: That letters patent granted to him No. 533,763, on February 5, "1896," are inoperative or invalid for the reason that the specification thereof is defective or insufficient, and that such defect or insufficiency consists particularly in this: That the claim is not coextensive with the statement of invention, which invention, as stated in lines 16 to 22, page 1, of the printed specification of said patent No. 533,763, is as follows:

"My invention consists in a series or nest of anti-friction rollers carried by a roller frame and operating directly upon the bearing-plate that is bolted to the top bolster, and various other novel features of construction, combination, and arrangement of parts, hereinafter described and claimed."

That said errors arose from inadvertence, accident, or mistake, and without any fraudulent or deceptive intention on the part of deponent. That the omissions sought to be supplied are: (a) A claim for the combination with a bolster and a bearing-plate of a series or nest of anti-friction rollers carried by a roller frame, and operating directly upon the bearing-plate that is bolted to the top bolster; (b) a claim for a side bearing for railway cars comprising a series of anti-friction rollers arranged in concentric rows, the rollers of the adjacent rows overlapping; (c) a claim for the combination, with a movable anti-friction device for the side bearing of a railway car, of a spring for restoring said anti-friction device to its normal position when released by the tilting of the body of the car.

The applicant further charges that his attorneys, being misled by the opinion of the Commissioner, accidentally omitted to append claims coextensive with the invention, and that he, being unversed in the language necessary to secure his invention, believed that it was fully covered, until a month last past, when he was informed by persons skilled in the art that such was not the case.

Defendants insist the reissue patent is void because (1) there was no true accident, inadvertence, or mistake; (2) the patentee was guilty of laches; (3) the reissue patent is for a different invention from the original.

It will be observed that 23 months intervened the grant of letters patent in No. 533,763 and the application for a reissue thereof. The record discloses no question of intervening rights, nor of equitable estoppel, the presence of which seems to have generally been deemed a matter to be considered, especially with reference to laches, although it was held in White v. Dunbar, 119 U. S. 47, 7 Sup. Ct. 72, 30 L. Ed. 303, that:

"The existence of intervening rights adds nothing to the illegality of a reissue which has been expanded to cover more than the original patent sought to cover. That is deduced from general principles of law as applied to the statutes authorizing reissues and affecting the rights of the government and the public."
It seems to have been with some reluctance that the courts have construed the reissue statute so as to permit the enlargement of claims. Rev. St. § 4916 (U. S. Comp. St. 1901, p. 3393), provides for a reissue of a new patent for the same invention (1) whenever any patent is inoperative or invalid by reason of a defective or insufficient specification; (2) or by reason of the patentee claiming as his own invention or discovery more than he had a right to claim as new, if the error has arisen by inadvertence, accident, or mistake, and without any fraudulent or deceptive intention.

In Miller v. Brass Co., 104 U. S. 350, 26 L. Ed. 783, the court, reasoning from the history of the statute, says:

"It is natural to conclude that the reissue for the latter purpose [making a claim broader] was not in the mind of Congress when it passed the law in question."

Discussing the subject further, the court says:

"But by a curious misapplication of the law it has come to be principally resorted to for the purpose of enlarging and expanding patent claims."

In Topliff v. Topliff, 145 U. S. 156, 12 Sup. Ct. 825, 36 L. Ed. 658, the court reviewed Miller v. Brass Co., and said:

"It is a mistake to suppose that that case was intended to settle the principle that under no circumstances would a reissue containing a broader claim than the original be supported. We have no desire to modify in any respect the views expressed in that and subsequent cases with regard to the validity of reissues."

In Freeman v. Asmus, 145 U. S. 226, 12 Sup. Ct. 339, 36 L. Ed. 635, it was sought by reissue—

"To construe the first claim so as to cover any kind of a blast furnace with a closed breast, having a slag discharge-opening cooled in any way, or to any extent, by water. There is nothing in the original specification which indicates that any such claim was intended to be made in the original patent. On the contrary, the whole purport of that specification shows that it was intended to claim only a slag discharge-piece or cinder-block constructed and attached in a specific manner."

The court held that the reissue was not for the same invention as the original patent, and that:

"There is nothing inconsistent with the foregoing views in our decision in Topliff v. Topliff."

From these and other decisions, it seems clear that the burden of showing mistake is upon the applicant in all cases involving the broadening of a claim, and must be plainly established. There is a line of cases holding that the grant of the reissue patent constitutes a prima facie presumption of its validity. Walker on Patents (4th Ed.) § 492; Clark v. Wooster, 119 U. S. 326, 7 Sup. Ct. 217, 30 L. Ed. 392; Whitcomb v. Coal Co. (C. C.) 47 Fed. 655.

In Topliff v. Topliff it is said that the court will not review the decision of the Commissioner as to inadvertence, accident, or mistake, "unless the matter is manifest from the record." This language is repeated in substance in Hobbs v. Beach, 180 U. S. 395, 21 Sup. Ct. 499, 46 L. Ed. 586, and may be deemed to express the final conclusion of the Supreme Court in the subject; so that, notwithstanding the
burden which is cast upon the complainant to maintain his allegation of accident and mistake in this cause, the defendants must take the onus of showing that the facts of record do not sustain the presumption arising from the grant—which is no greater than that arising from any grant of a patent.

It is defendants' contention that it appears from the record that no mistake occurred in the proceedings resulting in the grant of Wands' original patent, No. 533,763, and that the reissue is for an invention different from that of the original patent. This involves a comparison of the two. The presumption arising from the grant of the reissue attaches only to the existence of accident, mistake, and inadvertence, and not to the identity of the invention.

All of the four claims of Wands' original patent call for a peculiar arrangement of anti-friction rollers. Claims 1, 2, and 3 in terms set out nested or alternated rollers, and describe their mounting. Claim 4 does not contain the terms "nested" or "alternated," but disclosed a device which of necessity includes rollers nested or alternated. Each of said claims includes the centering device. Claims 4 and 5 of the reissue patent in suit, and each of them, would, upon their face, and unless limited by the specification, read upon any side-bearing device for railway cars employing a movable anti-friction element combined with a centering spring. Claim 6 varies from claims 4 and 5 only in the addition of the frame and in locating same between the top truck-bolster and the transom of the car-body. They are broad enough to cover each of the claims of the original patent. Thus it is sought by the language of the reissue claims to broaden the limited claims of the original patent into claims covering the whole field of movable anti-friction side bearings for railway cars, of which spring-restoring devices are an element. That the reissue is broader than the original cannot be gainsaid. It seeks to bring within the monopoly of its patent side bearings, not apparently in mind at the time of filing the original application.

"My invention," says the patentee (page 1, line 9) "relates to anti-friction side bearings for railway cars; the object of my invention being to provide means that will present a larger bearing surface than any of the devices now in use, without cutting, sawing, or altering the bolster or transom in the present construction." Manifestly, the spring-centering element had nothing to do with the enlargement of the bearing surface. It will be seen that, of the ten claims of the original application, only three included the centering spring. The others were rejected, and claim 1 was saved by adding the spring feature. In the other six claims, Wands was seeking to cover his wider bearing surface only, and evidently did not consider the retracting feature an essential element to that end. It can hardly be claimed that the original patent was not a complete device. It was operative, just as completely as that of the reissue patent. For all that Wands was seeking, it was in itself a finished side-bearing arrangement. Later he thought he could just as well claim the resilient centering device and make it apply to every anti-friction side bearing which is centered by a spring. Undoubtedly he made the mistake of not claiming the larger invention, if it be such,
in his first application; but this is not the mistake the statute and the courts have in mind. In Campbell v. James, 104 U. S. 356, 26 L. Ed. 786:

"When a patent fully and clearly, without ambiguity or obscurity, describes and claims a specific invention, complete in itself, so that it cannot be said to be inoperative or invalid by reason of a defective or insufficient specification, a reissue cannot be had for the purpose of expanding and generalizing the claim, so as to make it embrace an invention not described and specified in the original."

Approving the language of Justice Grier in Burr v. Duryee, 1 Wall. 531, 17 L. Ed. 650, in which the court says:

"The surrender of valid patents and the granting of reissued patents thereon, with expanded or equivocal claims, when the original was clearly neither inoperative nor invalid, and which specification is neither defective nor insufficient, is a great abuse of the privilege granted by the statute and productive of great injury to the public. This privilege was not given to the patentee or his assignee in order that the patent may be rendered more elastic or expansive, and therefore more available for the suppression of all other invention."

In Corbin Cabinet Lock Co. v. Eagle Lock Co., 150 U. S. 42, 14 Sup. Ct. 30, 37 L. Ed. 989, it appears that the reissue was made, among other things, to cover a device containing one element, a mortise, not claimed in the original and surrendered patent. The court says this "clearly operated to broaden and expand the original claim," and holds the reissue unwarranted. Says the court:

"It is settled by the authorities that, to warrant new and broader claims in a reissue, such claims must not be merely suggested or indicated in the original specification, drawings, or models; but it must further appear from the original patent that they constitute parts or portions of the inventions which were intended or sought to be covered or secured by such original patent."

In Hobbs v. Beach, 180 U. S. 394, 21 Sup. Ct. 414, 45 L. Ed. 586, the reissue patent was attacked upon the ground that the original patent was neither inoperative nor invalid by reason of any defective or insufficient specification. The reissue had been applied for only a few weeks after the original issue, and, as the court says, "was issued merely to correct, as it would seem, an obvious error in one of the drawings." The court holds that:

"To justify a reissue it is not necessary that the patent should be wholly inoperative or invalid. It is sufficient if it fail to secure to the patentee all of that which he has invented and claimed."

In Huber v. Nelson, 148 U. S. 270, 13 Sup. Ct. 603, 37 L. Ed. 447, the court held the reissue invalid because it left out one of the elements of the original claim, to wit, a flushing chamber. Says the court:

"We think that, on all the facts of this case, no one of the claims of the reissue can be construed as valid in leaving out the flushing chamber as an element of the combination, inasmuch as every claim of the original patent contained it."

It was further held in this case:

"That the failure to claim the particular combination not claimed in the original patent, but claimed in the reissue, was not due to any such inadvertence or mistake as would authorize the claiming of it in the reissue, and that the failure to claim such combination originally occurred under such
circumstances and was accompanied with such full knowledge of all material facts as to amount to an abandonment of that particular combination to the public."

This was reviewed and approved in Olin v. Timken, 155 U. S. 141, 15 Sup. Ct. 49, 39 L. Ed. 100.

An examination of the foregoing cases, and a large number of other cases decided by the Supreme Court and by the various Courts of Appeal and Circuit Courts, leads plainly to the conclusion so well stated by Judge Coxe in Carpenter Straw Sewing Machine Co. v. Searle (C. C.) 52 Fed. 809, 814, and approved by the Circuit Court of Appeals in 60 Fed. 82, 8 C. C. A. 476, viz.:

"That unless the court can find that the invention of the reissue is described as the invention in the original, and that the patentee intended to secure it as his invention in the original, the reissue is invalid. It is not for the same invention."

What are the facts in the case before the court? The original patent—that is, the application therefor—was based upon one central thought, viz., a device that should "provide means that will present a larger bearing surface than any of the devices now in use." Seven of the ten claims asked for were devoted to the arrangement of the rollers. All of these were rejected, and the rejection acquiesced in. Afterwards one was amended so as to include the spring, and allowed. Thus it will be seen the original patent and each of its claims call for anti-friction rollers nested or alternated, combined with a resilient centering device. These two things are vital elements of that patent. Now, it is sought by reissue to drop out the distinctive feature of the patent as described in the claims, and substitute another element, viz., any movable anti-friction arrangement for cars, whether nested or not. As above stated, this is a clear departure from the invention of the original patent, attempted almost two years after the original grant. While a patentee may not be limited to the purpose of his patent expressed in the specification, yet, in a proceeding like this, in which it is essential that his intention should be arrived at, it is not unreasonable that his stated purpose should be given due weight. The Commissioner found that the necessary inadvertence, accident, and mistake existed. Under the circumstances, it is difficult to see upon what evidence he based his finding. The same record is before the court now, and does not, in the judgment of the court, sustain that conclusion. It seems incredible that a man of sufficient intelligence to invent the device of the original patent could fail to discover at once that his patent did not purport to secure to him a monopoly of the combination of movable anti-friction side bearing for railway cars of every kind with centering springs. Under the circumstances, the delay of 23 months seems wholly unaccounted for.

In Ives v. Sargent, 119 U. S. 661, 7 Sup. Ct. 436, 30 L. Ed. 544, Mr. Justice Matthews quotes with approval the language of the court in Wollensak v. Reiber, 115 U. S. 96, 99, 5 Sup. Ct. 1137, 1139, 29 L. Ed. 350, as follows, viz.:

"It follows from this that if, at the date of the issue of the original patent, the patentee had been conscious of the nature and extent of his invention, an inspection of the patent, when issued, and an examination of its terms, made with that reasonable degree of care which is habitual to and
expected of men in the management of their own interests in the ordinary affairs of life, would have immediately informed him that the patent had failed fully to cover the area of his invention; and this must be deemed to be notice to him of the fact, for the law imputes knowledge when opportunity and interest, combined with reasonable care, would necessarily impart it."

He also cites and approves the following language in Mahn v. Harwood, 112 U. S. 354, 5 Sup. Ct. 174, 28 L. Ed. 665, viz.:

"If a patentee had not claimed as much as he is entitled to claim, he is bound to discover the fact in a reasonable time, or he loses all his right to a reissue; and if the Commissioner of Patents, after the lapse of such reasonable time, undertakes to grant a reissue for the purpose of correcting the supposed mistake, he exceeds his power and acts under a mistaken view of the law. The court, seeing this, has a right, and it is its duty, to declare the reissue pro tanto void in any suit founded upon it."

In the same case it is held that the time fixed by law with regard to public use, two years, might be deemed to be such a delay as to defeat the reissue. Here something less than two years had elapsed; but it is not the rule that two years must intervene. The circumstances of each case must control. Freeman v. Asmus, 145 U. S. 226, 12 Sup. Ct. 939, 36 L. Ed. 685. Under the facts of this case, even though an arbitrary period of two years had not intervened, yet there was unpardonable delay. It would seem to constitute practically indisputable evidence of what otherwise appears to be the fact; i. e., that Wands had no intention of claiming the spring broadly, with any movable anti-friction side bearing, as an invention at the time of filing his application. Whether he deemed that feature old in the art, or did not consider it a necessary element of his invention to secure a wider bearing surface, does not appear. When the examiner rejected, among others, claim 1 of his original application, he amended by adding the spring-centering device. His attention was thereby specifically called to the fact that the centering element was indispensable to his invention. He must have had this fact vividly in mind at that time. It was clearly treated by him as an incidental feature of his patented device.

It should not, however, be overlooked that in the original as well as the reissue specification (line 80, page 1) it is stated that:

"These rollers, 16, are preferably nested, or so alternated and located upon the shafts, 15, as that the periphery of each succeeding roller will overlap the periphery of the adjacent roller," etc.

It would therefore seem that, had Wands not limited his original claims to the nested arrangement, but had made the claim as broad as his specification, his original patent would have covered the substance of the claims of the reissue patent here under consideration, if the same may be deemed to be limited by the specification to movable anti-friction roller bearings. Under the statute, however, and the language of the Supreme Court in Ives v. Sargent, 119 U. S. 652, 7 Sup. Ct. 436, 30 L. Ed. 644, Wands was required to "particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention," and his invention was limited by the language of his claims.
It is apparent that the claims of the reissue patent here in suit are broader than the specification. This latter limits the invention to movable roller anti-friction bearings. Claims 4 and 5 in terms, and claim 6 in effect, cover any movable anti-friction device. It is held in White v. Dunbar, 119 U. S. 47, 7 Sup. Ct. 72, 30 L. Ed. 303, that the specification cannot be resorted to for the purpose of changing the claim and making it different from what it is. Nor can a patentee, who had claimed either more or less than was necessary, in a suit for infringement be relieved from the consequences. McClain v. Ortmayer, 141 U. S. 419, 12 Sup. Ct. 76, 35 L. Ed. 800. Our own Court of Appeals, in Anderson Foundry & Machine Co. v. Potts, 108 Fed. 379, 47 C. C. A. 409, has said:

"The true rule seems to be stated in McCarty v. Railroad Co., 160 U. S. 110, 116, 16 Sup. Ct. 249, 40 L. Ed. 358: • • • 'It is not permissible to read into a claim an element which is not present, for the purpose of making out a case of novelty or infringement.'"


The resilient restoring or centering feature of the reissue patent in suit is not new even in anti-friction car bearings. It is found in Jewett patent, No. 418,388, granted December 4, 1889, where its function is the same as in the patent in suit, except that it is combined with anti-friction rollers arranged to take care of sidewise movements of the car body, instead of swiveling movements, as in Wands' device. This Jewett patent comes fairly within the language of claims 4, 5, and 6 of Wands' reissue patent in suit. The King patent, No. 273,693, granted March 6, 1883, discloses a so-called spring case tapering upwardly, from the top of which protrudes the periphery of a properly journaled roller, which bears upon cushioning springs, resting upon the base of the box, by which arrangement a tilting movement is achieved in addition to the cushion effect. Says the inventor:

"My present invention consists in the peculiar construction, combination, and relative arrangement of the several parts that form the said side bearing, the object being, first, to have the springs properly supported, carried, and protected to sustain the vertical, horizontal, and oblique pressure to which they are subjected; second, to prevent the parts of the spring case from binding under such pressure; and, third, to provide more convenient and effective means for connecting and securing the parts together and limiting their motion."

The patentee further states that the roller or protruding wheel may even be dispensed with, as he finds—

"that sufficient relief is afforded against friction by the springs within the spring case, which together form said yielding bearing."

It is evident that the yielding side bearing will travel with the swaying movement of the car body to the limit of its play, which increases in the ratio of its depression in the case. When relieved from the strain, the springs must inevitably serve to re-center the bearing. This device differs from Wands' reissue claim 6 mainly in that (1) it has but
one roller, and (2) that its travel is, perhaps, less extended than that of Wands, being limited to the walls of its case (though it is doubtful whether the reissue covers a bodily rolling traversing movement). It possesses both sidewise and swiveling movement against the tension of the springs. The testimony of complainant's expert Livermore is that, "speaking broadly and entirely vaguely," Wands was not the first to produce a side bearing which might be called a side bearing provided with a spring-centered anti-friction device, though he does not think the claims in suit embody the subject-matter claimed by King. Whatever the difference, however, may it not in a sense be said to be only one of degree? It is, freely speaking, a movable anti-friction device combined with a resilient means for centering, even though the patentee may not have specifically claimed the latter feature, and comes generally within the language of the reissue claims in suit.

The spring-restoring device, in connection with railway anti-friction bearings, is also found in patent No. 348,741, granted to M. G. Hubbard September 7, 1886, patent No. 416,773, granted to W. Behrens December 10, 1888, and other devices not necessary to enumerate. Thus, even though the reissue claims in suit be deemed to have escaped the Scylla of the invalid reissue, they are straightforwardly engulfs in the Charybdis of the prior art. They are therefore held to be invalid.

Claims 1 and 2 of Wands' so-called second patent, No. 590,286, differ from the reissue patent substantially in that claim 1 calls for an arrangement of the centering device which shall be "parallel with the line of travel of the bearing," and claim 2 covers a spring arranged "parallel with the plane of the carriage." It is conceded that the restoring spring of Wands' original patent was arranged "parallel with the plane of the carriage." It is also true that the change from the flat spring of the original patent to the coil spring of the second patent involves merely the substitution of one form of spring for another. Complainant's expert, Livermore, concedes that:

"The recognition or discovery that coiled springs might be employed in combination with the anti-friction device involved carried with it the idea of the arrangement of coiled springs parallel with the line of travel of the anti-friction device."

Now it is too late to claim that invention may be predicated in the spring art upon the substitution of one form of spring for another. Both of the claims in suit are broad enough to cover the claims of Wands' original patent; i. e., nested or alternating rollers in connection with movable anti-friction car bearings. In view, therefore, of the facts (1) that more than two years intervened the grant of the original patent and that now in suit, and (2) the surrender of that patent, and (3) the invalidity of the reissue patent, it must be held that the subject-matter of these two claims was abandoned to the public.

The claims alleged to be infringed of the third Wands' patent (No. 694,503, dated March 4, 1902) are as follows:

"23. In a side bearing for cars, the combination with an anti-friction device of a track-plate, upon which the same is arranged, guides rising from opposite sides of the track-plate, said guides being provided with openings so as to enable air to sweep over the track, and resilient means cooperating with said anti-friction device to restore it to its normal position, substantially as described.

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"24. In a side bearing for cars, the combination with an anti-friction device of a track-plate, upon which the same is arranged, guides rising from opposite sides of the track-plate, said guides being provided with openings for the circulation of air; the ends of the bearing being open so as to permit air to sweep over the track-plate, and mechanism co-operating with the anti-friction device to restore it to its normal position, substantially as described.

"25. In a side bearing for cars, the combination with a base-plate having a way in which operates an anti-friction device, said way being free from pockets or other obstructions, thereby preventing the lodging or packing of dust, dirt, etc., an anti-friction device traversing said way, guides rising from the opposite side of said base-plate for guiding the anti-friction device in its movement, and resilient means supported by said guides and co-operating with the anti-friction device for restoring the same to its normal position, substantially as described.

"26. In a side bearing for cars, the combination with a way free from pockets and open at its ends, thereby admitting an unobstructed circulation of air over said way and around the anti-friction device arranged thereon, an anti-friction device traversing said way, an anti-friction device, a bearing-plate co-operating with said anti-friction device, the ends of said bearing-plate being cut away to permit the air to sweep over the way, and resilient means co-operating with the anti-friction device and the bearing-plate for restoring said parts to normal position, substantially as described.

"27. In a side bearing for cars, the combination with a way free from pockets or obstructions, thereby preventing the lodging or packing of dust, dirt, etc., on the way, said way being open at its ends, guides on opposite sides of the way, openings in the guides, the open ends of the way, and the openings in the guides permitting a circulation of air over said way and around the anti-friction device arranged thereon, an anti-friction device traversing said way, and resilient means co-operating with the anti-friction device for restoring it to a central position, substantially as described."

As stated in complainant's brief, the construction referred to in these claims is characterized principally by the provision which is made for preventing the accumulation of dust and cinders within the structure, which would clog and interfere with its operative movements.

This patent was applied for June 21, 1901, a month after the granting of the Perry patent, No. 672,648. Wands has copied into this third patent the box-covered arrangement of the Perry patent, also the feature of the simultaneous compression of the coiled springs, both seemingly novel features of the Perry patent. If this Perry patent is valid, and the open track plate of the Wands' patent is a feature of patentable novelty, Wands' position is that merely of an improver of the Perry device.

The prevention of dust from clogging and interfering with the operation of side bearings is not a new problem. It was recognized as very desirable at an early date. Attempts have been made to solve it by inclosing the working parts; but, owing to the nature of the device, complete inclosure has been impossible. Many besides Wands have made openings to allow the dust to escape; but they seem to have been working on the principle of making the action of the parts push the dirt out, rather than that of allowing a free draft of air to blow it out. Some of the prior art patents show a more or less open structure, which undoubtedly, to some extent, would permit the passage of air and the consequent removal of dust; but none seem to recognize the principle and apply it so squarely as Wands. Patent to Barber, No. 620,092, seems to come closer than any of the others. He says:
"The bearing-plates, h₁, for the side-bearing rollers, h, are shown as provided with a central groove or depression, h⁶, running crosswise of the bearing surfaces and extending lengthwise of the car. The castings, h₈, are also provided with end openings, h⁷, which register with the ends of the groove, h⁶, when the parts are in working position. This construction affords a draft passage for the currents of air when the car is in motion, and the air thus moving through the passageway, h⁶, h⁷, will blow out whatever dust or dirt may fall therein under the action of the wheels or from other causes. Hence by this construction the accumulation of dust, sand, or dirt on the bearing-plates, h₁, for the side-bearing rollers, h, will be prevented."

But an examination of the drawings shows that the air does not spread over and clear the bearing surface, h⁴ and h⁵, thus to prevent lodgment of dust on the bearing surface; but the air merely sweeps through the passage, h⁶, below the bearing surface, so that dirt dislodged by the rollers may be carried away.

Wands seems to have been the first to apply this means of keeping the parts clean to roller bearings of the type involved in this case, and there seems to be a small modicum of invention in his arrangement. Defendants have substantially copied this feature of the Wands patent and must be held as infringers.

The Huntoon patent, No. 694,549, is for a street car side bearing. It involves none of the controlling features of the other patents herein. There is no question of spring-restoring devices, or nested or any other kind of movable rollers. Nor does it seem to be germane at all to the matters contained in the other patents in suit. As to it defendant very properly urges the defense of multifariousness. That defense, however, is one for the discretion of the court. It should not prevail in a case in which the testimony has been taken and final argument had. It is clearly the duty of the court at this time to consider the case upon its merits, and thus avoid the trouble and expense of a rehearing of the cause. It was never devised for the purpose of embarrassing the disposition of court business, but rather for facilitating it. Therefore the motion to dismiss will be overruled.

The validity of the patent does not seem to be seriously assailed, although the court is referred to several prior patents. Only claims 1, 3, and 9 are before the court. They read as follows, viz.:

"1. In a side bearing for cars, the combination with a box-shaped base of spindles loosely journalled therein, and rollers loosely mounted on said spindles, said rollers protruding through the top of the box, substantially as described."

"3. In a side bearing for cars, the combination with a boxed-shaped housing, formed with blind bearings, of spindles loosely journalled in said bearings, and rollers on said spindles which protrude through openings in the cover of the box-shaped housing, substantially as described."

"9. A side bearing for cars, the combination with a box-shaped housing of spindles journalled therein, rollers on said spindles, and a cover-plate provided with openings through which said rollers protrude, said cover-plate also having lugs which are arranged above the spindles to hold the same against vertical movement, said lugs also serving to lock the cover-plate against lateral movement, substantially as described."

While the answer is evasive as to infringement, it is deemed to be a positive denial of infringement, except so far as it may be deduced from the admission by defendants that they have manufactured under their patents No. 672,648, 728,857, and 806,360, granted to Hubert
N. Perry, which patents they aver do not infringe complainant’s patent in suit. Comparing the claims in suit with those of patent No. 806,360, which read as follows, viz.:

"1. A side bearing for cars, comprising a box-like base member, a journal mounted therein, an integral open-ended cylinder mounted upon said journal, a series of rollers mounted within said cylinder around said journal, a pair of washers mounted upon said journal at the ends of said rollers and constituting smooth confining bearings therefor, and a top plate provided with apertures through which said cylinders revolubly protrude, said top plate overlying the upper edges of said washers and provided with integrally-formed lugs having curved bearing-surfaces overlying and confining said journal, substantially as described.

"2. A side bearing for cars, comprising in combination a box-like base member provided with air passages therethrough, bearing supports upon the inner walls of said base member, a journal mounted within said bearing supports, an open-ended cylinder mounted upon said journal between said bearing supports, a series of rollers mounted within said cylinder around said journal and moving thereupon, a pair of washers mounted upon said journal, and confining said rollers within said cylinder and also forming smooth bearings for the ends of said rollers, a top plate secured to said base member and overlying the upper edges of said washers, and provided with an aperture through which said cylinder revolubly protrudes, said lug members upon the under side of said top plate fitting between said washers and the wall of said box-like base over said journal and confining same in its bearings, substantially as described."

—it appears that the latter patent differs from the claims of the Huntoon patent in suit, in that the journal or shaft of the Perry patent is separated from the cylinder by rollers held in place by washers at their ends upon which the cylinder freely revolves, thus having a roller bearing, while the Huntoon, called by him a roller, revolves freely upon the shaft or journal, or spindle, as he calls it. The latter patent calls for a cylinder or roller which may or may not have a bushing or sleeve between itself and its shaft or spindle. Broadly speaking, the one has a roller bearing and the other has not. Huntoon, in claims 1 and 3 of his patent, calls for loosely journeled spindles. Perry makes his journal bearings snug. Both patents disclose a movable bearing, however, and neither discloses just how snug or loose the bearing may be. In both it is evident that the journal or spindle bearing is intended to relieve any binding action of the roller upon its journal, thereby supplementing the same.

While the validity of the Huntoon patent is deemed to be conceded by the defendants, it still becomes necessary to look into the prior art for the purpose of ascertaining the scope to be given to it. It will be noticed that the rollers or cylinder of both patents bear only upon their shaft or spindle supports. Their peripheries do not travel upon the under plate of the device, as in the Wands patents. Consequently they may be located in a stationary frame, and will always respond to the swiveling motion of the car, while the rollers running upon a plate or flat surface will bind when they are under pressure and at the limit of their movement in their frame. In these latter cases, it is essential that the roller frames be movable. It is, therefore, in the freely mounted wheel or roller side-bearing art that we must look for anticipations of the Huntoon patent. In this search, neither of the parties has been at much pains to assist the court, although
there must be considerable data upon the subject. Defendant's counsel do, however, cite: (1) Merrick patent, No. 38,973, of 1863; (2) Galloway patent, No. 168,476, of 1875; (3) Harding patent, No. 661,981, of 1900; (4) Marquardt patent, No. 331,311, of 1885.

The Merrick patent calls for a wheel which rolls upon its bearings upon the bed plate. A wheel which rests upon the bed plate, and does not hang upon its bearings and remain free from the bed plate, is not in point here. The Galloway patent discloses a railway car bearing which employs two wheels or rollers traveling upon their own axles, substantially as shown in the patent in suit, and having no other resemblance thereto. The Harding patent shows a side bearing for railway cars having wheels or rollers freely hung and moving upon their axles, free from contact with the base plate, and whose peripheries protrude from the bearing case or box, which is not arranged to meet the requirements of the claim in suit. The reference to the Marquardt patent relates only to the form of the cover-plate fastening. The free-wheel may be found in the before-mentioned King patent, No. 273,693, for a side bearing, though differently adjusted.

The wheel or roller used by Huntoon as an anti-friction device is not new, unless its arrangement is new. The patentee declares his object to be the construction of "a device of the character described in a simple and compact form, the parts being readily assembled and dismantled, whereby repairs can be quickly and easily made." His device seems to accomplish this end. It is not made to appear in the record that it has been shown or even attained before. True, its elements are all old; but, if it accomplishes what he asserts for it, he is entitled to claim it as an effective combination. Under the circumstances, can defendants' roller-bearing cylinder be deemed an equivalent of Huntoon's spindle? At most, Perry has added a new feature, the anti-friction rollers between the cylinder and journal, together with the necessary end washers. His use of two rollers or wheels, instead of four, does not amount to invention. It would seem as though any mechanic would think of the Perry roller-bearing device. It is so very old in every art involving the subject of rotation.

As the court approaches the end of this tedious aggregation of alleged infringements, it is impressed with the thought that the record discloses rather more evidence of a purpose to tiptoe at the heels of complainants' patentees than is consistent with independent research into the legitimate fields of invention. It is one of complainant's grievances that Perry was formerly in its employ, and left for the purpose of joining hands with the defendant Laughlin in order to injure complainant's business. However that may be, as to all the matters in dispute it would seem as though defendants' eagerness to approximate as nearly as they dare the device of the patent in suit, has led them to overstep the borders of Huntoon's domain, and they are held to be infringers.

Counsel for complainant has devoted much of his argument to the contention that defendant Henry D. Laughlin is personally responsible for the acts of the Perry Side Bearing Company. This is charged in the bill and not denied by the answer. There seems to be no doubt that Laughlin owned all but a nominal amount of the stock and di-
rected the acts of the corporation. This is established by his admissions in his answer and testimony, and his express assertions that he had personal control of the company. He makes no effort to deny that he was behind the acts of the company, and, indeed, in his letter to complainant of November 14, 1904, says that he holds himself responsible for the acts of the Perry Side Bearing Company. Although the answer contains a general denial that Laughlin acted in any way but as a corporate officer, there seems to be abundant ground for his joinder with defendant company in this suit. Saxleher v. Eisner, 147 Fed. 189, 77 C. C. A. 417; Whiting Safety Catch Co. v. Western Wheeled Scraper Co. et al. (C. C.) 148 Fed. 396.

Infringement is therefore decreed as to patents 694,503 and 694,549, and denied as to the reissue patent No. 11,611 and patent No. 590,286. A decree may be drawn in accordance with the above findings.

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CHICAGO RY. EQUIPMENT CO. et al. v. PERRY SIDE BEARING CO. et al.

(Circuit Court, N. D. Illinois, E. D. February 15, 1903)

No. 28,674.

See, also, 170 Fed. 968.

Jesse A. Baldwin, Paul Bakewell, and F. R. Cornwall, for complainants.

Ossfeld, Towle & Linthicum and Albert H. Graves, for defendants.

KOHLSAAT, Circuit Judge. Defendant presents to the court the form of a decree in which the court is made to find that claims 25 and 26 of patent to Wands, No. 694,503, dated March 4, 1902, are not infringed by defendant. It appears that the device manufactured by defendants is not that of the Perry patents, but is one in which the end walls have been removed so as to produce a way free from pockets and other obstructions whereby claims 25 and 26 of the patent in suit avoid the lodging and packing of dust, dirt, etc. This way is made an essential feature, to the end that its surface may be perfectly presented to the action of the wind for cleansing. In the original opinion the court found that:

"As stated in complainant's brief, the construction referred to in these claims is characterized principally by the provision which is made for preventing the accumulation of dust and cinders within the structure, which would clog and interfere with its operative movements."

The device of the Perry patent, No. 672,648, discloses a housed side bearing having ends practically closed, when in a central position. The downwardly projecting lug portions formed integrally with the top plate fit into the spaces between the upwardly extending portions made integrally with the end wall proper, thus practically closing the box or housing. The lower or track plate at all times presents serious obstruction to the sweep of the air because of the upstanding portions of the end wall. By cutting away the central upstanding tongue of the end wall and a portion of the end wall itself, defendants entirely removed this objectionable feature. In so doing, however, they appropriated the main feature of complainant's patent in suit. While claim 25 does not in terms call for these openings, yet it does describe "a base plate having a way • • • free from pockets or other obstructions"—a provision which the Perry patent did not purport to cover, and which seems to have been aside from Perry's thought. Taken in connection with the drawings and specifications, there is no doubt that, if there is invention in any of the Wands claims in suit, defendants infringe both of claims 25 and 26. Therefore they are not entitled to any modifications of the opinion as to said claims.
From complainant’s record (pages 148 and 149) it appears that complainant withdrew patent No. 708,801 from this suit, and is therefore entitled to have the same dismissed from the case without prejudice. If the action has entailed any costs or damages, they may be suggested to the court hereafter.

UNITED STATES v. MEYER.

(District Court, E. D. Washington, S. D. May 27, 1909.)

No. 64.

1. Aliens (§ 64*)—Naturalization—Necessity of Previous Declaration of Intention—Widow of Soldier.

    Naturalization Act June 29, 1906, c. 3592, § 4, subd. 6, 34 Stat. 598 (U. S. Comp. St. Supp. 1907, p. 422), which authorizes the naturalization of the widow and minor children of an alien, who dies after having declared his intention to become a citizen, but before he was actually naturalized, without making such declaration, does not entitle the widow of an alien who never declared his intention to naturalization without previously making such declaration because he was an honorably discharged soldier of the United States and as such entitled to naturalization without making any declaration, under Rev. St. § 2166 (U. S. Comp. St. 1901, p. 1331).

    [Ed. Note.—For other cases, see Aliens, Cent. Dig. § 128; Dec. Dig. § 64.*]


    Act June 29, 1906, c. 3592, § 15, 34 Stat. 601 (U. S. Comp. St. Supp. 1907, p. 427), confers jurisdiction on any court authorized to naturalize aliens in the district where a naturalized citizen resides to cancel the certificate of naturalization of such person, although granted by another court, where its issuance was illegal.

    [Ed. Note.—For other cases, see Aliens, Dec. Dig. § 67.*]

3. Aliens (§ 65*)—Naturalization—Honorably Discharged Soldiers.

    Rev. St. § 2166 (U. S. Comp. St. 1901, p. 1331), which provides that honorably discharged soldiers of the United States may be admitted to citizenship without any previous declaration of intention, was not repealed by Naturalization Act June 29, 1906, c. 3592, 34 Stat. 596 (U. S. Comp. St. Supp. 1907, p. 418).

    [Ed. Note.—For other cases, see Aliens, Dec. Dig. § 65.*]

On Demurrer to Petition.


H. J. Snively, for respondent.

WHITSON, District Judge. The respondent is the widow of an honorably discharged soldier, who had never applied for admission to citizenship, nor made a declaration of intention. On the 10th day of April, 1908, she presented her petition for naturalization to the superior court of the state of Washington for the county of Benton, alleging the alienage of her husband and herself, and on the 15th day of July next following was admitted to citizenship by that court. She filed no declaration of intention, but relied upon the service of her husband in the army and the discharge received during his lifetime. The controversy is raised by demurrer to the petition, filed in this court, to cancel and set aside the certificate issued in pursuance of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
the order made in the state court. Want of power to grant the relief
prayed for, because the matter in issue was adjudicated by a court of
co-ordinate jurisdiction, and a construction of federal statutes which
justified the admission of the respondent, is the reliance of her coun-
sel.

Treating the judgment of the state court as an adjudication with
the parties before it, and with authority to consider the subject-mat-
ter, we must refer to the general rule in such cases, for a judgment
of this character must be given the same force and effect as that of
any other judgment of a court of general jurisdiction.

In United States v. Walker, 109 U. S. 258, 266, 3 Sup. Ct. 277, 282,
27 L. Ed. 927, the Supreme Court had under consideration a prin-
ciple applicable to the issues here.

It was there said:

"Although a court may have jurisdiction over the parties and the subject-
matter yet if it makes a decree which is not within the powers granted to it
by the law of its organization its decree is void."

So Windsor v. McVeigh, 93 U. S. 274, 23 L. Ed. 914, was discussed,
and the following excerpt noted:

"The doctrine invoked by counsel, that when a court has once acquired
jurisdiction it has a right to decide every question which arises in the case,
and its judgment, however erroneous, cannot be collaterally assailed, is un-
doubtedly correct as a general proposition, but it is subject to many quali-
fications in its application. It is only correct when the court proceeds, after ac-
quiring jurisdiction of the cause, according to established modes governing
the class to which the case belongs, and does not transcend in the extent or
character of its judgment the law which is applicable to it."

Again, the following from Ex parte Lange, 18 Wall. 163, 21 L.
Ed. 872, was quoted approvingly:

"It is no answer to this to say that the court had jurisdiction of the per-
sion of the prisoner and of the offense under the statute. It by no means
follows that these two facts make valid, however erroneous it may be, any
judgment the court may render in such case."

An erroneous finding or a mistake in judgment of a court having
jurisdiction cannot be reviewed or reconsidered by one of no greater
authority. Such courts cannot sit in review of the decisions of each
other. United States v. Gleason (C. C.) 78 Fed. 386, and cases there
cited, affirmed in 90 Fed. 778, 33 C. C. A. 272. But where a court
goes beyond the limits which the law has fixed, it is coram non judice.
Avgeno v. Schmidt, 113 U. S. 302, 5 Sup. Ct. 487, 28 L. Ed. 976; Free-
man on Judgments (4th Ed.) § 120c; Grignon v. Astor et al., 43 U. S.
337, 11 L. Ed. 283. In Voorhees v. Bank, 10 Pet. 450, 9 L. Ed. 490,
it was said that the line which separates error in judgment from
usurpation of power is very definite, and it was pointed out that in
the latter case the judgment is a nullity.

It is with this principle in view that I proceed to an examination of
the merits of the petition. Section 2166 of the Revised Statutes (U.
S. Comp. St. 1901, p. 1531) was not repealed by Act June 29, 1906, c.
(C. C.) 165 Fed. 1003. That section provides that honorably dis-
charged soldiers may be admitted to become citizens of the United
States upon petition without any previous declaration of intention. The argument is that the sixth subdivision of section 4 of the act of June 29, 1906, authorizes the widow of such soldier to succeed to his rights in virtue of his army service, such service and an honorable discharge being, it is contended, the equivalent of the declaration of intention. Boyd v. Thayer, 143 U. S. 135, 12 Sup. Ct. 375, 36 L. Ed. 103, has been cited as sustaining this view, but an examination of that case will show that it proceeded upon other grounds. Two classes of persons are provided for who may become citizens without declaring their intention: First. An honorably discharged soldier having the necessary qualifications as to residence. Second. The widow or minor children of one who has declared his intention to become a citizen, but who dies before he is actually naturalized. These are expressly named, and by a familiar rule, even if the statute were silent, others would be excluded.

To hold that the widow of an honorably discharged soldier may apply without declaring her intention is not only to ingraft another exception upon the law, but to bring it into direct conflict with the provisions of section 4 of the act of 1906, which expressly requires a declaration of intention. "That an alien may be admitted to become a citizen of the United States in the following manner and not otherwise" is the language of the act, and this excludes by express language the exception insisted upon. No doubt a court possessed of jurisdiction of the person and of the subject-matter is authorized to make conclusive findings of fact, at least in the absence of fraud, but the rule to that effect cited by counsel laid down in the Cyclopedia of Law and Procedure, vol. 2, p. 114, as applied to the admission of an alien, is to be understood in the sense that the limits defined by law are strictly observed.

Jurisdiction is expressly conferred by section 15 of the act of 1906 to entertain a suit to cancel and set aside a certificate of citizenship procured through fraud or illegality. The superior court of Benton county acted upon the theory that as a matter of law the widow was entitled to admission as a citizen without declaring her intention. But clearly this was an erroneous construction. There was no authority of law for such procedure. It was void for want of it. The court exceeded its jurisdiction, and, having done so, this court, by virtue of the act of Congress, is empowered to cancel the certificate for illegality.

It has been suggested that the respondent may surrender her certificaté and present a new petition. But the statutes do not seem to countenance this procedure, nor is it apparent how it could be of any practical benefit.

Demurrer overruled.
170 FEDERAL REPORTER.

In re REESE.
(District Court, M. D. Pennsylvania. June 8, 1909.)

No. 1,168, in Bankruptcy.

Bankruptcy (§ 136*)—Order on Bankrupt to Turn Over Property—Sufficiency of Evidence.

To justify an order requiring a bankrupt to turn over property, the proof that he has withheld property should be clear, and, where it depends upon the comparative estimates of the value of a stock of goods at different times, the discrepancy must be great and such as cannot be otherwise explained.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 136.*]

In Bankruptcy. On certificate from W. L. Hill, referee, sur rule on bankrupt to turn over certain property.

M. J. Martin and R. W. Rymer, for exceptions.
Ralph L. Levy, for trustee.

ARCHBALD, District Judge. The bankruptcy in this case was involuntary. The respondent being under execution, a petition was filed by creditors which he resisted, but which finally ended in an adjudication. He was conducting a grocery store, buying and selling for cash up to a few months before his failure. Dropping at that time the jobbing firms with whom he had been dealing before that, he began to buy of new parties, and ran up a large indebtedness on credit, contrary to his previous practice, obtaining in that way some $9,000 worth of goods inside of four months, a large part of which, it is claimed, is unaccounted for. Charging that he withholds the proceeds of sales during this time not applied to his debts or his personal and store expenses, a petition was filed by his trustee to compel him to turn over this money, which the referee sustained to the extent of $2,500. This amount was derived by charging the bankrupt with the stock which he was supposed to have on hand on December 1, 1907, the date taken for the reckoning, together with his purchases from then on as shown by his bills and invoices, and crediting thereon the value of the goods which he had when he failed, as well as the money realized from sales which was paid out meantime. There can be no just criticisms of the course so pursued nor the result obtained, provided only the figures taken can be relied on. The referee has evidently endeavored to be conservative and fair to the bankrupt in his estimates, but, as shown by the evidence taken since the hearing before him, the amounts with which the bankrupt is to be charged must in any event be reduced by over $1,600 of credits of which the referee had no knowledge, and it is only the balance that is now in controversy.

The chance for error in any such calculation lies in the value assigned to the stock of the bankrupt at the time when the reckoning began, as compared with what it is found to be when he goes into bankruptcy. The trustee contends that at both it was practically the same in the present case, and the referee takes this view of it,

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

fixing the value in each instance at $4,000. The bankrupt claims that it was only $2,000 at the beginning of this period, and $6,000 at the end of it. This is a wide variance which is not easily disposed of. The uncertainty is due to the fact that the value at the first is wholly a matter of estimate. The referee relies on the statement of the bankrupt early in his examination, before there was any controversy, that he had on hand on January 1, 1908, about as large a stock as when he was closed up, and that it was the same on December 1, 1907, which is the first date taken, the value he fixes being $3,000 or $4,000. He subsequently corrected this, however, stating that the stock was very much depleted on December 1, having been allowed to run down on account of the panic that fell and the consequent falling off of business, and he amplified this at the hearing before the court on the exceptions. He also at the same time increased his estimate of the value of the stock when he was closed up to $6,000, the appraisers, as he says, who made it $3,500, having omitted many articles. The value of the stock at the time the store was closed is too fully attested, however, to be shaken, not only having been inventoried and valued by the appraisers, but also having been gone over carefully by the receiver, himself an experienced grocer, and others, all of whom substantially agree in their figures. And while these estimates are likely to have been low, in contemplation of the forced sale which was to follow, the value cannot have been anything like that given by the bankrupt. The referee is conservative when he fixes it at $4,000, which is about 15 per cent. above the appraisement, and that will be adhered to.

But, on the other hand, if $4,000 is to be taken as the value at the end, it is hardly fair to compare this, which was the result of a close and careful inventory, with the figures which he gave as the value at the beginning, which at best was nothing but a rough guess. Comparison is rather to be made between estimate and estimate, the value of the stock on December 1, according to his original statement, being $3,000 or $4,000, which as contrasted with $6,000, the value given to it by him at the end, makes a difference of $2,000 or $3,000. I am aware that at one point in his testimony he apparently makes the value at both times the same. But he corrects this afterwards, and notwithstanding the suspicion that the correction may have been for a purpose, coming after these proceedings were instituted, I am satisfied that the original statement was an inadvertence, and that the correction should be accepted. The stock is very likely, as he explains, to have been depleted and run down at the beginning of this period, for the reasons which he gives, which will also account for his otherwise large purchases immediately following that, and, on the basis of its being $4,000 at the end, as determined by the appraisement, it may well be regarded as not above $2,000 at the beginning, in accordance with the difference as estimated by the bankrupt between the one time and the other.

In one respect, however, the bankrupt has not been held for all that he should have been. It was shown by the evidence that he bought goods for cash of Short to the amount of $600, and from Pierce and others to about $200 further. And this money, having been allowed on the one side as cash paid out, should be charged on the other as so much more of goods received, to be accounted
for. Making this correction, the account with the bankrupt may be stated as follows:

The bankrupt is to be charged with:

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Stock on hand December 1, 1907</td>
<td>$2,000.00</td>
</tr>
<tr>
<td>Goods bought on credit, as per bills and invoices</td>
<td>8,965.32</td>
</tr>
<tr>
<td>Goods bought for cash</td>
<td>800.00</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>$11,765.32</strong></td>
</tr>
</tbody>
</table>

The bankrupt is to be credited with:

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Stock turned over to trustee, say</td>
<td>$4,000.00</td>
</tr>
<tr>
<td>Various cash credits as found by the referee</td>
<td>5,949.72</td>
</tr>
<tr>
<td>Credits proved at hearing before the court not known to the referee</td>
<td>1,665.74</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>$11,615.46</strong></td>
</tr>
</tbody>
</table>

This shows a difference of $150 against the bankrupt, but must be regarded as practically balancing. Depending, as it does, on mere estimates on one side and the other, it cannot be expected to come out even. And it is only in any case of this kind, where there are great discrepancies which cannot be explained except on the basis that the bankrupt has made away with his property, that the matter can be laid hold of by a summary order. Being satisfied, therefore, that the bankrupt has cleared himself in the present instance of the charge made by the trustee of withholding and appropriating what belongs to his creditors,

The exceptions are sustained, and the petition of the trustee is dismissed.

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UNITED STATES v. STANDARD OIL CO.
(District Court, N. D. Illinois, N. D. March 10, 1909.)

No. 3,717.

1. JURY (§ 66*)—DRAWING OF JURY IN FEDERAL COURT—DRAWING FROM PART OF DISTRICT.

While a federal court is given discretion by Rev. St. § 802 (U. S. Comp. St. 1901, p. 623), to direct the selection of jurors from any part of the district instead of the district at large, such power should only be exercised when there is some reason for it, and in a criminal prosecution against a corporation in the district including Chicago, which contains two-thirds of the population of the district, where the case involves a large way questions of the transportation of commerce, a panel of jurors drawn almost entirely from without the city and composed largely of farmers will be set aside, as not best calculated to return a fair and intelligent verdict, and a panel drawn from the entire district.

[Ed. Note.—For other cases, see Jury, Dec. Dig. § 66.*]

2. CARRIERS (§ 38*)—INTERSTATE Commerce—PROSECUTION FOR RECEIVING CONCESSIONS.

In a prosecution against a shipper for receiving concessions from the published rates of a railroad company in violation of Elkins Act Feb. 19, 1903, c. 708, § 1, 32 Stat. 847 (U. S. Comp. St. Supp. 1907, p. 880), which involves continuous shipments covering a number of years, there can be no greater number of offenses than there were payments of freight, in which concessions were granted and received, such receipt being the completion of the transaction which constitutes the offense.

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

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

In an indictment charging a shipper with having received from a railroad company a rebate or concession in violation of Elkins Act Feb. 19, 1903, c. 708, § 1, 32 Stat. 847 (U. S. Comp. St. Supp. 1907, p. 880), whereby oil was transported for it in interstate commerce at a less rate than that named in the tariffs published and filed by the railroad company, an averment that such company established, published, and filed a rate on oil between Chicago & St. Louis of 19 1/2 cents per hundred pounds is not sustained by proof that its schedules named only the rate over its own line from Chicago to East St. Louis at 18 cents, and that the tariff on connecting lines between East St. Louis and St. Louis was 11 1/2 cents.

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


Upon the trial of an indictment against a shipper for a violation of Elkins Act Feb. 19, 1903, c. 708, § 1, 32 Stat. 847 (U. S. Comp. St. Supp. 1907, p. 880), by receiving from a railroad company a rebate or concession whereby its property was transported in interstate commerce at a less rate than that named in the tariffs published and filed by such railroad company, it is essential for the government to prove that such tariffs were posted, at least in the depot, station, or office of the railroad company where the shipments were received, as required by section 6 of the interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 350 [U. S. Comp. St. 1901, p. 3156]).

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


Freight rates required to be established by carriers, according to the provisions of section 6 of the interstate commerce law (Act Feb. 4, 1887, c. 104, 24 Stat. 350, as amended by Act March 2, 1889, c. 382, § 1, 25 Stat. 855 [U. S. Comp. St. 1901, p. 3156]), are not established by tariffs naming class rates that do not contain a classification of freight, but merely refer to a classification published by other parties and subject to change by such parties. A departure by a shipper from such rates does not constitute an offense under Elkins Act Feb. 19, 1903, c. 708, § 1, 32 Stat. 847 (U. S. Comp. St. Supp. 1907, p. 880).

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 30.*]

For former opinions, see 148 Fed. 719, 155 Fed. 305, and 164 Fed. 376.

The indictment charges the defendant with having received a concession from lawfully established rates, through the transportation of its property in interstate commerce, in violation of the provisions of Elkins Act Feb. 19, 1903, c. 708, 32 Stat. 847 (U. S. Comp. St. Supp. 1907, p. 880). It is averred in certain counts that the Chicago & Alton Railway, by virtue of a common arrangement with the Chicago Terminal Transfer Railroad, which extends from Whiting, Ind., to Chappell, Ill., had established a route for the transportation of property by railroad from Whiting, Ind., to East St. Louis, Ill.; and in the remaining counts that the Chicago & Alton Railway was engaged in the transportation of petroleum by railroad over its railway route from Chappell, Ill., to St. Louis, Mo.; that the lawfully established rate for the transportation of petroleum products from Whiting, Ind., to East St. Louis, Ill., over the route of the Chicago & Alton Railway, was 18 cents per hundredweight, and that the lawfully established rate over its route from Chappell to St. Louis was 19 1/2 cents per hundredweight; that printed tariffs showing the rates from Whiting to East St. Louis were kept open to public inspection as required by law at Whiting and Chappell, and that those showing the rates from Chappell to St. Louis were likewise kept at Chappell.

Each of the first 885 counts avers the transportation of a car of petroleum from Whiting to East St. Louis, and the payment of freight thereon at the rate of 6 cents per hundredweight. Each of the remaining 1,016 counts

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
charges the transportation of a car of oil from Chappell to St. Louis and payment thereon of freight charges at 7½ cents per one hundred pounds.

The indictment as returned contained 1,903 counts. At the former trial a verdict of not guilty was returned as to 441 counts.

The first count of the indictment is as follows:

"The grand jurors for the United States of America, inquiring for the Northern division of the Northern district of Illinois, upon their oath present, that before and on the first day of September, in the year nineteen hundred and three, and throughout the period of time from that day until and on the first day of March, in the year nineteen hundred and five, the Chicago and Alton Railway Company was a corporation organized and existing under and by virtue of the laws of the state of Illinois, and was a common carrier engaged in the transportation of property by railroad, over its railway route, from Whiting, in the state of Indiana, to East St. Louis, in the state of Illinois, under a common arrangement with a certain other corporation common carrier, to wit, the Chicago Terminal Transfer Railroad Company, a corporation under the laws of the state of Illinois, for a continuous carriage and shipment of property, in interstate commerce, from Whiting aforesaid to East St. Louis aforesaid, over the connecting railroads of the said corporation common carriers, that is to say, over the railroad of the said Chicago Terminal Transfer Railroad Company from Whiting aforesaid to Chappell, in the said division and district, and over the railroad of the said Chicago and Alton Railway Company from Chappell aforesaid to East St. Louis aforesaid; that so the said Chicago and Alton Railway Company, during the said period, was a corporation common carrier subject to the provisions of the act of Congress approved February 4, 1887, entitled 'An act to regulate commerce,' and also to the acts of Congress amendatory of the said act; that during the said period the said Chicago and Alton Railway Company, as required by law, kept open for public inspection, to wit, at Whiting and Chappell aforesaid, its printed tariffs and schedules showing the rates and charges for the transportation of property, in the interstate commerce aforesaid, which the said Chicago and Alton Railway Company established and which were then in force upon its said route, and, as required by law, filed copies of such tariffs and schedules with the Interstate Commerce Commission of the said United States; which said tariffs and schedules, so published and filed as aforesaid, showed the rate and charge for the transportation of certain kinds of such property, to wit, petroleum and products of petroleum, in car load lots, from Whiting aforesaid to East St. Louis aforesaid, by the said route, to be thirty cents for each one hundred pounds thereof, and that all of the foregoing facts were, throughout the said period, well known to the Standard Oil Company hereinafter mentioned.

"And the grand jurors aforesaid, upon their oath aforesaid, do further present that within the period of time aforesaid, to wit, on the said first day of September, in the year nineteen hundred and three, and while the said tariffs and schedules of rates and charges, so published and filed as aforesaid, were still in force as aforesaid on its said route, the said Chicago and Alton Railway Company unlawfully did engage in the transportation of such petroleum thereon, in interstate commerce, to wit, from Whiting aforesaid, through the said Northern division of the said Northern district of Illinois, to East St. Louis aforesaid, over the said railway route, for and on account, and pursuant to the request, of the Standard Oil Company, a corporation theretofore organized and then existing under the laws of the state of Indiana, of a large quantity, to wit, 77,971 pounds, of a certain product of petroleum known as refined oil, in a tank car of the Union Tank Line Company, numbered 9401, at a total rate and charge to the said Standard Oil Company, for such transportation thereof, of six cents for each one hundred pounds, under a common arrangement between the said Chicago and Alton Railway Company and the said Chicago Terminal Transfer Railroad Company for a continuous carriage and shipment of the said refined oil from Whiting aforesaid to East St. Louis aforesaid, over the said railway route, in the same tank car, without stoppage or interruption, at Chappell aforesaid or elsewhere, for the purpose of unloading, reloading, or transshipment; which said arrangement then and there was one under which the said refined oil was, during such transportation, accompanied by
a written switching waybill and a waybill indicating that the same was
being switched and transported from Whiting aforesaid to Chappell aforesaid
by the said Chicago Terminal Transfer Railroad Company, and trans-
ported from Chappell aforesaid to East St. Louis aforesaid by the said Chicago
and Alton Railway Company.

"And so the grand jurors aforesaid, upon their oath aforesaid, do say
that the said Standard Oil Company, corporation as aforesaid, on the said
first day of September, in the year nineteen hundred and three, at and within
the said Northern division of the said Northern district of Illinois, in manner
and form aforesaid, unlawfully did knowingly accept and receive from the
said Chicago and Alton Railway Company a concession in respect of the
transportation of certain of its, the said Standard Oil Company's, property
in interstate commerce, whereby, and by which device, that property was
transported, in such interstate commerce, at a less rate than that named in the
tariffs so, as required by the said act to regulate commerce and the said acts
amendatory thereof, published and filed by the said Chicago and Alton Rail-
way Company: Against the peace and dignity of the said United States, and
counter to the form of the statute of the same in such case made and
provided."

Counts 2 to 885 are, by reference to the first count, in substantially the
same form, with changes in car numbers, weight, date of shipment, and, in
some instances, character of freight.

Count 886 is as follows:

"And the grand jurors aforesaid, upon their oath aforesaid, do further
present that, before and on the first day of September, in the year nineteen
hundred and three, and throughout the period of time from that day until
and on the first day of March, in the year nineteen hundred and five, the
Chicago and Alton Railway Company was a corporation organized and exist-
ing under and by virtue of the laws of the state of Illinois, and was a
common carrier engaged in the transportation of property by railroad, over
its railway route, from Chappell, in the said Northern division of the said
Northern district, and in the state of Illinois, to St. Louis, in the state of
Missouri; that so the said Chicago and Alton Railway Company, during the
said period, was a corporation common carrier subject to the provisions of
the act of Congress approved February 4, 1887, entitled 'An act to regulate
commerce,' and also to the acts of Congress amendatory of the said act;
that during the said period the said Chicago and Alton Railway Company,
as required by law, kept open for public inspection, to wit, at Chappell aforesaid,
its printed tariffs and schedules showing the rates and charges for the
transportation of property, in the Interstate commerce aforesaid, which the
said Chicago and Alton Railway Company established, and which were then
in force upon its said route, and, as required by law, filed copies of such
tariffs and schedules with the Interstate Commerce Commission of the said
United States; that the said tariffs and schedules, so published and filed as
aforesaid, showed the rate and charge for the transportation of certain kinds
of such property, to wit, petroleum and products of petroleum, in car load
lots, from Chappell aforesaid to St. Louis aforesaid, by the said route, to be
nineteen and one-half cents for each one hundred pounds thereof; and also
that all of the foregoing facts were, throughout the said period, well known
to the Standard Oil Company hereinafter mentioned.

"And the grand jurors aforesaid, upon their oaths aforesaid, do further
present that, within the period of time aforesaid, to wit, on the first day of
September, in the year nineteen hundred and three, and while the said tar-
riffs and schedules of rates and charges, so published and filed as aforesaid,
were still in force as aforesaid on its said route, the said Chicago and Alton
Railway Company unlawfully did engage in the transportation in interstate
commerce, to wit, from Chappell aforesaid, through the said Northern division
of the said Northern district of Illinois, to St. Louis aforesaid, over the said
railway route, for and on account, and pursuant to the request, of the Stand-
ard Oil Company, a corporation theretofore organized and then existing under
the laws of the state of Indiana, at a total rate and charge to the said Stand-
ard Oil Company, for such transportation thereof, of seven and one-half cents
for each one hundred pounds, of a large quantity, to wit, 23,091 pounds of a
certain product of petroleum known as petroleum lubricating oil, in a tank car of the Republic Oil Company numbered 131.

"And so the grand jurors aforesaid, upon their oath aforesaid, do say that the said Standard Oil Company, corporation as aforesaid, on the said first day of September, in the year nineteen hundred and three, at and within the said Northern division of the said Northern district of Illinois, in manner and form aforesaid, unlawfully did knowingly accept and receive from the said Chicago and Alton Railway Company a concession in respect of the transportation of certain of its, the said Standard Oil Company's, property in interstate commerce, whereby, and by which device, that property was transported, in such interstate commerce, at a less rate than that named in the tariffs so, as required by the said act to regulate commerce and the said acts amendatory thereof, published and filed by the said Chicago and Alton Railway Company: Against the peace and dignity of the said United States, and contrary to the form of the statutes of the same in such case made and provided."

The remaining counts are, by reference to count 886, In substantially the same form, with changes in car numbers, weight, date of shipment, and, in some instances, character of freight.

The tariffs relied upon by the government as constituting the lawful rate are:

(1) Tariff 24 of the Chicago & St. Louis Traffic Association, an association of 27 railroads, including the Chicago & Alton Railroad, dated May 15, 1899, and filed with the Interstate Commerce Commission May 6, 1899, naming class rates between Chicago and East St. Louis, including a fifth-class rate of 18 cents per hundredweight in car loads, and various commodity rates on commodities other than petroleum oils. The tariff states upon its face that it is "Governed by Illinois Classification." The same rates are also applied from Summit and Willow Springs, stations on the Chicago & Alton Railway, on either side of Chappell, to East St. Louis.

(2) A document, prepared by the Illinois Railroad and Warehouse Commissioners, entitled: "Railroad and Warehouse Commissioners' Revised Schedule of Reasonable Maximum Rates of Charges for the Transportation of Passengers and Freight on the Railroads in the State of Illinois, Including a Classification of Freight." This document was adopted in September, 1899, is recited to take effect on January 1, 1900, and was filed with the Interstate Commerce Commission on January 3, 1900. The previous issue of this commissioners' schedule of maximum rates, including a classification of freight, was dated April 3, 1899, but no copy thereof was filed with the Commission. The issue prior to that of 1899, dated in 1895, was on file with the Commission. The classification in connection with each of these schedules puts petroleum and its oil products in the fifth class.

(4) Various tariffs of St. Louis bridge or ferry companies naming a rate of 1½ cents per hundredweight from East St. Louis to St. Louis.

There was no evidence tending to show that copies of any of such tariffs were either posted or on file in the station at Whiting.

The government offered evidence tending to show that the copies of such tariffs were not at the general freight office, the local freight office, and the commercial office in Chicago of the Chicago & Alton Railway, and such copies were kept in the regular office files, and were in use by the rate clerks in quoting rates and accessible to the public on application. It did not appear that any of such tariffs were actually posted; notices, however, were posted which stated in effect that tariffs could be had upon application to the agent. It likewise appeared that at Chappell there was kept in the office in the tower house at that point a copy of tariff 24, of the so-called "Illinois Classification," of the application sheets, and copies of some St. Louis bridge and ferry tariffs without the particular tariffs so kept being specified; and all of such bridge and ferry tariffs were kept in the files of tariffs in use in that office in inserting rates in waybills made out there.
Chappell is about thirteen miles from Chicago, and is the junction of the Chicago & Alton Railway with the Chicago Terminal Transfer Railroad, a belt line. It is not a public station where passengers or freight are received. It consists only of a tower house, the upper story of which is used as an office, where is transacted only such business as is connected with the transfer of car load freight received by the Chicago & Alton from the belt line, or delivered to it, at that point.

It also appears that the Chicago & Alton Railway extends from Chicago through Chappell to East St. Louis, and that it reaches St. Louis only by its connection with the various bridge and ferry companies already mentioned.


The defendant challenged the array of jurors on the ground that while the city of Chicago and Cook county have more than two-thirds of the total population of the Northern district of Illinois from which the jury was drawn, only 3 out of 150 jurors in the panel reside in Cook county, and that 6 per cent. of the jurors drawn are farmers or retired farmers.

The ruling of the court upon this motion is:

ANDERSON, District Judge (orally). I can see very well why that provision of the law directing from what part of the district the jury should in some cases be drawn, is made. Suppose that in a district composed of a number of counties a defendant is brought to trial who is alleged to have committed a crime that has caused an unusual amount of feeling, as well as prejudice, and there has been considerable discussion in a certain part of the district either for or against him—suppose against him. In such a case I suppose the court would have the right, and probably ought, to direct the jurors to be drawn from other parts of the district. If a case were triable here, for example, it might not be necessary to make that direction, because the reason would not apply to a community like this, as it would to a smaller one; but there might be reasons why the court ought to, and of course could, direct that the jurors be drawn from those parts of the district outside of Chicago. In a proper case I do not think there would be any question but what the court has that power, but it is not an arbitrary power. There has to be some reason for it even in discretionary matters. The court should act upon grounds or reasons. To my mind it is not enough to say that a man's constitutional rights are saved by a literal compliance with the provision of the Constitution which guarantees him a trial in the state and district where the offense is committed. A man might be tried by a jury in a state and district and yet be substantially deprived of some of his rights.

While I agree that this is largely a matter of discretion, if it is a matter of discretion whether the court shall direct that the jurors be drawn from a particular part or portion of the district, then I suppose it is very largely a matter of discretion whether the court shall set aside the drawing of jurors drawn from a particular part of the district.

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It has been suggested by way of inquiry, would the court set aside the panel because, forsooth, there was one county in the district that was entirely unrepresented? That question is ordinarily of very easy solution, and will admit of but one answer, and that is a negative one. Of course, the court would not ordinarily set aside a panel because of that, but here is a district composed of Cook county and some other counties, and, when this panel is drawn, it appears that although the court knows and the evidence shows that at least two-thirds of the population of this district is in Cook county, or in the city of Chicago, yet only 3 out of a 150 jurors drawn come from Cook County.

Now, would the court originally have been justified in directing that those jurors all be drawn from that portion of the district outside of Cook county? If so, the court ought to have been able to give some good reason for it. If it were an original proposition whether or not this court should direct that the jurors who should try this case should be drawn from all of the counties of the district substantially in proportion to the population of the qualified jurors, or whether they should be drawn from the district exclusive of Cook county and city of Chicago, I have an impression that it would be pretty hard to give any substantial reason why that sort of an order should be made.

I do not understand that anybody is charged with bad faith, or that anybody has charged any bad faith on the part of the jury commissioners. No suggestion of that kind has been made, and I do not want to be understood as in any sense criticising what has been done, but here is the way it strikes me: As I said this morning, a man is entitled to a fair trial. This defendant is a corporation, but the same rules apply. A defendant is entitled to a fair and impartial trial. Now, without reference to how this comes to be or without reference to the way it came about, and without suggesting in any way that any one is to blame for it, yet here is a case of wide public interest, and everybody has probably some view on the matter. It has been much discussed, and it involves problems in regard to the transportation of commerce in a large way. Without going into the matter very far, we know that there are certain views taken on some subjects in the city, and other views are taken in the country, whether right or wrong. The views of the people who live in large communities and do business in a large way and on a large scale do not always harmonize with the views of people who live in smaller places and do business on a smaller scale. I am not now saying which set of people are nearer right. It is not for me to say.

Without any reference to how it happened, it so happened that this case is tried in a district that is composed, as I have said of this enormous commercial city and the small rural towns outside. The air may be much purer out there than it is here. The moral standards may not only be different, but they may be better; I do not know; it is not for me to say. The degree of intelligence outside may be equal to the intelligence in the city, and that is not for me to say. But what is a jury? The jury is a jury of men, a jury of a man's peers. What is the verdict of the jury that we are after? It is the average judgment of 12 men, not the judgment of 12 carpenters,
12 farmers, 12 bankers, or 12 professional men, but the average judgment, I might say, of average men. It so happens that this venire drawn here to-day, or this panel, or whatever you may call it, is composed of men, I assume, beyond reproach in character and standing and capacity, but they are all with the exception of three, outside of this great commercial city, which is a large part, a major part, of this district so far as population, business, and wealth are concerned, and it so happens, by reason of that fact, that a large proportion of these men are farmers. As I said this morning: I think mighty well of the farmer as a juror. I have seen him tried for a long time. I don't think the farmer is any better than other people in some respects, but as a rule he is a good juror; and I think there are questions in this case which farmers may be thoroughly qualified as jurors to try. Yet the probabilities are that if the jury were composed partly of business men that a more satisfactory conclusion might be reached, or if not a more satisfactory conclusion, yet the conclusion would be accepted more satisfactorily.

I don't feel under all the circumstances that the jury selected in this panel would be entirely unobjectionable. I don't mean by that that there is anything in the composition of it, so far as the individual men are concerned, that can be reasonably objected to; but, however this thing happened, I don't like the looks of it. I don't see any reason why the qualified jurors, people who are qualified to be jurors, resident in Cook county and Chicago, should be systematically left out of this box. I think that the jury commissioners, in putting the names in the box, ought to put in a fair proportion of qualified jurors from this county. I don't want to start in this trial feeling myself that something is not quite fair. I don't want to start in the trial with the defendant and its counsel feeling there is something that is not quite fair about it. I feel that we ought to start fair and keep fair. At least we ought to begin fair, and I think this panel ought to be set aside.

The defendant also moved that the government be required to elect not to exceed 36 counts upon which it would proceed to trial, for the reason that it appears upon the record that under the decision of the Court of Appeals there are not more than 36 distinct offenses charged in the various counts of the indictment.

In ruling upon this motion the court said:

This discussion has been interesting; but I don't now see just how the court can rule upon it before the trial, or how any motion may very intelligently be made, yet I think I might as well give counsel the views that I now entertain on these propositions, these views, of course, being subject to modification if I conclude otherwise upon further reflection.

Now, in the first place, it is perfectly manifest that there are not 1,462 offenses, whatever may be the proper conclusion to come to between 1 offense and 36 or more. It is perfectly evident now that there are not 1,462 cases, although there are 1,462 counts. We know that both from the decision of the Court of Appeals as to what the law is, and we know now, before we enter upon the trial of the case,
what the facts are, so far as this feature of the case is concerned, and they are unchangeable, as I take it.

The proof on this trial may differ widely from the proof in the other trial upon knowledge or intent, and possibly on some kindred questions, but as to the physical features, if I may so speak of the transaction, or course of business, how it was done and all that, I take it (being shown by the transactions as they are recorded in the papers and records between the shipper and carrier), that those facts will be in this trial as they were on the former trial. I assume that. So the question is quite different from the ordinary situation where the motion is made, before the introduction of the evidence, to require the government to elect. Ordinarily it is a very good answer to this motion to say the government does not exactly know what the proof is, or the government has framed its indictment to meet different phases of the proof, and therefore to suggest that this motion be not entertained and the ruling on it postponed until the close of the evidence. Ordinarily that is a very good suggestion, although it does not have much force here.

The court now knows what the law is; that is to say, the court has been told by the Court of Appeals. The court knows what the facts are, what the facts will be, and while I don't exactly see how the motion can be shaped, or how I can rule upon it as a motion, yet I think in the interest of justice and of time, and getting through with this trial within a reasonable time, I may as well indicate what I think about some of these questions—and then counsel can govern themselves accordingly—how the motions are to be made, and how they will be ruled upon in accordance with these views, unless some new light is thrown upon it and exceptions can be saved if they are overruled, and if they are sustained the government can shape its case so as to save time, and in that situation I think it is better for the court to indicate what he thinks about it.

Now, we know that there are not 1,462 offenses. I don't think, myself, that the proposition that this is a continuing offense is frivolous by any manner of means. If the question were before me for the first time, I mean to say, if this were the first time the question had ever been up, I would give considerable consideration to that proposition. I might say that the argument of the government that to put that construction on the law would practically amount to a license does not weigh with me at all. That is a matter to be addressed to the lawmaking department. If they have made a statute in such a way that it can be avoided, or practically nullified; it is their business to remedy it, and not the court’s in its construction. This very contention was before the Court of Appeals. In the first place, the Court of Appeals did not adopt that construction. They have not said directly or indirectly that this is the proper view to take of it. In so far as the Court of Appeals has acted, they have discarded it. I don't say that they have held that that theory is not the correct one. I don't say that it may not eventually prevail, as suggested by counsel for the defendant; but I do say, as I understand it, that matter was put up to the Court of Appeals and pressed upon them as against the theory adopted by the court in the former trial, and the Court of
Appeals did not take up with it. There isn't anything in this opinion that I have been able to see from reading it which gives any encouragement to that theory; although, as I said a while ago, I think it is a proposition that can be powerfully urged, and if the adoption of that theory would result as suggested by counsel for the government, that is a consideration for the lawmaking department, and not the judicial department of the government.

The difficulty about the theory as to three offenses is like unto the difficulty about the first. That suggestion was made to the Court of Appeals, and pressed upon them as the proper theory as against the theory adopted by the trial court. There is nothing in the opinion to encourage that theory as I read it.

Now, I have not been able to figure out just what the government's contention is on this matter. Counsel who made the argument for the government said it was very clear to him, and it may be my fault that he did not make it clear to me. If there is anything in this opinion that does speak upon this question, it does not leave the conclusion that the shipment is the unit. I don't know exactly what counsel meant by "the shipment" anyhow. I asked if he meant a train load, and manifestly the answer would not be "yes" to that proposition. It might or it might not. It does not mean a car load. We have already found that out.

I may say now if the government, under the facts in this case as I understand them, can make a separate charge for each car, I don't see any objection to making a separate charge for each hundred pounds. I don't know of any possible ground upon which it could be split up finer than that, but if we start out to find units we can go on finding units until we get down to the lowest unit that appears; and, as I recall it, the proof shows that this was shipped, billed, and the rate fixed in car loads at so much per hundred pounds. If you can take a shipment and divide it into car loads, I don't see why you cannot go on dividing into still smaller units—hundred pounds.

The offense here is plain. It is the accepting and receiving of the concession. If there is anything that the Court of Appeals has made plain to us in this opinion, to my mind it is that the offense is completed when the concession is received. If it were a rebate, if they paid the 18 cents, and the 12 cents were paid back, then the crime against rebating is committed when the 12 cents is paid back. Now, they say that when it is a concession, that instead of the whole amount being paid, and the rebate being paid back, the concession is accepted and given by the settlement between the parties of the difference between the concession and the legal rate; that is, by paying the unlawful rate. Now, that is essential, and counsel for the government, I think, will concede that that is essential, to the consummation of the offense. I think the Court of Appeals have said that that is an essential ingredient of the offense; it is the thing which completes the transaction. That thing which completes a transaction and puts the final touch upon it, the finishing touch upon it, is the thing which distinguishes it from other transactions. The dividing line comes there. So I don't think there can be more than that number of offenses, for this period covered by this indictment, than the evidence
shows there were payments of this difference, whether that is 36 or more or less.

Now, where are we? When you get to that point, where are we? If the court sees, upon a state of facts which in all probability will be substantially, so far as this question is concerned, as upon the former trial, when the court sees that there can be no more than so many convictions, say 36 for illustration, is it right to put the defendant to its defense upon 1,462 charges? If I were an individual defendant and charged in that way, I would think I had a legitimate ground of complaint. Not only that, but what is the duty of the court here? Here are 1,462 separate independent charges on the face of the indictment. The court has come to the conclusion that there cannot be a verdict of guilty sustained upon these, upon more than, say, for illustration, 36. Is the court to try 1,462 cases, 1,426 of which are dead cases, in order to try 36 live ones?

In view of the evidence as it appeared on the trial before, and as in all probability it will appear on this trial, so far as this question is concerned, and in view of the opinion of the Court of Appeals, I don't think there can be more convictions here than the number of completed transactions within the view of the Court of Appeals, and, if it is 36 settlements, it is 36. If there were 36 payments during this year and a half upon this business as it was agreed on, there cannot be over 36 convictions.

Now, this indictment was not drawn upon that theory at all. It was not drawn upon the theory that the Court of Appeals have given their adherence to and which I think I will have to adopt. The government may not split up its cause of action; it may take out of the transaction that which makes an offense, but it may not split it up in the sense of doubling up on the defendant and convicting him of more than one offense when only one has been committed. He can only be indicted, tried, and convicted for one offense.

Now, if the theory is correct that that which makes the offense, which closes the transaction, which cuts it off and separates it from the next transaction, is this settlement, then, even if that is true, these counts in the indictment which are drawn as they are may be sufficient under the proof to sustain a conviction upon the theory which I have discussed. I assume it is true; there has been no discussion on that. That being the case, the government ought to in some way confine its testimony to one count under each transaction. This matter has not been suggested, but I assume or suppose that is the way it would work out. In other words, if the charge is that on a certain day the shipper received a concession in respect to the transportation of a certain car of property at a certain rate, which was less than the lawful rate, I am inclined to the view now that the charge is sustained by proof (leaving out all questions as to lawful rate and intent, and addressing myself simply to this question) that on a certain day a certain car loaded with a certain commodity for which there is a lawful rate was shipped at a less rate, and upon a subsequent day a settlement was made at the less rate for shipments in which this car was included. I think that proposition is sound, and it is comparatively simple if you look at it right.
So the government, I think, ought to select a count, a shipment of which, or of the car mentioned in which, was included in a settlement, which is the final completion of the transaction which makes up the offense.

The court in ruling upon the question of the sufficiency of the documents relied upon by the government to constitute the lawful rate and in directing a verdict said:

The question immediately before the court is, shall witnesses be heard to testify in substance as to what carriers and shippers understand by the term “Illinois Classification,” what the practice was with regard to it, as throwing some light upon the construction to be given to these two instruments, Tariff Schedule No. 24, which took effect May 15, 1899, and Illinois Classification adopted September, 1899?

I think it is utterly immaterial and unnecessary for this court to attempt to demonstrate whether the particular question that has arisen here is a question of law or a question of fact. If it is a question of law, it is for the court to say as a proposition of law whether or not these two instruments make what the statute requires, an established rate, and the court will pass upon it as such. If it is a question of fact, then the question before the court is whether or not the evidence is sufficient to support a finding of an established rate. If it be a question of fact, upon that view of the case it is for the court to say whether or not there is enough evidence here to go to the jury upon that question. So I shall not waste any time in determining whether or not the particular question before the court yesterday morning is a question of law or a question of fact; nor as to whether the Court of Appeals, when they used the words “judicial questions,” meant questions to be decided by the court—questions of law; or whether they meant questions to be decided by the jury—questions of fact.

Now, the offered evidence, to my mind, would be superfluous. It has already been testified to—I don’t suppose there could be any dispute about it—that among carriers and shippers alike the term “Illinois Classification” meant that classification which was gotten out or prepared by the Board of Railroad and Warehouse Commissioners of the State of Illinois. The proffered testimony can go no farther than that. Suppose the court should hear such evidence. The district attorney says that the effect of it will be, and the fact, finally, will be, that what is meant by the term “Illinois Classification” is the classification made by the Railroad and Warehouse Commissioners of the State of Illinois from time to time. The very first thing that attracts one’s attention in this section 6, that has been discussed so often, is this:

“Every common carrier subject to the provisions of this act shall print and keep open to public inspection schedules showing the rates and fares and charges for the transportation of passengers and property [note what follows] which any such common carrier has established and which are in force at the time upon its route.” Act Feb. 4, 1887, c. 104, 24 Stat. 380 (U. S. Comp. St. 1901, p. 3156).
Now, what have we here? Tariff 24 standing by itself of course makes no rate; it is not complete—requires something else. What is it? It is indicated on the first page of the tariff—notice the language, "governed by Illinois Classification except as noted herein." Under the proffered evidence and the argument of the district attorney, that means this: If the court is to give it any construction at all, it means, governed by such classification as the Illinois Railroad and Warehouse Commissioners may from time to time issue and promulgate. Can it be argued successfully that a rate that is dependent upon that sort of a shifting scale is established?

The thing that this defendant is charged with having deviated from is an established rate. A rate to be established must be fixed. The very section which provides for the publication and filing of the established rate provides the means and ways in which the established rates may be amended or changed. Of course, that means that is the only way they can be changed. The method of amendment, or change, or alteration, laid down there is exclusive. Now, not only is this rate, thus arrived at, a shifting, variable rate, but it is a rate which is shifting and variable by the conduct and action of an outside third party. In other words, the Alton Railroad says when it files this tariff: These are the rates upon these commodities, subject to the changes that may be made in the classification, and, of course, therefore, in the rates from time to time by the Railroad and Warehouse Commissioners of the State of Illinois. To state the proposition is to answer it. It cannot be possible that that can be an established rate.

It has been said that the changes actually made in these classifications did not apply to the commodities that are in question here. To my mind that is not controlling. An instrument in writing, if changed, is changed all through. The whole instrument is changed. If you revise the classification, canceling one already in existence, and put in force a revised one, making any change whatever, you make a new classification. So, if it is desired by the government to know, with reference to its future conduct of this case, what the views of the court are upon this question, I would say that if the classification of the Railroad and Warehouse Commissioners of Illinois, of date April 8, 1899, had been filed with the Interstate Commerce Commission, and was there on file from April 3, 1899, and therefore was on file when Tariff 24 was filed in May, 1899, the government would not be in any better position than it is now.

If Tariff 24 had incorporated as a part of it some definite, particular classification, which classification in conjunction with Tariff 24 made a completed instrument, a different question would be presented. But, according to the suggestions made by the district attorney, the proffered evidence does not propose to cover any such point; and it will be to the effect that this Illinois Classification was subject to change, and in fact was changed, from time to time by the Railroad and Warehouse Commissioners of the State of Illinois.

Now, then, I will go a little further, so that we can make some headway, and not take up much more time in argument. If, in the course of the statements that I may make now, counsel on either side conceive that the court has erred in its conception of the facts on
any particular point, or if there is any suggestion as to the law, I will be glad to hear it. This Illinois Classification, which, with Tariff 24, is claimed to make up the tariff, the rate, or schedule of rates, was gotten up by the Railroad and Warehouse Commissioners of the State of Illinois. This court judicially knows what the functions of the commissioners are, although personally I had not heard about it until a few days ago. The court knows that the Railroad and Warehouse Commissioners of Illinois have only power to fix rates beyond which the railroads shall not go. So, therefore, when the Railroad and Warehouse Commissioners of Illinois got together to perform their functions, they fixed maximum rates, and, as suggested by the district attorney, in order to do it intelligently and to save making a list which could not be put on the two sides of this courtroom, each item being carried out in detail, they adopted the method of classification and of fixing rates by the class. It is this which is called the "Illinois Classification." It is this instrument which is offered in evidence as the Illinois Classification. It is this instrument which, it is claimed by the government, is meant by "governed by Illinois Classification, except as noted." So I think there might be a serious question here as to whether or not there has ever been anything fixed, by the filing of these two instruments, except maximum rates; and it was for that reason, it is because that subject was in my mind, that I asked as to the date of the Elkins act, February 19, 1903, and as to what offenses were created by the Elkins act; because it occurred to me that these instruments, being filed three or four years, almost four years, prior to the Elkins act, may have been construed to be a compliance with the law as it was when they were filed, and could only be construed as a schedule of maximum rates. It is perfectly manifest that there can be no crime composed of a concession from a maximum rate. To state that is to demonstrate it. I think that that question arises on these papers, and is not, to say the least of it, trivial, and it might, upon further consideration, rise to a matter of substantial importance.

But let us go a step further. This indictment contains a large number of counts—1400 or 1500—about one half of which allege shipments from Chappell to St. Louis; the other half, shipments from Whiting to East St. Louis. Now, as to the Chappell counts, there is a total failure of proof; and, as I said some days ago, the Chappell counts might as well be eliminated. I will give the reason why. It is short, and I think very plain. This statute provides for the establishment and the filing and the publication of two kinds of schedules or tariffs, and only two. The one is the schedule of rates for the transportation of persons and property by a carrier engaged in interstate commerce, over its own route. The other is the schedule of charges for the transportation of persons and property over continuous or connecting routes, or several carriers. As I said the other day, there is no third class; at least, I don't know of any third class; no third class has been pointed out up to this time. These Chappell counts are based upon the proposition that the Chicago & Alton Railroad had a route extending from Chappell, Ill., to St. Louis, Mo. They are predicated, further, upon the averment that the rate, the established rate,
from Chappell to St. Louis, established, published, and filed by the C. & A., was 19½ cents. Now, the proof shows, so far as it shows any rate at all—and I have already indicated that I don't think it shows any rate at all—that if there was any rate, it was 18 cents from Chappell to East St. Louis—the rate of the C. & A.—and a cent and a half from East St. Louis to St. Louis—the rate of another, independent, common carrier, in some instances the Wiggins Ferry Company, and in others some terminal transfer railroad company, I think.

I can readily understand and appreciate how, in a certain kind of a case, the sum of the locals is the through rate; it is not necessary to stop and discuss that. But in a criminal case, where the indictment avers that the common carrier, over whose line the shipment was made, had established and published and filed schedules establishing a rate over its line of 19½ cents, and the proof shows that the tariffs and schedules which are filed show 18 cents over its route, and that the 19½-cent rate is made up by adding to the 18-cent rate a cent and a half rate of another, independent, common carrier, the proof absolutely fails. It is a fatal variance. I stated that the other day. There has been no question made about it; no offer of the government to take issue upon that proposition. The Chappell counts could not stand at all; the proof fails.

Now, to come to the Whiting counts. It has been some days since some of the questions arose about those counts, and they have not been fully argued. What I am going to say about the Whiting counts is subject to revision, if I get further light either upon the facts or the law. I am now going to simply suggest a few things about the Whiting counts.

This is a new field in which we are exploring. What this statute means, how it is to be construed, so far has not had very much light thrown upon it by the courts. But, for the purpose of this case, I stated a number of days ago, and I have not heard any dissent from that view, that the construction as to where the publication might be made was easy of solution. If the Chicago & Alton Railroad Company received freight for transportation here in Chicago and shipped it in interstate commerce to some point, and it had complied with the statute with regard to the making and establishing of rates, and with regard to the filing of these with the Interstate Commerce Commission, and had actually posted in two public places the tariffs as required, so that it would be an absolutely literal compliance with the statute, at the station where the freight was received, that would be sufficient publication under the statute without the government being obliged to show that this same thing had been performed at each of the stations along the line of the Chicago & Alton Railroad. I don't know that there has been any discussion about that, but I think that proposition is sound.

But to make a simpler case. If the shipment were from some station which had a depot and a station house, in the ordinary sense of the word, and the statute had been literally complied with, so far as the establishment of the rate was concerned, and the filing with the Interstate Commerce Commission was concerned, and the posting and publishing, literally as required by the statute, at the station where
the freight was received for transportation, that would be an establishment of a rate, the varying from which would be an offense under the Elkins act. I think that is the reasonable construction to put upon the statute; that in such case the government would not be required to prove they had at every station on the line exactly and literally complied with the statute with regard to publication.

Now, under that construction—which of course is in favor of the government—upon that view of it, it necessarily follows that if the government alleges that publication took place in a certain manner, or in accordance with the law at a certain station, the government makes that a material averment and must prove it. I think that proposition is sound. What have we here? We have in the Whiting counts the averment as to the posting and publishing at Whiting and Chappell; and Chappell, so far as the shipments from Whiting are concerned, of course, is surplusage, unless the court can find, as a matter of fact, that they are the same station. It appears that when this case was first begun, or in one of the earlier stages of it, a bill of particulars was called for, and a bill of particulars was filed, setting forth the application sheets which show the Chicago common points theory. It is, therefore, insisted that, when the government is attempting to establish publication at Whiting, it proves that publication if it shows compliance with that part of the statute at Chicago. I say that I have very grave doubts about that. I don't think that, if a man was on trial for his liberty here, and that sort of a theory was the only theory upon which his liberty could be taken from him, that the court for an instant could resolve that question in favor of the government. And exactly the same rule must apply in this case. So, if you put it most strongly with regard to the Whiting counts, it is a grave question in my mind whether there is not a variance between the averments of the indictment and the proof.

Then there is another question. Not only must the railroad company, the carrier, establish rates and prepare schedules showing those rates, not only must it file these schedules with the Interstate Commerce Commission, but it must publish them. Now, there has not been any evidence here showing that there was a compliance, a literal and full compliance, with the statute as to the posting, as to the publication, and that part of publication which is included in the word "posting." I am not now going to hold, or say, that I don't think that the evidence is sufficient to show publication. I am not going to hold that. But up to this time no court that I know of, having before it a question similar to this, has decided what publication is sufficient, or what is sufficient compliance with that statute. And it is enough for me to say now, that if the government has introduced all the evidence it has upon the question of publishing, upon the question of publication, that it will probably be incumbent upon the government to show to the court that it is sufficient.

That leads me to make just one more remark. During the course of the arguments that have arisen upon this hearing, the consequences of certain rulings, if made, have been referred to. That, of course, is proper argument. The court should give a statute such construction
—this kind of a statute, for example—as will effectuate the remedying of the evil it was sought to remedy.

But this statute not only makes it an offense for the shipper to depart from the rate established, but it makes it an offense upon the part of the railroad to fail to establish the rate. The carrier is strictly enjoined to do the things required by this statute; and there ought to be no trouble whatever in making a common carrier comply with this statute. There ought to be no difficulty whatever in compelling every common carrier, engaged in interstate commerce, to erect the standard plain as day, so that the shipper who gets a concession from it cannot escape. That is not only the fact—the statute not only makes it an offense for the carrier to fail to do these things—but there is given here the additional power to enforce compliance by mandamus in the United States court. So, if a shipper happens to escape because of the failure of the carrier to do its duty, then the carrier should be punished; and not only should it be punished, but it should be compelled to observe the law and to erect this standard, and make it plain, so that the shipper could not afterwards escape.

This defendant is charged with a deviation from the standard created, as alleged, by the carrier under the law. My judgment is that there is no such fixed standard shown as will warrant the court in submitting to the jury the question whether the defendant has deviated from such standard.

The jury being recalled, the court continued:

Gentlemen of the jury, I have made up my mind in this case; and as you have a sort of perfunctory office to perform with regard to it, and as you have been here now some time listening to the evidence with a good deal of interest, and may have some notions of your own about the case, I think it is nothing more than just and fair to you that I should enter somewhat into detail in explaining to you why I shall make the direction that I shall make; and I may repeat some things that I have already said in your hearing, but as the discussion has taken place both in your hearing and when you were out of the courtroom, I think I will explain one or two points fully, even at the expense of some repetition.

It is hardly worth while for me to suggest to you that you and I have no arbitrary power in this case; and I have not any more arbitrary power than you. It is frequently the habit of people to speak of the power of the federal judges, and in a sense that is true; but a federal judge has no arbitrary power. I am bound by the law, just as you are bound by the law. I have no more right to strain, or vary, or change the settled rules of law than you have. You have not any more right to do that than I have.

Now, the settled law in this case has been pronounced by the Court of Appeals, by whose decision I am bound and you are bound; and they have settled the law, as I said, for this case. They have not said what the law is in a certain case, and then left it to us to apply it to this case. They have said what the law is in this case; and under my oath as a judge I am bound by that, and under your oaths as
jurors you are bound by that; and you are bound by what I say to you that it means.

The government in this case—without stopping now to state to you what the charges in detail are—the government in this case charges, in brief, that the Chicago & Alton Railroad Company, the carrier, had in all respects complied with the statute with regard to establishing, filing, and publishing its schedules of rates for the transportation of passengers and freight over its line, and by that compliance with the statute it established as the rate between Chicago and common points, and East St. Louis, 18 cents per hundred pounds. It then charges that the Standard Oil Company, the defendant, received a concession, in that it shipped not at the 18-cent rate, but at a less rate, to wit 6 cents per hundred pounds. Now, it is perfectly plain that, before the government can ask this jury to return a verdict of guilty, it must establish beyond a reasonable doubt that there was a compliance by the railroad company with the statute with regard to establishing, filing, and publishing schedules showing the rates of transportation of different kinds of freight upon its route, must show beyond a reasonable doubt that it had done this, and that that rate was 18 cents.

I don't suppose there is a man on the jury who does not understand that it is not by the charge alone in a court such as ours that a party is convicted, nor is it by the evidence alone; but it takes the charge supported by the evidence to make a case in this court. We have the charge. But the evidence does not prove the charge. The government now, as in the former trial—I call your attention to this particularly—relies upon as establishing this 18-cent rate the instrument here which is called "Tariff No. 24," together with the instrument which is called the "Illinois Classification."

On the former trial it relied upon these same instruments. I want to read to you what the Court of Appeals said:

"This view of what is essential to constitute the offense makes it plain that the trial court was in error, as a matter of law, in the application, to the case of a shipper, of the principles that the trial court applied to this case. And this error is made all the plainer, lifting it from what might otherwise be considered a mere technical error to the level of a real substantial error, when the exact nature of the so-called tariffs published and filed, relied upon by the government as the lawful rate, are scrutinized; and when the rate that the trial court deciphered out of these papers is compared with the admitted rates on other roads for the same products, and with the admitted rates on the same road for like products. The tariff sheet relied upon as the lawful published rate filed with the Interstate Commerce Commission is Tariff Sheet No. 24 of the Chicago & St. Louis Traffic Association; and the first thing to be noted is that this Tariff Sheet No. 24 makes no reference, by name, to petroleum or the products of petroleum. On the face of that tariff sheet, no 18-cent rate for petroleum or the products of petroleum appears. The 18-cent rate was only arrived at by a process of circumlocution; that is to say, on the face of these tariff sheets there was found the printed line, 'Governed by Illinois Classification except as noted herein'; then by turning to a classification adopted by the Railroad and Warehouse Commission of Illinois, September 7, 1899. It was found that petroleum and its products were set down in the 'fifth' class; and then, by turning back to Tariff Sheet No. 24, it was found that the rate set down for the 'fifth class' was 18 cents per one hundred pounds. And so, out of this process of reference and cross-reference, the lawful published rate was evolved by the trial court to be 18
cents, not because it so appeared on the face of the tariff sheets, but because, by reference to other sheets—sheets fixing, not rates, but classification, and that not by the Interstate Commerce Commission or the carrier, but by the Illinois Railway Commission—it could be so figured out.

"Now, many nice judicial questions are raised, in this case, upon the accuracy and validity of the result thus arrived at. Tariff Schedule No. 24, for instance, with the words thereon printed, 'Governed by Illinois Classification,' took effect May 15, 1899. The Illinois Classification, that the government relies upon as an adoption by reference, was not adopted until nearly four months afterwards, to wit, September 7, 1899. No proof is in the record either of the terms or the existence of any Illinois classification as of May 15, 1899, the time the tariff sheet was filed. Do the words, 'Governed by Illinois Classification,' refer to a classification presently in existence—the classification in existence when the tariff was filed? If so, the proof fails, for no such classification is shown. Are the words to be interpreted as if they read, 'Governed by Illinois Classification "as from time to time that classification may be changed"'? If so, it is only because words not expressed are to be judicially imported into the face of this tariff sheet—the clause to be so enlarged by judicial interpretation that it would be thereafter within the power of state commissions, at any time, through changes of state classifications, to alter from time to time, and without consent of the interstate carriers, interstate rates for interstate commerce, unless such interstate carrier instantly reconformed its tariff sheets to the changed classifications of the several state commissions. Indeed, taking this along with some of the other questions that have been brought to our attention in connection with these schedules, we are not prepared to say that 'Tariff Sheet No. 24 really fixes the rate on petroleum and its products at 18 cents. The most we can say is that the question is one upon which judges, after full discussion, might very reasonably disagree."

Now, gentlemen of the jury, the defendant is charged here by indictment—this is a criminal case. The defendant is presumed to be innocent until proved to be guilty beyond all reasonable doubt; and, before this jury would be justified in returning a verdict upon a single one of these counts against the defendant, it would have to be satisfied beyond all reasonable doubt—to such a degree of certainty as to overcome the presumption of innocence which surrounds the defendant—that there was a definitely fixed 18-cent rate.

The Court of Appeals have said, upon this same evidence, after having considered it in all its relations, that they cannot say that these two papers really fix any 18-cent rate. They have so stated—so said.

Therefore, gentlemen of the jury, if it is a matter about which reasonable men may differ, or trained judges may disagree, if the Court of Appeals say, after reviewing these papers, after looking them over and after consulting together, that they cannot tell what the rate is, that reasonable men might differ on that question, then, of course, the evidence is not sufficient to warrant you in finding that these papers establish that rate beyond a reasonable doubt.

So it becomes your duty and my duty to dispose of this case in accordance with that ruling; and the method by which that is done is this: The government has closed its case; it has made certain offers of evidence, which have been ruled on, and it has closed its case. It says it has nothing more to offer. The question then is for the court, whether there is evidence sufficient to warrant a verdict; whether, if the jury should return a verdict in favor of the government, the court will allow it to stand. Under the plain ruling of the Court of Appeals a verdict under this evidence would not be allowed
to stand and could not stand, and therefore it ought not to be re-
turned.

Inasmuch as you have gone thus far in the case, I will suggest to
you one or two more reasons why this verdict which I shall direct
must be returned. About one-half of these fourteen or fifteen hun-
dred counts are based on shipments from Chappell, Ill., to St. Louis,
Mo. I am satisfied from what I know of the make-up of this jury
that there are jurors here who have served in that capacity before,
who will readily understand the point about which I am now going to
speak. The counts of the indictment which refer to the Chappell
shipments aver that the rate fixed and established by the Chicago
& Alton Railroad from Chappell to St. Louis was 19\(\frac{1}{2}\) cents.
There is no principle more thoroughly understood among judges and
lawyers, or more thoroughly established, than this: That you cannot
charge a man with one thing and prove against him something else;
that the substantial averments of the indictment must be proved
as laid. Now, the proof in this case is, in so far as there is any proof
on that subject, that, whereas the charge is that the established rate
of the Chicago & Alton from Chappell to St. Louis was 19\(\frac{1}{2}\) cents,
the proof is that the Chicago & Alton had a rate of 18 cents, if there
was any proof on that subject, 18 cents to East St. Louis, and then
an independent common carrier had a rate of a cent and a half from
East St. Louis to St. Louis; and the 19\(\frac{1}{2}\)-cent rate, averred in the
indictment to be the rate of the Alton, is sought to be proved, to be
made up by the sum of those rates. I say to you, gentlemen of the
jury, that that is a fatal variance; that no case can stand in a court
in this country where there is such a difference—for that is what
the word "variance" means—between the charge and the proof. The
proof does not sustain the charge. So as to the Chappell counts there
can be no verdict but a verdict of not guilty.

The rest of the indictment is made up of what I may call the Whiting
counts, and there is a variance there which I would not state as
positively to be fatal as that in the Chappell counts, but I am inclined
to think it substantial. This statute—you may have heard enough of
it read to understand it—provides for the establishment of these rates,
and the making of these schedules, and for the filing of them with the
Interstate Commerce Commission, and also the publication of them at
every depot, station, and office where freight is received for trans-
portation. That is the substance of it. Now, I am inclined to hold
that it would not be necessary for the government to establish that
the carrier had posted, as required by the statute, and published its
schedules or tariffs at every station along its line, but that the statute
would be complied with and the rate would be established if it were
published at the station where the freight was received. I think that
would be a fair construction of the law. Now that, as I said when
counsel were arguing the question, was a construction in favor of the
government. I would not feel that I ought to hold the government
to the necessity of proving that the carrier had done this at every
station. Those Whiting counts charge that the transportation was
from Whiting to East St. Louis, and they aver, each of them as I
understand, the publication at Whiting, while the proof shows that the publication, if there was any publication, was at the city of Chicago and not at Whiting. In other words, the publication at Whiting is not proved, even if the proof of publication at Chicago is sufficient in itself. And I am inclined to think that there is a variance there. It is not worth while to enter into a discussion of that further, but it at least throws grave doubt upon that branch of the case.

Then there is still another question, gentlemen of the jury. In order to make these rates valid rates, so that a departure from them by the carrier or the shipper is a crime under this statute, it is necessary that they be published, and there are words here in the statute which indicate what that publication shall in part consist of. The word "post" is used. A literal compliance with the statute would require the schedules or tariffs to be posted in two public places in each depot, station, or office where freight was received for transportation. That has not been shown here. I am not now saying to you that it is necessary in order to establish this rate, so far as the publication is concerned, to strictly comply with the precise requirements of this statute, but I do say to you that upon the proof as it stands I am not sure that there has been such publication shown as would make this a legal rate if it were legal in every other respect.

For these reasons, gentlemen of the jury, it is perfectly plain to me that the government is not entitled to a verdict of guilty on any of the counts of this indictment. By the law as laid down, and which is binding on all of us, by the Court of Appeals, there is no other view to take of it. If you should return of verdict of guilty, it would be my duty to set it aside, and I would set it aside instantly. If I did not do my duty in setting it aside, I am perfectly satisfied that the Court of Appeals would reverse the case.

I therefore say it is my duty to instruct you to return a verdict of not guilty on all of these counts; and I accordingly so instruct you.

UNITED BREWERIES CO. v. COLBY et al.
(Circuit Court, N. D. Iowa, C. D. June 15, 1909.)
No. 303.

1. Pleading (§§ 192, 367*)—Answer—Sufficiency of Allegations.
   In an action to recover the purchase price of liquors, an allegation in the answer that such liquors were sold in violation of the laws of the state, and with intent on the part of plaintiff to enable defendants to violate such laws, is not demurrable as stating a legal conclusion; the remedy for any indefiniteness or uncertainty of statement being by motion, and not by demurrer.
   [Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 409, 1173–1193; Dec. Dig. §§ 192, 367.*]

   Code Iowa 1897, § 2582 et seq., forbids the sale of liquors in that state in violation of its provisions under severe penalties, to be recovered by the state by criminal prosecution. Section 2423 provides that all pay-
ments made for liquors sold in violation of the statute shall be held to have been received under a valid promise to repay the same on demand. Held, that an action to recover money so paid is not penal, but civil and remedial, and may be maintained in a federal court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 973; Dec. Dig. § 371.*]

On Demurrer to Answer and Counterclaim.

Henry & Henry and Mitchell & Hackler, for plaintiff.
Kelleher & O'Connor and Healy & Healy, for defendants.

REED, District Judge. The plaintiff, an Illinois corporation, sues the defendants in this court to recover a balance of some $3,000 upon an account for liquors, which it alleges it sold to the defendants in the state of Illinois. The defendants' answer is, first, a general denial; second and third, that the liquors were sold to the defendants in violation of the statutes of Iowa, and of the law of the place where they were sold, and with intent to enable the defendants to violate the statutes of Iowa. In the counterclaim the defendants allege that from 1902 to 1907 the plaintiff sold to the defendants large quantities of intoxicating liquors in violation of the statutes of Iowa, with intent to enable the defendants to violate the same, and for which they paid the plaintiff the sum of $56,466; that by virtue of such statutes the plaintiff is deemed to have received said sum from the defendants upon a valid promise to repay the same to them upon a demand therefor; that they have made such demand, with which the plaintiff refuses to comply; and they ask judgment against it for such amount. To the second and third divisions of the answer the plaintiff demurs, upon the ground that they state legal conclusions only, and to the counterclaim upon the ground that defendants seek to recover of the plaintiff a penalty imposed by the statutes of Iowa for the sale of intoxicating liquors in violation thereof, and that this court has no jurisdiction of an action to recover such penalty.

The second and third divisions of the answer distinctly aver that the liquors were sold by the plaintiff to the defendants in violation of the statute of Iowa, and with intent on the part of plaintiff to enable the defendants to violate such statute. It may be that these allegations of the answer as to the place and circumstances under which the sales were made should be more definite and certain; but a demurrer is not the proper remedy to reach such defect, if any there be. The demurrer to the answer is therefore overruled.

Section 2382 et seq. of the Code of Iowa of 1897, forbids under severe penalties the sale in that state of intoxicating liquors, including wine and beer, in violation of their provisions. These penalties are imposed as a punishment for the violation of the statute, and when incurred accrue to the state and are recoverable by it upon information or indictment against the wrongdoer. In addition section 2423 provides:

"All payments or compensation for intoxicating liquor sold in violation of this chapter, whether such payments or compensation be in money or anything else whatsoever, shall be held to have been received in violation of law, and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes 170 F.—64
to have been received upon a valid promise and agreement of the receiver to pay on demand to the person furnishing such consideration the amount of said money, or the just value of such other thing. All sales, transfers, liens and securities of every kind which either in whole or in part shall have been made for or on account of intoxicating liquors sold in violation of this chapter shall be null and void against all persons, and no rights of any kind shall be acquired thereby.

Defendants' counterclaim rests upon this section of the Iowa statute, and the question presented is: Is the right of recovery there given an additional penalty imposed by way of punishment for the violation of the statute, or is it to relieve the purchaser from his participation in the illegal sale or purchase, so far as to enable him to recover from the seller the consideration paid for the liquors illegally sold? In Hamilton v. Schlitz Brewing Co. (C. C.) 100 Fed. 675, Judge Shiras held that such right is given as a part of the penalty imposed upon persons who violate the statute, and that the enforcement of such right rests wholly with the courts of the state, and that a suit by the individual to whom the right is given is not within the jurisdiction of a Circuit Court of the United States. The defendants urge that, inasmuch as the plaintiff has brought his action in this court, it is to be distinguished for that reason from the Hamilton Case, and that defendants may bring forward as a counterclaim against the plaintiff any cause of action that they might so present if the action had been brought in the state court. But, if the right of recovery given by this section is not within the jurisdiction of the national courts, the fact that the state statute authorizes such a claim to be presented as a counterclaim against a plaintiff in an action pending in the state court would not confer jurisdiction thereof upon the federal courts, for their jurisdiction depends upon the laws of Congress, and cannot be enlarged or restricted by any act of the state.

But for the ruling in Hamilton v. Schlitz Brewing Co., there would be no hesitancy in overruling the demurrer to this counterclaim. The decision in that case rests wholly upon the case of Wisconsin v. Pelican Ins. Co., 127 U. S. 265, 8 Sup. Ct. 1370, 32 L. Ed. 239. That was a suit brought originally in the Supreme Court of the United States by the state of Wisconsin, under that clause of the federal Constitution which confers original jurisdiction upon that court in all cases in which a state shall be a party, to recover of the insurance company penalties incurred by it for conducting its business in the state of Wisconsin in violation of certain statutes of that state. The state had recovered in one of its courts a judgment against the insurance company for the amount of the penalties so imposed, and the company being a corporation of Louisiana, and having no property in the state of Wisconsin from which the judgment could be satisfied, the state brought suit in the Supreme Court and prayed that it might have judgment for the amount of the judgment against the insurance company which it had recovered in the state court. There seems to be a clear distinction between the subject-matter of that suit and the right of action given by section 2483 of the Iowa Code. The recovery sought in the Wisconsin case was by the state for penalties imposed by its authority as a punishment for the violation of its laws. In the course of the opinion the court recognizes the rule that one
sovereignty will not execute the penal laws of another, and held that the rule applies, not only to prosecutions and sentences for crimes and misdemeanors, but to all suits by the state for recovery of pecuniary penalties imposed as a punishment for the violation of its laws, and to all judgments for such penalties, in whatever form the action may be brought. The court says:

"The statute of Wisconsin, under which the state recovered in one of her own courts the judgment now and here sued on, was in the strictest sense a penal statute, imposing a penalty upon any insurance company of another state doing business in the state of Wisconsin without having deposited with the proper officer of the state a full statement of its property and business during the previous year. * * * The cause of action was not any private injury, but solely the offense committed against the state by violating her law. The prosecution was in the name of the state, and the whole penalty, when recovered, would accrue to the state. * * * The real nature of the case is not affected by the forms provided by the laws of the state for the punishment of the offense. It is immaterial whether, by the law of Wisconsin, the prosecution must be by indictment or by action, or whether, under that law, a judgment there obtained for the penalty might be enforced by execution, by scire facias, or by a new suit. In whatever form the state pursues her right to punish the offense against her sovereignty, every step of the proceeding tends to one end, the compelling the offender to pay a pecuniary fine by way of punishment for the offense."

It was therefore held that the suit, though in form a civil action, was in effect a penal one for the recovery by the state of a penalty imposed by it as a punishment for the violation of its laws by the insurance company, and was not one within the jurisdiction of the Supreme Court, which has jurisdiction only of suits of a civil nature. State of Iowa v. C., B. & Q. Railway Co. (C. C.) 37 Fed. 497, 3 L. R. A. 554, and Dey v. Railway Cos. (C. C.) 45 Fed. 82, are to the same effect. That penalties imposed by the state as punishment for the violation of its laws, and which inure wholly to the benefit of the state when recovered, will not be enforced by the courts of another state or sovereignty, is settled by these and other authorities.

But a right of action given by statute to an individual for the recovery of damages sustained, or the redress of wrongs suffered, by him because of a violation of the statute by another, in which recovery the state has no pecuniary interest, is not of this class. Such statutes are purely remedial as to the individual, and the right of recovery under them may be enforced in the courts of another sovereignty. Dennick v. Railroad Co., 193 U. S. 11, 26 L. Ed. 439; Huntington v. Attrill, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123, and the cases there cited. Wisconsin v. Pelican Ins. Co. is reviewed at some length in the Huntington Case, and at page 667 of 146 U. S. and page 227 of 13 Sup. Ct. (36 L. Ed. 1123), it is said:

"Penal laws, strictly and properly, are those imposing punishment for an offense committed against the state, and which, by the English and American Constitutions, the executive of the state has the power to pardon. Statutes giving a private action against the wrongdoer are sometimes spoken of as penal in their nature; but in such cases it has been pointed out that neither the liability imposed nor the remedy given is strictly penal. The action of an owner of property against the hundred to recover damages caused by a mob was said by Justices Willes and Buller to be 'penal against the hundred, but certainly remedial as to the sufferer.' * * * A statute giving the right to recover back money lost at gaming, and, if the loser does not sue within a
certain time, authorizing a qui tam action to be brought by any other person for threefold the amount, has been held to be remedial as to the loser, though penal as regards the suit by a common informer. * * * As said by Mr. Justice Ashhurst in the King's Bench, and repeated by Mr. Justice Wilde in the Supreme Judicial Court of Massachusetts: 'It has been held in many instances that, where a statute gives accumulative damages to the party, aggrieved, it is not a penal action.' * * * Thus a statute giving to a tenant, ousted without notice, double the yearly value of the premises against the landlord, has been held to be 'not like a penal law where a punishment is imposed for a crime,' but 'rather as a remedial than a penal law,' because 'the act indeed does give a penalty, but it is to the party aggrieved.'"

The ultimate holding is that whether a statute of one state, which in some respect may be penal, is so in the sense that it will not be enforced in the courts of another, depends upon its purpose. If that is only to punish an offense against the public justice of the state, it will not be enforced beyond the jurisdiction of its enactment; but, if its purpose is also to afford a private remedy to a person injured by the wrongful acts, the private remedy afforded may be so enforced.

In Dennick v. Railroad Co., 103 U. S. 11, 26 L. Ed. 439, an action was brought in a state court of New York to recover of the railroad company damages for injuries to a person in New Jersey, which resulted in his death in that state, where a right of action therefore was given by a statute of that state. The case was removed by the railroad company to the Circuit Court of the United States where judgment went for the defendant. In reversing that judgment Mr. Justice Miller, speaking for the Supreme Court, said:

"It can scarcely be contended that the act belongs to the class of criminal laws which can only be enforced by the courts of the state where the offense was committed; for it is, though a statutory remedy, a civil action to recover damages for a civil injury. It is, indeed, a right dependent solely on the statute of the state; but when the act is done for which the law says the person shall be liable, and the action by which the remedy is to be enforced is a personal and not a real action, and is of that character which the law recognizes as transitory and not local, we cannot see why the defendant may not be held liable in any court to whose jurisdiction he can be subjected by personal process or by voluntary appearance, as was the case here. It is difficult to understand how the nature of the remedy or the jurisdiction of the courts to enforce it is in any manner dependent on the question whether it is a statutory right or a common-law right. Wherever, by either the common law or the statute law of a state, a right of action has become fixed and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties."


The Iowa statute, by sections other than section 2423, imposes severe penalties by way of punishment on those who sell intoxicating liquors in that state in violation thereof, and these penalties, when recovered, inure to the exclusive benefit of the state. Such penalties can only be enforced in the courts of that state. But section 2423 declares that "all * * * transfers" made for or on account of intoxicating liquors sold in violation of law shall be void as against all persons, and that no rights of any kind shall be acquired thereby, and gives to the purchaser who has paid for any such liquors so sold a
right of recovery from the seller of the amount so paid to him. This section is purely remedial as to the purchaser, in that it removes what otherwise might be a bar to an action by him for such recovery because of his participation in the illegal sale, and is not by way of additional punishment of the seller, but only requires that he shall restore to the purchaser that which he has taken from him without rendering any valid consideration therefor.

A right of recovery is not infrequently given to one for injuries sustained because of a violation of a statute, even when a penalty is also imposed as a punishment for such violation. This same statute of Iowa gives a right of action, against persons selling intoxicating liquors, to the wife, child, or parent of any intoxicated person, for the recovery of all damages sustained by either, as well as exemplary damages, in consequence of the sale of such liquors to such person contrary to the provisions of the statute. The safety appliance law of Congress, also that of the state of Iowa, impose severe penalties as a punishment upon railway corporations, engaged respectively in interstate and state commerce, for a failure to equip their engines and cars used in such commerce with safety appliances as required by such statutes, and also gives a right of action to injured employés, against the railway company so failing, for the recovery of all damages sustained by them because of such failure. Other instances might be cited, but these are sufficient to show that the right of action so given to the individual in all such cases is remedial as to him; and while it arises from a violation of the statute, the recovery is for the exclusive benefit of the individual, and not by way of punishment of the wrongdoer, except where exemplary damages may be recovered, and the action for such recovery, even of the exemplary damages, is purely civil in its nature, and far within the meaning of the act of Congress conferring jurisdiction upon the federal courts. That act provides:

"That the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds exclusive of interest and costs the sum or value of $2,000, * * * in which there shall be a controversy between citizens of different states. * * *" Act Aug. 13, 1888, c. 806, § 1, 25 Stat. 453 (U. S. Comp. St. 1901, p. 508).

This includes all controversies of a civil nature, if they be of judicial cognizance, and is sufficiently comprehensive to include a right of action such as that given by section 2423 of the Iowa statute. There may be conflict in the authorities as to when a statute will be held remedial, or purely penal, in such sense that it will be enforced only in the courts of the state of its enactment; but the rule for this court is settled by the decisions of the Supreme Court of the United States above cited. Besides, the Supreme Court of Iowa has held that the recovery authorized by section 2423 is not for a statutory penalty, and that the action therefor is civil, and not criminal, or quasi criminal. Woodward v. Squires & Co., 39 Iowa, 435, s. c. 41 Iowa, 677. This is a definite interpretation of this statute, which is controlling as to its meaning.

The conclusion, therefore, is that the demurrer to the counterclaim should be overruled; and it is so ordered.
   The fact that a carrier had used reasonable care or diligence to pro-
   vide and repair the appliances prescribed by the federal safety appliance
   act cannot be pleaded as a defense to an action for penalty under the act,
   because the question of reasonable care or diligence on the part of the
   carrier does not enter into such a controversy. The duties imposed by
   the act are absolute, and failure to perform them is a violation of the act.
   [Ed. Note.—For other cases, see Railroads, Dec. Dig. § 254.*
   Duty of railroad companies to furnish safe appliances, see note to Fel-
   ton v. Bullard, 37 C. C. A. 8.]

   The federal safety appliance act requires that each coupler must be
   operative of its own mechanism, irrespective of the condition of the ap-
   pliances on other or adjacent cars.
   [Ed. Note.—For other cases, see Railroads, Cent. Dig. § 743 ; Dec. Dig.
   § 229.*]

   The safety appliance act is remedial in its character, enacted for the
   better protection of railroad employés and travelers by rail, and it
   should be construed by the courts, as far as its terms will admit, so as
   to carry out fully the intention of Congress.
   [Ed. Note.—For other cases, see Railroads, Cent. Dig. § 743 ; Dec. Dig.
   § 229.*]

   An empty car hauled in a train with other cars carrying interstate
   commerce must be equipped with appliances required by law, and such
   appliances kept in repair to the same extent as those of a loaded car. It
   is just as dangerous to couple and uncouple empty cars as loaded cars.
   [Ed. Note.—For other cases, see Railroads, Cent. Dig. § 743 ; Dec. Dig.
   § 229.*]

   An action to recover a penalty under the safety appliance act is civil
   in its nature, and requires the plaintiff, in order to establish the alle-
   gations of the complaint, to produce a preponderance of evidence only.
   [Ed. Note.—For other cases, see Railroads, Cent. Dig. § 772 ; Dec. Dig.
   § 254.*]

6. Railroads (§ 254*) — Safety Appliance Act — Evidence — Defective Cou-
   plers.
   The facts in this case, as affected by the foregoing principles of law,
   discussed and explained.
   [Ed. Note.—For other cases, see Railroads, Dec. Dig. § 254.*]

(Syllabus by the Court.)

Moore & Rollins, for defendant.

BOYD, District Judge (charging jury). This is a civil action,
gentlemen of the jury, brought by the United States, as plaintiff,
against the Southern Railway Company, as defendant. wherein the
plaintiff seeks to recover of the defendant certain penalties alleged

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
to be due on the ground that the defendant has violated the provisions of an act of Congress. The act I refer to is a statute passed by the Congress of the United States (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]) requiring railroad companies operating interstate lines or engaged in what is commonly called interstate commerce to provide certain equipment for cars used by such railroad companies in their business, such equipment coming under the general head of safety appliances. One of the requirements under the provisions of the statute is that upon each car used in interstate traffic by such railroad companies as come within the scope of the law there shall be provided an automatic coupler; that is, a coupler which is so contrived as to effect a coupling and an uncoupling without requiring the employé of the carrier to go between the cars for that purpose. And a further requirement is that this coupler have attached to it a lever consisting of an iron rod extending out near enough to the end or side of the car that in order to uncouple the cars the employé can take hold of the lever and raise the pin so as to bring about a dissolution of the coupling—that is, a separation of the cars—without going between the cars for that purpose. This act has been made to apply not only to cars, but to locomotive engines and to tenders; in other words, to all carriages, cars, and rolling stock that are used on the railroads upon which a coupler is required in order to attach it to a train or to another car. The courts have construed this act as originally passed and the amendment thereto to apply to all cars and locomotives, tenders, etc., as I have stated.

In addition to the requirement in regard to the coupler, the act says further that:

"From and after the 1st of July, 1895, until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab-irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars."

It is therefore a requirement by the terms of the statute that upon the ends and sides of the cars there shall be these grab-irons or handholds which you have heard described here, and this requirement is also imperative.

Now, gentlemen, that is the law as the court understands it, so far as it is necessary to explain it to you in this case.

The court charges you that the question of reasonable diligence on the part of the interstate railroad companies or carriers does not enter into this controversy. The law, according to the construction which has been placed upon it by the courts of the land, imposes upon the carrier these duties which are said to be absolute, and this court so interprets this law. The hauling or using, therefore, on the part of a carrier engaged in interstate commerce, of any cars, tenders, locomotives, or other rolling stock used in carrying on interstate commerce, which are not equipped with this coupling I have described, or where this coupling apparatus is in a state of unrepair rendering it inoperative, is a violation of the law. And it is also a violation of the statute to fail to have the handholds or grab-irons which have been
described to you upon the ends and sides of the cars, and to maintain them there in proper repair.

Therefore, gentlemen, the question—the first question which you are called upon to determine, and afterwards to apply to each one of the issues which you will take under consideration—is whether these engines with tenders, or either one of them, or whether these cars, described by the witnesses, or either one of them, was in use by the Southern Railway in its business as a carrier of interstate commerce; that is, traffic, articles of freight, or commerce between the states. It is admitted that the defendant, the Southern Railway Company, is an interstate carrier; in other words, that it is a railroad company engaged in operating a system of railways and conducting an interstate business by carrying freight and passengers from one state to another. As the court has said to you, this law makes the duty of this railroad company, the defendant in this case, being an interstate carrier, absolute in respect to the requirements for couplers and handholds before described. As I have said, the fact that the railroad company had used reasonable care or diligence to provide either the couplers or handholds, or to repair either, if such was needed, would not be a defense to this action, provided the car upon which the equipment was required was in use, and the equipment had not been provided, or, having been provided, was out of repair so as to unfit it for its intended use. If a car, a locomotive, or tender in use as before stated fails to have the coupling apparatus not only attached, but in working condition as intended—that is, self-operating and coupling without the necessity of the employé going between the cars for that purpose; if it is not provided with the lever, by the use of which the employé, when it becomes necessary, can uncouple the cars without going between them; if it is without the handholds or grabirons, as before stated—if the railroad company does not have either one of these or all of them on the cars which require them, or if all are out of repair, or either one is out of repair for use as contemplated, and if such car, locomotive, or tender is in use upon the road, either loaded or unloaded, in connection with the operation of an interstate commerce train, such condition constitutes a violation of the law and renders the railroad company liable.

I can possibly be a little more explicit, especially in regard to the coupler. This apparatus must be complete and in working order on each car, to the end that the coupling will be made automatically when the cars are brought together, and the lever must be there and the coupler in condition that the employé may make the uncoupling either from the one car or the other without going between them. In other words, the federal safety appliance act requires that each coupler must be operative of its own mechanism, irrespective of the condition of the appliances on other or adjacent cars. The statute we are considering is remedial in its character, enacted for the better protection of railroad employés and travelers by rail, and it should be construed by the courts, as far as its terms will admit, so as to carry out fully the intention of Congress. If an unloaded car is being used and hauled in a train with other cars carrying interstate commerce, the law says that this car, though empty, comes within the
provisions of the statute and must be equipped and kept in repair in respect to the couplers and the handholds to the same extent as if it contained a load. It is just as dangerous to couple and uncouple empty cars as to handle loaded cars. As I told you a while ago, an essential element of the case, a necessary basis of liability, is that the car or engine or tender must be in use. Of course, if it is standing upon the side track not being used, then, as I said before, there is no violation. Or if it is in the repair shop, carried there for repairs and found in this condition, then the law would not apply.

Now, gentlemen, with these general propositions of law, I instruct you further that this is a civil action, brought to recover a penalty; not an action for damages for an injury which some one has sustained by reason of an alleged defect in the machinery or equipment in use by defendant on its railroad, but a suit brought by the United States against this railroad company to recover a penalty as a punishment for an alleged failure to comply with the provisions of this statute. Although the recovery is a punishment, because it is a penalty which requires the carrier to pay money on account of its failure to comply with the law, and to pay it not to an individual or to a number of individuals, but to the government, yet it is a civil action, and it differs from a criminal action in respect to the quantum of proof required to authorize the jury to return a verdict in favor of the plaintiff. In a criminal action—that is, if this were an indictment—the prosecution would be required by sufficient testimony to convince your minds beyond a reasonable doubt before you would be warranted in returning a verdict of guilty; but such is not the rule in this action. In this case it being, as stated, a civil action, the law says that the plaintiff, to establish the allegations of the complaint, is required to produce a preponderance of evidence; in other words, the burden is on the plaintiff to present to the jury facts and circumstances tending to sustain the contentions which outweigh, when put together, the testimony to the contrary. It is the duty of the jury to consider the testimony pro and con upon each one of the issues, and determine whether the preponderance is in favor of the plaintiff. As illustrating what constitutes the weight of evidence, it may be said that the jury should put the testimony of the plaintiff on the one side of the balance and the testimony of the defendant on the other side, and, in order to authorize the jury to return a verdict for the United States upon any one or more of the issues, the evidence in favor of the issue must outweigh the evidence against it; that is, it must tip the scales.

Then, gentlemen, you take the first issue: "Is the defendant liable to the plaintiff for the penalty as alleged in the first cause of action relative to engine No. 1,650?" The plaintiff's witnesses say substantially, in regard to that, that engine No. 1,650, which they say was in use in the yard of the defendant at Asheville in shifting cars engaged in interstate commerce, was being used by the defendant at this work with the chain on the tender coupler broken, so that the lever would not lift the pin to permit the uncoupling without the presence of some one between the cars. Now that is the contention that the United States makes in regard to that, and that is substantially
what the witnesses for the United States say. On the other hand, as to that issue, the witnesses for the defendant say that engine No. 1,-650 was in the yard, that the tender chain was broken, but that the defendant's employes were in the act of putting it in order when it was discovered by the government witnesses. The testimony for the defendant is further to the effect, as the court recalls it, that the break had only occurred shortly before, and that the engine was not used for any duty in the yard there until it had been repaired and put in proper condition to work as required by the law. The disagreement between these witnesses you are called upon either to reconcile, or decide which you will accept. If, taking into consideration the character of the witnesses, the manner of their statement, and all these things, you are satisfied by the weight of the testimony that the government's contention is right, then you would say in response to the first issue "Yes." But if upon the whole testimony you are not satisfied by this preponderance of testimony—if the prosecution has not given you the weight of testimony—then you will answer that issue "No."

And so, gentlemen, the same principles apply to the second issue: "Is the defendant liable to the plaintiff for the penalty as alleged in the second cause of action relative to engine No. 3,016?" As to that engine the government witnesses say, substantially, that the uncoupling lever was missing from the tender, and that the engine was used in shifting and moving interstate cars. On the other hand, the witnesses for the defendant say that this engine, No. 3,016, was not used at all, was not fired up. Now how is this? That is the question for you to answer. If the government has not satisfied you of the truth of its contention by its evidence, you would not be authorized to answer that issue in the affirmative; or if upon the consideration of all the testimony your mind is in doubt about it, or if the testimony is so that you cannot decide it, evenly balanced, then the government cannot recover, and you should answer the issue in the negative.

The third issue is: "Is the defendant liable to the plaintiff for the penalty as alleged in the third cause of action relative to Southern Railway Company car No. 180,201?" The witnesses for the United States say that that car was defective in that the chain on the coupler was broken and that that car was there in transit—was being used in interstate commerce. And they say further that, the chain being broken, the coupler could not be used as an automatic coupler. If that be true, gentlemen, then the plaintiff is entitled to have you answer the third issue in the affirmative. On the other hand, the witnesses for the defendant say that the coupler was good—would work without going between the cars. Now that is another instance, gentlemen, in which you must decide what the truth of the transaction was. With all the testimony, if the government has given you the weight of the evidence, as I have before indicated, you should find that issue in the affirmative; if not, in the negative.

The fourth issue: "Is the defendant liable to the plaintiff for the penalty as alleged in the fourth cause of action relative to Southern Indiana car No. 1,649?" The witnesses for the government say that car No. 1,649 was a flat car, I believe; said it was moved out on the line; that it was used there in interstate business, and that the grab-
iron was missing on one end of the car. That is what they say. On the other hand, the witnesses for the defendant say that they had inspected car No. 1,649, Southern Indiana car, and that it was in good condition, and that no grabirons were missing. There is another controversy, gentlemen—a contradiction between witnesses—which it is your province exclusively to determine. You will answer that according to the rules of law that I have announced before.

Fifth issue: "Is the defendant liable to the plaintiff for the penalty as alleged in the fifth cause of action relative to Charleston & Western Carolina car No. 5,074?" The witnesses for the United States say that the grabiron was gone on the end of that car, and that it was being used in interstate commerce. On the other hand, the witness for the defendant says he inspected that car No. 5,074 and found no handholds missing. Gentlemen, it is your duty to say how that is.

Now, there is nothing left for me to do, gentlemen, except to instruct you as to the law in regard to contradictory testimony. The law says that in case of conflicting testimony it is the duty of the jury to harmonize it, if possible. But if the testimony is so contradictory, so absolutely antagonistic, that it is incapable of reconciliation, then it is the province of the jury to accept the testimony of such witnesses as they believe and disregard that of those they do not believe. So then, gentlemen, that is about the whole case here. It devolves upon you to say how these matters are. You have heard all of this testimony, and I will not address you further, but you are to determine as to what the real facts are. You take the case, take these issues, consider all the testimony, and in view of the rules of law, as laid down to you by the court, answer them.

Verdict for government on four counts.

MEMORANDUM DECISIONS.


PER CURIAM. Decree of Circuit Court affirmed on opinion below.

PER CURIAM. This was an action by the father to recover damages for negligence in the operation of a train of cars by the defendant railway company, which resulted in the death of his male child 20 months old. The defenses were a denial of negligence and plea of contributory negligence. The child was on the railway track at a public crossing. The evidence was contradictory as to whether he was lying or sitting at the time the train approached. There was evidence tending to show that the engineer in charge of the train could have seen the object and known that it was an infant in time to have stopped the train before it reached him, and other evidence to the contrary. The trial court submitted the case to the jury on two issues: (1) Whether the engineer discovered, or in the exercise of ordinary care could have discovered, that the object ahead of him on the track was a child a sufficient distance away to enable him to have stopped the train and avoided the accident; and (2) whether the father failed to exercise ordinary care to keep the child away from the track. The verdict responded to these issues in favor of the plaintiff, and we think there was sufficient evidence to sustain the findings. Discovering no prejudicial error in other respects complained of, the judgment is affirmed.

LISMAN et al. v. MILWAUKEE, L. S. & W. RY. CO. (Circuit Court of Appeals, Seventh Circuit. February 11, 1909.) No. 1,547. In error to the Circuit Court of the United States for the Eastern District of Wisconsin. For opinion below, see 161 Fed. 472. Delos McMurdo and Edward P. Vilas, for plaintiffs in error. Lloyd W. Bowers, for defendant in error.

PER CURIAM. Affirmed.


PER CURIAM. The motion to dismiss the writ of error, because not brought within six months after the final judgment, is sustained, upon the authority of Kentucky, etc., Co. v. Howes, 82 C. C. A. 337, 153 Fed. 163.


PER CURIAM. There seems to be more than the usual number of contradictions, inconsistencies, and untrustworthy estimates in this record. We are not inclined to reverse the findings of fact or the conclusions of the District Judge who heard all the libelant's witnesses and the more important ones called by the claimant. Decree affirmed, with costs.
RACINE ENGINE & MACHINERY CO. v. CONFECTIONERS' MACHINERY & MFG. CO. (Circuit Court of Appeals, Seventh Circuit. April 15, 1909.) No. 1,540. Appeal from the Circuit Court of the United States for the Eastern District of Wisconsin. For opinion below, see 163 Fed. 914. E. H. Rottum and Frank E. Dennett, for appellant. William Quinby, for appellee.

PER CURIAM. Affirmed.

In re RUBEL et al. (Circuit Court of Appeals, Seventh Circuit. February 9, 1909.) Appeal from the District Court of the United States for the Eastern District of Wisconsin. See, also, 166 Fed. 131. Charles M. Morris, for appellant. W. E. Black, for appellee.

PER CURIAM. Order dismissing appeal.


PER CURIAM. We see no way to distinguish this case from the case of Rushmore v. Manhattan Screw & Stamping Works, 163 Fed. 940, decided by this court July 27, 1908. The decree should be modified by excluding from its provisions the direction for an accounting and injunction against the use of the words “Flare Front” in connection with the sale by the defendant of search-light lamps for automobiles. As so modified, the decree should be affirmed, with one-half costs of this court.

UNITED STATES v. AUGER. (Circuit Court of Appeals, Seventh Circuit. October 22, 1908.) No. 1,474. Appeal from the Circuit Court of the United States for the Western District of Wisconsin. For opinion below, see 153 Fed. 671. William G. Wheeler, for the United States. Victor T. Pierrelee, for appellee.

PER CURIAM. Appeal dismissed on stipulation of counsel.


PER CURIAM. Affirmed.


PER CURIAM. Decree affirmed, with interest and costs.


Lacombe, Circuit Judge. It is quite important that there should be an early final determination of the questions arising upon these exceptions, especially because similar questions are presented in the cases affecting the other "controlled companies," and it is expected that the receiverships of the various units comprised in the Third Avenue System can be terminated if all legal complications are disposed of. Therefore it seems wiser not to undertake the preparation of an extended opinion, but to indicate briefly the conclusions of this court. The first seven conclusions of the special master as to "open account" and the "promissory note for $933.493.90" are concurred in, for the reasons given in his report. The exceptions to the eleventh conclusion, that the claim on the said note is impressed with a trust in favor of the mortgage trustee, are sustained for these reasons: (1) Construing the instrument as a whole, I am not satisfied that it was the intent of the parties that obligations incurred to the railroad company (or to its assignees or sublessee) for current operating debt incurred in the ordinary course of business, should be held for or assigned to the trustee, under the provisions of the clause relied upon on page 43 of the printed copy of the mortgage. (2) No written demand was made by the trustee until after the property passed out of the control of the sublessee into that of the receivers. In view of the conclusion reached as to the eleventh conclusion, it is not necessary now to discuss the ninth or tenth conclusions. In order, however, to facilitate the presentation of the whole case on appeal, the exceptions to those conclusions are overruled. As to the eighth conclusion the exception is overruled; but the order confirming the report should contain a clause allowing claimant to prove so much of the claim represented by this promissory note as includes "current operating debt incurred in the ordinary course of business."


Noyes, Circuit Judge. In view of the expected early hearing of the exceptions to the master's report and of the death of the attorney for the complainants, who is stated to have reached an agreement with respect to the amount of the master's fees, it seems to me preferable that action upon this motion should be deferred until after the hearing upon such exceptions. The master's fees cannot be apportioned until after the hearing upon this report, and the amount thereof can better be fixed at that time. I am not deciding that in all cases a master must wait for his fees until his report is acted upon. On the contrary, it would seem that there might be many cases where the parties should be required to advance his fees and to leave the matter of adjustment between them for future determination. Consequently this motion will be denied, without prejudice to its renewal in case of delay in bringing on the hearing upon the master's report.

LACOMBE, Circuit Judge. The question whether or not this statute (chapter 429, p. 1221, Laws N. Y. 1908) is constitutional depends upon the power and authority which the owner of land in this state possesses and may exercise over what lies beneath its surface. In view of the recent deliverance of the Court of Appeals on that proposition (Hathorn v. Natural Carbonic Gas Co., 194 N. Y. 326, 87 N. E. 504), the demurrer to the bill is sustained.


LACOMBE, Circuit Judge. Complainant could not obtain complete relief by a motion to extend the scope of the original injunction. Under these circumstances the more satisfactory practice is to file supplemental bill, and thus avoid multiplicity of suits. Demurrer overruled.


LACOMBE, Circuit Judge. This is an application for decree of foreclosure and sale under second or income mortgage, upon final record. At the hearing no one made any objection to such disposition of the case. Complainant may take decree in the usual form, copy of proposed decree to be served on all parties, with 10 days' notice of settlement.


LACOMBE, Circuit Judge. It is preposterous to keep this tobacco lying in the bonded warehouse, deteriorating in quality and declining in price, upon such a flimsy defense as the one here interposed. Complainant may take a mandatory injunction directing defendant Salomon to execute the necessary withdrawal papers, complainant to pay warehouse withdrawal and other charges. When withdrawn, the tobacco will be taken by the marshal, who will sell the same promptly on as good terms as he can procure, and will turn the proceeds into the registry of the court until the litigation to determine the ownership of the tobacco shall have terminated.

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§ 32. Where, in deportation proceedings against an alleged alien Chinese prostitute, described as “Sally Doe,” she was identified as belonging to a class not entitled to be or remain in the United States, it was not material that she was not identified by the name used in the complaint and warrant to describe her.—Wong Chun v. United States (C. C. A.) 152.

§ 32. Under Act Cong. May 5, 1892, c. 60, § 3, 27 Stat. 25 (U. S. Comp. St. 1901, p. 1320), a commissioner’s finding in deportation proceedings that the evidence produced by the alien is not entitled to credit should not be reversed on appeal.—Wong Chun v. United States (C. C. A.) 182.

§ 38. An indictment under Act Sept. 13, 1888, 25 Stat. 478 (U. S. Comp. St. 1901, p. 1316), charging the master of a vessel with unlawfully permitting a Chinese laborer to land in the United States, must aver that such landing was “knowingly” permitted by defendant.—United States v. Rout (D. C.) 201.

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§ 51. Where an alien female thought entitled to enter at the time she arrived in the United States as the wife of a citizen, was found practicing prostitution within three years thereafter, she was subject to deportation, under Act Cong. Feb. 20, 1907, c. 1134, §§ 2 3, 34 Stat. 898, 900 (U. S. Comp. St. Supp. 1907, pp. 301, 302).—Looe Shee v. North (C. C. A.) 506.

§ 51. Evidence that an alien female was found practicing prostitution within three years after her entry held evidence that she was a prostitute at the time she entered and was subject to deportation, under Act Cong. Feb. 20, 1907, c. 1134, 34 Stat. 808 (U. S. Comp. St. Supp. 1907, p. 389).—Looe Shee v. North (C. C. A.) 506.

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§ 64. Act June 29, 1906, c. 3592 § 4, subd. 6, 34 Stat. 598 (U. S. Comp. St. Supp. 1907, p. 422), does not authorize the naturalization without a previous declaration of intention of the widow of an alien who never made such declaration because he was an honorably discharged soldier and might himself have been naturalized without it under Rev. St. § 2166 (U. S. Comp. St. 1901, p. 1331).—United States v. Meyer (D. C.) 983.

§ 65. Rev. St. § 2166 (U. S. Comp. St. 1901, p. 1331), which provides that honorably discharged soldiers of the United States may be admitted to citizenship without any previous declaration of intention, was not repealed by Naturalization Act June 29, 1906, c. 3592, 34 Stat. 596 (U. S. Comp. St. Supp. 1907, p. 419).—United States v. Meyer (D. C.) 883.

§ 67. The naturalization act of June 29, 1906, c. 3592, § 15, 34 Stat. 601 (U. S. Comp. St. Supp. 1907, p. 427), confers jurisdiction on any court authorized to naturalize aliens in the district where a naturalized citizen resides to cancel his certificate of naturalization for fraud or because illegally procured, whether granted by that or any other court, or federal.—United States v. Simon (C. C.) 650.


§ 67. Act June 29, 1906, c. 3592, § 15, 34 Stat. 601 (U. S. Comp. St. Supp. 1907, p. 427), confers jurisdiction on any court authorized to naturalize aliens in the district where a naturalized citizen resides to cancel the certificate of naturalization of such person, although granted by another court, where its issuance was illegal.—United States v. Meyer (D. C.) 983.

§ 71. A certificate of naturalization granted to an alien who during the preceding five years had been physically absent from the United States for several months and during that time became naturalized into another allegiance is subject to cancellation either on the ground of fraud or because illegally procured.—United States v. Simon (C. C.) 680.

§ 71. A certificate of citizenship granted to an alien who had not been a bona fide resident of the United States for the next preceding five years, and who did not intend to become such resident, but desired the citizenship for his protection in a foreign country, will be canceled for fraud.—United States v. Mansour (D. C.) 671.

§ 71½. Evidence that a naturalized citizen had been convicted for drunkenness within the 5 years immediately preceding his application for naturalization held not sufficient ground for cancelling his certificate of naturalization as having been illegally procured, where it was shown that he had reformed and had remained sober for more than 4½ years before his application.—United States v. Dwyer (C. C.) 685.

ground of fraud or that they were illegally procured, is constitutional.—United States v. Mansour (D. C.) 671.

§ 714. A suit for the cancellation of a certificate of naturalization under Act June 25, 1906, c. 3592, § 15, 34 Stat. 601 (U. S. Comp. St. Supp. 1907, p. 427), is a special proceeding, and, while the proof must be of the kind and force required to set aside a judgment, the pleadings and procedure may be molded in any way best calculated to meet the ends of justice.—United States v. Mansour (D. C.) 676.

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§ 19. An order of a court suspending an attorney from the right to practice therein for a stated time will not be reviewed by an appellate court in proceedings not instituted until after the term of suspension has expired.—Leber v. United States (C. C. A.) 881; Pratt v. Same, 1d.

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§ 78. A rule made on petition of a defendant requiring the plaintiff and a third party to interplead, but which does not discharge the defendant from liability nor make any disposition of the property which the action was brought to recover, is not a final order from which a writ of error will lie.—Huxley v. Pennsylvania Warehousing & Safe Deposit Co. (C. C. A.) 687.

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§ 435. An administrator held to have waived his right to object that he was not joined by a proper revivor, and should be formally substituted on appeal as a respondent.—McNeil v. McNeil (C. C. A.) 289.

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§ 722. An assignment of errors filed in a District Court for an appeal should bear the title of that court and not of the Circuit Court of Appeals, but such informality will not invalidate the appeal.—Church Cooperage Co. v. Pinkney (C. C. A.) 266.

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§ 840. A Circuit Court of Appeals has no jurisdiction to remand a cause with directions to dismiss for want of jurisdiction, where the alleged want of jurisdiction in the court below is predicated upon an issue of fact adjudicated in the court below in favor of jurisdiction, and where the order or judgment making such adjudication is not properly brought up for review.—Brady v. Bernard & Kittinger (C. C. A.) 576.

§ 866. Where at the close of the evidence both parties request a directed verdict, but two questions are open for consideration in the appellate court: First, was there substantial evidence supporting the finding? and, second, did the court commit any error of law during the trial?—Chicago, B. & Q. Ry. Co. v. United States (C. C. A.) 556.

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§ 79. A court will not exercise its discretion, where it is vested with such discretion, to refuse to forfeit a criminal recognizance to enable a creditor of the principal to recover a sum deposited by him with his surety as indemnity.—United States v. Marrin (D. C.) 476.

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§ 84. The fact that a district attorney did not go into another jurisdiction in which a defendant at large on bail from the court in his district was arrested for another offense and institute or join in proceedings for his release is not available as a defense to a motion to forfeit his recognizance on his nonappearance.—United States v. Marrin (D. C.) 476.

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erty of the defendant by converting it into
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a referee requiring a bankrupt to turn over
property to his trustee.—In re Averick (D. C.)
521.

§ 136. An order requiring a bankrupt to
deliver alleged withheld money to his trustee
is not absolutely invalid unless it is shown that
the money belongs to the estate and is in the bank-
rupt's possession or control at the time of
the order.—In re Adler (D. C.) 634.

§ 136. Approximate estimates, inferences, and
conjectures not rising to conclusive proof that
a bankrupt had withheld assets held insufficient
to sustain an order requiring the bankrupt to
pay a specified sum to his trustee.—In re Adler
(D. C.) 634.

§ 136. To justify an order requiring a bank-
rupt to turn over property, the proof that he
has withheld property should be clear, and,
where it depends upon the comparative esti-
mates of the value of a stock of goods at dif-
f erent times, the discrepancy must be great
and such as cannot be otherwise explained.—In
re Reese (D. C.) 986.

§ 145. The right of action against officers
of a corporation who incur excessive indebted-
ness, given by Hard's Rev. St. Ill. 1908, c. 82,
§ 16, belongs exclusively to creditors, and is
not an asset of the corporation which passes
to its trustee in bankruptcy.—In re Beachy &
Co. (D. C.) 825.

§ 145. The right of action against officers
who wrongfully assume to exercise corporate
authority given by Hard's Rev. St. Ill. 1908,
c. 32, § 18, can be enforced only by creditors
of the pretended corporation by action at
law, and does not pass to the trustee of the
organization in bankruptcy.—In re Beachy &
Co. (D. C.) 825.

(C) PREFERENCES AND TRANSFERS BY
BANKRUPT, AND ATTACHMENTS
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§ 159. Corporation's mortgage to secure in-
doorance of its notes held given for a present
consideration within Bankr. Act July 1, 1898
C. 541, § 67d, 30 Stat. 564, 565 (U. S. Comp. St.
1901, p. 3449).—In re Farmers' Supply Co. (D.
C.) 502.

§ 165. A corporation's mortgage securing in-
dorsers of its paper held not an illegal prefer-
ence.—In re Farmers' Supply Co. (D. C.) 602.

§ 166. The fact alone that a creditor knows
his debtor to be financially embarrassed and is
pressing for payment of his claim is not suffi-
cient to charge him with having reasonable
cause to believe his debtor to be insolvent and
that a transfer of property to him as security
is intended as a preference, so as to render such
transfer voidable on the bankruptcy of the
debtor, under Bankr. Act July 1, 1898, c. 541,
§ 60b, 30 Stat. 562 (U. S. Comp. St. 1901, p.
3445).—Sharpe v. Allender (C. C. A.) 559.

§ 166. Evidence held insufficient to establish
the insolvency of a bankrupt corporation at the
time it assigned insurance policies to a creditor
as security, or to show that the creditor had
reasonable cause to believe it insolvent, if in
fact so, and the transfer held not voidable as a
preference.—In re Neill, Pinckney, Maxwell Co.
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§ 178. Whether a conditional sale of goods
was invalid because the goods were furnished
to the buyer for resale in the usual course of
business must be determined in the buyer's
bankruptcy proceedings in accordance with
the general law, there being no local law prohibiting
such contracts.—In re Gray (D. C.) 628.

§ 188. An auctioneer, who made an advance
on account of property to be sold, taking a re-
ciept authorizing the deduction of the amount
from the proceeds, held to have acquired no
lien which entitled him to priority over general
creditors in bankruptcy for such advance; the
property having remained in the possession
of the bankrupt.—In re Paulhaber Stable Co.
(C. C. A.) 68.

(D) ADMINISTRATION OF ESTATE.

§ 222. Under Bankr. Act July 1, 1898, c. 541,
in the absence of personal objection, the judge
in his discretion may refer bankruptcy proceed-
ings to any referee within the district to sub-
serve the convenience of the parties.—In re
Western Inv. Co. (D. C.) 677.

§ 228. A bankrupt's petition to review a
referee's order requiring payment of money al-
eged to have been withheld will be treated as
a contempt proceeding.—In re Adler (D. C.)
634.

§ 250. A court of bankruptcy has power to
order assessments on unpaid subscriptions to
the stock of a bankrupt corporation.—In re Eu-
reka Furniture Co. (D. C.) 485.

(E) ACTIONS BY OR AGAINST TRUSTEE.

§ 294. A Circuit Court of the United States
is without jurisdiction of a suit the object of
which is to determine liens upon, and priorities
in the distribution of, a bankrupt's estate in
process of administration by a District Court,
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tor being original and exclusive.—Bray v. United States Fidelity & Guaranty Co. (C. C. A.) 639.

(F) CLAIMS AGAINST AND DISTRIBUTION OF ESTATE.

§ 310. A mortgagee, whose mortgage is foreclosed within a year after the mortgagor's bankruptcy, is not entitled to prove his claim for a deficiency after the expiration of such year, having the right to prove it in the first instance as a secured claim under Bankr. Act July 1, 1898, c. 541, §§ 57a, 57e, 50 Stat. 500 (U. S. Comp. St. 1901, p. 3445).—In re Sampter (C. C. A.) 938.

§ 310. Under Bankr. Act July 1, 1898, c. 541, §§ 571, 530 Stat. 500 (U. S. Comp. St. 1901, p. 3445), where claimant took a mortgage to secure the indorsement of the president of the bankrupt corporation of the corporation's note, the bank was entitled to prove its entire claim against the bankrupt's estate.—In re Otto F. Lange Co. (D. C.) 114.


§ 318. A conditional sale contract of goods in Indian Territory, valid there without registration, prior to statehood, did not need registration after statehood under Wilson's Rev. & Ann. St. Okl. 1903, § 4179, and Enabling Act June 16, 1906, 34 Stat. 267, c. 3335, to enable the seller to enforce the same in the buyer's subsequent bankruptcy proceedings.—In re Gray (D. C.) 683.

§ 328. A preferred creditor, having been compelled to surrender its preference at the suit of the bankrupt's trustee, is entitled to prove and have its claim against the estate thereafter, though more than a year prescribed for the proof of claims by Bankr. Act July 1, 1898, c. 541, § 57a, 50 Stat. 501 (U. S. Comp. St. 1901, p. 3445), and proceedings for its enforcement will not be stayed by the court of bankruptcy.—In re Otto F. Lange Co. (D. C.) 114.

§ 331. Indorsees of corporation's notes secured by a mortgage, having paid the notes at maturity by advancing one-half of the money, held entitled to assert the mortgage lien as joint petitioners in the corporation's bankruptcy proceeding.—In re Farmers' Supply Co. (D. C.) 502.

§ 345. The owner of trust funds held by a bankrupt which he mingled with his own may recover the same so far as he can trace them or property bought with them into the hands of the trustee to the enlargement of the estate, but no further.—In re J. M. Acheson Co. (C. C. A.) 427; Ginsburg v. Mears, Id.

§ 345. Where a bankrupt corporation had been a general depositary for the funds of a grocers' association of which its president was treasurer, its other directors having been told by him that such deposits were authorized by the association to be repaid on demand, it did not hold such funds as a special deposit in trust, but the association was a general creditor only, not entitled to priority.—In re Smith, Thundike & Brown Co. (C. C. A.) 900; Smith v. Wisconsin Trust Co. Id.

§ 347. Where vessels belonging to a bankrupt estate at the time of the adjudication are permitted by the court to be taken and sold in admiralty suits to enforce maritime liens, the proceeds are subject to the costs incurred by the bankruptcy court in preserving the property and the costs of administration which are given priority by Bankr. Act July 1, 1898, c. 541, § 64b (1), (3), 30 Stat. 563 (U. S. Comp. St. 1901, p. 3447).—In re Hughes (D. C.) 505.

V. RIGHTS, REMEDIES, AND DISCHARGE OF BANKRUPT.

§ 391. A fine imposed by a state court of New York for contempt, committed by willfully presenting to the court false affidavits, is not a debt which is released by a discharge in bankruptcy under Bankr. Act July 1, 1898, c. 541, § 17a, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3428), and a court of bankruptcy will not set aside proceedings against the debtor for its enforcement.—In re Koronsky (C. C. A.) 719.

§ 391. A fine imposed on a bankrupt, although after the filing of the petition against him, by a state court for a criminal contempt, is not a dischargeable debt under Bankr. Act July 1, 1898, c. 541, § 17a, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3428), and proceedings for its enforcement will not be stayed by the court of bankruptcy.—In re Hall (D. C.) 721.

§ 396. A bankrupt, who was a single man living alone, and whose parents were living, is not the head of a family and entitled as such to the exemption of $500 in value of personal property under Const. S. C. art. 3, § 28, because at the time of his bankruptcy he was paying the board and expenses of a sister at a school.—In re McGowan (D. C.) 493.

§ 399. The failure of a bankrupt through oversight to make a claim to a homestead exemption in his schedule does not deprive him of the exemption allowed to himself and his family by the laws of the state, where timely application is otherwise made to the court of bankruptcy therefor, and such application, although not such in form, may properly be treated as an amendment of the schedule.—In re Maxson (D. C.) 350.

§ 399. Under Code Iowa 1897, §§ 2972, 2074, the husband or wife of a bankrupt may intervene and have the homestead of the family set apart as exempt, even if it is not claimed by the bankrupt.—In re Maxson (D. C.) 356.

§ 399. The fact that a bankrupt had waived his right of homestead in favor of certain creditors, as authorized by the laws of the state, does not authorize the court of bankruptcy to refuse to allow and set aside the homestead.—In re Batten (D. C.) 688.

§ 408. The concealment of firm assets by one member of a partnership alone will not deprive another partner of his right to a discharge.—In re Schachter (D. C.) 683.

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VII. OFFENSES AGAINST BANKRUPT LAWS.

Conspiracy to conceal assets, see Conspiracy, § 28.

§ 492. Under Bankr. Act July 1, 1898, c. 541, § 29b, 30 Stat. 554 (U. S. Comp. St. 1901, p. 3433), not only the bankrupt, but persons aiding and abetting in the concealment of the bankrupt's assets, are punishable therefore—United States v. Young & Holland Co. (C. C.) 110.


§ 495. On the trial of a bankrupt, charged with concealment of property from his trustee, testimony of the trustee is admissible to show that he was not informed by defendant that property belonging to him was stored in places where that charged to have been concealed was found by the trustee.—Johnson v. United States (C. C. A.) 581.

§ 495. On the trial of a bankrupt, charged with concealing property from his trustee, the schedules filed by him are not admissible as evidence against him, being excluded by Rev. St. § 890 (U. S. Comp. St. 1901, p. 661).—Cohen v. United States (C. O. A.) 715.

BANKS AND BANKING.

II. BANKING CORPORATIONS AND ASSOCIATIONS.

(E) INSOLVENCY AND DISSOLUTION.

§ 77. An agreement by the officers of a bank holding notes of defendant to accept from a corporation satisfactory securities in substitution for such notes constitutes no defense to an action on the notes by a receiver for the bank, where no substitute securities were presented by the corporation prior to the bank's failure.—Fowler v. Peet (C. C.) 620.

IV. NATIONAL BANKS.

§ 256. Rev. St. § 5200 (U. S. Comp. St. 1901, p. 3497), which makes it a criminal offense for any officer or agent of a national bank to make any false entry in any report to the association with intent to deceive any officer of the association, etc., includes a report voluntarily made as well as one required by law, if the false entry was made with the requisite unlawful intent.—Harper v. United States (C. C. A.) 385.

§ 257. An indictment under Rev. St. § 5200 (U. S. Comp. St. 1901, p. 3497), charging defendant as cashier of a national bank with having made a false entry in a report, held to sufficiently aver that such report was one made by

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the association.—Harper v. United States (C. C. A.) 385.

§ 257. Instructions given on the trial of a defendant charged with having, while cashier of a national bank, made false entries in a report of the bank, with intent to deceive the president thereof, considered, and, taken together, held not erroneous.—Harper v. United States (C. C. A.) 385.

§ 261. That a national bank had loaned to the owners of a dredge on a chattel mortgage more than one-tenth of its capital stock, in violation of Rev. St. §§ 5200, 5239 (U. S. Comp. St. 1901, pp. 3494, 3515), held no objection to the enforcement of the bank's rights under the mortgage.—The Seattle (C. C. A.) 294.

§ 288. The fact alone that a deposit of public funds in a bank by a public officer was wrongful, and known to be so by the bank, does not entitle a claim therefor to priority of payment over those of general creditors on the insolvent of the bank.—Lucas County v. Jamison (C. C.) 333.

§ 288. In all cases where an insolvent bank held funds as trustee, to entitle a claim therefor to a preference over those of general creditors in the distribution of the bank's assets, it must be shown that such funds have not been dissipated, but that they remain in the estate and can be identified, not by earmarks, but by being traced into the estate and there now found, to its augmentation.—Lucas County v. Jamison (C. C.) 338.

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IV. NEGOTIABILITY AND TRANSFER.

(A) INSTRUMENTS NEGOTIABLE.

§ 173. A provision in a promissory note that it shall become due and payable at once on default in the payment of interest is not self-executory, but merely gives the holder an option to declare the note due, and unless such option is exercised a default in the payment of the interest does not affect the negotiability of the note.—Gillette v. Hodge (C. C. A.) 313.

V. RIGHTS AND LIABILITIES ON INDORSEMENT OR TRANSFER.

(B) INDORSEMENT FOR TRANSFER.

§ 251. The liability of persons who placed their signatures on a promissory note of a corporation in such form as to render them indorsers under the negotiable instruments act of Pennsylvania of May 16, 1901 (P. L. 203, § 53), is not enlarged by the fact that as officers of the corporation they also signed the note in its behalf.—McDonald v. Luckenbach (C. C. A.) 434.

(D) BONA FIDE PURCHASERS.

§ 309. That a negotiable note was delivered to the payee subject to a condition which has not been fulfilled is not a defense to the note in the hands of a bona fide indorsee for value before maturity.—Gillette v. Hodge (C. C. A.) 313.

VIII. ACTIONS.

§ 468. In an action on a note reciting that it was "subject to terms of a contract between maker and payee" of a certain date, it is not necessary that the complaint allege performance of such contract by the payee; any failure of performance available to defeat recovery being matter of defense.—Manufacturers' Commercial Co. v. Klots Throwing Co. (C. C. A.) 311.

§ 489. An action to charge a defendant as an indorser of a note of a corporation affirms the validity of the note, and there can be no recovery therein on the ground that the note is void because executed without authority, and that defendant is liable because as an officer he signed the same in its behalf.—McDonald v. Luckenbach (C. C. A.) 434.

BONA FIDE PURCHASERS.

Of bill of exchange or promissory note, see Bills and Notes, § 309.

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§ 15. Under the laws of the United States in surveys of public lands bordering on naviga-
ble waters, the shore lines are meandered, and in general all grants and conveyances of such lands by the government give title only to land above the line of ordinary high water.—United States v. Ashton (C. C.) 500.

§ 15. The setting apart of lands bordering on Puget Sound as a reservation for the Puypulup Indians did not vest them with title to the tide lands, especially in view of the treaty of December 26, 1854, 10 Stat. 1132, and the subsequent allotment of the lands in severalty pursuant to a survey made under Act May 29, 1872, c. 223, 17 Stat. 186, in which the shore line was meandered.—United States v. Ashton (C. C.) 509.

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§ 3. A spur railway line built by a lumber company on its own land, forming a connection from a railroad to its mill, some miles distant, for the purpose of transporting its own products to the railroad for shipment, which had no rolling stock except an engine and logging cars, and which neither did, nor held itself out to do, carrying for the public, is not a common carrier.—E. E. Taunzer & Co. v. Chicago, R. I. & P. R. Co. (C. C. A.) 240.

§ 12. A state has power, either through its legislature or a commission to regulate the rates of charge of common carriers on intrastate business, subject to the limitation that such rates must be reasonable and affordable to the carrier just and reasonable compensation for the services performed and for the use of the property devoted to the business, estimated at its fair valuation.—Southern Pac. Co. v. Bartine (C. C.) 725.

§ 12. In estimating the value of the property of a railroad company for the purpose of determining the reasonableness of rates fixed by a state, the market value of all its stocks and bonds, the construction or the cost of reproduction of the property is absolutely controlling but each should be regarded as a fact tending to show fair value, and if one or more of such facts is shown it may be assumed that it represents such value.—Southern Pac. Co. v. Bartine (C. C.) 725.

§ 12. It does not necessarily follow that a schedule of maximum freight rates is confiscatory and unconstitutional because it fails to yield a reasonable return on the investment. Such rates must be reasonable not only to the company but also to the public and the fact that they do not prove remunerative to a new road built through a sparsely settled country where there is at present little local business does not require the few people and the small business to pay such rates as will make the road immediately profitable to its stockholders.—Southern Pac. Co. v. Bartine (C. C.) 725.

§ 12. In suits by various railroad companies to enjoin the enforcement of Nev. Act March 5, 1907 (St. Nev. 1907, p. 73, e. 49) creating a railroad commission and authorizing it to establish freight rates on intrastate business, not higher than those prescribed in a schedule of maximum rates therein contained, evidence considered except in the case of one complainant held insufficient to show that such maximum rates if adopted and enforced would be unconstitutional as confiscatory.—Southern Pac. Co. v. Bartine (C. C.) 725.

§ 18. Preliminary injunctions restraining the enforcement of state statutes regulating railroad rates which have not yet gone into operation and which are not apparently extreme or unjust on their face, and the validity of which can probably only be determined by actual test, should not be granted on ex parte affidavits alone stating opinions.—Railroad Commission of Alabama v. Central of Georgia Ry. Co. (C. C. A.) 225.

§ 18. In a suit by railroad companies to enjoin the enforcement of rates fixed by a state law as confiscatory, the fact that bonds may be
required from complainants for the protection of passengers and shippers against loss from overcharges if the law shall be finally held valid is not a sufficient ground for granting preliminary injunctions.—Railroad Commission of Alabama v. Central of Georgia Ry. Co. (C. C. A.) 225.

§ 18. A suit will not lie in a federal court to enjoin the exercise of the power to fix railroad rates conferred on the state railroad commission by Nev. Act March 5, 1907 (St. Nev. 1907, p. 73, c. 44).—Southern Pac. Co. v. Bartine (C. C.) 725.

(B) INTERSTATE AND INTERNATIONAL TRANSPORTATION.

Right of review in action for penalties for violation of Safety Appliance Act, see Penalties, § 40.

§ 30. Freight rates required to be established by carriers, according to the provisions of section 2 of the commerce law (Act Feb. 4, 1887, c. 104, 24 Stat. 380, as amended by Act March 2, 1889, c. 382, § 1, 25 Stat. 835 (U. S. Comp. St. 1901, p. 3158)), are not established by tariffs naming class rates that do not contain a classification of freight, but merely refer to a classification published by other parties and subject to change by such parties. A departure by a shipper from such rates does not constitute an offense under Elkins Act Feb. 19, 1903, c. 708, § 1, 32 Stat. 547 (U. S. Comp. St. Supp. 1907, p. 880).—United States v. Standard Oil Co. (D. C.) 988.

§ 36. A shipper may maintain an action at law under Interstate Commerce Act Feb. 4, 1887, c. 104, § 8, 24 Stat. 382 (U. S. Comp. St. 1901, p. 3159), to recover damages from an interstate railroad company because of the giving of a preference or advantage to another shipper by permitting him to keep cars on his terminal tracks without payment of the charges fixed by its schedules while denying the same right to plaintiff.—Lyne v. Delaware, L. & W. R. Co. (C. C.) 847.

§ 36. The provision of section 16 of the interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 384) as amended by Act June 29, 1906, c. 3991, § 5, 34 Stat. 500 (U. S. Comp. St. Supp. 1907, p. 902), that all complaints for the recovery of damages shall be filed with the Interstate Commerce Commission within two years from the time the cause of action accrues, is merely a limitation as to time when such remedy is pursued, and does not deprive a party injured of the right to sue at law for damages under section 9 of the original act of February 4, 1887, c. 104, 24 Stat. 382 (U. S. Comp. St. 1901, p. 3159).—Lyne v. Delaware, L. & W. R. Co. (C. C.) 847.


§ 38. An established and published tariff rate sheet showing the rate on bulk lime between two points to be $2.50 a ton in car load lots of not less than 40,000 pounds did not establish an allegation in an indictment for rebating that the rate was $70 a car of 40,000 pounds minimum.—Atchison, T. & S. F. Ry. Co. v. United States (C. C. A.) 250.

§ 38. In a prosecution against an interstate carrier for rebating, evidence that the concession granted consisted only in proportionate freight on bulk lime lost in transit held admissible as bearing on the carrier's intent to grant a concession from the established rates.—Atchison, T. & S. F. Ry. Co. v. United States (C. C. A.) 250.

§ 38. In a prosecution against a shipper for receiving concessions from the published rates of a railroad company in violation of Elkins Act Feb. 19, 1903, c. 708, § 1, 32 Stat. 547 (U. S. Comp. St. Supp. 1907, p. 880), which involves continuous shipments covering a number of years, there can be no greater number of offenses than there were payments of freight in which concessions were granted and received, such receipt being the completion of the transaction which constitutes the offense.—United States v. Standard Oil Co. (D. C.) 988.

§ 38. In a prosecution of a shipper for receiving concessions from a railroad company in violation of Elkins Act Feb. 19, 1903, c. 708, § 1, 32 Stat. 547 (U. S. Comp. St. Supp. 1907, p. 880), evidence held not to sustain an averment that the company had established a rate between points named.—United States v. Standard Oil Co. (D. C.) 988.

§ 38. In a prosecution for receiving rebates on interstate shipments in violation of Elkins Act Feb. 19, 1903, c. 708, § 1, 32 Stat. 547 (U. S. Comp. St. Supp. 1907, p. 880), it is essential for the government to prove that the tariffs established by the railroad company were posted at least in the station where the shipments were made, as required by Interstate Commerce Act Feb. 5, 1887, c. 104, § 6, 24 Stat. 380 (U. S. Comp. St. Supp. 1907, p. 868).—United States v. Standard Oil Co. (D. C.) 988.

II. CARRIAGE OF GOODS.

(B) BILLS OF LADING, SHIPPING RECEIPTS, AND SPECIAL CONTRACTS.

§ 51. Where a bank which has advanced money or credit to purchase merchandise for import, taking the bills of lading to itself, per-
mits the importer to take the property on trust receipts, the transaction is not one of conditional sale but for security; and, where the bank claims and sells the property as permitted by the trust receipt, it is entitled to recover any deficiency remaining due on its debt.


§ 66½. A contract between a railroad company and a lumber company with respect to the construction and operation of a private road by the latter construed, and held to bind the railroad company to furnish cars for the use of the lumber company on its line as a shipper on reasonable demand therefor.


(I) CONNECTING CARRIERS.

§ 171. A contract between a railroad company and a lumber company with respect to the construction and operation of a private road by the latter construed, and held to bind the railroad company to furnish cars for the use of the lumber company on its line as a shipper on reasonable demand therefor.


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§ 347. A passenger on a railroad train under Civ. Code Cal. §§ 483, 484, is not necessarily negligent as a matter of law, in going on the platform of a car while the train is in motion.


§ 347. Whether a passenger was negligent in going on the platform of his car as the train was approaching his station, which had been announced just before the train was wrecked and he was injured, held for the jury.


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VIII. Lights, Signals, and Lookouts.
§ 75. Under rule 11 of the supervising inspectors of steam vessels, adopted pursuant to section 2 of the inland rules (Act June 7, 1897, c. 4, 30 Stat. 102 [U. S. Comp. St. 1901, p. 2884]), a scow in tow, which fails to carry the lights prescribed thereby, may be charged with contributory fault for a collision with another vessel of the tow.—The Eugene F. Moran (C. C. A.) 925; The Charles E. Mathews, Id.; Scows 15 D and 18 D, Id.

§ 75. Pilot Rules for Inland Waters (Ed. 1905) rule 12, par. 3, applies to the Delaware river, and requires a car float in tow alongside of a tug on the starboard side, where the cars obscure the side lights of the tug, to carry a green light at night on her starboard bow.—The Lizzie Crawford (D. C.) 837; The Active, Id.

IX. Fog or Thick Weather.
§ 82. A decree affirmed, holding a steamer solely in fault for a collision at sea, at night, in a dense fog, with a meeting bark, for excessive speed and inattention to the bark's fog signals.—The Seneca (C. C. A.) 937; New York & Canada Mail S. S. Co. v. De Buhr, Id.

§ 82. A steam vessel in a dense fog is bound to observe unusual caution and to maintain only such a rate of speed as would enable her to come to a standstill by reversing her engines at full speed before she could collide with a vessel which she could not see through the fog.—The Bailey Gatzer (D. C.) 101.

§ 85. A collision between a steamer and an anchored dredge in Willamette river in a fog held due solely to the excessive speed of the steamer.—The Bailey Gatzer (D. C.) 101.

X. Narrow Channels, Harbors, Rivers, and Canals.
§ 90. Article 25 of the inland navigation rules (Act June 7, 1897, c. 4, 30 Stat. 101 [U. S. Comp. St. 1901, p. 2883]), relating to the navigation of narrow channels, is not inflexible, but is to be followed only "when safe and practicable."—The Three Brothers (C. C. A.) 48; The Clare, Id.

§ 90. Article 25 of the inland navigation rules (Act June 7, 1897, c. 4, 30 Stat. 101 [U. S. Comp. St. 1901, p. 2883]), relating to the navigation of narrow channels, does not apply to hawser tows passing up the Harlem river at Kingsbridge on an ebb tide, which may properly keep to the left-hand side of the channel.—The Three Brothers (C. C. A.) 48; The Clare, Id.

§ 95. A steam lighter, with a barge in tow, held solely in fault for a collision between its tow and a meeting steamship in East River.—The Maine (C. C. A.) 915; The Manhattan, Id.

§ 95. A steamship and a tug with a car float alongside both held in fault for a collision between the steamer and float at night on the Delaware river; the steamer because of her failure to stand by in violation of Act Sept. 4, 1890, c. 875, § 1, 26 Stat. 425 (U. S. Comp. St. 1901, p. 2902), and for being on the wrong side of the river, and the tug for permitting the car float to obscure her lights and giving no warning to the approaching steamer, and for failing to place a green light on the starboard bow of the float as required by Pilot Rules for Inland Waters (Ed. 1905) rule 12, par. 3.—The Lizzie Crawford (D. C.) 837; The Active, Id.

§ 102. A decree holding both a steamship and tug with a tow in fault for a collision in New York Harbor in the daytime affirmed.—The Tugboat No. 6 (C. C. A.) 306.

§ 102. A collision between a barge, forming one of a long tow passing down upper New York Harbor at night, near the mouth of the Greeniville dredged channel, and a car float, on the side of a transfer tug going out of the channel, held due to the fault of both tugs.—The No. 32 (C. C. A.) 932; The Transfer No. 18, Id.

§ 102. A steamship and a tug with car floats on the sides both held in fault for a collision while on crossing courses in New York Harbor.—The Transfer No. 9 (C. C. A.) 944; The Cadillac, Id.

COMBINATIONS.
See Conspiracy; Monopolies, § 28.

Comity.
Between courts, see Courts, § 508.

Comerce.
Carriage of goods and passengers, see Carriers; Shipping.
II. SUBJECTS OF REGULATION.

§ 27. The safety appliance act (Act March 2, 1893, c. 196. § 1, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]) held violated where defective coupling appliances orgrab irons are allowed on a car containing domestic traffic which is hauled with car containing interstate traffic.—United States v. Baltimore & O. R. Co. (D. C.) 496.

§ 41. Where a liquid in casks is shipped in interstate commerce in car load lots, the cask and not the car is the "original package" within the meaning of Food & Drugs Act June 30, 1906, c. 3915, § 10, 34 Stat. 771 (U. S. Comp. St. Supp. 1907, p. 934), which authorizes the seizure and forfeiture for adulteration or misbranding of articles so shipped while remaining in "original unbroken packages."—United States v. Sixty-Five Casks Liquid Extracts (D. C.) 449.

§ 41. Shipments of a drug preparation in bulk to the owner from its manufacturing agent in another state held not made in interstate commerce, and the article held not subject to seizure and forfeiture for misbranding under Food & Drugs Act June 30, 1906, c. 3915, § 10, 34 Stat. 771 (U. S. Comp. St. Supp. 1907, p. 934), where before being offered for sale by the owner it was bottled and properly labeled.—United States v. Sixty-Five Casks Liquid Extracts (D. C.) 449.

III. MEANS AND METHODS OF REGULATION.

Right of review in action for penalties for violation of Safety Appliance Act, see Penalties, § 40.

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See Bills and Notes.

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To take testimony, see Depositions.

Validity of law authorizing railroad commission to fix rates as delegation of legislative power, see Constitutional Law, § 62.

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In equity, see Equity, § 410.

Validity of law authorizing railroad commission to fix rates as delegation of legislative power, see Constitutional Law, § 62.

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See Carriers.

COMPENSATION.

Of particular classes of officers or other persons.

See Witnesses, § 14.

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In criminal prosecution, see Indictment and Information.

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Of period of limitation, see Limitation of Actions, § 65.

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See Sales, §§ 451–472.

CONDITIONS.

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As to claim in bankruptcy, see Bankruptcy, § 318.

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Of United States to withdrawal of sureties on bonds of officers, see United States, § 51.

CONSIDERATION.

Of contract in general, see Contracts.

Of mortgage by bankrupt as affecting question of preference, see Bankruptcy, § 159.

CONSPIRACY.

Combinations to monopolize trade, see Monopolies, § 28.
II. CRIMINAL RESPONSIBILITY.

(A) OFFENSES.

§ 28. An indictment for conspiracy to conceal assets of a bankrupt in violation of Bankr. Act July 1, 1898, c. 541, § 29th, 30 Stat. 554 (U. S. Comp. St. 1901, p. 3433), was not objectionable because there was no existing bankruptcy when the conspiracy originated.—United States v. Young & Holland Co. (C. Ct.) 110.

§ 40. Individuals could be guilty of conspiracy to conceal assets of a bankrupt corporation, even if it could not be charged as a conspirator.—United States v. Young & Holland Co. (C. Ct.) 110.

(B) PROSECUTION AND PUNISHMENT.

§ 43. The averment of overt acts held sufficient in an indictment for conspiracy to commit an offense against the United States, under Rev. St. § 5440 (U. S. Comp. St. 1901, p. 3076).—Daly v. United States (C. C. A.) 321.

CONSTITUTIONAL LAW.

Provisions relating to particular subjects. See Allens, § 71 1/2; Eminent Domain, § 2; Jury, § 19. Enactment and validity of statutes, see Statutes, § 64. Special or local laws, see Statutes, § 76.

III. DISTRIBUTION OF GOVERNMENTAL POWERS AND FUNCTIONS.

(A) LEGISLATIVE POWERS AND DELEGATION THEREOF.

§ 52. The fixing of railroad rates by a state through whatever body and although preceded by an investigation judicial in form is a legislative and not a judicial act, and a statute authorizing the fixing of rates by a railroad commission is not invalid as an attempt to confer judicial power on the commission in violation of a provision of the state Constitution.—Southern Pac. Co. v. Bartine (C. C.) 725.

§ 58. The provision of Nev. Act March 5, 1907 (St. Nev. 1907, p. 73, c. 44), that the Governor, Lieutenant Governor and Attorney General of the state shall constitute a railroad board for the appointment of railroad commissioners does not create and fill new offices nor violate the Constitution as the exercise of an executive function by the Legislature.—Southern Pac. Co. v. Bartine (C. C.) 725.

§ 62. The provision of the Alabama railroad rate statute of August 9, 1907 (Gen. Acts Ala. 1907, p. 711), authorizing the State Railroad Commission to change rates fixed by statute from time to time as conditions may in its judgment render it expedient or proper to do so, is not void as an attempted delegation of legislative power in violation of section 243 of the state Constitution of 1901, which confers power over rate statutes on the Legislature.—Railroad Commission of Alabama v. Central of Georgia Ry. Co. (C. C. A.) 225.

§ 62. The provision of the sundry civil appropriation act of June 4, 1897, c. 2, § 1, 30 Stat. 35 (U. S. Comp. St. 1901, p. 1540), making it a criminal offense to violate any regulation which should be made by the Secretary of Agriculture, is void as an attempted delegation of legislative power to create a crime.—United States v. Grimaud (D. C.) 205.

V. PERSONAL, CIVIL AND POLITICAL RIGHTS.

§ 84. The constitutional guaranty of religious freedom has no application to Rev. St. § 2893, as amended by Act Sept. 26, 1888, c. 1039, § 2, 25 Stat. 496 (U. S. Comp. St. 1901, p. 2658), excluding from the mails papers or writings that are obscene, lewd, or lascivious.—Knowles v. United States (C. C. A.) 409.

§ 90. The constitutional guaranty of freedom of the press has no application to Rev. St. § 2893, as amended by Act Sept. 26, 1888, c. 1039, § 2, 25 Stat. 496 (U. S. Comp. St. 1901, p. 2658), excluding from the mails papers or writings that are obscene, lewd, or lascivious.—Knowles v. United States (C. C. A.) 409.

VI. VESTED RIGHTS.


§ 109. The Legislature, under pretense of making or changing a rule of evidence, cannot deprive a party of a vested right in property.—Downs v. Blount (C. C. A.) 15.

§ 109. Parties to a suit have no vested right to have their case tried by existing rules of evidence.—Downs v. Blount (C. C. A.) 15.

VIII. RETROSPECTIVE AND EX POST FACTO LAWS.


X. EQUAL PROTECTION OF LAWS.

§ 242. Nev. Act March 5, 1907 (St. Nev. 1907, p. 73, c. 44), regulating freight charges of railroads is not unconstitution as denying the equal protection of the laws because it provides that it shall not apply to new roads until they shall have been in operation for two years.—Southern Pac. Co. v. Bartine (C. C.) 725.

§ 242. Nev. Act March 5, 1907 (St. Nev. 1907, p. 73, c. 44) creating a railroad commission and authorizing it, after investigation and on a finding that rates charged by any railroad company are unreasonable or unjustly discriminatory to fix just and reasonable rates to be charged by such company is not unconstitution as denying to some railroad companies the equal protection of the laws because the rates prescribed may not be the same as to all companies.—Southern Pac. Co. v. Bartine (C. C.) 725.

Topics, divisions, & section (§) NUMBERS in this Index, & Dec. & Amer. Digs. & Reporter Indexes agree
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Of contracts, instruments, or judicial acts and proceedings.
See Contracts, § 206; Guaranty, § 35; Statutes, § 226.
Bill of lading, see Carriers, § 51.
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Disobedience of injunction in patent infringement suit as contempt, see Patents, § 326.
Disobedience of subpoena as contempt, see Witnesses, § 21.

I. ACTS OR CONDUCT CONSTITUTING CONTEMPT OF COURT.

§ 10. An attorney has the right to advise a client as to the validity of an order of court or a writ issued under its authority, but he has no right to go beyond that and advise the client to disobey the same, and if he does so he is guilty of a contempt of court.—Leber v. United States (C. C. A.) 881; Pratt v. Same, Id.

§ 10. The action of an attorney in going to a judge in his room and stating that he wished to speak to him as a citizen, and then attempting to influence the judge's action with respect to the trial of a pending case, was a gross violation of professional propriety, and warranted the punishment of the attorney for a contempt of the court.—Leber v. United States (C. C. A.) 881; Pratt v. Same, Id.


II. POWER TO PUNISH, AND PROCEEDING THEREFORE.

§ 61. Under Alaska Code Civ. Proc. § 611, it is not an abuse of discretion for the court to refuse a jury trial in a proceeding for contempt not committed in the presence of the court, where judgment against the accused is justified by the admitted facts.—Leber v. United States (C. C. A.) 881; Pratt v. Same, Id.

III. PUNISHMENT.

Fine for criminal contempt as dischargeable debt in bankruptcy, see Bankruptcy, § 391.

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Agreements within statute of frauds, see Frauds, Statute of.
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Particular classes of implied contracts.
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II. CONSTRUCTION AND OPERA-

(C) SUBJECT-MATTER.

§ 206. An agreement between two parties to share in paying the "cost and expense" of a suit against one of the parties includes the costs taxed against such party as a part of the "expense" of the suit.—Provident Chemical Works v. Hygienic Chemical Co. (C. C.) 523.

§ 206. A contract between alleged infringers of a patent to share equally the cost and expense of any and all suits brought against either or its customers thereon construed, and held not to apply to a suit against one in which the only issue was as to infringement, brought after the validity of the patent had been established in a prior suit against the other.—Provident Chemical Works v. Hygienic Chemical Co. (C. C.) 523.

VI. ACTIONS FOR BREACH.

§ 328. A contract provision forbidding an allowance of damages for delay of defendant in furnishing materials to a contractor was no defense to the contractor's action for damages for unlawful eviction.—Parnum v. Kennebec Water Dist. (C. C. A.) 173.

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III. INFRINGEMENT.

(B) ACTIONS.

§ 85. A preliminary injunction restraining infringement of a copyright should not be granted, where on the showing made and the facts appearing the question of infringement is in serious doubt.—Benton v. Van Dyke (C. C.) 283.

CORPORATIONS.

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IV. CAPITAL, STOCK, AND DIVIDENDS.

(B) SUBSCRIPTION TO STOCK.

§ 88. Under the Illinois statute it is competent for the directors of a corporation to accept merchandise in which the corporation is authorized to deal in lieu of cash in payment for capital stock, and such a transaction can only be impeached for actual fraud.—In re Beachy & Co. (D. C.) 825.

V. MEMBERS AND STOCKHOLDERS.

(D) LIABILITY FOR CORPORATE DEBTS AND ACTS.

Infringement of patent, see Patents, § 287.

§ 247. A stockholder in a corporation held not relieved from liability to creditors on his unpaid subscription, either on the ground of fraud inducing his subscription, or because of his formal release therefrom by the action of other stockholders.—In re Eureka Furniture Co. (D. C.) 485.

§ 263. A nonresident stockholder of a foreign corporation doing business in California does not assume such contractual relation with a person contracting with the corporation there as will subject him to suit in the state of his residence to enforce the individual liability imposed by Const. Cal. art. 12, §§ 3, 15, and Civ. Code Cal. § 3272. On stockholders of domestic corporations, and which also provide that foreign corporations shall not be allowed to do business in the state on more favorable conditions than domestic corporations.—Thomas v. Matthiessen (C. C.) 302.

VI. OFFICERS AND AGENTS.

(B) AUTHORITY AND FUNCTIONS.

§ 306. The fact that the president and secretary of a corporation, who as such officers signed a promissory note in its behalf, did so without authority, does not render them individually parties to the note, nor liable thereon as makers.—McDonald v. Luckenbach (C. C. A.) 481.

(D) LIABILITY FOR CORPORATE DEBTS AND ACTS.

Infringement of patent, see Patents, § 287.

Right of action by trustee of corporation in bankruptcy, see Bankruptcy, § 145.

VII. CORPORATE POWERS AND LIABILITIES.

(B) REPRESENTATION OF CORPORATION BY OFFICERS AND AGENTS.

§ 432. Where the action of the treasurer of a corporation in depositing its funds with another corporation of which he was an officer was not in violation of any statute, the presumption is that it was not in violation of the by-laws or regulations of the corporation, and the burden of proof rests upon it, when it alleges that the deposit was unauthorized.—In re Smith Thorndike & Co. (C. C. A.) 500;

Smith v. Wisconsin Trust Co., 1d.

(C) PROPERTY AND CONVEYANCES.

§ 445. A transferee of all of the property of a corporation takes and holds the same subject to the rights of creditors of the transferring corporation which as to the property are unaffected by the transfer, but the transferee does not become personally liable to such creditor except where it has disposed of, misapplied, or converted the property in fraud of the rights of such creditors, in which case a court of equity may require an accounting.—Boyd v. Northern Pac. Ry. Co. (C. C.) 779.

(D) CONTRACTS AND INDEBTEDNESS.

§ 474. Under Rev. St. Ohio, § 3256, a mortgage executed by a corporation to secure bonds pledged to secure the payment of other obligations is a valid incumbrance, so long as the obligations secured remain unpaid.—Gilchrist Transp. Co. v. Phenix Ins. Co. (C. C. A.) 279.

§ 477. A corporation’s mortgage held not invalid for want of a corporate seal.—In re Farmers’ Supply Co. (D. C.) 502.

§ 478. Indorsers of the notes of a corporation secured by a mortgage on the corporation’s assets held contingent creditors of the corporation from the time of the indorsement.—In re Farmers’ Supply Co. (D. C.) 502.

(E) TORTS.

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(G) CRIMES AND CRIMINAL PROSECUTIONS.

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VIII. INSOLVENCY AND RECEIVERS.

§ 548. Counsel for a creditor, who procures an adjudication of insolvency against a corporation, is entitled to compensation for services rendered in the protection of the fund, even
after the appointment of receivers.—Bowker v. Haight & Freese, Co. (C. C. A.) 67.

XII. FOREIGN CORPORATIONS.

Decisions of state courts as rules of decision of federal court on questions of jurisdiction of actions against foreign corporations, see Courts, § 374.

Decisions of state courts as rules of decision in federal courts, on questions of service of process against foreign corporation, see Courts, § 374.

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II. ESTABLISHMENT, ORGANIZATION, AND PROCEDURE IN GENERAL.

(A) CREATION AND CONSTITUTION, AND COURT OFFICERS.

Jurisdiction of different divisions of motion for a new trial in criminal prosecution, see Criminal Law, § 950.

(D) RULES OF DECISION, ADJUDICATIONS, OPINIONS, AND RECORDS.

Operation and effect of decisions in patent infringement suits, see Patents, § 327.

§ 96. Expressions of opinion by the Supreme Court of the United States on facts essentially different from those in issue are not controlling on lower federal courts.—United States v. Illinois Cent. R. Co. (C. C. A.) 542.


VII. UNITED STATES COURTS.

Disposition of deposits in court, see Deposits in Courts, § 11.

(A) JURISDICTION AND POWERS IN GENERAL.

§ 262. The second clause of Rev. St. § 806 (U. S. Comp. St. 1901, p. 663), authorizes Circuit Courts to entertain bills to perpetuate testimony in the exercise of their constitutional powers as courts of chancery in matters which may be cognizable in any federal court, and is wholly separate from the first clause giving any federal court power to grant a demimus potestatum to take depositions in a pending suit.—Westinghouse Mach. Co. v. Electric Storage Battery Co. (C. C. A.) 430.

§ 262. Where a creditor has reduced his demand to judgment in a state court and exhausted his remedy at law therein, the fact that he might invoke the equity powers of such court does not give him a legal remedy which will defeat his right to maintain a creditors' suit in a federal court.—Hultberg v. Anderson (C. C.) 637.

(C) JURISDICTION DEPENDENT ON CITIZENSHIP, RESIDENCE, OR CHAR-ACTER OF PARTIES.

§ 807. A creditors' suit in a federal court by a judgment creditor to subject property within the district standing in the name of others to the payment of complainant's judgment is a local suit of which, under the provisions of Act March 3, 1875, c. 137, § 8, 18 Stat. 472 (U. S. Comp. St. 1901, p. 512), the court has jurisdiction, notwithstanding the fact that neither complainant nor the judgment defendant is a citizen or resident of the district.—Hultberg v. Anderson (C. C.) 637.

§ 312. A suit by an assignee of a mortgage held not one to recover the contents of a chose in action within the meaning of Judiciary Act March 3, 1875, § 1, c. 137, 18 Stat. 470 (U. S. Comp. St. 1901, p. 508), and within the jurisdiction of a federal court.—Hoé-Peters Land Co. v. Farr (C. C.) 644.

§ 312. Where the assignee of a cause of action has reduced the same to judgment, in a subsequent action on the judgment in a federal court the citizenship of the original assignor is wholly immaterial on the question of the jurisdiction of such court.—Hultberg v. Anderson (C. C.) 637.

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JURISDICTION DEPENDENT ON AMOUNT OR VALUE IN CONTROVERSY.

§ 328. An action in assumpsit for damages for defendant's breach of a contract of insurance held to involve a sum in excess of $2,000, exclusive of interest and costs, and was therefore within federal jurisdiction.—Continental Casualty Co. v. Spradlin (C. C. A.) 322.

§ 329. In a suit for an injunction in a federal court the amount in dispute for jurisdictional purposes is the value of the right to be protected and where the requisite value is alleged and not denied it is immaterial how much, or whether any, actual loss has been sustained.—Southern Pac. Co. v. Bartine (C. C.) 725.

PROCEDURE, AND ADOPTION OF PRACTICE OF STATE COURTS.

§ 338. Failure of a partnership to comply with Rev. St. Ohio, §§ 3170-1 to 3170-7, held not to deprive it of the right to commence and maintain litigation in the federal courts.—In re Farmers' Supply Co. (D. C.) 592.

STATE LAWS AS RULES OF DECISION.

§ 360. The construction which the courts of a state have placed upon its statute of frauds is binding upon the federal courts.—Walker v. Hafer (C. C. A.) 37.

§ 361. A decision by the Supreme Court of a state construing the Constitution or statutes of the state rendered after a suit in a federal court, involving rights previously accrued or liabilities incurred under such Constitution or statutes, has been tried and submitted for decision, is not binding or such federal court in the case, but it is entitled to exercise its independent judgment.—Chicago, B. & Q. R. Co. v. Board of Sup'rs of Appanoose County (C. C.) 695.

§ 371. Where a state statute requires the repayment of all taxes with a certain rate of interest as a condition precedent to relief against a sale for taxes, such condition will be enforced in a federal court.—Hobo-Peters Land Co. v. Farr (C. C.) 644.

§ 371. An action under Code Iowa 1897, § 2423, by a purchaser of liquors sold in violation of the statute, to recover the amount paid therefor, is civil and remedial, and not penal, and is within the jurisdiction of a federal court.—United Breweries Co. v. Colby (C. C.) 1008.

§ 374. Where a foreign corporation appears specially for the purpose of removal, and objects to the sufficiency of the service, the Circuit Court must determine that question for itself, and is not controlled by the state law.—West v. Cincinnati, N. O. & T. P. Ry. Co. (C. C.) 349.

§ 374. A foreign railroad company held not to be doing business in Georgia, so that service on a commercial agent would confer jurisdiction over the corporation so far as the federal courts were concerned.—West v. Cincinnati, N. O. & T. P. Ry. Co. (C. C.) 349.

COURT OF APPEALS.

§ 405. Under Act March 3, 1891, c. 517, § 6, 26 Stat. 828, and section 5, as amended by Act Jan. 20, 1897, c. 68, 29 Stat. 492 (U. S. Comp. St. 1901, p. 549), a Circuit Court of Appeals is given jurisdiction to review the judgment of the Supreme Court of a territory in a criminal case not capital, whether it arose under a federal or territorial statute.—Storm v. Territory of Arizona (C. C. A.) 423.

VIII. CONCURRENT AND CONFLICTING JURISDICTION, AND COMITY.

§ 508. A federal court, which has entered decrees enjoining the enforcement of a state statute fixing railroad passenger rates as unconstitutional and confiscatory, retaining jurisdiction to modify such decrees if conditions should change, which decrees have not been appealed from, will enjoin a circuit attorney of the state from prosecuting a suit in a state court, the purpose of which is to relitigate the questions determined.—Missouri Pac. Ry. Co. v. Jones (C. C.) 124.

§ 508. A federal court cannot grant an injunction to restrain proceedings in a state court, unless necessary for the exercise of its own jurisdiction, previously obtained.—Potter v. Selwyn & Co. (C. C.) 223.

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IV. JURISDICTION.
Appellate jurisdiction of circuit court of appeals, see Courts, § 405.

X. EVIDENCE.
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§ 95. In an action for death under Code Civ. Proc. Alaska, § 353, where decedent left neither wife nor children, the measure of damages was the value of his life to his estate measured by his earning capacity, thriftiness, and probable length of life.—Jennings v. Alaska Treadwell Gold Mining Co. (C. C. A.) 146.

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§ 49. A contract for the construction of a drainage ditch made under the Missouri statute (Rev. St. 1899, § 8283, as amended by Laws 1905, p. 182 [Ann. St. 1906, p. 3018]), and executed by the chief engineer of a drainage district with the approval of the county court, is the contract of the county.—Wills v. Bates County (C. C.) 812.

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to its requirements.—United States v. Sixty-Five \underline{\text{Casks Liquid Extracts (D. C.) 449.}}

§ 2. The word “label” as used in Food &
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§ 11. Under the Food & Drugs Act of June
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§ 10. The Indians have a right to occupy the country inhabited by them to the exclusion of white people until their rights shall have been relinquished by them or terminated by laws enacted by Congress.—United States v. Ashton (C. C.) 509.

§ 10. The aboriginal inhabitants of the country now composing the United States were not seized of titles to real estate.—United States v. Ashton (C. C.) 509.

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§ 15. An Indian of the Creek Tribe who as heir succeeded to the allotment of his deceased son, who died before the allotment was made, held to have power to sell and convey the same under Act April 23, 1890, c. 1876, § 29, 26 Stat. 145.—Shulthis v. McDougal (C. C. A.) 529; Berryhill v. Shulthis, Id.

§ 16. Under Mansf. Dig. Ark. c. 27, extended to Indian Territory by Act Feb. 19, 1903, c. 707, 32 Stat. 841, an oil lease executed by an Indian is required to be recorded to be effective against a subsequent purchaser without notice, although it had not been approved by the Secretary of the Interior as required by statute at the time of the sale of the land.—Shulthis v. McDougal (C. C. A.) 529; Berryhill v. Shulthis, Id.

§ 16. The filing in the office of the agency of a copy of an oil and gas lease executed by an Indian in Indian Territory, required by the rules of the Interior Department, is merely for administrative purposes, and does not charge a subsequent purchaser of the land with constructive notice of such lease, especially where Congress had previously provided for the recording of such instruments and designated the places of record.—Shulthis v. McDougal (C. C. A.) 529; Berryhill v. Shulthis, Id.

§ 18. An Indian entitled under the terms of the Steenerson act (Act April 28, 1904, c. 1785, 33 Stat. 539 [U. S. Comp. St. Supp. 1907, p. 579]) to an allotment of land on the White Earth reservation in Minnesota, but who died before the necessary preliminary work could be done and applications received, held to have acquired no right to specific land which could pass to his heirs or personal representatives by a premature application and selection left with the agent.—Woodbury v. United States (C. C. A.) 502.

§ 18. The descent of land to which an infant child of the Creek Tribe of Indians was entitled, but who died before allotment, and the nature of the estate taken by his heirs, considered and determined under section 7 of the supplemental agreement with the Five Civilized Tribes of August 8, 1902 (Act June 30, 1902, c. 1325, 32 Stat. 501), and Mansf. Dig. Ark. c. 27.—Shulthis v. McDougal (C. C. A.) 529; Berryhill v. Shulthis, Id.

INDICTMENT AND INFORMATION.
In prosecution for conspiracy, see Conspiracy, § 43.
In prosecution for larceny, see Larceny, § 40.

V. REQUISITES AND SUFFICIENCY OF ACCUSATION.
§ 71. In determining the sufficiency of an indictment, the question is not whether it might have been made more certain, but whether it contains every element of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense whether the record shows with accuracy, to what extent he may plead a former acquittal or conviction.—Harper v. United States (C. C. A.) 383.

IX. ISSUES, PROOF, AND VARIANCE.
In prosecution for larceny, see Larceny, § 40.

INDORSEMENT.
Of bill of exchange or promissory note, see Bills and Notes, §§ 281, 369.
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INFORMATION.
Criminal accusation, see Indictment and Information.

INFRINGEMENT.
Of patent, see Patents, §§ 226, 258.
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See Internal Revenue, § 8.

INJUNCTION.
By United States court enjoining proceedings in state court, see Courts, § 508.
Restraining infringement of copyright, see Copyrights, § 83.
Restraining infringement of patent, see Patents, § 317.

II. SUBJECTS OF PROTECTION AND RELIEF.
§ 104. Bondholders of a coal company secured by mortgage on its property have such an interest therein as entitles them to maintain a suit to enjoin striking employees and others conspiring with them from illegally preventing and interfering with the working of the mines by threatening and intimidating the company’s employees, where it is alleged that such operation is necessary to enable the company to pay the interest on its bonds.—Carter v. Fortney (C. C.) 403.

III. ACTIONS FOR INJUNCTIONS.
§ 114. To a suit by bondholders of a coal company to enjoin striking employees and others conspiring with them from illegally interfering with and preventing the working of the company’s mines by threatening and intimidating its employees, which operation of its mines it is alleged is necessary to enable the company to pay the interest on its bonds, without applying to the mortgage trustee to bring such suit.—Carter v. Fortney (C. C.) 403.

§ 118. Bondholders of a coal company may maintain a suit to enjoin illegal interference with the operation of the company’s mines by strikers and their confederates, which operation is necessary to enable the company to pay the interest on its bonds, without first applying to the company to bring such suit.—Carter v. Fortney (C. C.) 463.

IV. PRELIMINARY AND INTERLOCUTORY INJUNCTIONS.
(A) GROUNDS AND PROCEEDINGS TO PROCURE.
§ 137. The public has an interest in the enforcement of every law until it is repealed or judicially annulled, which should be taken into consideration before granting a preliminary injunction restraining its enforcement where questions of fact are involved.—Railroad Commission of Alabama v. Central of Georgia Ry. Co. (C. C. A.) 225.

IN PAIS.
Estoppel, see Estoppel, §§ 68, 92.

INSANE PERSONS.

II. INQUISITIONS.
Wrongful arrest and commitment for examination as false imprisonment, see False Imprisonment, § 11.

INSOLVENCY.
See Bankruptcy.
Of bank, see Banks and Banking, § 71.
Of corporation, see Corporations, § 548.

INSTRUCTIONS.
In civil actions, see Trial, §§ 235–268.

INSURANCE.

V. THE CONTRACT IN GENERAL.
(B) CONSTRUCTION AND OPERATION.
§ 146. While it is a rule of construction of insurance policies that words of exception or limitation of liability are to be strictly construed against the insurer, and forfeiture avoided if possible, yet if the language used by the parties has a plain meaning, and is not inconsistent with other clauses or provisions of their contract, effect must be given to it.—Gilchrist Transp. Co. v. Phenix Ins. Co. (C. C. A.) 279.

VII. ASSIGNMENT OR OTHER TRANSFER OF POLICY.
Preferential assignment by bankrupt, see Bankruptcy, § 166.

IX. AVOIDANCE OF POLICY FOR MISREPRESENTATION, FRAUD, OR BREACH OF WARRANTY OR CONDITION.

(B) MATTERS RELATING TO PROPERTY OR INTEREST INSURED.
§ 283. A vessel is a chattel, and a mortgage thereof a chattel mortgage, within the meaning of a provision of a policy of insurance thereon that it shall be void “if the subject of insurance be personal property and be or become incumbered by a chattel mortgage.”—Gilchrist Transp. Co. v. Phenix Ins. Co. (C. C. A.) 279.

§ 283. A mortgage on a vessel to secure a debt of the mortgagor is a present incumbrance by chattel mortgage, within the meaning of a provision of a policy of insurance on such vessel, making it void in case of such incumbrance.
so long as the debt secured is outstanding, although it is not in default.—Gileihrtr Transp. Co. v. Phenix Ins. Co. (C. C. A.) 270.

XIII. EXTENT OF LOSS AND LIABILITY OF INSURER.

(A) MARINE INSURANCE.

§ 472. An open marine policy on goods to be shipped by plaintiff from time to time, containing a clause that "this insurance is not to cover more than $100,000 by any one steamer or in any one place at one time," construed with respect to the liability of the insurer for a loss where a steamer carried more than $100,000 worth of plaintiff's goods.—Hood Rubber Co. v. Atlantic Mut. Ins. Co. (C. C. A.) 393.

(B) INSURANCE OF PROPERTY AND TITLES.

§ 499. Under a fire insurance policy which limits the liability of the insurer to the actual cash value of the property insured at the time the loss or damage occurs, the extent of the liability is not the cash value at the time the property is exposed to the danger of loss by the outbreak of the fire, but the actual cash value at the time the loss occurs, which is necessarily to be referred, if material, to the time when in point of fact, as nearly as can be ascertained, the fire reaches and consumes or damages it.—Liverpool, London & Globe Ins. Co. v. McFadden (C. C. A.) 179.

XVIII. ACTIONS ON POLICIES.

§ 660. In an action on a fire insurance policy to recover for a loss of cotton stored in New York City, the value of the cotton "at the time the loss occurred," where that was during the hours when the Cotton Exchange was open, may be determined by taking the ruling price of "spor" cotton for the day as fixed by the committee of the exchange.—Liverpool, London & Globe Ins. Co. v. McFadden (C. C. A.) 179.

INTENT.

Affecting or element of fraudulent conveyances, see Bankruptcy, § 166.

INTEREST.

Provisions of note as to maturity on default in payment of interest, see Bills and Notes, § 173.

INTERLOCUTORY INJUNCTION.

See Injunction, § 137.

INTERNAL REVENUE.

§ 8. Will construed, and held, that the beneficiaries of the trust created out of the residue took interests which vested prior to July 2, 1905, so that an inheritance tax paid thereon was recoverable by the executors under Act Cong. June 27, 1902, c. 1160, § 3, 32 Stat. 406 (U. S. Comp. St. Supp. 1907, p. 632).—Chouteau v. Allen (C. C. A.) 412.

§ 9. A manufacturer of flavoring extracts in which alcohol is used held not subject to special tax, under Rev. St. § 3244 (U. S. Comp. St. 1901, p. 20930), as a rectifier or wholesale or retail dealer in liquors.—Allen v. Liquid Carbonic Co. (C. C. A.) 315.

§ 40. A retail liquor dealer who has his internal revenue tax paid stamp duly posted in his place of business is not subject to prosecution for carrying on business without paying the special tax therefor because of the shipment of a quantity of liquor from his stock on an order received by mail by an express company C. O. D. to the purchaser at another place.—Jones v. United States (C. C. A.) 1.

§ 40. Rev. St. § 3449 (U. S. Comp. St. 1901, p. 2277), making it a penal offense for any person to ship or remove any spirituous or fermented liquors or wines under any other than the proper name or brand by which they are known to the trade, is intended to prevent frauds on the revenue, and has no application to marks or brands placed on packages by government officers.—Woolner & Co. v. Renick (C. C.) 662.

INTERNATIONAL LAW.

See Aliens.

INTERPRETATION.

Of contracts, instruments, or judicial acts and proceedings.

See Contracts, § 206; Guaranty, § 35; Statutes, § 226.

Bill of lading, see Carriers, § 51.

INTERROGATORIES.

To witnesses, see Depositions.

INTERSTATE COMMERCE.

Regulation, see Carriers, §§ 36, 38; Commerce.

INTOXICATING LIQUORS.

V. REGULATIONS.

Regulations under pure Food and Drugs Act, see Food, § 7.

VI. OFFENSES.

Violation of internal revenue laws, see Internal Revenue, § 40.

XII. RIGHTS OF PROPERTY AND CONTRACTS.

Jurisdiction of federal court in action to recover money paid for liquor, see Courts, § 371.

INVENTION.

See Patents.
JOINT ADVENTURES.

§ 7. A party to a contract for the construction of a dredge held chargeable with notice of a chattel mortgage on the dredge, given to secure a loan to construct it, whether the mortgage was recorded or not.—The Seattle (C. C. A.) 284.
§ 7. Power to borrow money to build a dredge, and to mortgage the dredge as security, held a power coupled with an interest, which was not subject to revocation.—The Seattle (C. C. A.) 284.
§ 7. A party to a dredging contract having given his assistants power to mortgage the dredge, a mortgage executed pursuant to the power was valid, whether his signature was attached or not.—The Seattle (C. C. A.) 284.

JUDGES.

See Courts.

JUDGMENT.

Decisions of courts in general, see Courts, §§ 96, 116. On appeal or writ of error, see Appeal and Error, §§ 1178–1213. Review, see Appeal and Error.

II. BY CONFESSION.

§ 46. A warrant of attorney to confess judgment contained in a joint and several note held equivalent to several powers signed by the individual makers, and to entitle the holder to enter several judgments against the makers.—George D. Harter Bank v. Straus (C. C.) 489.

VI. ON TRIAL OF ISSUES.

(A) RENDITION, FORM, AND REQUIRITES IN GENERAL.

§ 190. In an action by a servant to recover for a personal injury on the ground that the master was negligent in the construction of a scaffold on which plaintiff, with other laborers, was required to work, where the evidence on such issue was conflicting, the court cannot enter a judgment for defendant notwithstanding the verdict.—Whitfield v. Hammerstein (C. C.) 621.

§ 199. Where the question of the modification of a contract sued on depends upon written evidence and also upon conflicting parol testimony, the whole issue is one for the jury, and the court cannot enter judgment notwithstanding the verdict.—Jones v. Edward B. Smith & Co. (C. C.) 622.

XIII. MERGER AND BAR OF CAUSES OF ACTION AND DEFENSES.

(A) JUDGMENTS OPERATIVE AS BAR.

§ 570. A decree dismissing a suit in equity on demurrer on the ground that the bill failed to allege essential facts is not one on the merits, and cannot be pleaded in bar to the cause of action stated by an amended bill, which supplies such omissions.—Miller v. Marigie (C. C. A.) 710.

(B) CAUSES OF ACTION AND DEFENSES MERGED, BARRED, OR CONCLUDED.

§ 590. A judgment for defendant in a contractor’s action on a quantum meruit held no bar to a subsequent action by the contractor for breach of the contract or to recover a reserved percentage earned and unpaid.—Farum v. Kennebec Water Dist. (C. C. A.) 173.

XIV. CONCLUSIVENESS OF ADJUDICATION.

(B) PERSONS CONCLUDED.

§ 683. A decree foreclosing a tax deed under Wis. St. 1898, §§ 1197–1210, by which its terms barred the defendants, including a mortgagee, and all persons claiming under them after the filing of the lis pendens, of any interest in the property, following the terms of section 1206, does not conclude one claiming under such mortgagee by an assignment made before the suit, but not recorded, who was not made a party, although the fact of the assignment was known to the plaintiff.—Hobe-Peters Land Co. v. Farr (C. C.) 644.

XIX. SUSPENSION, ENFORCEMENT, AND REVIVAL.

§ 852. Where the defendant in an action at law in a federal court by the receiver of a bank claims an equitable set-off, proceedings for collection of the judgment recovered may properly be stayed to give him an opportunity to establish his claim in equity.—Fowler v. Feet (C. C.) 620.

JURISDICTION.

Amount in controversy, see Courts, §§ 328, 329.
Appellate jurisdiction, see Appeal and Error, § 19.
Effect of appearance, see Appearance.
Of trustee in bankruptcy, see Bankruptcy, § 294.
Particular courts, see Courts.
To cancel certificate of naturalization, see Aliens, §§ 67, 71 1/2.

JURY.

Instructions in civil actions, see Trial, §§ 235–263.

II. RIGHT TO TRIAL BY JURY.

IV. SUMMONING, ATTENDANCE, DISCHARGE, AND COMPENSATION.

§ 68. While a federal court is given discretion by Rev. St. § 802 (U. S. Comp. St. 1901, p. 625), to direct the selection of jurors from any part of the district instead of the district at large, such power should only be exercised when there is some reason for it.—United States v. Standard Oil Co. (D. C.) 988.

JUSTIFICATION.
For libel, see Libel and Slander, § 110.

KNOWLEDGE.
Affecting or element of assumption of risk by servant, see Master and Servant, § 217. Affecting or element of fraudulent conveyances, see Bankruptcy, § 166.

LABELS.
Requirements of Food and Drugs Act, see Druggists, § 2.

LACHES.
Effect in Equity, see Equity, §§ 72, 82.

LANDLORD AND TENANT.
Lease of Indian land, see Indians, § 16. Lease of public lands, see Public Lands, § 55. Mining leases, see Mines and Minerals, § 64. Railroad leases, see Railroads, § 134.

VIII. RENT AND ADVANCES.
(C) LIEN.
§ 248. Under the law of Pennsylvania goods and chattels on demised premises, whether the property of the lessee or a subtenant, are under a quasi pledge to the landlord for rent, and when he has exercised his right of distraint, his lien is superior to that of an execution creditor of the owner.—In re De Lancey Stables Co. (D. C.) 860.

LANDS.
See Public Lands.
Of Indian, see Indians, §§ 10–13.

LARCENY.

II. PROSECUTION AND PUNISHMENT.
(A) INDICTMENT AND INFORMATION.
§ 140. Under an indictment charging the theft of a horse from “S. K. Canady,” proof that the name of the owner was “S. K. Kennedy” did not constitute a fatal variance, where there was no claim that there were persons by both names, by reason of which the defendant could have been misled.—James v. United States (C. C. A.) 942.

LATENT INJURIES.
Liability of vessel owner for injuries to cargo, see Shipping, § 42.

LAW OF THE CASE.
Decision on appeal, see Appeal and Error, § 1097.

LEASES.
See Landlord and Tenant.
Of Indian lands, see Indians, § 16.

LEGISLATIVE POWER.
See Constitutional Law, §§ 52–62.

LETTERS PATENT.
For inventions, see Patents.

LIBEL AND SLANDER.

I. WORDS AND ACTS ACTIONABLE, AND LIABILITY THEREOF.

IV. ACTIONS.
(A) RIGHT OF ACTION AND DEFENSES.
§ 71. It is no defense to an action for libel that plaintiff had previously libeled defendant.—Sternberg Mfg. Co. v. Miller, Du Brul & Peters Mfg. Co. (C. C. A.) 298.

(C) EVIDENCE.
§ 107. In an action for libel, it was not error to permit the plaintiff to testify as to the effect of the alleged libelous article on his feelings.—S. S. McClure Co. v. Philipp (C. C. A.) 910.

§ 110. Where an alleged libelous article charged plaintiff with having received rebates from a railroad company between certain dates in violation of the statute making such receipt a criminal offense, it was not error to exclude as irrelevant testimony offered to show that plaintiff, as manager of a corporation, had received rebates several years before the enactment of such statute.—S. S. McClure Co. v. Philipp (C. C. A.) 910.

(E) TRIAL, JUDGMENT, AND REVIEW.
§ 124. In an action for libel, where the publication by defendant of the article complained of was not denied, and it was libelous on its face, it was not error to refuse an instruction which in effect submitted such question to the jury.—Sternberg Mfg. Co. v. Miller, Du Brul & Peters Mfg. Co. (C. C. A.) 298.

§ 124. An instruction in an action for libel considered, and held without prejudice to the defendant, even if a statement contained therein
was not technically correct.—S. S. McClure Co. v. Philipp (C. C. A.) 910.

§ 124. In an action for libel in publishing an article charging plaintiff with having received rebates from a railroad company, which was a criminal offense under the statute (Act Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1907, p. 880]), and referring to the same as a "private graft," it was not error for the court to instruct the jury as to the effect and meaning of the word "graft," as used therein.—S. S. McClure Co. v. Philipp (C. C. A.) 910.

LIENS.

Effect of proceedings in bankruptcy, see Bankruptcy, § 188.

Particular classes of liens.

See Mechanics' Liens.

Landlord's lien for rent, see Landlord and Tenant, § 248.

Mortgage, see Chattel Mortgages, § 138.

§ 7. Where a party agrees to make specific property a security for a debt, equity raises an equitable lien in case the security is not given.—In re Farmers' Supply Co. (D. C.) 562.

LIGHTS.

Of vessels, see Collision, § 75.

LIMITATION.

Of claim of patent, see Patents, §§ 176, 178.

LIMITATION OF ACTIONS.

Laches, see Equity, §§ 72, 82.

II. COMPUTATION OF PERIOD OF LIMITATION.

(B) PERFORMANCE OF CONDITION, DEMAND, AND NOTICE.

§ 65. Under the law of Kansas by which a creditor cannot maintain a suit to subject property standing in the name of third persons to his demand until he has reduced the same to judgment, limitation does not begin to run against such a suit until such judgment is rendered.—Hultberg v. Anderson (C. C.) 657.

LIMITATION OF LIABILITY.

Of carrier by water, see Shipping, § 140.

LIQUIDATED DAMAGES.

See Damages, § 78.

LIS PENDENS.

§ 11. Under the law of West Virginia one who purchases land in good faith after a bill for specific performance of a prior contract made by his vendor has been dismissed by the Circuit Court of the state and before an appeal has been taken therefrom will be protected in his purchase, although an appeal is afterward taken on which such decree is reversed.—Wheeling Creek Gas Co. v. Elder (C. C.) 213; Same v. Crow, 1d.

LITERARY PROPERTY.

See Copyrights.

LOCAL LAWS.

See Statutes, § 76.

LOCATION.

Of mining claim, see Mines and Minerals, §§ 9-38.

LOGGING RAILROADS.

As not constituting common carriers, see Carriers, § 3.

MACHINERY.

Production and use of electricity, see Electricity.

MAIL.

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MALICIOUS PROSECUTION.

See False Imprisonment.

MANDATE.

To lower court on decision on appeal, see Appeal and Error, §§ 1195, 1213.

MARINE INSURANCE.

See Insurance, § 472.

MARRIAGE.

See Divorce.

MASTER AND SERVANT.

See Work and Labor.

I. THE RELATION.

(C) TERMINATION AND DISCHARGE.

§ 40. Upon the question whether a service required of an employé was or was not reasonable, and such as he was required to perform under his contract of employment, his testimony as to his ability to perform it, which was known to his employer, is admissible.—Development Co. of America v. King (C. C. A.) 923.

§ 41. An employé, wrongfully discharged, held not required to deduct from the salary recoverable an amount earned by him after his discharge, where in order to obtain the employment he bought stock in a corporation, which became insolvent, and lost more than his earnings.—Development Co. of America v. King (C. C. A.) 923.

For cases in Dec. Dig. & Amer. Digs. 1897 to date & Indexes see same topic & section (§) NUMBER 170 F.—67.
III. MASTER'S LIABILITY FOR INJURIES TO SERVANT.

(A) NATURE AND EXTENT IN GENERAL.
Right of review in action for penalties for violation of Safety Appliance Act, see Penalties, § 40.

§ 256. A railroad company held not liable for an injury to a servant through the negligence of an employer of an independent contractor which it had no reason to anticipate.—Pierson v. Chicago, R. I. & P. Ry. Co. (C. C. A.) 271.

(B) TOOLS, MACHINERY, APPLIANCES, AND PLACES FOR WORK.
Right of review in action for penalties for violation of Safety Appliance Act, see Penalties, § 40.

(F) RISKS ASSUMED BY SERVANT.
§ 217. Where both the defect in a machine and the danger from it were plainly visible and obvious, an employer of mature age and average intelligence, who continued to use it without complaint, must be conclusively presumed to have assumed the risk therefrom, and cannot recover for his resulting injury.—Erico v. Washburn Williams Co. (C. C.) 852.

(G) CONTRIBUTORY NEGLIGENCE OF SERVANT.
§ 256. A workman in a railroad engine house, who fell into a pit near his locker in the dark and was injured, held guilty of contributory negligence in extinguishing his torch before going to the locker, knowing that there were open pits near it.—Northern Pac. Ry. Co. v. Post (C. C. A.) 943.

§ 256. A track laborer, sent by his foreman across the tracks for some tools and tools, who was struck and injured by a slowly moving engine while walking between the rails, held chargeable with contributory negligence as matter of law.—Soccoroso v. Philadelphia & R. Ry. Co. (C. C.) 722.

§ 256. Disobedience by servant of rules of company of which he has knowledge held negligence as a matter of law.—Great Northern Ry. Co. v. Hooker (C. C. A.) 154.

(H) ACTIONS.
§ 254. Interpretation of plain rules of a master held for the court.—Great Northern Ry. Co. v. Hooker (C. C. A.) 154.

§ 256. Where there was evidence that an employee suing for a personal injury resulting from the bursting of a steam pipe, and also his employer, the defendant, knew of a defect in the pipe two weeks before the accident, although contradicted, the question of defendant's negligence in failing to have the pipe repaired was properly submitted to the jury.—Berwind-White Coal Mining Co. v. Firment (C. C. A.) 151.

§ 256. In an action by a boy 14 years old, against his employer to recover for a personal injury, the question of negligence of the master held properly submitted to the jury.—Standard Silk Co. v. Force (C. C. A.) 154.

§ 256. In an action by a servant against the master to recover for a personal injury, it was error to submit to the jury the question of defendant's negligence in failing to adopt a precaution not shown by previous experience to have been necessary for the safety of workmen, or to have ever been adapted or used elsewhere.—Atoka Coal & Mining Co. v. Miller (C. C. A.) 554.

§ 256. In an action by a boy 14 years old against his employer to recover for a personal injury, the question of assumption of risk held properly submitted to the jury.—Standard Silk Co. v. Force (C. C. A.) 154.

§ 256. The question of assumption of risk held properly submitted to the jury in an action for an injury to an inexperienced employee who was set to work in defendant's mill to operate a dangerous machine without instructions or warning.—Northern Lumber & Fibre Co. v. Paquette (C. C. A.) 717.

§ 256. In an action by a boy 14 years old against his employer to recover for a personal injury, the question of contributory negligence held properly submitted to the jury.—Standard Silk Co. v. Force (C. C. A.) 154.

§ 256. The question of contributory negligence held properly submitted to the jury in an action for an injury to an inexperienced employee who was set to work in defendant's mill to operate a dangerous machine without instructions or warning.—Northern Lumber & Fibre Co. v. Paquette (C. C. A.) 717.

§ 256. In an action by a brakeman against a railroad company for an injury alleged to have resulted from the use of a car not equipped with an automatic coupler as required by the Safety Appliance Act, 15 U. S. Comp. St. 1583, c. 196, § 2, 24 Stat. 531 (U. S. Comp. St. 1901, p. 3174), the refusal of an instruction on contributory negligence held error.—Norfolk & W. Ry. Co. v. Hazelrigg (C. C. A.) 551.

IV. LIABILITIES FOR INJURIES TO THIRD PERSONS.

(B) WORK OF INDEPENDENT CONTRACTOR.
§ 316. A contract between the general contractor for a building and a subcontractor construed, and held to renders the latter an independent contractor, for whose negligence resulting in an injury to a third person, the principal contractor was not responsible.—Morning v. Cramp & Co. (C. C.) 364.

MASTERS IN CHANCERY.

See Equity, § 410.

MASTERS OF VESSELS.

See Shipping, § 69.
MECHANICS' LIENS.

III. PROCEEDINGS TO PERFECT.

§ 156. Oral notice of an intent to claim a mechanic's lien held sufficient under Rev. St. Ohio, § 3185.—In re Farmers' Supply Co. (D. C.) 502.

MEDICINES.

See Druggists.

MEMORANDA.

Required by statute of frauds, see Frauds, Statute of, § 116.

MERCHANDISE.

Payment for corporate stock in merchandise, see Corporations, § 88.

MINES AND MINERALS.

Laws relating to selection of non-mineral lands granted in aid of railroads, see Public Lands, § 81.

I. PUBLIC MINERAL LANDS.

B. LOCATION AND ACQUISITION OF CLAIMS.

§ 9. Coal lands are "mineral lands" within the meaning of that term as generally employed in the laws regulating the disposal of the public domain.—United States v. Northern Pac. Ry. Co. (C. C.) 498.


§ 17. That a locator drew in one of his lines to exclude excess territory and left out his discovery point did not vitiate his claim, provided he made a new discovery within the readjusted lines before rights of third persons intervened.—Waskey v. Hammer (C. C. A.) 31.

§ 18. An excessive mineral location is not thereby rendered wholly void, but is invalid only as to the excessive area.—Waskey v. Hammer (C. C. A.) 31.

§ 18. A locator of an excessive mining claim may select the portion of the claim which he will reject as excess.—Waskey v. Hammer (C. C. A.) 31.

§ 27. Under Rev. St. §§ 2320, 2222, 2329 (U. S. Comp. St. 1901, pp. 1424, 1425, 1432), possessory title to a mining claim can only be acquired by a valid location, an essential of which is the discovery of mineral thereon; and where the locators of two association claims which overlap are sinking shafts at the same time, the first to discover mineral has priority of right, although the location was staked after the other, if it was made openly and peaceably.—Hauson v. Craig (C. C. A.) 62.

§ 38. The pleadings in an action of ejectment for a mining claim held to present is-

sues of fact, which under the evidence were properly submitted to the jury.—Halla v. Cowden (C. C. A.) 559.

II. TITLE, CONVEYANCES, AND CONTRACTS.

(C) LEASES, LICENSES, AND CONTRACTS.

§ 64. An assignment of a lease of mining property in Alaska, required by Code Civ. Proc. Alaska, § 3046 (31 Stat. 493), to be executed with the formality of a deed, is not invalid because the subscribing witnesses thereto were members of the partnership which was the assignee.—Halla v. Cowden (C. C. A.) 559.

III. OPERATION OF MINES, QUARRIES, AND WELLS.

Restraining interference in operation, see Injunction, § 104.

MISREPRESENTATION.

By insured, see Insurance, § 283.

MITIGATION.

Of damages, see Damages, § 62.

MONOPOLIES.

II. TRUSTS AND OTHER COMBINATIONS IN RESTRAINT OF TRADE.


MORTGAGES.

 Preferential mortgages by bankrupt, see Bankruptcy, §§ 159, 165.

Mortgages by or to particular classes of persons. See Corporations, §§ 477, 478; Street Railroads, § 55.

Joint adventurers, see Joint Adventures, § 7.

Mortgages of particular species of, or estates or interest in, property.

Of personal property, see Chattel Mortgages.

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§ 30. In contemplation of law an invention does not exist until the inventor's ideas have been reduced to practical form, either as the basis for a patent or an anticipation of another's invention.—American Graphophone Co. v. Leeds & Catlin Co. (C. C. A.) 327.

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§ 286. Damages suffered by nonexclusive licensee of a patent for infringement must be recovered, if at all, by the owner of the patent prosecuting in behalf of the licensee.—Brookfield v. Novelty Glass Mfg. Co. (C. C. A.) 960.

§ 286. Where the owner of a patent was not individually engaged in the manufacture or sale of the patented article, he cannot recover from an infringer damages the payment of which a corporation licensee, in which he was a stockholder, was deprived by the infringement, where such corporation is not a party to the suit, nor any part thereof, in the absence of proof of the terms of the license.—Brookfield v. Novelty Glass Mfg. Co. (C. C.) 830.

§ 287. An individual who owns practically all of the stock of a corporation and personally controls and directs its action may be held jointly liable with it for infringements of a patent by the corporation.—Chicago Ry. Equipment Co. v. Perry Side Bearing Co. (C. C.) 968.


§ 310. The granting of leave to the complainant in a suit for infringement against a corporation to file a supplemental bill to charge the officers of the corporation with personal li-
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§ 312. Where infringement is deliberate, if there is uncertainty on the subject of profits, defendant must prove it.—Novelty Glass Mfg. Co. v. Brookfield (C. C. A.) 946.

§ 317. The fact that a defendant has ceased to infringe, and has promised not to infringe in the future, does not necessarily prevent the granting of an injunction against him; but, as an injunction is only granted to prevent threatened injury, it should not issue if it is clear that no further infringement is to be anticipated.—Crier v. Innes (C. C. A.) 324.

§ 318. In an accounting for infringement of patent, complainants held not responsible because defendants' profits were enhanced by combination in restraint of trade as to the patented article, and a party who benefits from the benefit of it, and not complainants' testator, though he may have assisted in bringing it about.—Novelty Glass Mfg. Co. v. Brookfield (C. C. A.) 946.

§ 318. While equity will not aid either party to recover fruits of a transaction prohibited by law, held inapplicable, in a suit for an accounting for infringement of patent, that defendants' profits may have been enhanced by a combination in restraint of trade in the property covered by the patent.—Novelty Glass Mfg. Co. v. Brookfield (C. C. A.) 946.

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§ 319. Where the claims of a patent infringed are for a combination of old elements, the invention consisting in the combination, the infringer is liable for all of the profits made by the use of such combination.—Brookfield v. Novelty Glass Mfg. Co. (C. C.) 890.

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§ 325. Where the complainant in a suit for infringement established the validity of his patent and its infringement, but, owing to the peculiar circumstances of the case, was not entitled to any of the relief prayed for, the costs may be divided as deemed equitable by the court.—Crier v. Innes (C. C. A.) 324.

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§ 326. A party, enjoined from infringement of a patent by making or selling a device found to infringe, is guilty of contempt for violating the injunction, where he merely makes formal and immaterial changes in such device for the purpose of evading the injunction.—Queen & Co. v. Green (C. C.) 61.

§ 326. While the fact that a party, charged with contempt for violating an injunction against infringement of a patent, acted under the advice of counsel, is to be considered in deciding whether he shall be punished, and, if so, the extent of the punishment, it is not a defense, if continued infringement is found.—Queen & Co. v. Green (C. C.) 61.

§ 327. As a general rule, where a Circuit Court has sustained the validity of a patent and its decree has been affirmed by the Circuit Court of Appeals, such decision will be followed by the latter court in a subsequent case involving the same patent, although its invalidity was not urged on the prior appeal.—Crier v. Innes (C. C. A.) 324.

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§ 286. Refusal to allow an amendment to meet the proofs held within the discretion of the trial court.—Brookfield v. Novelty Glass Mfg. Co. (C. C. A.) 960.

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§ 867. In an action to recover the purchase price of liquors, an allegation in the answer that such liquors were sold in violation of the laws of the state, and with intent on the part of plaintiff to enable defendants to violate such laws, is not demurrable as stating a legal conclusion.—United Breweries Co. v. Colby (C. C.) 1003.

XII. ISSUES, PROOF, AND VARIANCE.

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I. POST-OFFICE DEPARTMENT, POST OFFICES, POSTMASTERS, AND OTHER OFFICERS.

§ 7. A postmaster who, in obedience to instructions from the First Assistant Postmaster General, given under authority of Rev. St. § 336 (U. S. Comp. St. 1901, p. 224), and the rules and regulations of the department, appointed and paid a clerk who was not employed in his office, is not liable to the United States on his bond for the amount so paid out, where he acted in good faith and without knowledge of the place or nature of the clerk's employment, but supposing that he was employed in the postal service.—United States v. Warfield (C. C. A.) 43.

II. MAILABLE MATTER, TRANSMISSION AND DELIVERY OF MAIL, AND MONEY ORDERS.

§ 28. The authority of the United States over mail ceases immediately on voluntary rightful surrender to the party entitled to receive it.—United States v. Buellington (C. C.) 121.

§ 29. Delivery of a letter after having been deposited in the mails by the post office authorities to the writer or his agent terminates the government's authority over it.—United States v. Buellington (C. C.) 121.

§ 29. Delivery of a letter by the postal authorities to the agent of the addressee terminates the government's authority over it.—United States v. Buellington (C. C.) 121.

III. OFFENSES AGAINST POSTAL LAWS.

Laws prohibiting mailing of indecent matter as infringement on freedom of the press, see Constitutional Law, § 90.

Laws prohibiting mailing of indecent matter as violating right to religious liberty, see Constitutional Law, § 94.

§ 31. In a prosecution under Rev. St. § 3893, as amended by Act Sept. 26, 1888, c. 1039, § 2, 23 Stat. 496 (U. S. Comp. St. 1901, p. 2658), for depositing obscene, lewd, or lascivious matter in the mails, the purpose of the defendant is immaterial, and that its motive was good is no defense.—Knowles v. United States (C. C. A.) 409.

§ 31. In Rev. St. § 3893, as amended by Act Sept. 26, 1888, c. 1039, § 2, 23 Stat. 496 (U. S. Comp. St. 1901, p. 2658), making it a misdemeanor to mail any obscene, lewd, or lascivious paper or writing, the word "obscene" should be given fully as broad a significance as it had at common law.—Knowles v. United States (C. C. A.) 409.

§ 31. The true test to determine whether a writing is nonmailable under Rev. St. § 3893, as amended by Act Sept. 26, 1888, c. 1039, § 2, 23 Stat. 496 (U. S. Comp. St. 1901, p. 2658), as obscene, lewd, or lascivious, is whether its language has a tendency to deprave and corrupt the morals of those whose minds are open to such influences, and into whose hands it may fall, by arousing and implanting in such minds obscene, lewd, or lascivious thoughts or desires.—Knowles v. United States (C. C. A.) 409.

§ 43. Where a postmaster, after having written, stamped, and deposited a letter in the mails, withdrew it and delivered it to defendant for carriage to the addressee, defendant's subsequent destruction of the letter constituted no offense, under Rev. St. § 3892 (U. S. Comp. St. 1901, p. 2657).—United States v. Buellington (C. C.) 121.

§ 50. In a prosecution under Rev. St. § 3893, as amended by Act Sept. 26, 1888, c. 1039, § 2, 23 Stat. 496 (U. S. Comp. St. 1901, p. 2658), for mailing obscene, lewd, or lascivious writing, whenever reasonable minds might reach different conclusions as to whether the
writing was within the statute, it is the duty of the court to submit the question to the jury.—Knowles v. United States (C. C. A.) 409.

§ 50. Whether a newspaper article was obscene, lewd, or lascivious, and rendered the mailing of the paper containing it a criminal offense under Rev. St. § 3893, as amended by Act Sept. 26, 1888, c. 1059, § 2, 25 Stat. 496 (U. S. Comp. St. 1901, p. 2653), held a question for the jury.—Knowles v. United States (C. C. A.) 409.

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II. SERVICE.

(D) PRIVILEGES AND EXEMPTIONS.

§ 118. A receiver while in attendance on a court in another jurisdiction as plaintiff in an action therein, and also in obedience to a subpoena served on him by the defendant while going to and returning from such court is privileged from the service of civil process on him in a suit against him in such jurisdiction.—Peet v. Fowler (C. C.) 618.

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§ 55. A Mississippi lease of school lands for 99 years held not to authorize the lessee to cut the timber on the land for a mere sale thereof.—Simpson County v. Wisner-Cox Lumber & Mfg. Co. (C. C. A.) 52; Same v. Cox (C. C. A.) 56.

(E) GRANTS IN AID OF RAILROADS.
§ 79. Land within the place limits of the grant to the Northern Pacific Railroad Company of May 31, 1870, which at such date, as shown by the books of the land office, was subject to a homestead entry, but which entry had in fact been abandoned and was canceled prior to the definite location of the road, was vacant public land which passed under the grant.—United States v. Northern Pac. Ry. Co. (D. C.) 854.

§ 81. An act of Congress permitting a railroad company to make lien selections on the relinquishment of lands granted to it within a national park or reserve is to be construed as a grant most favorably to the government.—United States v. Northern Pac. Ry. Co. (C. C.) 408.

§ 81. Act March 2, 1899, c. 377, § 3, 30 Stat. 994, permitting the Northern Pacific Railroad Company to select lands in lieu of lands patented to it within Mount Rainier National Park and the Pacific Forest Reserve, construed, and held to permit the selection only of the lands actually nonmineral.—United States v. Northern Pac. Ry. Co. (C. C.) 408.

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QUIETING TITLE.
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§ 35. An allegation in a bill or complaint to quiet title that the plaintiff "has been and now is the owner seized in fee and entitled to the possession of" the premises in suit, by implication, is an assertion of plaintiff's possession, and, so construed, is sufficient to support a suit in equity under the settled rule of the federal courts.—Stockton v. Oregon Short Line R. Co. (C. C.) 627.

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Right of review in action for penalties for violation of Safety Appliance Act, see Penalties, § 40.

II. RAILROAD COMPANIES.

§ 20. The Northern Pacific Railway Company held to have been a reorganization of the Northern Pacific Railroad Company, and as such, and also because of its participation in the proceeds of unmortgaged property of the original company, to be liable to a general creditor of such original company, who was not a party to the suits through which the property was transferred.—Boyd v. Northern Pac. Ry. Co. (C. C.) 779.

VII. SALES, LEASES, TRAFFIC CONTRACTS, AND CONSOLIDATION.

§ 134. A provision of a railroad lease constructed, and held not to render the lessee liable for an indebtedness of the lessor on account of the construction of its road.—Boyd v. Northern Pac. Ry. Co. (C. C.) 779.

§ 134. A lessee of all of the property of a railroad company which also acquired all of its stock, and converted to its own use assets of the lessee which would otherwise have been available to its creditors, held to have thereby incurred personal liability for its debts.—Boyd v. Northern Pac. Ry. Co. (C. C.) 779.

§ 139. An action at law is not maintainable against a successor corporation by purchase or lease to recover damages for a breach of contract by its vendor or lessor, without proof of an express assumption of liability, or that possession of the assets of the succeeded corporation was obtained by virtue of some relation by which liability for its prior obligations is imposed by statute.—E. E. Tuenzer & Co. v. Chicago, R. I. & P. R. Co. (C. C. A.) 240.

§ 139. A railroad company succeeding by purchase or lease to the property of another company, and which proceeded to carry out a contract with a third party made by its vendor or lessor, received the benefits thereof, and demanded performance by the other party, thereby adopted the contract as its own, and may be held liable for its breach in a direct action at law.—E. E. Tuenzer & Co. v. Chicago, R. I. & P. R. Co. (C. C. A.) 240.

X. OPERATION.

(B) STATUTORY, MUNICIPAL, AND OFFICIAL REGULATIONS.

§ 229. Where an interstate carrier has equipped its rolling stock engaged in interstate commerce with automatic couplers, as required by Safety Appliance Act March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), held not to require an interstate carrier having equipped its cars with automatic couplers to keep such equipment in repair at all events.—United States v. Illinois Cent. R. Co. (C. C. A.) 542.


§ 229. An interstate railroad is guilty of violating Safety Appliance Act March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), if it starts a car containing interstate commerce with a defective coupling which could have been discovered by inspection, but not so if the defect developed in transit and there has been no lack of diligence in discovering and repairing it.—United States v. Illinois Cent. R. Co. (C. C. A.) 542.


§ 229. The coupling and uncoupling apparatus on each end of every car must be in an operative condition.—United States v. Baltimore & O. R. Co. (D. C.) 456.

§ 229. The safety appliance act requires that each coupler must be operative of its own mechanism, irrespective of the condition of the appliances on other cars.—United States v. Southern Ry. Co. (D. C.) 1014.

§ 229. The safety appliance act is enacted for the better protection of employes and passengers, and should be construed so as to carry out the intent of Congress.—United States v. Southern Ry. Co. (D. C.) 1014.

§ 229. An empty car in a train with cars carrying interstate commerce must be equipped in accordance with the safety appliance act.—United States v. Southern Ry. Co. (D. C.) 1014.


§ 254. An action to recover the penalty is a civil and not criminal action.—Chicago, B. & Q. Ry. Co. v. United States (C. C. A.) 556.

§ 254. The duty imposed on railroad companies by Safety Appliance Act March 2, 1893, c. 196, 27 Stat. 531, as amended by act April 1, 1896, c. 87, 20 Stat. 85 (U. S. Comp. St. 1901, p. 3174), and Ac: March 2, 1903, c. 376, 32 Stat. 943 (U. S. Comp. St. Supp. 1907, p. 885), is absolute, and a company is not relieved from liability for the penalty for its violation by the exercise of reasonable care nor because

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the violation was not intentional, an action to recover the penalty being civil and not criminal.

§ 254. That a carrier has used reasonable care to repair appliances required by the federal safety appliance act is no defense to an action for penalty under the act.—United States v. Southern Ry. Co. (D. C.) 1014.

§ 254. An action to recover a penalty under the safety appliance act requires plaintiff to establish the allegations of his complaint by a preponderance of the evidence only.—United States v. Southern Ry. Co. (D. C.) 1014.

§ 254. A railroad company is liable to the penalty under the safety appliance act if it uses a car in interstate commerce on which the grab-iron are missing.—United States v. Southern Ry. Co. (D. C.) 1014.

§ 254. Railroad using engine in shifting cars engaged in interstate commerce with the tender coupler of repair held liable to a penalty under the interstate commerce act.—United States v. Southern Ry. Co. (D. C.) 1014.

§ 254. Where a car used in interstate commerce was defective in that the chain on the coupler was broken, the railroad was liable to the penalty under the safety appliance act.—United States v. Southern Ry. Co. (D. C.) 1014.

(F) ACCIDENTS AT CROSSINGS.

§ 316. Rule of railroad company requiring engineer to have train under control on approaching station construed.—Great Northern Ry. Co. v. Hooker (C. C. A.) 154.

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(I) FIRES.

§ 460. The owner of property destroyed by fire communicated from a railroad engine cannot be charged with contributory negligence as matter of law, because, as a shipper loading from a public platform maintained by the railroad company on its right of way, he did not remove the litter incidentally made, and through such litter around the platform the fire was communicated to his property.—Erickson v. Pennsylvania R. Co. (C. C. A.) 572.

§ 480. Under Act N. J. April 14, 1903 (P. L. p. 673) § 57, which makes proof that a fire which destroys property was communicated from a railroad engine, prima facie evidence of the company’s negligence, where such proof is made evidence to rebut the presumption is necessarily required, and the question is one for the jury.—Erickson v. Pennsylvania R. Co. (C. C. A.) 572.

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I. REQUISITES AND VALIDITY.

§ 24. Where a plaintiff suing at law to recover damages seeks to avoid the effect of a settlement and release on the ground of his mental incapacity at the time the release was executed, conceding that he may raise such issue in an action at law, he must return or tender a return of the money received in settlement.—Mahr v. Union Pac. R. Co. (C. C. A.) 699.

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Of cause on appeal or writ of error, see Appeal and Error, §§ 1195, 1213.
REMOVAL OF CAUSES.

II. ORIGIN, NATURE, AND SUBJECT OF CONTROVERSY.

§ 23. An action brought in a state court under Rev. Code Idaho, § 4538, which provides that "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," is removable into a federal court where the citizenship and amount involved are such as to give the court jurisdiction.—Robson v. Oregon Short Line R. Co. (C. C.) 627.

III. CITIZENSHIP OR ALIENAGE OF PARTIES.

(B) SEPARABLE CONTROVERSIES.

§ 32. In a suit for specific performance of a contract to sell land, against the vendor and a subsequent purchaser before the contract was recorded, there is a separate controversy with each grantee which entitles him to remove the suit if a nonresident and the amount involved is sufficient.—Wheeling Creek Gas, Coal & Cokie Co. v. Elder (C. C.) 215; Same v. Crow, Id.

VI. PROCEEDINGS TO PRODUCE AND EFFECT OF REMOVAL.

§ 79. Where the original pleadings and record in a cause in a state court do not disclose a fact which entitled the defendant to remove the same, he may file a petition for removal after an amended pleading filed by plaintiff for the first time. Robinson v. Parker-Washington Co. (C. C.) 356.

§ 86. On the removal of a cause in which, as appears by the record, the parties are citizens of different states, but neither is an inhabitant of the district of suit, the federal court acquires general jurisdiction by virtue of the diversity of citizenship of the parties, and has power to permit the petition for removal to be amended to show that plaintiff is in fact a citizen and resident of the district of suit.—Harding v. Standard Oil Co. (C. C.) 651.

§ 83. It is usual in a petition for removal which alleges a separable controversy to set out the controversy, but it is sufficient if it appears from the record that such controversy actually exists.—Harding v. Standard Oil Co. (C. C.) 651.

VIII. PROCEEDINGS IN CAUSE AFTER REMOVAL.

§ 114. Where a foreign corporation is doing some substantial business in a state, and a suit commenced in a state court by service of process valid under the state statute is removed into a federal court, such court will not set aside the service.—Sleicher v. Pullman Co. (C. C.) 365.

§ 114. A foreign railroad company held to have been doing such substantial business in New York as to render it subject to service of process therein under the state statute, which would not be set aside after removal of the cause into a federal court.—Sleicher v. Pullman Co. (C. C.) 365.

§ 115. Whether a foreign corporation, defendant in a removal case, has been properly served, is to be determined by the same rule that would be applied in a case originally brought in the Circuit Court.—West v. Cincinnati, N. O. & T. P. Ry. Co. (C. C.) 349.

§ 118. The right of removal is not to be determined by the form of action in the state court, but by the essential character of the case, and, regardless of form, the cause is removable if the federal court has jurisdiction upon either its equity or law side, and it may require the plaintiff to replead accordingly.—Stockton v. Oregon Short Line R. Co. (C. C.) 627.

REMOVAL OF CLOUD.

See Quieting Title.

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See Landlord and Tenant, § 248.

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I. REQUISITES AND VALIDITY OF CONTRACT.
§ 35. A memorandum of sale of malt "subject to trial car," signed by both parties, held to constitute a binding contract, although the purchaser did not order the trial car, having the right to waive such provision.—Columbia Malting Co. v. Church (C. C. A.) 369.

§ 52. Written contracts, prepared and signed by the parties, following oral negotiations therefor, held to presumptively embody the entire agreement.—Omaha Cooperage Co. v. Armour & Co. (C. C. A.) 292.

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(C) DELIVERY AND ACCEPTANCE OF GOODS.
§ 173. A buyer, who contracted for potatoes to be shipped between certain dates, held not entitled to set up the failure to deliver within the stated time, to justify his refusal to accept a delivery afterward, where the delay was at his request.—Abel v. Ward (C. O. A.) 925.

IX. CONDITIONAL SALES.
Failure to file contract for registration as affecting right to prove claim thereon in bankruptcy proceedings, see Bankruptcy, § 318.

§ 451. Where a conditional sale is made in one state, and contemplates or expressly provides that the property is to be delivered or used in another state, it is governed by the law of the latter.—In re Gray (D. C.) 638.

§ 455. Where a bank which has advanced money or credit to purchase merchandise for import, taking the bills of lading to itself, permits the importer to take the property on trust receipts, the transaction is not one of conditional sale, but for security; and, where the bank reclaims and sells the property as permitted by the trust receipt, it is entitled to recover any deficiency remaining due on its debt.—Charway & Bodvin v. York Silk Mfg. Co. (C. C.) 819.

§ 465. A conditional sale contract made in Oklahoma Territory for the delivery of goods in Indian Territory held not required to be filed in the office of the register of deeds under Wilson's Rev. & Ann. St. Okl. 1903, § 4179.—In re Gray (D. C.) 638.

§ 465. Prior to statehood, there was no law in Indian Territory requiring conditional sale contracts to be recorded.—In re Gray (D. C.) 638.

§ 469. Execution of notes by the buyer of goods under a conditional sale contract held not to transfer title to the buyer.—In re Gray (D. C.) 638.

§ 472. A conditional sale, in the absence of fraud, held not invalidated because the goods were furnished for resale.—In re Gray (D. C.) 638.

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II. AMOUNT AND APPORTIONMENT.
§ 28. An award of $4,000 made against the United States for the salvage of a derelict cargo belonging to the navy, worth $18,000, which was picked up off the southern coast of Florida by a steamer and towed to Jacksonville.—Earn Line S. S. Co. v. United States (C. C.) 834.

§ 28. A salver of derelict property found at sea who took the same to a court of admiralty and libeled it for salvage, claiming the entire proceeds, but was awarded a moiety only, the remainder being deposited in the registry of the court subject to its orders, is entitled to such balance where, after the lapse of a number of years, no owner or claimant of the property has appeared.—In re Moneys in Registry of District Court (D. C.) 470.

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See Public Lands, § 55.

SEALS.
Necessity of corporate seal on corporate mortgage, see Corporations, § 477.

SEAMEN.
§ 2. Every sailor on an American vessel is an American seaman, within the meaning of Act Dec. 21, 1898, c. 28, § 1, 30 Stat. 755 (U. S. Comp. St. 1901, p. 3081), and entitled to the protection thereof, regardless of his nationality.—The Laura M. Lunt (D. C.) 204.
§ 20. The master of a vessel has no authority to arbitrarily reduce the wages of a seaman, signed as such, on the ground that he proved incompetent to fill the position of a mate, although there may have been a verbal agreement on the subject.—The Laura M. Lunt (D. C.) 204.

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SEPARABLE CONTROVERSY.
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SERVICES.
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SETTLEMENT.
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SHIPPING.
See Admiralty; Collision; Salvage; Seamen; Towage.

III. Charters.
§ 42. A ship which is fit for the carrying of an article is one which will carry such article without injury, and the liability of a shipowner for breach of a warranty of fitness is not limited to such injury to the cargo as is apparent before its delivery, but extends to a latent injury.—Church Cooperage Co. v. Pinkney (C. C. A.) 266.

§ 42. A general warranty of fitness in a charter held to render the shipowner liable for injury to a cargo of whisky barrel shovels by being impregnated with creosote fumes, due to her having previously carried a cargo of creosote, in the absence of any stipulation in the charter against such liability.—Church Cooperage Co. v. Pinkney (C. C. A.) 266.

§ 42. A charter of a vessel construed, and a provision for cleaning the hold held not to limit the general warranty of fitness.—Church Cooperage Co. v. Pinkney (C. C. A.) 266.

§ 42. A charterer held not to have waived a warranty of fitness in the charter.—Church Cooperage Co. v. Pinkney (C. C. A.) 266.

§ 43. A provision in a charter party for "customary dispatch" in discharging has reference to the local market, and is not to be held to limit the charterer's option to dispose of the cargo as the charterer may choose.—Gilbert Transp. Co. v. Borden (C. C. A.) 706.

§ 46. A charterer of a steamer for a voyage to the west coast of South America, or at his option to be employed in general trade for five months, held to have exercised the option, and not to be entitled to send her to the west coast after the lapse of three months.—Walsh v. Tweedle Trading Co. (C. C. A.) 60; The Hern, Id.

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§ 14. Where a contract for the towage of a barge to Buffalo provided that the tow assumed all risks, and after reaching Buffalo, through some arrangement between the masters, the towage was continued for another port, and on the way the barge was wrecked, the tug cannot

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